

REPORT OF THE

**Virginia Freedom of
Information Advisory Council**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



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ADVISORY COUNCIL**

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THE GENERAL ASSEMBLY OF VIRGINIA**

COMMONWEALTH OF VIRGINIA
DECEMBER 2007

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OF THE
VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

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REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

To: **The Honorable Timothy M. Kaine, Governor of Virginia**
and
The General Assembly of Virginia

Richmond, Virginia
December 2007

INTRODUCTION

"The liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them."

Patrick Henry
1787

Established by the 2000 Session of the General Assembly¹, the Virginia Freedom of Information Advisory Council (the "Council") was created as an advisory council in the legislative branch of state government to encourage and facilitate compliance with the Freedom of Information Act (FOIA). As directed by statute, the Council is tasked with furnishing advisory opinions concerning FOIA upon request of any person or agency of state or local government; conducting training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of FOIA; and publishing educational materials on the provisions of FOIA². The Council is also required to file an annual report on its activities and findings regarding FOIA, including recommendations for changes in the law, to the Governor and the General Assembly.

¹ Chapters 917 and 987 of the 2000 Acts of Assembly.

² Chapter 21 (§ 30-178 et seq.) of Title 30 of the *Code of Virginia*.

The Council is composed of 12 members, including one member of the House of Delegates; one member of the Senate of Virginia; the Attorney General or his designee; the Librarian of Virginia; the director of the Division of Legislative Services; one representative of local government; two representatives of the news media; and four citizens.

The Council provides guidance to those seeking assistance in the understanding and application of FOIA; although the Council cannot compel the production of documents or issue orders. By rendering advisory opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide the future public access practices of state and local government agencies. Although the Council has no authority to mediate disputes, it may be called upon as a resource to assist in the resolution of FOIA disputes and keep the parties in compliance with FOIA. In fulfilling its statutory charge, the Council strives to keep abreast of trends, developments in judicial decisions, and emerging issues. The Council serves as a forum for the discussion, study, and resolution of FOIA and related public access issues and is known for its application of sound public policy considerations to resolve disputes and clarify ambiguities in the law. Serving as an ombudsman, the Council is a resource for the public, representatives of state and local government, and members of the media.

During 2007, the Council said goodbye to members J. Stewart Bryan and Nolan T. Yelich. Mr. Bryan, an original member of the Council who served seven years on the Council, declined reappointment for a final four-year term. Mr. Yelich, also an original member of the Council serving ex officio as the Librarian of Virginia, retired from state service on July 1, 2007. Mr. George Whitehurst was appointed to the Council by the Speaker of the House of Delegates to fill Mr. Bryan's seat. Dr. Sandra G. Treadway, appointed as Mr. Yelich's successor as Librarian of Virginia, now serves ex officio in that capacity on the Council.

EXECUTIVE SUMMARY

Since the creation of the Council in 2000, the General Assembly has customarily referred to the Council a number of FOIA and related access bills introduced during each session that require in-depth examination and/or resolution of complex issues. The 2007 Session was no exception and 12 bills were referred to the Council for further study. Three of these bills concerned the conduct of electronic meetings (i.e., teleconferences and audio/visual meetings). The remaining 9 bills, some of which were companion bills (introduced in both chambers) dealt with public access to personal identifying information contained in public records. In response, the Council appointed two subcommittees to study the above-described legislation.

The Electronic Meetings Subcommittee (E-Meetings Subcommittee),³ initially formed in 2005 to study issues raised by HB 2760 (Delegate Reese) and continued in 2006 to study SB 465 (Senator Edwards), was again continued to examine the three bills that fell within its purview, namely: HB 2293 (Delegate McClellan), HB 2553 (Delegate Ebbin), and SB 1271 (Senator Whipple). HB 2293 would have permitted local governing bodies and school

³ The Electronic Meetings Subcommittee consisted of Council members Edwards (Chair), Senator Houck, Wiley, Miller, Fifer, and Axselle.

boards to conduct electronic meetings wherein no public business is transacted (i.e., discussions only). HB 2553 would have allowed local public bodies to conduct electronic meetings under certain conditions when a local state of emergency has been declared. SB 1271 would have removed the requirement for a quorum to be physically assembled when a state public body conducts an electronic meeting. At the unanimous recommendation of the E-Meetings Subcommittee, the Council tabled further consideration of HB 2293 and SB 1271, due in large part to the strong preference for face-to-face meetings believing that they better serve not only the public, but the members of the public body conducting the meeting. The Council continues to believe that face-to-face meetings should be the rule rather than the exception. The Council voted unanimously to recommend a revised draft of HB 2553 to the 2008 Session of the General Assembly. The recommended draft would allow a local public body to meet by electronic means without a physically assembled quorum at a single location when the Governor has declared a state of emergency, the catastrophic nature of the emergency makes it impracticable or unsafe to assemble a quorum in one location, and the purpose of the meeting is to address the emergency. The local public body must also (i) give public notice contemporaneously with the notice given the members, using the best possible methods given the nature of the emergency; (ii) make arrangements for public access to the meeting; and (iii) otherwise comply with the usual rules for electronic meetings. Additionally, the minutes must reflect the nature of the emergency and the fact that the meeting was held electronically.⁴

The second subcommittee, the Personal Identifying Information Subcommittee (PII Subcommittee)⁵ was formed to examine the remaining nine referred bills. These nine bills covered six different topics, all which, however, dealt with issues involving public access to an individual's personal identifying information contained in public records.⁶ With the advent of the Internet, personal privacy concerns have increased dramatically. Previously, personal privacy was deemed sufficiently protected by the concept of "practical obscurity" in that gaining access to public records, whether in paper or electronic form, required some effort from the requester. Judges and others have recognized the concept of practical obscurity.

The notion that public records are limited by a built-in assumption of 'practical obscurity' was first advanced by the Supreme Court in a case denying a reporter's request for an FBI rap sheet that compiled conviction records from several states because it would constitute an unwarranted invasion of privacy. Although the individual records were public, the court ruled that they were in a sense protected by the barriers of time and inconvenience involved in collecting them.⁷

⁴ Additionally, the draft bill makes a technical amendment in the definition of "meeting" to include the provisions of § 2.2-3708.1 (added in 2007).

⁵ The Personal Identifying Information Subcommittee consisted of Council members Senator Houck (Chair), Delegate Griffith, Malveaux, Bryan, Edwards, Hopkins, Spencer, and Yelich.

⁶ Public records by definition under FOIA include "all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business." See § 2.2-3701.

⁷ As Public Records Go Online, Some Say They're Too Public, *The New York Times*, August 24, 2001.

The state of technology today, however, has extensive capabilities. Using computers and sophisticated mathematical techniques, information experts now can discover patterns in data drawn from completely unrelated databases, thus making inferences about details of people's lives. The 2007 legislation referred to the Council reflects this sentiment. Direction from the Council to the PII Subcommittee reflected the belief, however, that these bills represented a piecemeal approach to this issue and it was the intent of the Council, through the work of the PII Subcommittee, to devise a uniform rule concerning access to personal identifying information after careful consideration of all sides of the issue. The work of the PII Subcommittee included the following bills:

- HB 2821 (Delegate Sickles) would have provided a general exemption for social security numbers, and was referred to both the FOIA Council and the Joint Commission on Technology and Science (JCOTS);
- HB 2558 (Delegate Brink) exempts certain information in rabies vaccination certifications, and was passed with a sunset provision such that it expires July 1, 2008;
- HB 3097 (Delegate Cole)/SB 1106 (Senator Chichester) would have exempted certain personal information in constituent correspondence;
- HB 3118 (Delegate Carrico)/SB 883 (Senator Deeds) would have exempted certain personal information in licensing records of the Department of Game and Inland Fisheries;
- HB 3161 (Delegate D. Marshall)/SB 1404 (Senator Hanger) would have exempted complainant information with respect to violations of local ordinances; and
- SB 819 (Senator Cuccinelli) would have provided a general exemption for social security numbers and other personal information.

The Council, jointly with the Social Security Number Subcommittee of the Joint Commission on Technology and Science (JCOTS), examined specifically public access to social security numbers (SSNs) in public records pursuant to HB 2821 and SB 819. Public comment indicated that a FOIA exemption was problematic for certain entities (e.g. print media, data aggregators, private investigators, and others) because of their expressed need for SSNs to verify identity. Further, a FOIA exemption would be harmful to the basic policy of FOIA that motive for a request is immaterial. Thus the discretionary release of a SSN under such an exemption would require the government to ascertain the motive for the request. Additionally, it was argued by privacy advocates that FOIA exemptions are discretionary with the public body having custody of the record and therefore would allow a government entity to release records containing SSNs unless expressly prohibited by some other law. Alternatively, access advocates argued that a FOIA exemption for SSNs, although discretionary, would be treated by government as a prohibition and effectively no records with SSNs would be accessible. Based on the foregoing and recognizing the complexity of the attendant issues, the Council agreed that they would address the over collection issue in legislation for the 2008 Session of the General Assembly. The Council is

committed, however, to continuing its examination of public access to SSNs during 2008. The Council, with the concurrence of the JCOTS Subcommittee, has recommended legislation to the 2008 Session that amends the Government Data Collection and Dissemination Practices Act (GDCDPA) by limiting the collection of SSNs by state and local government to those instances where collection of SSNs is required by state or federal law and the collection of SSNs is essential to the mission of the agency. Additionally, the Council, with the concurrence of the JCOTS Subcommittee, has recommended legislation amending the Personal Information Privacy Act (PIPA) (§ 59.1-446 et seq.). This draft clarifies that an individual may disseminate his or her own SSN without violating PIPA. The draft would also apply the prohibitions contained in PIPA on the dissemination of SSNs to those SSNs obtained from public records.⁸ Following up on concerns raised about the constitutionality of this provision, staff presented an outline of the constitutional issues that may come into play should the draft be passed into law. Staff discussed two relevant lines of jurisprudence. First, staff presented a series of cases where laws restricting the publication of truthful information lawfully obtained were consistently struck down as unconstitutional infringements upon citizens' freedoms of speech. Second, staff set forth cases and statutes highlighting the importance of SSNs and the compelling privacy interest in protecting individuals' SSNs. Under the first line of cases, the Supreme Court of the United States has consistently refused to set forth a blanket rule, but has instead held out the possibility that a law restricting the publication or dissemination of truthful information lawfully obtained might be constitutional if it serves to protect a sufficiently compelling state interest. However, in every specific case that has come before it, the Court has struck down such laws as unconstitutional restraints violating the First Amendment right to freedom of speech. None of these cases have specifically addressed the publication or dissemination of SSNs obtained from public records. Other cases from various courts have consistently held that there is a compelling privacy interest in protecting individuals' SSN information. By contrast, there is relatively little public interest in disseminating SSN information obtained from public records that do not otherwise provide greater transparency to government actions. In assessing all these cases together, staff concluded that while the recommended draft could be challenged as an improper prior restraint on freedom of speech under the first line of cases, there is nevertheless an even chance that a court would find the law constitutional because of the compelling interest in protecting SSNs.

Additionally, the Council examined a related issue-- public access to records relating to holders of concealed handgun permits--which was included as part of the PII Subcommittee's work. This issue was not the subject of legislation in the 2007 Session, but came to the attention of the Council following the publication on the Internet of the names and addresses of holders of concealed handgun permits by the Roanoke Times and the resulting controversy stemming from personal privacy concerns. The Roanoke Times obtained the database of such permittees from the Department of State Police. This issue was also the subject of an opinion from the Attorney General.⁹ The Council voted to recommend to the 2008 Session legislation requiring the Department of State Police (DSP) to withhold from public disclosure permittee information submitted to the DSP for purposes of entry into the Virginia Criminal Information Network. The proposed draft does contain

⁸ This was accomplished by striking certain language in PIPA as it is currently enacted.

⁹ Issued to the Honorable Dave Nutter on April 6, 2007.

a limited exception for access by law-enforcement agencies. Records of the names and addresses of holders of concealed handgun permits issued by the DSP, however, to out-of-state persons would be publicly available from DSP. Permittee records will still be open to the public at each circuit court where the permits are issued.

The Council continued to monitor Supreme Court of Virginia decisions relating to FOIA. In the case of *Fenter v. Norfolk Airport Authority* decided on September 14, 2007,¹⁰ John Fenter, a Virginia citizen, made multiple requests for records from the Norfolk Airport Authority (the Authority) concerning certain signs near the airport relating to vehicle searches. In response to two of his requests, the Authority referred Mr. Fenter to its attorney and indicated that it had referred his requests to the federal Transportation Safety Administration. The Court held that the Authority had violated FOIA as the responses given by the Authority did not correspond to any of the mandatory responses set forth in FOIA.¹¹ The Court also remanded the case for a determination of costs and attorney's fees to be awarded to Mr. Fenter. It is significant to note that prior to filing suit, Mr. Fenter sought an advisory opinion from the Council, issued on May 25, 2006 (AO-05-06), which reached essentially the same conclusion as the Court that the Authority had failed to provide a proper response under FOIA. The Court in its opinion referenced AO-05-06.

The Council continued its commitment to providing FOIA training. The Council views its training mission as its most important duty and welcomes any opportunity to provide FOIA training programs. During 2007, the Council conducted a total of 77 FOIA training programs throughout Virginia at the request of state and local government officials, the media, and citizens. These training programs are tailored to meet the needs of the requesting organization and are provided free of charge. All Council-sponsored training programs, whether the statewide workshops or specialized programs, are approved by the Virginia State Bar for continuing legal education credit for licensed attorneys. In addition, the Council conducted its statewide FOIA workshops, now offered in odd-numbered years, during the period June 11 through June 21, 2007 in Wise, Danville, Staunton, Manassas, Norfolk and Richmond. The workshops were pre-approved by the Virginia State Bar for continuing legal education credit, the Department of Criminal Justice Services for law-enforcement in-service credit, and the Virginia School Board Association for academy points. Approximately 600 persons, including government officials, media representatives and citizens, attended the statewide FOIA workshops. Based on course evaluations, these workshops were well received and met or exceeded attendee expectations.

For this reporting period, the Council, with a staff of two attorneys, responded to approximately 1,708 inquiries. Of these inquiries, 13 resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: two by government officials, three by media representatives, and eight by citizens. The remaining 1,695 requests were for informal opinions, received via telephone and e-mail. Of these requests, 854 were made by government officials, 674 by citizens, and 167 by media.

¹⁰ 274 Va. 524, 649 S.E.2d 704.

¹¹ Subsection B of § 2.2-3704.

FOIA was again the subject of significant legislative activity in the 2007 Session. The General Assembly passed a total of 19 bills amending FOIA in 2007. Of note, four of the 19 bills were recommendations of the Council, specifically: HB 1791 (Griffith), adding an additional response to address situations when a public body receives a request for public records under FOIA but cannot find the requested records or the requested records do not exist; SB 1001 (Houck), addressing various provisions regarding the conduct of electronic communication meetings; SB 1002 (Houck), concerning the release of certain records under the Public-Private Transportation Act of 1995 (PPTA) and the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA); and SB 1003 (Houck), concerning the venue for FOIA enforcement actions. A more detailed report of the bills passed during the 2007 session appears on the Council's website and is attached to the Council's 2007 annual report as Appendix E.

With the passage of SJR 170 during the 2006 Regular Session designating March 16, in 2006 and in each succeeding year, as Freedom of Information Day in Virginia, the General Assembly renewed its commitment to open government principles. Virginia is ranked as one of the top ten states for effective FOIA laws. March 2007 continued the observance of *Sunshine Week* statewide by publication of numerous articles and reports by print and broadcast media to inform the public of its right to know about the operation of government. Because of the annual advent of *Sunshine Week*, awareness of the Council, its role, and FOIA generally has increased. This is evident by the number of requests to the Council for advisory opinions, FOIA training, and other assistance. To commemorate Sunshine Week, the Council sponsored, in conjunction with the Virginia Coalition for Open Government, the Virginia Association of Broadcasters, the Virginia Press Association, the Library of Virginia, and the Virginia Library Association, a webcast program entitled "*Closed Doors; Open Democracies*." This program included national and local experts in FOI laws who discussed denied access at various levels of government and its impact. In addition, the Council's executive director, Maria Everett wrote an op/ed piece about the importance of FOIA for the *Richmond Times Dispatch*, titled "All of Us Must Do Better." This piece appeared in the *Richmond Times Dispatch* on March 16, 2007, along with a positive editorial about the work of the FOIA Council. Both pieces are attached to the Council's 2007 annual report as Appendix I. The Council looks forward to commemorating Freedom of Information Day in 2008 and has plans to host another sunshine reception to highlight the importance of government transparency to increase the public trust and keep the government accountable to the public it serves.

WORK OF THE COUNCIL

The Council held four meetings during this reporting period in which it considered a broad range of issues, including public access to Social Security Numbers and other personal identifying information, public access to records of holders of concealed handgun permits, and the conduct of electronic meetings by local public bodies in the event of declared states of emergency. The Council's discussions and deliberations are chronicled below. A condensed agenda for each of the Council's meetings appears as Appendix D.

March 19, 2007

The Council held its first quarterly meeting of 2007.¹² The purpose of the meeting was to review legislative changes to FOIA made by the 2007 General Assembly, identify topics for study, including bills referred to the Council for further examination, and to develop a study plan for this year's work.

Legislative Update

The General Assembly passed a total of 19 bills amending the FOIA in 2007. Four of the 19 bills were recommended by the Council: HB 1791 (Griffith), adding an additional response to address situations when a public body receives a request for public records under FOIA but cannot find the requested records or the requested records do not exist; SB 1001 (Houck), addressing various provisions regarding electronic communication meetings; SB 1002 (Houck), concerning the release of certain records under the Public-Private Transportation Act of 1995 (PPTA) and the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA); and SB 1003 (Houck), concerning the venue for FOIA enforcement actions. Of the 19 bills, four bills added three new records exemptions and one new closed meeting exemption; the other 15 bills all amend existing provisions of FOIA. A complete listing and description of these and other related access bills considered by the 2007 Session of the General Assembly is attached to this report as Appendix E.

Bills Referred to the Council for Study

Nine bills were referred to the Council for study by the 2007 Session of the General Assembly, falling into two topic areas:

- **Electronic Communication Meetings:**
 1. HB 2293 (McClellan)
 2. HB 2553 (Ebbin)
 3. SB 1271 (Whipple)

- **Protection of Personal Identifying Information:**
 1. HB 2821 (Sickles)
 2. HB 2558 (Brink)
 3. HB 3097 (Cole)/SB 1106 (Chichester)
 4. HB 3118 (Carrico)/SB 883 (Deeds)
 5. HB 3161 (Marshall, D.W.)/SB 1404 (Hanger)
 6. SB 819 (Cuccinelli)

HB 2821, regarding records containing social security numbers, and SB 819, which would have provided a general exemption for social security numbers and other personal information, were referred to JCOTS as well as to the Council. The Council expressed its intention to work jointly with JCOTS in studying these bills.

¹² All Council members were present except Nolan Yelich; Stephanie Hamlett, of the Office of the Attorney General, sat in by designation for Courtney Malveaux.

Public Comment

The Council noted that there had been a great deal of public concern regarding the recent online publication by the Roanoke Times of a list of all the holders of permits to carry concealed handguns in Virginia, and that several people had attended today's meeting to speak on that issue. In light of their attendance and concerns, and because the issue fell within the more general category of personal identifying information, it was decided to move the public comment period up on the agenda. Delegate David Nutter expressed his concern regarding this publication, informed the Council that he has requested a legal opinion from the Office of the Attorney General on the matter, and indicated that he would like to participate toward a resolution. James Kadison, representing the Virginia Citizens Defense League, expressed concern over the possible abuse of the list but also concern that it would not be appropriate to completely prohibit public access. B.J. Ostergren, representing the Virginia Watchdog, also expressed concern about this issue, particularly because concealed carry permit information is held by circuit court clerks as well as the State Police, and these same records may be available online through secure remote access systems on the circuit court clerks' websites.

Appointment of Subcommittees

The Council appointed two subcommittees to correspond to the two general topic areas of the bills referred for study. The members of the E-Meetings Subcommittee are John Edwards (Chair), Senator Houck, Roger Wiley, E. M. Miller, Craig Fifer, and Bill Axelle. The members of the PII Subcommittee are Senator Houck (Chair), Delegate Griffith, Courtney Malveaux, Stewart Bryan, John Edwards, Wat Hopkins,¹³ Mary Yancey Spencer, and Nolan Yelich. The subcommittees may be subdivided further to consider individual bills or issues. The concealed carry permit issue will be addressed by the PII Subcommittee. Delegate Griffith also suggested that the PII Subcommittee examine a bill that was sent to the Crime Commission concerning limiting access after trial to information about jurors. This subcommittee will also work with JCOTS, as previously mentioned in regard to HB 2821 and SB 819.

Other Business

Staff provided a description of what had happened concerning the online publication of the concealed carry permit list by the Roanoke Times. The Roanoke Times had published an editorial during Sunshine Week that used the concealed carry permit holder list as an example of a public record, and the list was published on the newspaper's website in conjunction with the editorial. The list was removed from the website shortly thereafter, after many complaints were received about the publication of the list. Various concerns about this topic were expressed by Council members Fifer, Griffith, and Houck, as well as Delegate Nutter and B.J. Ostergren. Lisa Wallmeyer, of the Division of Legislative Services, briefly discussed Code § 18.2-308, which governs issuance of the concealed carry permits. No decisions were made on this topic. Further deliberation of this issue will be conducted by the appropriate subcommittee.

¹³ Mr. Hopkins ultimately resigned from the PII Subcommittee due to time conflicts.

Of Note

Staff reported that for the period December 1, 2006 through February 28, 2007, it had received a total of 423 inquiries. Of the 423 inquiries, 1 request was for a formal written opinion and the remaining 422 inquiries were by telephone and electronic mail. Citizens accounted for 200 of the informal inquiries, the government for 189 inquiries, and the media for 33 inquiries. The formal opinion was requested by a member of the news media.

Staff also advised that plans were being made for the Council-sponsored FOIA seminars, to be held in six locations across Virginia in the month of June. The seminars will address access to public records, access to public meetings, law-enforcement records, and FOIA topics of current interest, including the legislative update. Further details will be provided on the Council website and by electronic mail as the plans are made final.

Ginger Stanley, representing the VPA, indicated that she would present information on Sunshine Week 2007 to the Council at its next meeting. This year Sunshine Week was March 11 through March 17, and so there had not been enough time to compile complete information for a report before this Council meeting.

June 7, 2007

The Council held its second meeting of 2007 to receive progress reports from its two subcommittees. The Council also commended Council member Nolan Yelich, Librarian of Virginia, for his distinguished service to the Council and to state government generally. Mr. Yelich will be retiring from state service effective July 1, 2007. The Council presented a resolution to Mr. Yelich describing his long and illustrious career as an exemplary public servant. The Council praised Mr. Yelich's leadership, marked by his geniality, insight, flexibility, and uncompromising integrity, and noted that his leadership in the preservation of public records has resulted in changes that will continue to benefit the citizens of Virginia.

Subcommittee Reports

Electronic Meeting Subcommittee. John Edwards, chair of the subcommittee reported that the subcommittee held its first meeting on May 10, 2007. Of the three bills referred to the subcommittee,¹⁴ only one patron, Delegate McClellan, was able to be present to discuss her bill (HB 2293). Delegate McClellan indicated that the bill was requested by the chair of the Richmond City School Board and would allow a local governing body, school board, or any subcommittee thereof to meet by electronic communication means provided (i) no purpose of the meeting is to take action on any matter before the governing body, school board, or subcommittee, or to otherwise transact any business of the governing body, school board, or subcommittee; (ii) the meeting is not called or prearranged with any purpose of transacting any business of the local governing body, school board, or subcommittee; and (iii) the local governing body, school board, or subcommittee otherwise complies with the electronic communication meetings law. Delegate McClellan stated that local government officials

¹⁴ HB 2293 (McClellan)--teleconferencing for local bodies ONLY when gathering information and no action will be taken. HB 2553 (Ebbin)--Allows a local governing body to meet by electronic communication means when a local state of emergency has been declared; and SB 1271 (Whipple)--Eliminates the requirement that a quorum of a state public body be physically assembled in one primary location in order for the public body to conduct a meeting through electronic communications means. Instead of the quorum, the bill provides that at least two members of the public body be physically assembled at one location.

are part time, volunteer members with other jobs. She indicated that the goal of the bill is to allow locally elected officials to take advantage of technology as do businesses currently. She reiterated that the bill would authorize teleconferencing only for receiving information by the local public body and for no other purpose. She urged the subcommittee to keep practical realities in mind. Local elected officials serve part time while juggling jobs in the private sector. She reiterated that the bill is narrowly drawn to limit use of teleconferencing to information gathering only.

Mr. Edwards noted that opposition to HB 2293 had been expressed at the meeting, but because a quorum of the subcommittee was not present, further consideration of HB 2293 will occur at the next meeting of the subcommittee. He stated that over the course of the subcommittee's study of electronic meeting issues over the last several years, the one constant is a predisposition to retain the face-to-face quorum requirement. The subcommittee, however, will keep an open mind as it considers the bills before it. Further, the patrons who were unable to attend the meeting will be given the opportunity to present their bills at future meetings of the subcommittee.

Personal Identifying Information Subcommittee. Senator Houck reported that the subcommittee has held one meeting to date to begin its deliberations on the nine bills referred for study.¹⁵ Senator Houck stated that a number of bills introduced during the 2007 Session concerned public access to personal identifying information, including social security numbers; addresses of citizens; rabies vaccination information; and holders of boat, fishing, and hunting licenses. Each bill represents a differing, piecemeal approach and it is the intent of the Subcommittee to devise a uniform rule concerning access to personal identifying information after careful consideration of all sides. Additionally, public access to holders of concealed handgun permits, will be included as part of the subcommittee's work. Although this was not the subject of legislation in the 2007 Session, it came to light following the publication of the names and addresses of holders of concealed handgun permits in the Roanoke Times and the resulting controversy.

Of Note

Staff briefed the Council on the upcoming 2007 Statewide FOIA Workshops scheduled for the weeks of June 11 and June 18 to be held in Wise, Danville, Staunton, Manassas, Norfolk, and Richmond.

Ginger Stanley, Executive Director of VPA, recapped for the Council the media events held during Sunshine Week (March 11-17, 2007), which was not only in Virginia, but across the nation. Almost three dozen newspapers ran articles, columns or editorials that week on

¹⁵ HB 2821 (Sickles)--Access to Social Security Numbers; HB 2558 (Brink)--Release of rabies certificate information; HB 3097 (Cole)/SB 1106 (Chichester)--Release of constituent contact information; HB 3118 (Carrico)/SB 883 (Deeds)--Release of the names, addresses, and social security numbers of holders of boat, fishing, hunting, and other licenses/permits issued by the Department of Game and Inland Fisheries; HB 3161 (Marshall, D.W.)/SB 1404 (Hanger)--Expansion of complainant information for violation of any local ordinance (currently only protected for zoning violations); and SB 819 (Cuccinelli)--Release of personal information concerning an identifiable individual, including date of birth, social security number, driver's license number, bank account numbers, credit or debit card numbers, personal identification numbers, electronic identification codes, automated or electronic signatures, biometric data, or fingerprints.

Sunshine Week and public access. The newspapers ran the gamut in size, from the state's major and mid-major dailies to small weeklies in far-reaching portions of Virginia.

Barrett Hardiman of the Virginia Association of Broadcasters reported that the broadcast media also participated in Sunshine Week by conducting news programs. He noted that participation by his association members was not as extensive as that of VPA.

Public Comment

Frosty Landon, executive director of the Virginia Coalition for Open Government, told the Council that he was retiring. He noted that what the Coalition had envisioned for the Council in 2000 has happened. The Council brings differing viewpoints together and has been recognized by the legislature for its in depth consideration of access issues. He stated that as a result of the Council, there is a better understanding of access laws. He suggested that perhaps it is time for the Council to begin formalized mediation of FOIA disputes.

Phyllis Errico of the Virginia Municipal League praised Mr. Landon for coming to each issue with respect and trust. She noted that this is why the Council is so important because solutions to access issues are coming from a place of respect and trust.

The Council also praised Mr. Landon for his contributions to public access and for his unwavering support of the Council's work.

September 10, 2007

The Council held its third meeting of 2007 to receive progress reports from its two subcommittees.¹⁶ The Council also welcomed new Council member Dr. Sandra G. Treadway, Librarian of Virginia, to the Council. Dr. Treadway replaced Nolan Yelich, who retired from state service effective July 1, 2007. In addition, the Council heard from the University of Virginia (UVA) regarding a proposed exemption for certain donor records held by UVA.

Subcommittee Reports

Electronic Meeting Subcommittee. John Edwards, Chair of the Subcommittee, reported that the Subcommittee met three times (on May 10, June 7, and July 12, 2007) to address three bills referred to it.¹⁷ Delegate McClellan spoke to her bill, HB 2293, at the first meeting of the Subcommittee. The other patrons did not attend the meetings of the Subcommittee. Mr. Edwards reported that the Subcommittee voted 4 to 0 to recommend against HB 2293, which would have allowed local public bodies to meet through electronic means only when gathering information and no action is to be taken at the meeting. Regarding SB 1271 (Whipple), the Subcommittee voted 4 to 0 to table the bill unless the patron requested further consideration; the patron has not done so. The bill would have eliminated the requirement that a quorum of a state public body be physically assembled in one primary location in order for the public body to conduct a meeting through electronic communications means. Instead of the quorum, the bill provided that at least two members of the public body be physically assembled at one location.

¹⁶ All Council members were present except Mr. Miller, Mr. Hopkins and Dr. Treadway.

¹⁷ HB 2293 (McClellan), SB 1271 (Whipple), and HB 2553 (Ebbin).

Regarding HB 2553 (Ebbin), the Subcommittee voted 5 to 0 to recommend a revised draft of this bill to the Council. The draft as revised would allow a local public body to meet by electronic means without a physically assembled quorum when the Governor has declared a state of emergency, the catastrophic nature of the emergency makes it impracticable or unsafe to assemble a quorum in one location, and the purpose of the meeting is to address the emergency. The local public body must also (i) give public notice contemporaneously with the notice given the members, using the best possible methods given the nature of the emergency; (ii) make arrangements for public access to the meeting; and (iii) otherwise comply with the usual rules for electronic meetings. The minutes must reflect the nature of the emergency and the fact that the meeting was held electronically. Additionally, the draft bill makes a technical amendment in the definition of "meeting" to include the provisions of § 2.2-3708.1 (added in 2007).

Mr. Edwards also presented a statement of principles regarding electronic meetings for the Council's consideration. Mr. Edwards noted that in the three years the Subcommittee had met to consider various issues regarding electronic meetings, it had consistently favored requiring face-to-face meetings of local public bodies and the physical assembly of quorums of state public bodies. Mr. Edwards moved that the Council adopt his statement reflecting those two principles as guidance and a starting point for future discussions of electronic meetings.

In response, Council member Wiley stated that while he understood Mr. Edwards' view, he could not support the statement of principles because he does not share the same concerns regarding electronic meetings. Mr. Wiley expressed that as a practical matter, electronic meetings will be a part of our lives, that such meetings increase efficiency and greatly reduce transportation costs, and that there is a difficulty in getting good people to serve without being paid, so we should make it as easy as possible to do so.

Council member Fifer opined that in this situation, where the Subcommittee has been meeting for some time and is not addressing a new subject area, it may be helpful for the Subcommittee to have guidance from the full Council regarding general principles rather than starting anew each time. Additionally, Mr. Fifer noted that the Subcommittee could recommend that the policy be discontinued or changed later.

Delegate Griffith indicated that his support for the concepts behind the proposed statement, especially for face-to-face meetings. Delegate Griffith indicated the value in seeing firsthand a speaker's body position, tenor of voice, and other characteristics that convey a speaker's passion and conviction regarding a topic that can be lost in transmission by even the best technology. He also indicated that people often do not pay as close attention to a speaker who is not physically present.

Council member Axselle indicated his support for the statement of principles setting a standard but noting that the standard may deviate, as stated by Mr. Fifer. An example is of such deviation is the bill today endorsed by the Council that would allow local governments to meet electronically under specific emergency circumstances. Mr. Axselle also described a

problem that occurred with an electronic meeting in which he participated, regarding the distribution of documents to members who are not physically present. When someone physically present distributed a document at the meeting, someone who had called in asked whether it was the same one that the member had sent him by electronic mail the night before.

Council member Malveaux questioned whether (i) these principals were best expressed by the Council or rather added to § 2.2-3700, the policy section of FOIA, and (ii) it is a bad thing or perhaps instead is beneficial to repeat these discussions as technology changes and the Subcommittee addresses the same questions anew. Mr. Edwards stated that he agreed that there is a need to continue these discussions, and the statement is offered only as a starting point. Council member Spencer indicated she did not agree with the underlying premise that is the Council's job to determine these matters for individual agencies, that she otherwise agreed with Mr. Wiley's position, and that she intended to vote against the statement.

Senator Houck agreed with Delegate Griffith, that the dynamic of live human discourse cannot be captured by technology and that dynamic is what citizens want and expect. However, while agreeing with the substance of the principles expressed, Senator Houck indicated he was reluctant to support the statement because the strength of the Council is to have an independent forum for relevant topics. Adopting the statement would give the appearance that the Council has already determined limits on electronic meetings, in effect "drawing a line in the sand." For that reason, to maintain the Council's autonomy, Senator Houck indicated he could not support the statement at this time.

Mr. Fifer indicated that he supported the merits of the statement of principles, and would prefer the burden of repeated discussion rather than the perception of bias by the Council. The Council then voted on the statement of principles as a resolution of the Council. Delegate Griffith and Council members Edwards, Axselle, and Fifer voted in favor of the resolution. Senator Houck and Council members Malveaux, Wiley and Spencer voted against it. Because the vote was tied, the resolution did not pass and the statement of principles was not adopted by the Council.

Personal Identifying Information Subcommittee. Senator Houck, Chair of the Subcommittee, reported that the Subcommittee has held three meetings to date to deliberate on the nine bills referred for study.¹⁸ Two meetings were joint meetings with a subcommittee of JCOTS. Those joint meetings addressed two bills, HB 2821 (Sickles), concerning access to SSNs, and SB 819 (Cuccinelli), concerning access to personal information including date of birth, social security number, driver's license number, bank account numbers, credit or debit card numbers, personal identification numbers, electronic identification codes, automated or electronic signatures, biometric data, or fingerprints. The Subcommittees decided to focus on HB 2821, concerning SSNs, because SB 819 is too broad, with possible unintended consequences. In its meetings, the Subcommittees have examined the treatment of SSNs under Virginia law, federal law, and the laws of other

¹⁸ HB 2821 (Sickles), SB 819 (Cuccinelli), HB 2558 (Brink), HB 3097 (Cole), SB 1106 (Chichester), HB 3118 (Carrico), SB 883 (Deeds), HB 3161 (Marshall, D.), and SB 1404 (Hanger).

states, all of which take somewhat different approaches. The Subcommittees have also looked at what personal information is collected by government from a practical perspective using real-life examples. The Subcommittees found that government collects too much personal information in the first instance, and that this over-collection needs to be addressed. The Subcommittees decided that these issues are best addressed by legislation outside of FOIA for two reasons: (i) the law should address the treatment of SSNs in the private sector as well as in public records (and FOIA only applies to public records); and (ii) under FOIA, a requester's purpose in requesting records does not matter. There are both good and bad reasons to share SSNs, and any proposed law may need to account for good or bad intent. Other laws outside of FOIA do account for intended use when determining who may have access to certain information, and so it is appropriate to address this matter outside of FOIA. Additionally, the Subcommittees have found that definition of "personal information" in the GDCDPA may need to be updated. The Subcommittees will continue their work to attempt to draft legislation that will best address the issues identified to date.

Additionally, apart from the joint meetings with JCOTS, the PII Subcommittee considered seven other bills and the issue of concealed carry handgun permits (CCH permits). Regarding HB 2558 (Brink), concerning an exemption for certain information in rabies vaccination certificates, at a prior meeting it was stated that the Virginia Treasurers' Association and the Virginia Veterinarians' Association are working on a form for use state-wide that limits the amount of personal information available to the public. The Subcommittee is waiting to see that form before taking further action on the bill. Regarding HB 3097 (Cole) and SB 1106 (Chichester), identical bills concerning the release of certain information in constituent correspondence, the bills were tabled without objection. No consensus was reached after the Subcommittee debated the issues involved and considered draft legislation that attempted to distinguish between personal correspondence and correspondence addressing public business. Regarding HB 3118 (Carrico) and SB 883 (Deeds), identical bills exempting certain records held by the Department of Game and Inland Fisheries (DGIF), the bills were discussed at the first Subcommittee meeting, but no action was taken. Further action on these bills will be dependent on what the Subcommittee decides regarding the larger issue of SSNs and personal information generally. Regarding HB 3161 (Marshall, D.) and SB 1404 (Hanger), identical bills expanding a current exemption regarding certain complainant information to include information in complaints for violations of any local ordinance, the bills were tabled by vote of 4 to 0. After discussion there was a consensus that the bills were overreaching.

CCH permits became an issue of concern to the Council earlier this year after the Roanoke Times published on its website a list of CCH permit holders obtained from the Department of State Police (DSP). Shortly thereafter the newspaper removed the list from its website after a great deal public outcry concerning the online publication of permit holders' personal information. Lisa Wallmeyer, of the Division of Legislative Services, presented draft legislation that would codify the opinion of the Attorney General issued in April, 2007, by providing that DSP shall withhold from public disclosure permittee information submitted to DSP for purposes of entry into the Virginia Criminal Information Network (VCIN). Additionally, the draft addresses a concern that arose at the last Subcommittee meeting by

clarifying that that records about nonresident permits issued by DSP remain open to the same extent that records held by the clerks of court concerning resident permits are open. Craig Merritt, on behalf of the VPA, suggested that further revision be made to the draft to keep personal information confidential but to allow statistical information to be released. Senator Houck indicated that unless there was objection from the Council, no vote would be taken on this draft today. Instead, as it is a sensitive topic, it would be left for further consideration until the next Council meeting.

Other Business

On behalf of UVA, Robert Lockridge, Executive Assist to the President for State Government Relations, presented draft legislation that would exempt certain donor records held by UVA from the mandatory disclosure requirements of FOIA. The proposed exemption would be added to § 2.2-3705.4, and would read as follows:

Records that contain personal information concerning donors and prospective donors in connection with fund-raising by or for a public institution of higher education; except that the amount, date and purpose of any pledge or donation, and the identity of the donor shall be released, unless the donor has requested anonymity in connection with or as a condition of making the pledge or donation.

As background, Mr. Lockridge stated that the total UVA endowment is approximately \$4.1 billion, of which \$2.7 billion is controlled directly by UVA and \$1.4 billion is controlled by foundations that contribute to UVA. Mr. Lockridge indicated that most university endowments are held by foundations, and that UVA is atypical in that it controls so much of its endowment directly. Mr. Lockridge further explained that while the foundations are not subject to FOIA, because of the way the UVA endowment is handled, many of the foundations' records end up in the possession of UVA itself, where they are subject to disclosure under FOIA. Mr. Lockridge reported that UVA is one of the most successful universities in the country in its fundraising efforts. In regard to donor records, Mr. Lockridge listed three confidentiality concerns: (i) many records contain sensitive personal information about individual donors, such as if a donor is going through a divorce or selling a privately-owned business; (ii) the records may contain strategies UVA uses in approaching particular donors, also reflecting personal information about those donors; and (iii) some donors expressed their own wish to remain anonymous. Explaining further, Mr. Lockridge indicated donors most often gave one of three reasons for requesting anonymity: (i) the donor does not want to be solicited for donations by other organizations; (ii) the donor has a child attending UVA and does not want the child's educational experience to be affected by the donation; and (iii) the donor does not wish for his or her spouse to know of the donation. Mr. Lockridge stated that not being able to promise anonymity to donors would lead to the erosion of donor confidence and a decrease in donations. As safeguards for public access, Mr. Lockridge pointed out that one could still obtain the total number of donors and total amount of donations, there would still be access to procurement records, the Auditor of Public Accounts would continue to have full access to all donation records, and UVA has two committees to ensure academic freedom and prevent undue influence from any anonymous donor, the Gift Policy and Gift Acceptance Committees.

Also speaking on behalf of UVA, Robert Sweeney, Senior Vice President for Development and Public Affairs, explained that when raising money at these levels, often there are many very large gifts from individual donors that require extensive, delicate negotiations. For example, Mr. Sweeney related that in the current fundraising efforts, there have been over 133 gifts valued at or above \$5 million each. In response to a question from the Council, Mr. Sweeney also explained that the Gift Policy and Gift Acceptance Committees are comprised of UVA administrative personnel, and their function is to carefully examine any gift that would be outside the norm. Mr. Sweeney also stated that every gift valued at or above \$100,000 has a written agreement associated with it. In response to another question from the Council, Mr. Sweeney explained that UVA has greater control of its endowment and associated records than other universities because UVA prefers to retain greater direct control over audits and policies regarding these gifts. UVA requires the foundations to provide certain data to UVA regarding gifts, and those records are not currently protected when possessed by UVA. Additionally, Mr. Sweeney pointed out that as part of its fundraising efforts, UVA generally seeks press coverage of large gifts because then other donors are encouraged to make large donations as well. Senator Houck noted that with the extremely competitive nature of admissions to UVA, one might question whether an anonymous gift might be used as a backdoor to gain admission for a donor's child. Mr. Sweeney stated that that could not happen because the Admissions staff and the Development staff are kept insulated from each other. Admissions personnel would not know who the donors are, nor would Development office staff be allowed to contact Admissions personnel.

After further clarification that the exemption sought would still permit the disclosure of the amount, date, and purpose of a donation, Senator Houck opened the floor to public comment. Jennifer Perkins, of the Coalition for Open Government (VCOG), indicated that UVA had approached VCOG before today's meeting to discuss this proposed exemption. While acknowledging that UVA made some good arguments, Ms. Perkins pointed out that it is UVA's choice to include foundation records in UVA's own files, thus subjecting those foundation records to disclosure under FOIA. Ms. Perkins suggested the possibility of using a separate database for anonymous donors and leaving the main database completely open. Delegate Griffith noted that in the past there were many questions concerning university foundations and the flow of money between the foundations and universities. He asked whether the UVA approach is not better than having the foundations control everything, because the public sees none of the foundations' records. Ms. Perkins responded that ideally, the public would have access to both foundation and university records, especially because there are situations where a donor's name could be important. Council member Wiley requested clarification concerning how much state funding UVA receives. Mr. Lockridge indicated that 14.2% was earned interest on the endowment, 15.2% was funding from the state, and the remainder of the funding comes from tuition fees and federal funding. Mr. Merritt stated that Delegate Griffith was correct, that in the late 1990's there had been an unsuccessful movement to open to public disclosure university foundation records. Mr. Merritt also stated that it is a choice by UVA and its board of visitors to maintain a commingled system regarding both private and public operations in a public database, and that database should be subject to the same presumption of openness as other public records. Recognizing that foundations do provide a vehicle for anonymous

donations, Mr. Merritt also stated that as a matter of public policy no one should give anonymously to a public body. Lynwood Butner, representing the Virginia Association of Broadcasters (VAB), followed by stating that as UVA is a public entity, donations to UVA should be subject to public scrutiny just as are campaign contributions.

Senator Houck suggested that considering the different viewpoints expressed regarding this proposed exemption, it would not be appropriate for the Council to take any action at this meeting. Instead the respective interested parties should continue to meet and attempt to reach common ground regarding the exemption, and give the Council a report on their efforts at the next Council meeting. Additionally, Senator Houck asked that the parties inform the Council when they will meet so that any interested Council members may also participate. There was general agreement from representatives of UVA, VPA, VAB, and VCOG to follow this course of action.

Of Note

There were no matters of note to report.

December 3, 2007

The Council held its final meeting of 2007¹⁹ on December 3, 2007. This meeting included the annual legislative preview for the upcoming Session of the General Assembly. The Council heard final reports from its two subcommittees; reviewed legislative proposals, including those from non-Council sources as part of the legislative preview; and received a draft copy of its 2007 annual report to the Governor and the General Assembly. The Council welcomed its newest member, George T. Whitehurst, who was recently appointed by the Speaker to fill Stewart Bryan's seat on the Council²⁰. The Council also set its first meeting for 2008 to be held at 1:00PM, Monday, March 31, 2008 in Richmond.

Annual Legislative Preview

Access to donor information: Rob Lockridge, Executive Assistant to the President for State Government Relations, University of Virginia, presented a draft to exempt from FOIA records maintained in connection with fund-raising by or for a public institution of higher education that contain personal information concerning donors and prospective donors or fundraising strategies concerning an individual donor or prospective donor. The exemption however would not protect the amount, date, purpose and terms of the pledge or donation, or the identity of the donor unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation. The draft specifically defined personal information as wealth assessments; estate, financial and tax planning information; health-related information; employment, familial and marital status; and contact information, birth dates and social security numbers. Senator Houck noted that donor identity is not currently protected from public access and asked whether UVA continued to receive gifts given this fact. Bob Sweeney, also of UVA, indicated that the university was willing to litigate to protect the anonymity of a donor if need be. Public comment was called for on this proposal. Craig Merritt, representing VPA, stated that VPA and UVA have been working

¹⁹ Council members Axelle, Edwards, Fifer, Griffith, Houck, Malveaux, Miller, Spencer, Treadway, Whitehurst, and Wiley were present. Council member Hopkins was absent.

²⁰ Mr. Bryan, an original member of the Council, declined reappointment for a final four-year term.

on resolution of their respective issues. He acknowledged that some of the concerns raised by VPA had been addressed in the draft, noting that essentially the draft presents three separate issues-- strategies for fundraising activities, personal identifiers, and anonymous donors. Mr. Merritt indicated that VPA took no issue with protecting fundraising strategies or personal identifiers, but noted that VPA has a fundamental disagreement with allowing protection of the identity of donors wishing to remain anonymous. He noted that the fact that UVA requires a gift agreement, signed by the university and the donor for any gift over \$100,000, speaks to the importance of this issue. He remarked further that there is potential for mischief because an anonymous donor might unduly influence decisions of the university, most notably in the areas of procurement and admissions. Peter Easter, on behalf of VAB, commented that VAB was in agreement with VPA. Delegate Griffith stated that he was concerned that without the proposed exemption, more fundraising activity would be shunted to private foundations of the universities. In that event, even less information about gift-giving activity would be public. Mr. Merritt remarked that while this may be true, the issue about access to private foundations was settled 10 years ago in favor of not including them under FOIA. Delegate Griffith maintained that with the proposed exemption, more information would be accessible by the public.

Audits directed by the Inspector General of VDOT: Keith Martin on behalf of VDOT next presented a draft that would exempt trade secrets; financial records, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; and revenue and cost projections provided by private business to the Virginia Department of Transportation for the purpose of an audit, special investigation or any study requested by the Inspector General's Office. Mr. Martin advised the Council that two years ago legislation was enacted requiring VDOT to examine its functions that could be more efficiently performed by the private sector. As a result, more than 50% of VDOT's budget goes to the private sector, with VDOT auditing contract performance. The Council noted that some of the language in the proposed VDOT draft needed to be clarified to comport with like records exemptions in FOIA. Public comment received on this proposal included some technical amendments offered by the VPA, which had been submitted to the Governor's office.

Local government investment pools: Bill Watt, Department of the Treasury, discussed an exemption for local government investment pools administered by the Department of the Treasury pursuant to the Local Government Investment Pool Act (§ 2.2-4600 et seq.). He noted that the purpose of the act is to secure the maximum public benefit from the prudent investment of public funds and is an avenue for local entities to invest in professionally managed funds. Specifically, the Department was seeking protection of the account information, including account name, number, and signatories, to protect against fraud especially in the age of wire transfers and other similar technology. Mr. Watt noted that protection would not extend to records indicating that a particular locality had an account in the pool. He stated that while there are security protocols in place, protection of the identities of the signatories was desirable to decrease the likelihood of fraud. There was no public comment on this proposal.

Financial information relating to children's residential treatment facilities: James G. Council, Virginia Residential Psychiatric Treatment Association, discussed the need for a FOIA exemption for certain financial information submitted by treatment facilities as part of their licensing requirement, which includes sensitive proprietary information, the disclosure of which may adversely affect the competitive position of the facility. These facilities are regulated by the Department of Mental Health, Mental Retardation and Substance Abuse Services. He noted that there are other FOIA exemptions protecting the competitive position of UVA Medical Center and Eastern Virginia Medical School, for example. There was no public comment on this proposal.

Virginia military base realignments: Marc Follmer, Office of Commonwealth Preparedness, advised the Council that his Office's proposal was essentially to resurrect the prior FOIA exemption for the Virginia Commission on Military Bases, which expired at the end of Governor Warner's administration. He noted that the proposed draft would also include protection to proactive strategies taken by Virginia to bring other military missions to Virginia. Mr. Follmer advised that the proposed exemption would be for records and would allow the Virginia Military Advisory Council and the Virginia Defense Industrial Authority to convene a closed meeting to discuss such records. He advised that his office has worked with the VPA to keep the exemption narrowly focused. There was no public comment on this proposal.

Local wireless franchise agreements: Council member Craig Fifer, on behalf of the City of Alexandria, presented a draft that would grant the same protections to bidders for a general franchise as may be available to other bidders under other processes. He stated that draft would amend the existing FOIA exemption found in § 2.2-3705.6(13), which currently applies only to cable franchisees. The City's requested amendment would broaden the exemption to apply to any type of franchise, and to both bidders for the franchise and the eventual winner. Mr. Fifer noted that this amendment would not broaden any concepts in current law, but would simply broaden the applicability of the existing concept to a category of bids that seems to have fallen through the cracks over time. There was no public comment on this draft. The Council suggested, however, that some of the language in the draft should to be clarified to comport with similar record exemptions in FOIA.

Subcommittee Reports

Electronic Meetings Subcommittee. John Edwards, chair of the Subcommittee, stated that the Subcommittee met three times (on May 10, June 7, and July 12, 2007) to address three bills referred to it. Delegate McClellan spoke to her bill, HB 2293, at the first meeting of the Subcommittee. The other patrons did not attend the meetings of the Subcommittee. Mr. Edwards advised the Council of the Subcommittee's recommendations as follows:

HB 2293 (McClellan)--The Subcommittee voted 4-0 to recommend against HB 2293, which would have allowed local public bodies to meet through electronic means only when gathering information and where no action is to be taken at the meeting.

SB 1271 (Whipple)--The Subcommittee voted 4-0 to table SB 1271 unless the patron requested further consideration of the bill; the patron has not done so. The bill would have eliminated the requirement that a quorum of a state public body be physically assembled in one primary location in order for the public body to conduct a meeting through electronic communications means. Instead of the quorum, the bill provided that at least two members of the public body be physically assembled at one location.

HB 2553 (Ebbin)--The Subcommittee voted 5-0 to recommend a revised draft of HB 2553 to the Council. The draft as revised would allow:

1. A local public body to meet by electronic means without a physically assembled quorum;
2. When the Governor has declared a state of emergency (and not locally-declared emergencies);
3. The catastrophic nature of the emergency makes it impracticable or unsafe to assemble a quorum in one location; and
4. The purpose of the meeting is to address the emergency.
5. The local public body must also (i) give public notice contemporaneously with the notice given the members, using the best possible methods given the nature of the emergency; (ii) make arrangements for public access to the meeting; and (iii) otherwise comply with the usual rules for electronic meetings.
6. The minutes must reflect the nature of the emergency and the fact that the meeting was held electronically.
7. Additionally, the draft bill makes a technical amendment in the definition of "meeting" to include the provisions of § 2.2-3708.1 (added in 2007).

Mr. Edwards described how the Subcommittee arrived at its recommendation and identified the specific issues that were examined. The draft was initially limited to local governing bodies and school boards and the Subcommittee questioned whether the draft should authorize all public bodies at the local level (i.e. industrial development authorities, regional authorities, planning commissions, etc.) to meet by electronic means in the event of a Governor-declared emergency. The Subcommittee voted 5 to 0 to authorize all local public bodies to meet by electronic means in the event of a Governor-declared emergency. The Subcommittee next considered the issue of whether it should try to articulate the types of catastrophic emergencies for which an electronic meeting was authorized. It was suggested the real issue is that the nature of the emergency inhibits the ability of members of a local public body to physically assemble in a single location. After extensive discussions, the Subcommittee voted 5 to 0 to adopt language offered by VPA that essentially provides that the nature of the catastrophic emergency inhibits the ability of members of the public body to physically assemble, whether by making it unsafe or impractical. Finally, the Subcommittee considered whether discussions by local public bodies in such instances would be limited to only the declared emergency or whether the agenda for such meetings could include other matters before the local public body. It was the consensus of the Subcommittee to limit discussions to those related to the Governor's declaration of the emergency. Mr. Edward made a motion, properly seconded, for the Council to adopt the

draft recommended by the Subcommittee. The Council voted unanimously to recommend the draft as described above to the 2008 Session of the General Assembly.

Personal Identifying Information Subcommittee. Senator Houck, chair of the Subcommittee, reported that the Subcommittee has held six meetings to date to deliberate on the nine bills referred for study. Five meetings were joint meetings with a subcommittee of JCOTS to consider HB 2821 and SB 819²¹, both of which were referred to the FOIA Council and JCOTS. He first discussed the work of the Subcommittee in conjunction with the JCOTS Subcommittee (hereinafter referred to as the Subcommittees). The Subcommittees decided to focus on HB 2821, concerning SSNs, because SB 819 was too broad as drafted and the Subcommittees were concerned about the possibility of unintended consequences of such far reaching language. Senator Houck noted that the Subcommittees have examined extensively the treatment of SSNs under Virginia law, federal law, and the laws of other states, all of which take somewhat different approaches. With regard to HB 2821 specifically, the Subcommittees shifted their focus from crafting a FOIA exemption for SSNs to the issue of over collection of SSNs by government. This shift came as a result of public comment at the July meeting that indicated that the real problem was over collection. Additionally, public comment indicated that a FOIA exemption was problematic for certain entities (e.g. print media, data aggregators, private investigators, and others) because of their expressed need for SSNs to verify identity. Further, a FOIA exemption would be harmful to the basic policy of FOIA that motive for a request is immaterial. The discretionary release of a SSN under such an exemption would require the government to ascertain the motive for the request. Additionally, it was argued by privacy advocates that FOIA exemptions are discretionary with the public body having custody of the record and thus would allow a government entity to release records containing SSNs unless expressly prohibited by some other law. Alternatively, access advocates argued that a FOIA exemption for SSNs, although discretionary, would be treated by government as a prohibition and effectively no SSNs would be accessible. Based on the foregoing and recognizing the complexity of the attendant issues, the Subcommittees agreed that they would address the over collection issue in legislation for the 2008 Session of the General Assembly. The Subcommittees are committed, however, to continuing their examination of public access to SSNs during 2008. The Subcommittees did agree that the issue of access to personal identifying information, specifically SSNs, is best addressed by legislation outside of FOIA for two reasons. Any such law should address the treatment of SSNs in the private sector as well as in public records and again, under FOIA, a requester's purpose in requesting records does not matter. As evidenced by the testimony to the Subcommittees, there are both good and bad reasons to share SSNs and any proposed law may need to account for good or bad intent.

The Subcommittees also considered legislation prohibiting republication of SSNs derived from public records. However, staff advised that there may be constitutional problems of such a prohibition in light of the First Amendment right of free speech. Following up on concerns raised about the constitutionality of this provision, staff presented an outline of the

²¹ HB 2821 (Sickles)--Access to Social Security Numbers. SB 819 (Cuccinelli)--Release of personal information concerning an identifiable individual, including date of birth, social security number, driver's license number, bank account numbers, credit or debit card numbers, personal identification numbers, electronic identification codes, automated or electronic signatures, biometric data, or fingerprints.

constitutional issues that may come into play should the draft be passed into law. Staff discussed two relevant lines of jurisprudence. First, staff presented a series of cases where laws restricting the publication of truthful information lawfully obtained were consistently struck down as unconstitutional infringements upon citizens' freedoms of speech. Second, staff set forth cases and statutes highlighting the importance of SSNs and the compelling privacy interest in protecting individuals' SSNs. Under the first line of cases, the Supreme Court of the United States has consistently refused to set forth a blanket rule, but has instead held out the possibility that a law restricting the publication or dissemination of truthful information lawfully obtained might be constitutional if it serves to protect a sufficiently compelling state interest. However, in every specific case that has come before it, the Court has struck down such laws as unconstitutional restraints violating the First Amendment right to freedom of speech. None of these cases have specifically addressed the publication or dissemination of SSNs obtained from public records. Other cases from various courts have consistently held that there is a compelling privacy interest in protecting individuals' SSN information. By contrast, there is relatively little public interest in disseminating SSN information obtained from public records that do not otherwise provide greater transparency to government actions. In assessing all these cases together, staff concluded that while the recommended draft could be challenged as an improper prior restraint on freedom of speech under the first line of cases, there is nevertheless an even chance that a court would find the law constitutional because of the compelling interest in protecting SSNs. As a result, the Subcommittees unanimously recommended legislation to the Council amending the Personal Information Privacy Act (PIPA) (§ 59.1-442 et seq.) to (i) clarify that an individual may disseminate his or her own SSN without violating PIPA and (ii) make PIPA's prohibitions against the dissemination of SSNs apply to those SSNs obtained from public records.

The Subcommittees also looked at the type of personal information collected by government from a practical perspective using real-life examples (i.e., hunting and fishing licenses, professional licenses, personnel records, etc). The Subcommittees found that the definition of "personal information" in the GDCDPA was in need of a few technical amendments to make it abundantly clear that SSNs are considered personal information. Staff advised the Subcommittees that in enacting the GDCDPA²² in 1976, the General Assembly made the following findings:

- An individual's privacy is directly affected by the extensive collection, maintenance, use and dissemination of personal information;
- The increasing use of computers and sophisticated information technology has greatly magnified the harm that can occur from these practices;
- An individual's opportunities to secure employment, insurance, credit, and his right to due process, and other legal protections are endangered by the misuse of certain of these personal information systems;
- Information shall not be collected unless the need for it has been clearly established in advance; and

²² Formerly known as the Privacy Protection Act of 1976; which was recodified and renamed in October 2003 to the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.).

- Information shall be appropriate and relevant to the purpose for which it has been collected.

The Subcommittees found that increasing privacy concerns over access to personal identifying information contained in public records was due to state and local government routinely collecting too much personal information as part of their operation without a demonstrated need for it--an issue the GDCDPA seeks to limit. The Subcommittees felt strongly that the inappropriate over collection of personal identifying information needs to be addressed now. Staff noted that this issue was included in a FOIA Council Advisory Opinion (AO-08-06) issued on August 22, 2006, which stated in pertinent part:

"In today's information age, privacy concerns and the threat of identity theft challenge longstanding rights of public access and principles of open government. It is important to note that the General Assembly has enacted several privacy based exemptions from disclosure that apply to particular types of records likely to contain personal information, such as exemptions for personnel records, scholastic records, and health records. There are also more limited exemptions applicable specifically to social security numbers, such as 2.2-3808.1 of the GDCDPA, quoted above, and subdivisions 17 and 18 of § 2.2-3705.7, which apply to certain records regarding toll facilities and records of the State Lottery Department, respectively. However, there is no exemption of general application that would allow social security numbers or other personal information to be redacted or otherwise withheld from disclosure. Just because a public record contains personal information does not automatically exempt that personal information or that record from disclosure. If no exemption applies, then the record must be released in its entirety upon request. The best way for a public body to guarantee the confidentiality of citizens' personal and private information is simply not to collect such information unnecessarily. Additionally, when collecting any information, public bodies would be well advised to include notice advising citizens (i) whether the citizen has the option not to provide certain information and (ii) whether the information collected is subject to disclosure as a public record under FOIA."

The Subcommittees unanimously recommended legislation to the Council limiting the collection of SSNs by state and local government to those instances where collection of SSNs is required by law and the collection of SSN is essential to the mission of the agency. The legislation also adds certain specific categories to the definition of personal information, strengthens the remedies provisions of the GDCDPA by adding civil penalties matching those in FOIA, and makes a technical change to allow general district courts to hear GDCDPA cases. Additionally, the draft has enactment clauses giving it a delayed effective date of July 1, 2009, and requiring agencies to study their own collection and use of SSNs and report to the FOIA Council and JCOTS on such collection and use by October 1, 2008. The draft also sets forth protections for the information so received (which might otherwise

reveal means of obtaining unprotected SSNs in public records). Senator Houck noted that a press release about this draft was issued to the Office of the Governor and his Secretaries, the Virginia Municipal League, the Virginia Association of Counties, the FOIA Council and JCOTS mailing lists, and other interested parties on November 8, 2007 in order to apprise them of the subcommittees' work and potential legislation.

Senator Houck then reported on the work of the PII Subcommittee of the Council, which studied the other bills referred exclusively to the Council by the General Assembly in 2007. He reminded the Council that the PII Subcommittee also gave consideration to the issue of access to concealed handgun permit information. He advised of the following PII Subcommittee actions:

HB 2558 (Brink)--Release of rabies certificate information. The Virginia Treasurers' Association and the Virginia Veterinarians' Association are working on a form for use state-wide that limits the amount of personal information available to the public. These associations will report directly to the Council.

HB 3097 (Cole)/SB 1106 (Chichester)--Release of constituent contact information. The bills were tabled without objection because no consensus was reached after the Subcommittee debated the issues involved and considered draft legislation that attempted to distinguish between personal correspondence and correspondence addressing public business.

HB 3118 (Carrico)/SB 883 (Deeds)--Release of the names, addresses, and social security numbers of holders of boat, fishing, hunting, and other licenses/permits issued by the Department of Game and Inland Fisheries. No action taken by the PII Subcommittee.

HB 3161 (Marshall, D.W.)/SB 1404 (Hanger)--Expansion of complainant information for violation of any local ordinance (currently only protected for zoning violations). The bills were tabled by vote of 4 to 0. After discussion there was a consensus that the bills were overreaching.

On the issue of public access to records of holders of concealed handgun permits (CHPs), Senator Houck advised that the PII Subcommittee unanimously recommended legislation that would restrict access to the statewide list of Virginia citizens who hold CHPs compiled by the Department of State Police (DSP), but would allow access to the lists of permittees held by individual court clerks, the lists of out-of-state permittees held by DSP, and any aggregate or statistical information that does not identify individual permittees.

Senator Houck concluded his report by indicating that at every meeting of the Subcommittee alone and in conjunction with JCOTS public comment was received that helped guide the work of the Subcommittee. He noted, however, that there was some disagreement from interested parties in the legislative direction upon which the Subcommittee ultimately agreed.

Public Comment

Before taking action on the legislation recommended by its two subcommittees, the floor was opened for public comment on each of the proposed drafts. Concerning the PIPA draft, the Council heard from B.J. Ostergren, representing the Virginia Watchdog, who indicated she felt that these bills were specifically directed at her and her website, which publishes public records containing SSNs on the Internet. She further indicated that a federal case declared a similar Washington state law unconstitutional, that there were United States Supreme Court cases holding such laws unconstitutional, that two similar bills were withdrawn by their patrons in the 2006 Session of the General Assembly over constitutional concerns, and she believed this draft would be unconstitutional as well. Mike Stollenwerk, representing the Fairfax County Privacy Council, indicated that he felt the draft was inconsistent with the other actions taken by the PII Subcommittee. He stated that there should be legislation providing a FOIA exemption for SSNs and that the state should move to redact SSNs from existing public records. Craig Merritt, representing VPA, stated that VPA opposes the PIPA draft and has always felt the statute was unconstitutional. He noted that generally SSNs are not published in newspapers. Delegate Mark Sickles stated that he felt strongly that the SSNs should be exempt from FOIA and the Council should act now to protect Virginia citizens. Senator Houck observed that FOIA exemptions are discretionary and questioned how that would be protecting the public. Delegate Sickles responded that the practical effect of such an exemption would be that it will be treated as if release of a SSN is prohibited and thus no discretion will be exercised to release it. Marc Greidinger, a private attorney, commented that he supported a FOIA exemption for SSNs. He stated that punishing an individual for republishing SSNs will not meet constitutional muster. He acknowledged, however, that over collection of SSNs is part of the problem.

The Council discussed the draft. Mr. Fifer and Mr. Malveaux expressed concern that the draft was not within the purview of the Council as it dealt with the conduct of private persons and not government. Senator Houck reiterated that HB 2821 was referred jointly to the Council and JCOTS, and a broader approach was therefore appropriate. He reminded the Council of the concerns and objections to HB 2821 and the complexity of the issue. Mr. Axselle stated that he could not understand what was wrong with the draft, noting that it is a prohibition against an act most people would find objectionable. Upon a motion to recommend, properly seconded, the Council voted 10-1²³ to recommend the PIPA draft to the 2008 Session of the General Assembly.

Public comment was then called for on the GDCDPA draft. Phyllis Errico, Virginia Association of Counties, commended the Subcommittee's work in fashioning good public policy. She stated that including driver's license number in the prohibition against collection was puzzling given that no mischief has been demonstrated as may be the case with SSNs. She cautioned the Council about the unintended consequences of prohibiting the collection of driver's license numbers. B. J. Ostergren, Virginia Watchdog, advised that she agreed wholeheartedly with the draft, but was concerned that the GDCDPA did not apply to court records. Marc Greidinger, private attorney, stated that he believed the GDCDPA draft is a

²³ Senator Houck, Delegate Griffith, Mssrs. Axselle, Edwards, Malveaux, Miller, Whitehurst, and Wiley, and Ms. Spencer and, Treadway voted aye; Mr. Fifer voted nay.

very good bill. Mr. Greidinger indicated, however, that he thought that damages should be awarded to the plaintiff for violation of the act.

The Council discussed this draft, focusing on the standard for award of the civil penalties for violation. Mr. Malveaux offered a friendly amendment to make award of a civil penalty in cases of willful and knowing violations as is done in FOIA. Mr. Wiley stated that the difference is with FOIA the violation is frequently committed by an individual whereas with the GDCDPA, the violation is based on agency policy. He stated that he was unsure how to prove an agency's state of mind. Mr. Malveaux withdrew his amendment and offered another. This amendment, agreed to in concept, would revise the draft to impose the civil penalty for willful and knowing violations committed by an individual, but not agencies. Staff was directed to work on language reflecting the Council's decision. Upon a motion to recommend, properly seconded, the Council voted unanimously to recommend the GDCDPA draft to the 2008 Session of the General Assembly.

Lastly, public comment was requested on the CHP draft. Phillip Van Cleave, president of the Virginia Citizens Defense League stated that the draft was overkill and access by nonprofits should not be prevented. No further public comment was offered. The Council discussed the draft. Mr. Fifer stated that he believed it rather insulting to the public to say that you can get the records as long as it is inconvenient to do so. Delegate Griffith responded that there was real concern for people in the DSP database who are abused spouses, other victims of crime, and other vulnerable populations. He opined that it is a crime of opportunity and it is much easier to get information online than having to go to the courthouse. Senator Houck noted that the draft, while not perfect, is a good balance. Upon a motion to recommend, properly seconded, the Council voted 10-1²⁴ to recommend the CHP draft to the 2008 Session of the General Assembly.

Copies of the drafts recommended by the Council appear on the Council's website.

Other Business

Alan Albert, Esq., speaking on behalf of the Virginia Treasurers Association and the Virginia Veterinary Medical Association, advised the Council that the two associations have come up with a workable solution to the issues raised in HB 2558²⁵ (Brink) from the 2007 Session. He stated that he has been working with VPA and the ultimate goal is not to require treasurers to keep the rabies certificate sent by veterinarians. He indicated that the issue will no longer be a FOIA issue, but a retention issue. He advised that he would circulate a draft to VPA and other interested parties for their comment.

Staff provided the Council with a draft copy of the Council's 2007 Annual Report for review and comment within the next two weeks.

²⁴ Senator Houck, Delegate Griffith, Mssrs. Axselle, Edwards, Malveaux, Miller, Whitehurst, and Wiley, and Ms. Spencer and, Treadway voted aye; Mr. Fifer voted nay.

²⁵Freedom of Information Act; certain information in rabies vaccination certificates. Exempts the identification of breed of a vaccinated animal and any personal identifying information relating to the animal owner that is not made a part of an animal license application from the mandatory disclosure provisions of the Freedom of Information Act. HB 2558 was referred to the Council for further study.

Of Note

Staff advised the Council that the Better Government Association and National Freedom of Information Coalition recently graded states' responsiveness to FOIA requests. Thirty-eight out of 50 states were given "F" grades in overall response. Virginia earned a "C". Only two "As" were given--Nebraska and New Jersey. No "Bs" and only 6 "Cs" were given. Four "Ds" were given. Grade criteria included response time, cost- and time-efficient appeal, expedited review by courts, award of attorneys' fees and court costs, and sanctions. Out of a possible 16 points, Virginia received 12.5 points.

The Council set the date for its first quarterly meeting of 2008. The Council will meet on Monday, March 31, 2008 in Richmond at 1:00 p.m.

SERVICES RENDERED BY THE COUNCIL

As part of its statutory duties, the Council is charged with providing opinions about the application and interpretation of FOIA, conducting FOIA training seminars, and publishing educational materials. In addition, the Council maintains a website designed to provide on-line access to many of the Council's resources. The Council offers advice and guidance over the phone, via e-mail, and in formal written opinions to the public, representatives of state and local government, and members of the news media. The Council also offers training seminars on the application of FOIA. In addition to the statewide FOIA Workshops offered in odd-numbered years, Council staff is available to conduct FOIA training throughout Virginia, upon request, for governmental entities, media groups and others interested in receiving a FOIA program that is tailored to meet the needs of the requesting organization. This service is provided free of charge. The Council develops and continually updates free educational materials to aid in the understanding and application of FOIA. To commemorate Sunshine Week in 2008, the Council sponsored, in conjunction with the Virginia Coalition for Open Government, the Virginia Association of Broadcasters, the Virginia Press Association, the Library of Virginia, and the Virginia Library Association, a webcast program entitled "*Closed Doors; Open Democracies.*" This program included national and local experts in FOI laws who discussed denied access at various levels of government and its impact. During this reporting period, the Council, with its staff of two, responded to more than 1,700 inquiries and conducted 77 training seminars statewide. A listing of these training seminars appears as Appendix B.

FOIA Opinions

The Council offers FOIA guidance to the public, representatives and employees of state and local government, and members of the news media. The Council issues both formal, written opinions as well as more informal opinions via the telephone or e-mail. At the direction of the Council, the staff has kept logs of all FOIA inquiries. In an effort to identify the users of the Council's services, the logs characterize callers as members of state government, local government, law enforcement, media, citizens, or out-of-state callers. The logs help to keep track of the general types of questions posed to the Council and are also invaluable to the Council in rendering consistent opinions and monitoring its efficiency

in responding to inquiries. All opinions, whether written or verbal, are based on the facts and information provided to the Council by the person requesting the opinion.

For the period of December 2006 to December 2007, the Council, with a staff of two attorneys, fielded more than 1,700 inquiries. Of these inquiries, 13 resulted in formal, written opinions. By issuing written opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide future practices. In addition to sending a signed copy of the letter opinion to the requester, written opinions are posted on the Council's website in chronological order and in a searchable database. The Council issues written opinions upon request, and requires that all facts and questions be put in writing by the requester. Requests for written opinions are handled on a "first come, first served" basis. Response for a written opinion is generally about four weeks, depending on the number of pending requests for written opinions, the complexity of the issues, and the other workload of the staff. A list of formal opinions issued during the past year appears as Appendix C. The table below profiles who requested written advisory opinions for the period December 2006 through December 2007:

Written Advisory Opinions: 13

State Government	0
Local Government	2
Law Enforcement	0
Citizens of the Commonwealth	7
Members of the News Media	3
Out-of-state	1

Typically, the Council provides advice over the phone and via e-mail. The bulk of the inquiries that the Council receives are handled in this manner. The questions and responses are recorded in a database for the Council's own use, but are not published on the website as are written advisory opinions. Questions are often answered on the day of receipt, although response time may be longer depending on the complexity of the question and the research required. The table below profiles who requested informal opinions between December 2006 and December 2007:

Telephone and E-mail Responses: 1,695

State Government	353
Local Government	421
Federal Government	2
Law Enforcement	78
Citizens of the Commonwealth	628
Members of the News Media	167
Out-of-state	46

During this reporting period, the Council has answered a broad spectrum of questions about FOIA. Appendix F to this report provides a breakdown of the type and number of issues raised by the inquiries received by the Council.

The Council's Website

The website address for the Council is <http://dls.state.va.us/foiacouncil.htm>. During the past year, the website was visited approximately 432,000 times. About 136,000 visitors viewed the written advisory opinions and reference materials of the Council. The Council's website provides access to a wide range of information concerning FOIA and the work of the Council, including (i) Council meeting schedules, including meeting summaries and agendas, (ii) the membership and staff lists of the Council, (iii) reference materials and sample forms and letters, (iv) the Council's annual reports, (v) information about Council subcommittees and legislative proposals, and (vi) links to other Virginia resources, including the Virginia Public Records Act. To facilitate compliance with FOIA, sample response letters for each of the five mandated responses to a FOIA request as well as a sample request letter are available on the website. Written advisory opinions have been available on the website since January 2001 and are searchable by any visitor to the website. The opinions are also listed in chronological order with a brief summary to assist website visitors.

FOIA Training

2006 was the first year where statewide FOIA training workshops were not offered. After conducting annual statewide FOIA workshops in each of the six years since the Council's creation in 2000, the Council viewed declining attendance over the previous two years as a sign that its basic training mission had been successfully accomplished. Statewide workshops were offered in 2007 to provide FOIA training to recently-appointed public officials and employees. As is customary, the workshops are approved by the State Bar of Virginia for continuing legal education credit (CLE) for attorneys. They are also approved for in-service credit for law-enforcement personnel by the Department of Criminal Justice Services and for three academy points for school board officials by the Virginia School Board Association.

The Council also provides training, upon request, to interested groups. These groups include the staff of state agencies, members of local governing bodies, media organizations, and any other group that wishes to learn more about FOIA. Council staff travels extensively throughout the Commonwealth to provide this training. The training is individualized to meet the needs of the particular group, can range from 45 minutes to several hours, and can present a general overview of FOIA or focus specifically on particular exemptions or portions of FOIA frequently used by that group. These specialized programs are provided free of charge. For the second year, all of the Council's training programs have been approved by the Virginia State Bar for continuing legal education credit for licensed attorneys. From December 2006 to December 2007, the Council conducted 77 such training programs. A listing of the training seminars appears as Appendix B.

Educational Materials

The Council continuously creates and updates educational materials that are relevant to requesters and helpful to government officials and employees in responding to requests and conducting public meetings. Publications range from documents explaining the basic procedural requirements of FOIA to documents exploring less-settled areas of the law. These materials are available on the website and are frequently distributed at the training seminars described above. Specifically, the Council offers the following educational materials:

- Access to Public Records
- Access to Public Meetings
- Guide to Electronic Meetings
- E-Mail: Use, Access & Retention
- E-Mail & Meetings
- Taking the Shock Out of FOIA Charges
- 2007 FOIA & Access Bill Summaries

In addition to these educational materials, the Council has also developed a series of sample letters to provide examples of how to make and respond to FOIA requests. This year, a sample response letter reflecting the 2007 amendment to FOIA requiring a fifth response that the records do not exist or cannot be located was developed and added to the website. A sample request letter is also available for a person wishing to make a FOIA request. Response letters are provided to demonstrate how to follow the legal requirements to withhold records in part or in their entirety, or to notify a requester of the public body's need for a seven-day extension to respond to the request.

CONCLUSION

In fulfilling its statutory charge, the Council strives to keep abreast of trends, developments in judicial decisions, and emerging issues related to FOIA and access generally. The Council has gained recognition as a forum for the discussion, study, and resolution of FOIA and related public access issues based on sound public policy considerations. During its seventh year of operation, the Council continued to serve as a resource for the public, representatives of state and local government, and members of the media, responding to more than 1,700 inquiries. It formed subcommittees to examine FOIA and related access issues, and encouraged the participation of many individuals and groups in Council studies. Through its website, the Council provides increased public awareness of and participation in its work, and publishes a variety of educational materials on the application of FOIA. Its commitment to facilitating compliance with FOIA through training continued in the form of specialized training sessions throughout the Commonwealth. The Council would like to express its gratitude to all who participated in the work of Council for their hard work and dedication.

Lastly, the Council extends special thanks to Forrest M. "Frosty" Landon, executive director of the Virginia Coalition for Open Government, who retired in 2007 after serving 11 years in that capacity. Not only instrumental in advocating for the creation of the Council in 2000, Mr. Landon's significant contributions to the work of the Council and his tireless efforts on behalf of the citizens of the Commonwealth to foster greater government transparency has ensured that Virginia will remain a model for protecting citizens' right to know about the operation of government.

Respectfully submitted,

R. Edward Houck, Chair
H. Morgan Griffith
Ralph L. "Bill" Axselle
John Stewart Bryan, III
John B. Edwards
Craig T. Fifer
W. Wat Hopkins
Courtney M. Malveaux
E. M. Miller, Jr.
Mary Yancey Spencer
Sandra G. Treadway
Roger C. Wiley

APPENDIX A

2008 LEGISLATIVE RECOMMENDATIONS

1. **BILL SUMMARY: Freedom of Information Act; electronic meetings; authority of local public bodies.** Allows any local governing body, school board, or any authority, board, bureau, commission, district, or agency of local government to meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii) the purpose of the meeting is to address the emergency. The local public body convening the meeting shall (a) give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided members of the local public body conducting the meeting; (b) make arrangements for public access to such meeting; and (c) otherwise comply with the provisions for electronic communication meetings. The nature of the emergency and the fact that the meeting was held by electronic communication means shall be stated in the minutes. The bill contains a technical amendment.

BILL TEXT:

A BILL to amend and reenact §§ 2.2-3701, 2.2-3708 and 2.2-3714 of the Code of Virginia, relating to the Freedom of Information Act; electronic meetings; authority of local public bodies.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3701, 2.2-3708 and 2.2-3714 of the Code of Virginia are amended

and reenacted as follows:

§ 2.2-3701. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Closed meeting" means a meeting from which the public is excluded.

"Electronic communication" means any audio or combined audio and visual communication method.

"Emergency" means an unforeseen circumstance rendering the notice required by this chapter impossible or impracticable and which circumstance requires immediate action.

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or § 2.2-3708.1, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership,

wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. The gathering of employees of a public body shall not be deemed a "meeting" subject to the provisions of this chapter.

"Open meeting" or "public meeting" means a meeting at which the public may be present.

"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

"Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, whose members are appointed by the participating local governing bodies, and such unit includes two or more counties or cities.

"Scholastic records" means those records containing information directly related to a student and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution.

§ 2.2-3708. Electronic communication meetings; applicability; physical quorum required; notice; report.

A. Except as expressly provided in [subsection G of this section or § 2.2-3708.1](#), no local governing body, school board, or any authority, board, bureau, commission, district or agency of local government, any committee thereof, or any entity created by a local governing body, school board, or any local authority, board, or commission shall conduct a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled. Nothing in this section shall be

construed to prohibit the use of interactive audio or video means to expand public participation.

B. Except as provided in subsection D of § 2.2-3707.01, state public bodies may conduct any meeting wherein the public business is discussed or transacted through electronic communication means, provided (i) a quorum of the public body is physically assembled at one primary or central meeting location, (ii) notice of the meeting has been given in accordance with subsection C, and (iii) the remote locations, from which additional members of the public body participate through electronic communication means, are open to the public. All persons attending the meeting at any of the meeting locations shall be afforded the same opportunity to address the public body as persons attending the primary or central location.

PublicState public bodies, however, may meet by electronic communication means without a quorum of the public body physically assembled at one location when ~~(i)~~(a) the Governor has declared a state of emergency in accordance with § 44-146.17, ~~(ii)~~(b) the meeting is necessary to take action to address the emergency, and ~~(iii)~~(c) the public body otherwise complies with the provisions of this section.

If an authorized public body holds an electronic meeting pursuant to this section, it shall also hold at least one meeting annually where members in attendance at the meeting are physically assembled at one location and where no members participate by electronic communication means.

C. Notice of any meetings held pursuant to this section shall be provided at least three working days in advance of the date scheduled for the meeting. The notice shall include the date, time, place, and purpose for the meeting; shall identify the locations for the meeting; and shall include a telephone number that may be used at remote locations to notify the primary or central meeting location of any interruption in the telephonic or video broadcast of the meeting to the remote locations. Any interruption in the telephonic or video broadcast of the meeting shall result in the suspension of action at the meeting until repairs are made and public access restored.

D. Agenda packets and, unless exempt, all materials that will be distributed to members of the public body and that have been made available to the staff of the public body in sufficient time for duplication and forwarding to all locations where public access will be provided shall be made available to the public at the time of the meeting. Minutes of all meetings held by electronic communication means shall be recorded as required by § 2.2-3707. Votes taken during any meeting conducted through electronic communication means shall be recorded by name in roll-call fashion and included in the minutes.

E. Three working days' notice shall not be required for meetings authorized under this section held in accordance with subsection G or that are continued to address an emergency or to conclude the agenda of the meeting for which proper notice has been given, when the date, time, place, and purpose of the continued meeting are set during the meeting prior to adjournment. Public bodies conducting emergency meetings through electronic communication means shall comply with the provisions of subsection D requiring minutes of the meeting. The nature of the emergency shall be stated in the minutes.

F. Any authorized public body that meets by electronic communication means shall make a written report of the following to the Virginia Freedom of

Information Advisory Council and the Joint Commission on Technology and Science by December 15 of each year:

1. The total number of electronic communication meetings held that year;
2. The dates and purposes of the meetings;
3. The number of sites for each meeting;
4. The types of electronic communication means by which the meetings were held;
5. The number of participants, including members of the public, at each meeting location;
6. The identity of the members of the public body recorded as absent and those recorded as present at each meeting location;
7. A summary of any public comment received about the electronic communication meetings; and
8. A written summary of the public body's experience using electronic communication meetings, including its logistical and technical experience.

G. Any local governing body, school board, or any authority, board, bureau, commission, district, or agency of local government may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii) the purpose of the meeting is to address the emergency. The local public body convening a meeting in accordance with this subsection shall (a) give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided members of the local public body conducting the meeting; (b) make arrangements for public access to such meeting; and (c) otherwise comply with the provisions of this section. The nature of the emergency and the fact that the meeting was held by electronic communication means shall be stated in the minutes.

§ 2.2-3714. Violations and penalties.

In a proceeding commenced against members of public bodies under § 2.2-3713 for a violation of §§ 2.2-3704, 2.2-3705.1 through 2.2-3705.8, 2.2-3706, 2.2-3707, 2.2-3708, 2.2-3708.1, 2.2-3710, 2.2-3711 or § 2.2-3712, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than \$250 nor more than \$1,000, which amount shall be paid into the State Literary Fund. For a second or subsequent violation, such civil penalty shall be not less than \$1,000 nor more than \$2,500.

2. BILL SUMMARY: Government Data Collection and Dissemination Practices Act (GDCDPA); personal information; definition; collection of same; penalty for violation; jurisdiction of district courts. Provides that no agency shall require an individual to furnish or disclose his social security number (SSN) or driver's license number unless the furnishing or disclosure of such number is (i) expressly authorized by state or federal law and (ii) essential for the performance of

that agency's duties. The bill also strengthens the remedies provisions of the GDCDPA by adding civil penalties matching those in FOIA, and grants general district courts the authority to hear GDCDPA cases. Additionally, the bill has enactment clauses giving it a delayed effective date of July 1, 2009, and requires state agencies to study their own collection and use of SSNs and report to the FOIA Council and JCOTS on such collection and use by October 1, 2008. The bill also contains a fourth enactment clause providing for the gathering of similar information about the use and collection of SSNs by cities, counties and towns with a population greater than 15,000. The bill contains technical amendments.

BILL TEXT:

A BILL to amend and reenact §§ 2.2-3801, 2.2-3808, 2.2-3809, and 16.1-77 of the Code of Virginia, relating to the Government Data Collection and Dissemination Practices Act; personal information; definition; collection of same; penalty for violation; jurisdiction of district courts.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3801, 2.2-3808, 2.2-3809, and 16.1-77 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3801. Definitions.

As used in this chapter, unless the context requires a different meaning:

1. "Agency" means any agency, authority, board, department, division, commission, institution, bureau, or like governmental entity of the Commonwealth or of any unit of local government including counties, cities, towns, regional governments, and the departments thereof, and includes constitutional officers, except as otherwise expressly provided by law. "Agency" shall also include any entity, whether public or private, with which any of the foregoing has entered into a contractual relationship for the operation of a system of personal information to accomplish an agency function. Any such entity included in this definition by reason of a contractual relationship shall only be deemed an agency as relates to services performed pursuant to that contractual relationship, provided that if any such entity is a consumer reporting agency, it shall be deemed to have satisfied all of the requirements of this chapter if it fully complies with the requirements of the Federal Fair Credit Reporting Act as applicable to services performed pursuant to such contractual relationship.

"Data subject" means an individual about whom personal information is indexed or may be located under his name, personal number, or other identifiable particulars, in an information system.

"Disseminate" means to release, transfer, or otherwise communicate information orally, in writing, or by electronic means.

"Information system" means the total components and operations of a record-keeping process, including information collected or managed by means of computer networks and the Internet, whether automated or manual, containing personal information and the name, personal number, or other identifying particulars of a data subject.

~~2.~~ "Personal information" means all information that (i) describes, locates or indexes anything about an individual including, but not limited to, his social security number, driver's license number, agency-issued identification number, student identification number, real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record, or ~~that (ii)~~ affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual; and the record of his presence, registration, or membership in an organization or activity, or admission to an institution. "Personal information" shall not include routine information maintained for the purpose of internal office administration whose use could not be such as to affect adversely any data subject nor does the term include real estate assessment information.

~~3. "Data subject" means an individual about whom personal information is indexed or may be located under his name, personal number, or other identifiable particulars, in an information system.~~

~~4. "Disseminate" means to release, transfer, or otherwise communicate information orally, in writing, or by electronic means.~~

5. "Purge" means to obliterate information completely from the transient, permanent, or archival records of an organization.

~~6. "Agency" means any agency, authority, board, department, division, commission, institution, bureau, or like governmental entity of the Commonwealth or of any unit of local government including counties, cities, towns, regional governments, and the departments thereof, and includes constitutional officers, except as otherwise expressly provided by law. "Agency" shall also include any entity, whether public or private, with which any of the foregoing has entered into a contractual relationship for the operation of a system of personal information to accomplish an agency function. Any such entity included in this definition by reason of a contractual relationship shall only be deemed an agency as relates to services performed pursuant to that contractual relationship, provided that if any such entity is a consumer reporting agency, it shall be deemed to have satisfied all of the requirements of this chapter if it fully complies with the requirements of the Federal Fair Credit Reporting Act as applicable to services performed pursuant to such contractual relationship.~~

§ 2.2-3808. Collection, disclosure, or display of social security number.

~~A. It shall be unlawful for~~ No agency shall require an individual to furnish or disclose his social security number or driver's license number unless the furnishing or disclosure of such number is (i) expressly authorized by state or federal law and (ii) essential for the performance of that agency's duties. Nor shall any agency ~~to~~ require an individual to disclose or furnish his social security account number not previously

disclosed or furnished, for any purpose in connection with any activity, or to refuse any service, privilege or right to an individual wholly or partly because the individual does not disclose or furnish such number, unless the disclosure or furnishing of such number is specifically required by federal or state law.

B. Agency-issued identification cards, student identification cards, or license certificates issued or replaced on or after July 1, 2003, shall not display an individual's entire social security number except as provided in § 46.2-703.

C. Any agency-issued identification card, student identification card, or license certificate that was issued prior to July 1, 2003, and that displays an individual's entire social security number shall be replaced no later than July 1, 2006, except that voter registration cards issued with a social security number and not previously replaced shall be replaced no later than the December 31st following the completion by the state and all localities of the decennial redistricting following the 2010 census. This subsection shall not apply to (i) driver's licenses and special identification cards issued by the Department of Motor Vehicles pursuant to Chapter 3 (§ 46.2-300 et seq.) of Title 46.2 and (ii) road tax registrations issued pursuant to § 46.2-703.

D. The provisions of subsections A and C ~~of this section~~ shall not be applicable to licenses issued by the State Corporation Commission's Bureau of Insurance until such time as a national insurance producer identification number has been created and implemented in all states. Commencing with the date of such implementation, the licenses issued by the State Corporation Commission's Bureau of Insurance shall be issued in compliance with subsection A of this section. Further, all licenses issued prior to the date of such implementation shall be replaced no later than 12 months following the date of such implementation.

§ 2.2-3809. Injunctive relief; civil penalty; attorneys' fees.

Any aggrieved person may institute a proceeding for injunction or mandamus against any person or agency that has engaged, is engaged, or is about to engage in any acts or practices in violation of the provisions of this chapter. The proceeding shall be brought in the district or circuit court of any county or city ~~wherein the person where the aggrieved person resides~~ or where the agency, made defendant resides or in any such suit, has a place of business.

In the case of any successful proceeding by an aggrieved party, the ~~person or~~ agency enjoined or made subject to a writ of mandamus by the court shall be liable for the costs of the action together with reasonable attorneys' fees as determined by the court.

In addition, if the court finds that a violation of subsection A of § 2.2-3808 was willfully and knowingly made by a specific public officer, appointee, or employee of any agency, the court may impose upon such individual a civil penalty of not less than \$250 nor more than \$1,000, which amount shall be paid into the State Literary Fund. For a second or subsequent violation, such civil penalty shall be not less than \$1,000 nor more than \$2,500. For a violation of subsection A of § 2.2-3808 by any agency, the court may impose a civil penalty of not less than \$250 nor more than \$1,000, which amount shall be paid into the State Literary Fund. For a second or subsequent violation, such civil penalty shall be not less than \$1,000 nor more than \$2,500.

§ 16.1-77. Civil jurisdiction of general district courts.

Except as provided in Article 5 (§ 16.1-122.1 et seq.) of this chapter, each general district court shall have, within the limits of the territory it serves, civil jurisdiction as follows:

(1) Exclusive original jurisdiction of any claim to specific personal property or to any debt, fine or other money, or to damages for breach of contract or for injury done to property, real or personal, or for any injury to the person that would be recoverable by action at law or suit in equity, when the amount of such claim does not exceed \$4,500 exclusive of interest and any attorney's fees contracted for in the instrument, and concurrent jurisdiction with the circuit courts having jurisdiction in such territory of any such claim when the amount thereof exceeds \$4,500 but does not exceed \$15,000, exclusive of interest and any attorney's fees contracted for in the instrument. However, this \$15,000 limit shall not apply with respect to distress warrants under the provisions of § 55-230, cases involving liquidated damages for violations of vehicle weight limits pursuant to § 46.2-1135, nor cases involving forfeiture of a bond pursuant to § 19.2-143.

(2) Jurisdiction to try and decide attachment cases when the amount of the plaintiff's claim does not exceed \$15,000 exclusive of interest and any attorney's fees contracted for in the instrument.

(3) Jurisdiction of actions of unlawful entry or detainer as provided in Article 13 (§ 8.01-124 et seq.) of Chapter 3 of Title 8.01, and in Chapter 13 (§ 55-217 et seq.) of Title 55, and the maximum jurisdictional limits prescribed in subdivision (1) shall not apply to any claim, counter-claim or cross-claim in an action for damages sustained or rent proved to be owing where the premises were used by the occupant primarily for business, commercial or agricultural purposes. Any counter-claim or cross-claim shall arise out of the same use of the property for business, commercial or agricultural purposes.

(4) Except where otherwise specifically provided, all jurisdiction, power and authority over any civil action or proceeding conferred upon any general district court judge or magistrate under or by virtue of any provisions of the Code of Virginia.

(5) Jurisdiction to try and decide suits in interpleader involving personal property where the amount of money or value of the property is not more than the maximum jurisdictional limits of the general district court. The action shall be brought in accordance with the procedures for interpleader as set forth in § 8.01-364. However, the general district court shall not have any power to issue injunctions. Actions in interpleader may be brought by either the stakeholder or any of the claimants. The initial pleading shall be either by motion for judgment or by warrant in debt. The initial pleading shall briefly set forth the circumstances of the claim and shall name as defendant all parties in interest who are not parties plaintiff.

(6) Jurisdiction to try and decide any cases pursuant to § 2.2-3713 of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) or § 2.2-3809 of the Government Data Collection and Dissemination Practices Act, for writs of mandamus or for injunctions.

(7) Concurrent jurisdiction with the circuit courts having jurisdiction in such territory to adjudicate habitual offenders pursuant to the provisions of Article 9 (§ 46.2-355.1 et seq.) of Chapter 3 of Title 46.2.

(8) Jurisdiction to try and decide cases alleging a civil violation described in § 18.2-76.

2. That the provisions of this act shall become effective on July 1, 2009, except that the third and fourth enactments of this act shall become effective on July 1, 2008.

3. That every state agency subject to the provisions of the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) shall conduct an analysis and review of its collection and use of social security numbers, to be completed by October 1, 2008. Each such agency shall submit, no later than October 1, 2008, to the chairmen of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science, on forms developed by the Council and the Commission, (i) a list of (a) all state or federal statutes authorizing or requiring the collection of social security numbers by such agency and (b) instances where social security numbers are voluntarily collected or (ii) in the absence of statutory authority to collect social security numbers, written justification explaining why continued collection is essential to its transaction of public business. In conducting such a review, each agency shall be encouraged to consider whether such collection and use is essential for its transaction of public business and to find alternative means of identifying individuals. The chairmen of the Council and the Commission may withhold from public disclosure any such lists or portions of lists as legislative working papers, if it deems that the public dissemination of such lists or portions of lists would cause a potential invasion of privacy.

4. That every county and city, and any town with a population in excess of 15,000 shall, no later than September 10, 2008, provide the Virginia Municipal League or the Virginia Association of Counties, as appropriate, information on a form agreed upon by the Virginia Municipal League, the Virginia Association of Counties and staff of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science identifying (a) all state or federal statutes authorizing or requiring the collection of social security numbers by such county, city or town and (b) instances where social security numbers are voluntarily collected or (ii) in the absence of statutory authority to collect social security numbers, written justification explaining why continued collection is essential to its transaction of public business. In conducting such a review, each such county, city or town shall be encouraged to consider whether such collection and use is essential for its transaction of public business and to find alternative means of identifying individuals. The information required by this enactment shall be submitted no later than October 1, 2008 to the chairmen of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science, on forms developed by the Council and the Commission.

3. **BILL SUMMARY: Personal Information Privacy Act; social security numbers.** Prohibits the dissemination of another person's social security number, regardless of whether such number is obtained from a public or private record. Currently, the prohibition against dissemination only applies to social security numbers obtained from private sources. This bill is a recommendation of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science

BILL TEXT:

A BILL to amend and reenact § 59.1-443.2 of the Code of Virginia, relating to the Personal Information Privacy Act; access to social security numbers.

Be it enacted by the General Assembly of Virginia:

1. That § 59.1-443.2 of the Code of Virginia is amended and reenacted as follows:

§ 59.1-443.2. Restricted use of social security numbers.

A. Except as otherwise specifically provided by law, a person shall not:

1. Intentionally communicate ~~an~~ another individual's social security number to the general public;

2. Print an individual's social security number on any card required for the individual to access or receive products or services provided by the person;

3. Require an individual to use his social security number to access an Internet website, unless a password, unique personal identification number or other authentication device is also required to access the site; or

4. Send or cause to be sent or delivered any letter, envelope, or package that displays a social security number on the face of the mailing envelope or package, or from which a social security number is visible, whether on the outside or inside of the mailing envelope or package.

B. This section does not prohibit the collection, use, or release of a social security number as permitted by the laws of the Commonwealth or the United States, or the use of a social security number for internal verification or administrative purposes unless such use is prohibited by a state or federal statute, rule, or regulation.

C. In the case of any (i) health care provider as defined in § 8.01-581.1, (ii) manager of a pharmacy benefit plan, (iii) insurer as defined in § 38.2-100, (iv) corporation providing a health services plan, (v) health maintenance organization providing a health care plan for health care services, or (vi) contractor of any such person, the prohibition contained in subdivision 2 of subsection A shall become effective on January 1, 2006.

D. This section shall not apply to ~~(i)~~ public bodies as defined in § 2.2-3701 ~~or (ii) records required by law to be open to the public, and shall not be construed to limit access to records pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).~~

E. No person shall embed an encrypted or unencrypted social security number in or on a card or document, including, but not limited to, using a bar code, chip, magnetic strip, or other technology, in place of removing the social security number as required by this section.

4. BILL SUMMARY: Concealed handgun permits; access to permittee information. Protects from public disclosure permittee names and descriptive information held by the Department of State Police for purposes of entry into the Virginia Criminal Information Network. However, the information would still be available to law-enforcement agencies, officers, and agents in the course of law-enforcement duties, and non-identifying statistical information would be available to the general public.

BILL TEXT:

A BILL to amend and reenact § 18.2-308 of the Code of Virginia, relating to concealed handgun permits; access to permittee information.

Be it enacted by the General Assembly of Virginia:

1. That § 18.2-308 of the Code of Virginia is amended and reenacted as follows:

§ 18.2-308. Personal protection; carrying concealed weapons; when lawful to carry.

A. If any person carries about his person, hidden from common observation, (i) any pistol, revolver, or other weapon designed or intended to propel a missile of any kind by action of an explosion of any combustible material; (ii) any dirk, bowie knife, switchblade knife, ballistic knife, machete, razor, slingshot, spring stick, metal knucks, or blackjack; (iii) any flailing instrument consisting of two or more rigid parts connected in such a manner as to allow them to swing freely, which may be known as a nun chahka, nun chuck, nunchaku, shuriken, or fighting chain; (iv) any disc, of whatever configuration, having at least two points or pointed blades which is designed to be thrown or propelled and which may be known as a throwing star or oriental dart; or (v) any weapon of like kind as those enumerated in this subsection, he shall be guilty of a Class 1 misdemeanor. A second violation of this section or a conviction under this section subsequent to any conviction under any substantially similar ordinance of any county, city, or town shall be punishable as a Class 6 felony, and a third or subsequent such violation shall be punishable as a Class 5 felony. For the purpose of this section, a weapon shall be deemed to be hidden from common observation when it is observable but is of such deceptive appearance as to disguise the weapon's true nature.

B. This section shall not apply to any person while in his own place of abode or the curtilage thereof.

Except as provided in subsection J1, this section shall not apply to:

1. Any person while in his own place of business;
2. Any law-enforcement officer, wherever such law-enforcement officer may travel in the Commonwealth;
3. Any regularly enrolled member of a target shooting organization who is at, or going to or from, an established shooting range, provided that the weapons are unloaded and securely wrapped while being transported;
4. Any regularly enrolled member of a weapons collecting organization who is at, or going to or from, a bona fide weapons exhibition, provided that the weapons are unloaded and securely wrapped while being transported;
5. Any person carrying such weapons between his place of abode and a place of purchase or repair, provided the weapons are unloaded and securely wrapped while being transported;
6. Any person actually engaged in lawful hunting, as authorized by the Board of Game and Inland Fisheries, under inclement weather conditions necessitating temporary protection of his firearm from those conditions, provided that possession of a handgun while engaged in lawful hunting shall not be construed as hunting with a handgun if the person hunting is carrying a valid concealed handgun permit;
7. Any State Police officer retired from the Department of State Police, any local law-enforcement officer, auxiliary police officer or animal control officer retired from a police department or sheriff's office within the Commonwealth, any special agent retired from the State Corporation Commission or the Alcoholic Beverage Control Board, any conservation police officer retired from the Department of Game and Inland Fisheries, and any Virginia Marine Police officer retired from the Law Enforcement Division of the Virginia Marine Resources Commission, other than an officer or agent terminated for cause, (i) with a service-related disability; (ii) following at least 15 years of service with any such law-enforcement agency, board or any combination thereof; or (iii) who has reached 55 years of age, provided such officer carries with him written proof of consultation with and favorable review of the need to carry a concealed handgun issued by the chief law-enforcement officer of the last such agency from which the officer retired or, in the case of special agents, issued by the State Corporation Commission or the Alcoholic Beverage Control Board. A copy of the proof of consultation and favorable review shall be forwarded by the chief or the Board to the Department of State Police for entry into the Virginia Criminal Information Network. The chief law-enforcement officer shall not without cause withhold such written proof if the retired law-enforcement officer otherwise meets the requirements of this section.

For purposes of applying the reciprocity provisions of subsection P, any person granted the privilege to carry a concealed handgun pursuant to this subdivision, while carrying the proof of consultation and favorable review required, shall be deemed to have been issued a concealed handgun permit.

For purposes of complying with the federal Law Enforcement Officers Safety Act of 2004, a retired law-enforcement officer who receives proof of consultation and review pursuant to this subdivision shall have the opportunity to annually participate, at the retired law-enforcement officer's expense, in the same training and testing to carry firearms as is required of active law-enforcement officers in the Commonwealth. If such retired law-enforcement officer meets the training and

qualification standards, the chief law-enforcement officer shall issue the retired officer certification, valid one year from the date of issuance, indicating that the retired officer has met the standards of the agency to carry a firearm; and

8. Any State Police officer who is a member of the organized reserve forces of any of the armed services of the United States, national guard, or naval militia, while such officer is called to active military duty, provided such officer carries with him written proof of consultation with and favorable review of the need to carry a concealed handgun issued by the Superintendent of State Police. The proof of consultation and favorable review shall be valid as long as the officer is on active military duty and shall expire when the officer returns to active law-enforcement duty. The issuance of the proof of consultation and favorable review shall be entered into the Virginia Criminal Information Network. The Superintendent of State Police shall not without cause withhold such written proof if the officer is in good standing and is qualified to carry a weapon while on active law-enforcement duty.

For purposes of applying the reciprocity provisions of subsection P, any person granted the privilege to carry a concealed handgun pursuant to this subdivision, while carrying the proof of consultation and favorable review required, shall be deemed to have been issued a concealed handgun permit.

C. This section shall also not apply to any of the following individuals while in the discharge of their official duties, or while in transit to or from such duties:

1. Carriers of the United States mail;
2. Officers or guards of any state correctional institution;
3. —Repealed.]
4. Conservators of the peace, except that the following conservators of the peace shall not be permitted to carry a concealed handgun without obtaining a permit as provided in subsection D hereof: (a) notaries public; (b) registrars; (c) drivers, operators or other persons in charge of any motor vehicle carrier of passengers for hire; or (d) commissioners in chancery;
5. Noncustodial employees of the Department of Corrections designated to carry weapons by the Director of the Department of Corrections pursuant to § 53.1-29; and
6. Harbormaster of the City of Hopewell.

D. Any person 21 years of age or older may apply in writing to the clerk of the circuit court of the county or city in which he resides, or if he is a member of the United States Armed Forces, the county or city in which he is domiciled, for a permit to carry a concealed handgun. There shall be no requirement regarding the length of time an applicant has been a resident or domiciliary of the county or city. The application shall be made under oath before a notary or other person qualified to take oaths and shall be made only on a form prescribed by the Department of State Police, in consultation with the Supreme Court, requiring only that information necessary to determine eligibility for the permit. The clerk shall enter on the application the date on which the application and all other information required to be submitted by the applicant is received. The court shall consult with either the sheriff or police department of the county or city and receive a report from the Central Criminal Records Exchange. As a condition for issuance of a concealed handgun permit, the applicant shall submit to fingerprinting if required by local

ordinance in the county or city where the applicant resides and provide personal descriptive information to be forwarded with the fingerprints through the Central Criminal Records Exchange to the Federal Bureau of Investigation for the purpose of obtaining criminal history record information regarding the applicant, and obtaining fingerprint identification information from federal records pursuant to criminal investigations by state and local law-enforcement agencies. However, no local ordinance shall require an applicant to submit to fingerprinting if the applicant has an existing concealed handgun permit issued pursuant to this section and is applying for a new five-year permit pursuant to subsection I. Where feasible and practical, the local law-enforcement agency may transfer information electronically to the State Police instead of inked fingerprint cards. Upon completion of the criminal history records check, the State Police shall return the fingerprint cards to the submitting local agency or, in the case of scanned fingerprints, destroy the electronic record. The local agency shall then promptly notify the person that he has 21 days from the date of the notice to request return of the fingerprint cards, if any. All fingerprint cards not claimed by the applicant within 21 days of notification by the local agency shall be destroyed. All optically scanned fingerprints shall be destroyed upon completion of the criminal history records check without requiring that the applicant be notified. Fingerprints taken for the purposes described in this section shall not be copied, held or used for any other purposes. The court shall issue the permit and notify the State Police of the issuance of the permit within 45 days of receipt of the completed application unless it is determined that the applicant is disqualified. Any order denying issuance of the permit shall state the basis for the denial of the permit and the applicant's right to and the requirements for perfecting an appeal of such order pursuant to subsection L. An application is deemed complete when all information required to be furnished by the applicant is delivered to and received by the clerk of court before or concomitant with the conduct of a state or national criminal history records check. If the court has not issued the permit or determined that the applicant is disqualified within 45 days of the date of receipt noted on the application, the clerk shall certify on the application that the 45-day period has expired, and send a copy of the certified application to the applicant. The certified application shall serve as a de facto permit, which shall expire 90 days after issuance, and shall be recognized as a valid concealed handgun permit when presented with a valid government-issued photo identification pursuant to subsection H, until the court issues a permit or finds the applicant to be disqualified. If the applicant is found to be disqualified after the de facto permit is issued, the applicant shall surrender the de facto permit to the court and the disqualification shall be deemed a denial of the permit and a revocation of the de facto permit. If the applicant is later found by the court to be disqualified after a permit has been issued, the permit shall be revoked. The clerk of court may withhold from public disclosure the social security number contained in a permit application in response to a request to inspect or copy any such permit application, except that such social security number shall not be withheld from any law-enforcement officer acting in the performance of his official duties.

E. The following persons shall be deemed disqualified from obtaining a permit:

1. An individual who is ineligible to possess a firearm pursuant to § 18.2-308.1:1, 18.2-308.1:2 or 18.2-308.1:3 or the substantially similar law of any other state or of the United States.

2. An individual who was ineligible to possess a firearm pursuant to § 18.2-308.1:1 and who was discharged from the custody of the Commissioner pursuant to § 19.2-182.7 less than five years before the date of his application for a concealed handgun permit.

3. An individual who was ineligible to possess a firearm pursuant to § 18.2-308.1:2 and whose competency or capacity was restored pursuant to § 37.2-1012 less than five years before the date of his application for a concealed handgun permit.

4. An individual who was ineligible to possess a firearm under § 18.2-308.1:3 and who was released from commitment less than five years before the date of this application for a concealed handgun permit.

5. An individual who is subject to a restraining order, or to a protective order and prohibited by § 18.2-308.1:4 from purchasing or transporting a firearm.

6. An individual who is prohibited by § 18.2-308.2 from possessing or transporting a firearm, except that a permit may be obtained in accordance with subsection C of that section.

7. An individual who has been convicted of two or more misdemeanors within the five-year period immediately preceding the application, if one of the misdemeanors was a Class 1 misdemeanor, but the judge shall have the discretion to deny a permit for two or more misdemeanors that are not Class 1. Traffic infractions and misdemeanors set forth in Title 46.2 shall not be considered for purposes of this disqualification.

8. An individual who is addicted to, or is an unlawful user or distributor of, marijuana or any controlled substance.

9. An individual who has been convicted of a violation of § 18.2-266 or a substantially similar local ordinance or of public drunkenness within the three-year period immediately preceding the application, or who is a habitual drunkard as determined pursuant to § 4.1-333.

10. An alien other than an alien lawfully admitted for permanent residence in the United States.

11. An individual who has been discharged from the Armed Forces of the United States under dishonorable conditions.

12. An individual who is a fugitive from justice.

13. An individual who the court finds, by a preponderance of the evidence, based on specific acts by the applicant, is likely to use a weapon unlawfully or negligently to endanger others. The sheriff, chief of police, or attorney for the Commonwealth may submit to the court a sworn written statement indicating that, in the opinion of such sheriff, chief of police, or attorney for the Commonwealth, based upon a disqualifying conviction or upon the specific acts set forth in the statement, the applicant is likely to use a weapon unlawfully or negligently to endanger others. The statement of the sheriff, chief of police, or the attorney for the Commonwealth shall be based upon personal knowledge of such individual or of a deputy sheriff, police officer, or assistant attorney for the Commonwealth of the

specific acts, or upon a written statement made under oath before a notary public of a competent person having personal knowledge of the specific acts.

14. An individual who has been convicted of any assault, assault and battery, sexual battery, discharging of a firearm in violation of § 18.2-280 or 18.2-286.1 or brandishing of a firearm in violation of § 18.2-282 within the three-year period immediately preceding the application.

15. An individual who has been convicted of stalking.

16. An individual whose previous convictions or adjudications of delinquency were based on an offense which would have been at the time of conviction a felony if committed by an adult under the laws of any state, the District of Columbia, the United States or its territories. For purposes of this disqualifier, only convictions occurring within 16 years following the later of the date of (i) the conviction or adjudication or (ii) release from any incarceration imposed upon such conviction or adjudication shall be deemed to be "previous convictions."

17. An individual who has a felony charge pending or a charge pending for an offense listed in subdivision 14 or 15.

18. An individual who has received mental health treatment or substance abuse treatment in a residential setting within five years prior to the date of his application for a concealed handgun permit.

19. An individual not otherwise ineligible pursuant to this section, who, within the three-year period immediately preceding the application for the permit, was found guilty of any criminal offense set forth in Article 1 (§ 18.2-247 et seq.) of Chapter 7 of this title or of a criminal offense of illegal possession or distribution of marijuana or any controlled substance, under the laws of any state, the District of Columbia, or the United States or its territories.

20. An individual, not otherwise ineligible pursuant to this section, with respect to whom, within the three-year period immediately preceding the application, upon a charge of any criminal offense set forth in Article 1 (§ 18.2-247 et seq.) of Chapter 7 of this title or upon a charge of illegal possession or distribution of marijuana or any controlled substance under the laws of any state, the District of Columbia, or the United States or its territories, the trial court found that the facts of the case were sufficient for a finding of guilt and disposed of the case pursuant to § 18.2-251 or the substantially similar law of any other state, the District of Columbia, or the United States or its territories.

F. The making of a materially false statement in an application under this section shall constitute perjury, punishable as provided in § 18.2-434.

G. The court shall require proof that the applicant has demonstrated competence with a handgun and the applicant may demonstrate such competence by one of the following, but no applicant shall be required to submit to any additional demonstration of competence:

1. Completing any hunter education or hunter safety course approved by the Department of Game and Inland Fisheries or a similar agency of another state;

2. Completing any National Rifle Association firearms safety or training course;

3. Completing any firearms safety or training course or class available to the general public offered by a law-enforcement agency, junior college, college, or

private or public institution or organization or firearms training school utilizing instructors certified by the National Rifle Association or the Department of Criminal Justice Services;

4. Completing any law-enforcement firearms safety or training course or class offered for security guards, investigators, special deputies, or any division or subdivision of law enforcement or security enforcement;

5. Presenting evidence of equivalent experience with a firearm through participation in organized shooting competition or current military service or proof of an honorable discharge from any branch of the armed services;

6. Obtaining or previously having held a license to carry a firearm in the Commonwealth or a locality thereof, unless such license has been revoked for cause;

7. Completing any firearms training or safety course or class conducted by a state-certified or National Rifle Association-certified firearms instructor;

8. Completing any governmental police agency firearms training course and qualifying to carry a firearm in the course of normal police duties; or

9. Completing any other firearms training which the court deems adequate.

A photocopy of a certificate of completion of any of the courses or classes; an affidavit from the instructor, school, club, organization, or group that conducted or taught such course or class attesting to the completion of the course or class by the applicant; or a copy of any document which shows completion of the course or class or evidences participation in firearms competition shall constitute evidence of qualification under this subsection.

H. The permit to carry a concealed handgun shall specify only the following information: name, address, date of birth, gender, height, weight, color of hair, color of eyes, and signature of the permittee; the signature of the judge issuing the permit, or of the clerk of court who has been authorized to sign such permits by the issuing judge; and the date of issuance. The permit to carry a concealed handgun shall be no larger than two inches wide by three and one-fourth inches long and shall be of a uniform style prescribed by the Department of State Police. The person issued the permit shall have such permit on his person at all times during which he is carrying a concealed handgun and shall display the permit and a photo-identification issued by a government agency of the Commonwealth or by the United States Department of Defense or United States State Department (passport) upon demand by a law-enforcement officer.

H1. If a permit holder is a member of the Virginia National Guard, Armed Forces of the United States, or the Armed Forces reserves of the United States, and his five-year permit expires during an active-duty military deployment outside of the permittee's county or city of residence, such permit shall remain valid for 90 days after the end date of the deployment. In order to establish proof of continued validity of the permit, such a permittee shall carry with him and display, upon request of a law-enforcement officer, a copy of the permittee's deployment orders or other documentation from the permittee's commanding officer that order the permittee to travel outside of his county or city of residence and that indicate the start and end date of such deployment.

I. Persons who previously have held a concealed handgun permit shall be issued, upon application as provided in subsection D, a new five-year permit unless

there is good cause shown for refusing to reissue a permit. If the circuit court denies the permit, the specific reasons for the denial shall be stated in the order of the court denying the permit. Upon denial of the application, the clerk shall provide the person with notice, in writing, of his right to an ore tenus hearing. Upon request of the applicant made within 21 days, the court shall place the matter on the docket for an ore tenus hearing. The applicant may be represented by counsel, but counsel shall not be appointed, and the rules of evidence shall apply. The final order of the court shall include the court's findings of fact and conclusions of law.

J. Any person convicted of an offense that would disqualify that person from obtaining a permit under subsection E or who violates subsection F shall forfeit his permit for a concealed handgun and surrender it to the court. Upon receipt by the Central Criminal Records Exchange of a record of the arrest, conviction or occurrence of any other event that would disqualify a person from obtaining a concealed handgun permit under subsection E, the Central Criminal Records Exchange shall notify the court having issued the permit of such disqualifying arrest, conviction or other event.

J1. Any person permitted to carry a concealed handgun, who is under the influence of alcohol or illegal drugs while carrying such handgun in a public place, shall be guilty of a Class 1 misdemeanor. Conviction of any of the following offenses shall be prima facie evidence, subject to rebuttal, that the person is "under the influence" for purposes of this section: manslaughter in violation of § 18.2-36.1, maiming in violation of § 18.2-51.4, driving while intoxicated in violation of § 18.2-266, public intoxication in violation of § 18.2-388, or driving while intoxicated in violation of § 46.2-341.24. Upon such conviction that court shall revoke the person's permit for a concealed handgun and promptly notify the issuing circuit court. A person convicted of a violation of this subsection shall be ineligible to apply for a concealed handgun permit for a period of five years.

J2. An individual who has a felony charge pending or a charge pending for an offense listed in subdivision E 14 or E 15, holding a permit for a concealed handgun, may have the permit suspended by the court before which such charge is pending or by the court that issued the permit.

J3. No person shall carry a concealed handgun onto the premises of any restaurant or club as defined in § 4.1-100 for which a license to sell and serve alcoholic beverages for on-premises consumption has been granted by the Virginia Alcoholic Beverage Control Board under Title 4.1 of the Code of Virginia; however, nothing herein shall prohibit any sworn law-enforcement officer from carrying a concealed handgun on the premises of such restaurant or club or any owner or event sponsor or his employees from carrying a concealed handgun while on duty at such restaurant or club if such person has a concealed handgun permit.

J4. Any individual for whom it would be unlawful to purchase, possess or transport a firearm under § 18.2-308.1:2 or 18.2-308.1:3, who holds a concealed handgun permit, may have the permit suspended by the court that issued the permit during the period of incompetency, incapacity or disability.

K. No fee shall be charged for the issuance of such permit to a person who has retired from service (i) as a magistrate in the Commonwealth; (ii) as a special agent with the Alcoholic Beverage Control Board or as a law-enforcement officer

with the Department of State Police, the Department of Game and Inland Fisheries, or a sheriff or police department, bureau or force of any political subdivision of the Commonwealth, after completing 15 years of service or after reaching age 55; (iii) as a law-enforcement officer with the United States Federal Bureau of Investigation, Bureau of Alcohol, Tobacco and Firearms, Secret Service Agency, Drug Enforcement Administration, United States Citizenship and Immigration Services, Customs Service, Department of State Diplomatic Security Service, U.S. Marshals Service or Naval Criminal Investigative Service, after completing 15 years of service or after reaching age 55; (iv) as a law-enforcement officer with any police or sheriff's department within the United States, the District of Columbia or any of the territories of the United States, after completing 15 years of service; or (v) as a law-enforcement officer with any combination of the agencies listed in clauses (ii) through (iv), after completing 15 years of service. The clerk shall charge a fee of \$10 for the processing of an application or issuing of a permit, including his costs associated with the consultation with law-enforcement agencies. The local law-enforcement agency conducting the background investigation may charge a fee not to exceed \$35 to cover the cost of conducting an investigation pursuant to this section. The \$35 fee shall include any amount assessed by the Federal Bureau of Investigation for providing criminal history record information, and the local law-enforcement agency shall forward the amount assessed by the Federal Bureau of Investigation to the State Police with the fingerprints taken from the applicant. The State Police may charge a fee not to exceed \$5 to cover their costs associated with processing the application. The total amount assessed for processing an application for a permit shall not exceed \$50, with such fees to be paid in one sum to the person who accepts the application. Payment may be made by any method accepted by that court for payment of other fees or penalties. No payment shall be required until the application is accepted by the court as a complete application. The order issuing such permit, or the copy of the permit application certified by the clerk as a de facto permit pursuant to subsection D, shall be provided to the State Police and the law-enforcement agencies of the county or city. The State Police shall enter the permittee's name and description in the Virginia Criminal Information Network so that the permit's existence and current status will be made known to law-enforcement personnel accessing the Network for investigative purposes. The State Police shall withhold from public disclosure permittee information submitted to the State Police for purposes of entry into the Virginia Criminal Information Network, except that such information shall not be withheld from any law-enforcement agency, officer, or authorized agent thereof acting in the performance of official law-enforcement duties. However, nothing in this subsection shall be construed to prohibit the release of (i) records by the State Police concerning permits issued to nonresidents of the Commonwealth pursuant to subsection P1, or (ii) statistical summaries, abstracts or other records containing information in an aggregate form that does not identify any individual permittees.

L. Any person denied a permit to carry a concealed handgun under the provisions of this section may present a petition for review to the Court of Appeals. The petition for review shall be filed within 60 days of the expiration of the time for requesting an ore tenus hearing pursuant to subsection I, or if an ore tenus hearing is

requested, within 60 days of the entry of the final order of the circuit court following the hearing. The petition shall be accompanied by a copy of the original papers filed in the circuit court, including a copy of the order of the circuit court denying the permit. Subject to the provisions of subsection B of § 17.1-410, the decision of the Court of Appeals or judge shall be final. Notwithstanding any other provision of law, if the decision to deny the permit is reversed upon appeal, taxable costs incurred by the person shall be paid by the Commonwealth.

M. For purposes of this section:

"Handgun" means any pistol or revolver or other firearm, except a machine gun, originally designed, made and intended to fire a projectile by means of an explosion of a combustible material from one or more barrels when held in one hand.

"Lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

"Law-enforcement officer" means those individuals defined as a law-enforcement officer in § 9.1-101, campus police officers appointed pursuant to Chapter 17 (§ 23-232 et seq.) of Title 23, law-enforcement agents of the Armed Forces of the United States, the Naval Criminal Investigative Service, and federal agents who are otherwise authorized to carry weapons by federal law. "Law-enforcement officer" shall also mean any sworn full-time law-enforcement officer employed by a law-enforcement agency of the United States or any state or political subdivision thereof, whose duties are substantially similar to those set forth in § 9.1-101.

"Personal knowledge" means knowledge of a fact that a person has himself gained through his own senses, or knowledge that was gained by a law-enforcement officer or prosecutor through the performance of his official duties.

N. As used in this article:

"Ballistic knife" means any knife with a detachable blade that is propelled by a spring-operated mechanism.

"Spring stick" means a spring-loaded metal stick activated by pushing a button which rapidly and forcefully telescopes the weapon to several times its original length.

O. The granting of a concealed handgun permit shall not thereby authorize the possession of any handgun or other weapon on property or in places where such possession is otherwise prohibited by law or is prohibited by the owner of private property.

P. A valid concealed handgun or concealed weapon permit or license issued by another state shall authorize the holder of such permit or license who is at least 21 years of age to carry a concealed handgun in the Commonwealth, provided (i) the issuing authority provides the means for instantaneous verification of the validity of all such permits or licenses issued within that state, accessible 24 hours a day, and (ii) except for the age of the permit or license holder and the type of weapon authorized to be carried, the requirements and qualifications of that state's law are adequate to prevent possession of a permit or license by persons who would be denied a permit in the Commonwealth under this section. The Superintendent of State Police shall (a)

in consultation with the Office of the Attorney General determine whether states meet the requirements and qualifications of this section, (b) maintain a registry of such states on the Virginia Criminal Information Network (VCIN), and (c) make the registry available to law-enforcement officers for investigative purposes. The Superintendent of the State Police, in consultation with the Attorney General, may also enter into agreements for reciprocal recognition with any state qualifying for recognition under this subsection.

P1. Nonresidents of the Commonwealth 21 years of age or older may apply in writing to the Virginia Department of State Police for a five-year permit to carry a concealed handgun. Every applicant for a nonresident concealed handgun permit shall submit two photographs of a type and kind specified by the Department of State Police for inclusion on the permit and shall submit fingerprints on a card provided by the Department of State Police for the purpose of obtaining the applicant's state or national criminal history record. As a condition for issuance of a concealed handgun permit, the applicant shall submit to fingerprinting by his local or state law-enforcement agency and provide personal descriptive information to be forwarded with the fingerprints through the Central Criminal Records Exchange to the Federal Bureau of Investigation for the purpose of obtaining criminal history record information regarding the applicant and obtaining fingerprint identification information from federal records pursuant to criminal investigations by state and local law-enforcement agencies. The application shall be made under oath before a notary or other person qualified to take oaths on a form provided by the Department of State Police, requiring only that information necessary to determine eligibility for the permit. If the permittee is later found by the Department of State Police to be disqualified, the permit shall be revoked and the person shall return the permit after being so notified by the Department of State Police. The permit requirement and restriction provisions of subsections E and F shall apply, *mutatis mutandis*, to the provisions of this subsection.

The applicant shall demonstrate competence with a handgun by one of the following:

1. Completing a hunter education or hunter safety course approved by the Virginia Department of Game and Inland Fisheries or a similar agency of another state;
2. Completing any National Rifle Association firearms safety or training course;
3. Completing any firearms safety or training course or class available to the general public offered by a law-enforcement agency, junior college, college, or private or public institution or organization or firearms training school utilizing instructors certified by the National Rifle Association or the Department of Criminal Justice Services or a similar agency of another state;
4. Completing any law-enforcement firearms safety or training course or class offered for security guards, investigators, special deputies, or any division or subdivision of law enforcement or security enforcement;
5. Presenting evidence of equivalent experience with a firearm through participation in organized shooting competition approved by the Department of

State Police or current military service or proof of an honorable discharge from any branch of the armed services;

6. Obtaining or previously having held a license to carry a firearm in the Commonwealth or a locality thereof, unless such license has been revoked for cause;

7. Completing any firearms training or safety course or class conducted by a state-certified or National Rifle Association-certified firearms instructor;

8. Completing any governmental police agency firearms training course and qualifying to carry a firearm in the course of normal police duties; or

9. Completing any other firearms training that the Virginia Department of State Police deems adequate.

A photocopy of a certificate of completion of any such course or class, an affidavit from the instructor, school, club, organization, or group that conducted or taught such course or class attesting to the completion of the course or class by the applicant, or a copy of any document which shows completion of the course or class or evidences participation in firearms competition shall satisfy the requirement for demonstration of competence with a handgun.

The Department of State Police may charge a fee not to exceed \$100 to cover the cost of the background check and issuance of the permit. Any fees collected shall be deposited in a special account to be used to offset the costs of administering the nonresident concealed handgun permit program. The Department of State Police shall enter the permittee's name and description in the Virginia Criminal Information Network so that the permit's existence and current status are known to law-enforcement personnel accessing the Network for investigative purposes.

The permit to carry a concealed handgun shall contain only the following information: name, address, date of birth, gender, height, weight, color of hair, color of eyes, and photograph of the permittee; the signature of the Superintendent of the Virginia Department of State Police or his designee; the date of issuance; and the expiration date. The person to whom the permit is issued shall have such permit on his person at all times when he is carrying a concealed handgun in the Commonwealth and shall display the permit on demand by a law-enforcement officer.

The Superintendent of the State Police shall promulgate regulations, pursuant to the Administrative Process Act (§ 2.2-4000 et seq.), for the implementation of an application process for obtaining a nonresident concealed handgun permit.

Q. A valid concealed handgun permit issued by the State of Maryland shall be valid in the Commonwealth provided, (i) the holder of the permit is licensed in the State of Maryland to perform duties substantially similar to those performed by Virginia branch pilots licensed pursuant to Chapter 9 (§ 54.1-900 et seq.) of Title 54.1 and is performing such duties while in the Commonwealth, and (ii) the holder of the permit is 21 years of age or older.

R. For the purposes of participation in concealed handgun reciprocity agreements with other jurisdictions, the official government-issued law-enforcement identification card issued to an active-duty law-enforcement officer in the Commonwealth who is exempt from obtaining a concealed handgun permit under this section shall be deemed a concealed handgun permit.

S. For the purposes of understanding the law relating to the use of deadly and lethal force, the Department of State Police, in consultation with the Supreme Court on the development of the application for a concealed handgun permit under this section, shall include a reference to the Virginia Supreme Court website address or the Virginia Reports on the application.

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APPENDIX B

TRAINING/EDUCATIONAL PRESENTATIONS

An important aspect of the Council's work involves efforts to educate citizens, government officials, and media representatives by means of seminars, workshops, and various other public presentations.

From December 1, 2006 through December 1, 2007, Council staff conducted 77 training seminars, which are listed below in chronological order identifying the group/agency requesting the training.

December 1, 2006	Commonwealth's Attorneys' Services Council Richmond, Virginia
December 5, 2006	Permit Technician Course Department of Housing and Community Development Richmond, Virginia
December 6, 2006	Public Defenders, Indigent Defense Commission Henrico County, Virginia
December 7, 2006	Norfolk State University Norfolk, Virginia
	Managing Jail Risk Conference State Compensation Board Richmond, Virginia
December 18, 2006	Russian Intern Orientation Senate of Virginia Richmond, Virginia
January 15, 2007	Radio Interview Richmond, Virginia
January 16, 2007	ARMA International, Tidewater Chapter Williamsburg, Virginia
January 17, 2007	Virginia Electoral Board Association Richmond, Virginia

February 8, 2007	Cumberland County Administration Cumberland County, Virginia
February 22, 2007	VITA First Responders Warrenton, Virginia
February 28, 2007	Arlington County Police Department Arlington, Virginia
March 6, 2007	Agency Heads, Secretariat of Health and Human Resources Richmond, Virginia
March 7, 2007	Virginia Municipal Clerks Association South Boston, Virginia
March 15, 2007	Town of Smithfield Smithfield, Virginia
March 16, 2007	City of Fairfax Fairfax, Virginia
March 20, 2007	Commonwealth's Attorneys' Services Council Williamsburg, Virginia
March 21, 2007	City of Suffolk Suffolk, Virginia
March 27, 2007	Virginia Rural Water Association Roanoke, Virginia
March 28, 2007	Office of the Lieutenant Governor Richmond, Virginia
April 11, 2007	Commonwealth Management Institute Virginia Commonwealth University Williamsburg, Virginia
April 12, 2007	James City County and City of Williamsburg Public Schools Williamsburg, Virginia
April 16, 2007	Treasurer's Association of Virginia Regional Conference Fredericksburg, Virginia

April 17, 2007	Treasurer's Association of Virginia Regional Conference Portsmouth, Virginia
	City of Suffolk Suffolk, Virginia
April 18, 2007	Northampton County Northampton, Virginia
April 23, 2007	Northern Virginia Regional Commission Fairfax, Virginia
April 26, 2007	Virginia Sheriff's Association Hampton, Virginia
April 30, 2007	Department of Forestry Charlottesville, Virginia
	Virginia Building and Code Officials 2007 Mid-Year Meeting Charlottesville, Virginia
May 11, 2007	Virginia Association of Elementary School Principals Roanoke, Virginia
May 15, 2007	Longwood University Farmville, Virginia
	Prince Edward County Farmville, Virginia
May 16, 2007	New Constitutional Officer Training Compensation Board Roanoke, Virginia
	City of Roanoke Roanoke, Virginia
May 18, 2007	New Constitutional Officer Training Compensation Board Richmond, Virginia
May 22, 2007	Communications Law Class

	Virginia Commonwealth University Richmond, Virginia
May 23, 2007	City of Suffolk, Suffolk, Virginia
May 31, 2007	City of Roanoke Roanoke, Virginia
June 4, 2007	City of Manassas and Manassas City Council Manassas, Virginia
June 6, 2007	Commonwealth Management Institute Virginia Commonwealth University Charlottesville, Virginia
June 11, 2007	2007 FOIA Workshop Wise, Virginia
June 12, 2007	2007 FOIA Workshop Danville, Virginia
June 13, 2007	2007 FOIA Workshop Staunton, Virginia
June 14, 2007	2007 FOIA Workshop Manassas, Virginia
June 19, 2007	Virginia Government Communicators Annual Conference Williamsburg, Virginia
June 20, 2007	2007 FOIA Workshop Norfolk, Virginia
June 21, 2007	2007 FOIA Workshop Richmond, Virginia
July 3, 2007	Department of Education Richmond, Virginia
July 10, 2007	Department of Housing and Community Development Richmond, Virginia

July 31, 2007	Fredericksburg Area Local Government Officials Fredericksburg, Virginia
August 6, 2007	Colonial Beach Public Schools Montross, Virginia Charlottesville City Schools Charlottesville, Virginia
August 8, 2007	City of Winchester Winchester, Virginia Town of Purcellville Purcellville, Virginia
August 10, 2007	Virginia Municipal League and Virginia Association of Counties Leadership Conference Richmond, Virginia
August 13, 2007	Department of General Services Richmond, Virginia
August 15, 2007	Hampton Roads Media Council Newport News, Virginia
August 16, 2007	City of Newport News Newport News, Virginia
August 23, 2007	Department of General Services Richmond, Virginia
September 5, 2007	Prince William County Department of Public Works Manassas, Virginia
September 13, 2007	Fairfax County Department of Public Safety Communications Fairfax, Virginia
September 20, 2007	Virginia Press Association Richmond, Virginia
October 4, 2007	Commonwealth Management Institute

Virginia Commonwealth University
Williamsburg, Virginia

Virginia Municipal Clerks Association
Virginia Beach, Virginia

October 5, 2007

Department of Education
Richmond, Virginia

October 9, 2007

WWBT Channel 12 Richmond
Richmond, Virginia

October 10, 2007

Managing Jail Risk Conference
State Compensation Board
Lynchburg, Virginia

October 16, 2007

Virginia Municipal League
2007 Annual Conference
Williamsburg, Virginia

October 17, 2007

Prince William County Management Staff
Prince William, Virginia

October 19, 2007

Department of Social Services
Office on Volunteerism and Community
Service
Richmond, Virginia

October 31, 2007

Commonwealth Management Institute
Virginia Commonwealth University
Virginia Beach, Virginia

November 1, 2007

Virginia Correctional Association and
Virginia Probation and Parole Association
2007 Annual Training Conference
Roanoke, Virginia

November 7, 2007

Franklin County
Rocky Mount, Virginia

November 14, 2007

Department of Rail and Public
Transportation
Richmond, Virginia

November 15, 2007

American Society for Public
Administration

Hampton Roads Chapter
Chesapeake, Virginia

Virginia Sheriff's Association
New Sheriff Orientation School
Richmond, Virginia

November 28, 2007

Permit Technician Course
Department of Housing and Community
Development
Richmond, Virginia

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APPENDIX C

INDEX OF WRITTEN ADVISORY OPINIONS December 1, 2006 through December 1, 2007

<u>Opinion No.</u>	<u>Issue(s)</u>
<hr/>	
January	
<hr/>	
<u>AO-01-07</u>	The closed meeting exemption for consultation with counsel regarding specific legal matters may not be used for the purpose of discussing a general policy in the absence of any specific legal transaction or dispute.
<hr/>	
March	
<hr/>	
<u>AO-02-07</u>	A public body may charge for the actual cost of staff time spent redacting records in response to a request. It may not charge any additional fee for a separate legal review of the same records.
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<u>AO-03-07</u>	An electronic mail message header showing the time and date when the message was received by a public body may not be withheld as <i>documentation or other information that describes the design, function, operation or access control features of any security system</i> under subdivision 3 of § 2.2-3705.2.
<hr/>	
<u>AO-04-07</u>	The authority of the FOIA Council is limited by statute to providing advisory opinions and guidance regarding FOIA. An opinion advising on the interaction of boat titling and registration laws with provisions of the Government Data Collections and Dissemination Practices Act would be beyond the authority of this office.
<hr/>	
May	
<hr/>	
<u>AO-05-07</u>	The student government of a public institution of higher education is a public body subject to FOIA. The branches of student government are analogous to the organization of government generally (i.e., legislative, executive, and judicial).

June

[AO-06-07](#)

Meetings must be noticed for the time when they actually begin. A public body must approve by vote in an open meeting a motion to convene a closed meeting, and must certify the closed meeting after reconvening in open session. The motion and certification must be included in the meeting minutes, along with records of the votes taken to approve the motion and certification.

July

[AO-07-07](#)

A center for independent living that receives 93% of its funding from public sources is a public body subject to FOIA.

[AO-08-07](#)

FOIA requires public notice to be given when a public body holds a public meeting. Failure to give the required notice is a violation of FOIA.

[AO-09-07](#)

FOIA allows a public body to charge for existing records. FOIA does not address what a public body may charge for additional access features beyond inspection and copying of existing records.

[AO-10-07](#)

Determining whether an entity is a public body as a *committee, subcommittee, or other entity however designated of a public body* depends on how the entity was formed and what functions it performs.

October

[AO-11-07](#)

A citizen advisory committee created by a constitutional officer is not itself a public body subject to FOIA. Records concerning such a committee in the possession of the constitutional officer are public records subject to FOIA.

[AO-12-07](#)

If a public body denies a request for public records in whole or part, it must send the requester a written response citing the law that allows the records to be withheld. The release of certain Department of Social Services records pertaining to child support enforcement matters is prohibited by law under Title 63.2 of the Code of Virginia.

AO-13-07

FOIA allows public bodies to hold closed meetings to discuss the acquisition of real property if holding the discussion *in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body*. Absent such jeopardy to the public body's bargaining position or negotiating strategy, these discussions must be open.

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APPENDIX D

2007 Meetings of the Freedom of Information Advisory Council

Monday, March 19, 2007

House Room D, General Assembly Building, Richmond

Recap of FOIA and Related Access Bills from 2007 Session of General Assembly. Creation/continuation of subcommittees to study Electronic Meetings and Personal Identifying Information in response to 12 bills referred to the FOIA Council by the General Assembly. Public comment and staff presentation regarding the publication online of a statewide list of concealed carry handgun permittees by the Roanoke Times; topic added for consideration by Personal Identifying Information Subcommittee. Statewide FOIA seminars to be held in June, 2007. Update on number of inquiries to Council for advisory opinions (oral and written).

Thursday, June 7, 2007

House Room D, General Assembly Building, Richmond

Resolution presented to Nolan Yelich, Librarian of Virginia and FOIA Council member, commending his public service on the occasion of his retirement effective July 1, 2007. Progress reports from Electronic Meetings and Personal Identifying Information Subcommittees. Update regarding statewide FOIA seminars to be held in June, 2007. Report on Sunshine Week-- Ginger Stanley, Virginia Press Association, and Barrett Hardiman, Virginia Association of Broadcasters. Frosty Landon, Executive Director of the Virginia Coalition for Open Government, announces his retirement.

Monday, September 10, 2007

House Room D, General Assembly Building, Richmond

Welcome Dr. Sandra G. Treadway, Librarian of Virginia. Progress reports from Electronic Meetings and Personal Identifying Information Subcommittees. Rob Lockridge, University of Virginia, presents proposed draft exemption for certain donor records.

Monday, December 3, 2007

House Room D, General Assembly Building, Richmond

Annual legislative preview: Rob Lockridge, University of Virginia - donor records exemption; Keith Martin, Department of Transportation -exemption for proprietary records submitted during audits or special investigations; William Watt, Department of Treasury - exemption for local government investment pools; James G. Council, Virginia Residential Psychiatric Treatment Association - exemption for financial records of children's residential treatment facilities; Marc Follmer, Office of Commonwealth Preparedness - records and meetings exemptions related to military base closure or realignment in Virginia; Craig Fifer, City of Alexandria - exemption for wireless service franchises. Final reports from Electronic Meeting Subcommittee and Personal Identifying Information Subcommittee. Review and adoption of

subcommittee-recommended legislative draft proposals. Update regarding HB 2558 (Brink), concerning a FOIA exemption relating to rabies certificates and dog license applications. Presentation of draft annual report. Presentation of national survey by Better Government Association and National Freedom of Information Coalition.

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APPENDIX E

Status of Freedom of Information and Other Related Access Bills Considered by the 2007 General Assembly

2007 FOIA LEGISLATIVE UPDATE

NOTE: *Unless otherwise stated, the changes in the law described herein will take effect July 1, 2007.*

I. Introduction

The General Assembly passed a total of 19 bills amending the Virginia Freedom of Information Act (FOIA) in 2007. Four of the 19 bills were recommended by the Freedom of Information Advisory Council: HB 1791 (Griffith), adding an additional response to address situations when a public body receives a request for public records under FOIA but cannot find the requested records or the requested records do not exist; SB 1001 (Houck), addressing various provisions regarding electronic communication meetings; SB 1002 (Houck), concerning the release of certain records under the Public-Private Transportation Act of 1995 (PPTA) and the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA); and SB 1003 (Houck), concerning the venue for FOIA enforcement actions.

Of the 19 bills, four bills created three new record exemptions to FOIA:

- Two bills add an identical exemption regarding the identities of persons designated to conduct executions (HB 2418 and SB 1295);
- Adds an exemption for certain information contained in rabies vaccination certificates provided to local treasurers; this bill was passed with a one-year sunset clause, and was referred to the FOIA Council for study (HB 2558);
- Adds an exemption for certain records held by the Virginia Retirement System (VRS) or local retirement systems; effective March 21, 2007 (SB 1369).

Only one bill adds a new closed meeting exemption to § 2.2-3711:

- SB 1369, mentioned above, also adds a meetings exemption to correspond to the record exemption it provides for certain records held by the Virginia Retirement System (VRS) or local retirement systems.

Fifteen bills amend existing provisions of FOIA:

- Provides that FOIA does not afford any rights to persons civilly committed pursuant to the Sexually Violent Predators Act, except in exercising their constitutionally protected rights (HB 1790 amending § 2.2-3703);

- Adds an additional response to address situations when a public body receives a request for public records under FOIA but cannot find the requested records or the requested records do not exist (HB 1791 amending § 2.2-3704);
- Two identical bills provide that FOIA does not apply to land records available via secure remote access, in addition to making various related changes to laws outside of FOIA (HB 2062 and SB 824 amending § 2.2-3703);
- Expands the current record exemption for state or local park and recreation departments to include local and regional park authorities (HB 2259 amending § 2.2-3705.7);
- Allows state public bodies to hold electronic meetings without a physically assembled quorum under certain conditions when the Governor has declared a state of emergency (HB 2669 amending § 2.2-3708);
- Clarifies where meeting notices and minutes of state public bodies must be posted (HB 2758 amending §§ 2.2-3707 and 2.2-3707.1);
- Makes numerous technical changes throughout the Code to update standard nomenclature for community probation services.²⁶ (HB 2858 amending §§ 2.2-3706 and 2.2-3711)
- Technical amendment to an existing records exemption for the Department of Environmental Quality and other related entities corresponding to the reorganization of those entities; not effective until July 1, 2008 (HB 3113 and SB 1403 amending § 2.2-3705.7);
- Amends an existing proprietary records exemption to include such records held by a nonprofit, nonstock corporation created by the Virginia Economic Development Partnership Authority. (HB 3171 amending § 2.2-3705.6);
- Various amendments relaxing certain requirements for electronic communications meetings and adding relevant definitions (SB 1001 amending §§ 2.2-3701 and 2.2-3708);
- Amends an existing exemption for certain records under the PPTA (Public-Private Transportation Act of 1995) and PPEA (Private Education Facilities and Infrastructure Act of 2002)(SB 1002 amending § 2.2-3705.6);
- Clarifies the venue provisions for bringing a petition to enforce FOIA (SB 1003 amending § 2.2-3713);
- Amends an existing closed meeting exemption to allow the discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure (SB 1111 amending § 2.2-3711).

Section II of this update presents a brief overview of amendments to FOIA section by section in order to provide context and organization to the numerous bills. Section III presents a brief overview of other access-related legislation passed during the 2007 Session of the General Assembly.

²⁶ Note that this bill effectively removes the exemption for closed meetings of community corrections resources boards regarding the placement of certain individuals in community diversion programs, currently subdivision A 18 of § 2.2-3711. Our understanding is that because of organizational changes outside of FOIA, these community diversion programs no longer exist, rendering the exemption moot.

For more specific information on the particulars of each bill, please see the bill itself. Unless otherwise indicated, the changes will become effective July 1, 2007.

II. Amendments to the Freedom of Information Act

§ 2.2-3701. Definitions.

Adds definition of "electronic communications" and "regional public body" to § 2.2-3701, in addition to changes to the procedural requirements for electronic communication meetings made in § 2.2-3708. SB 1001 (2007 Acts of Assembly, c. 945)

§ 2.2-3703. Public bodies and records to which chapter inapplicable; voter registration and election records; access by persons incarcerated in a state, local, or federal correctional facility.

Provides that FOIA does not afford any rights to persons civilly committed pursuant to the Sexually Violent Predators Act, except in exercising their constitutionally protected rights. HB 1790 (2007 Acts of Assembly, c. 438)

In addition to changes outside of FOIA regarding certain records held by clerks of court, provides that FOIA does not apply to land records available via secure remote access. HB 2062 (2007 Acts of Assembly, c. 626), SB 824 (2007 Acts of Assembly, c. 548)

§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and responding to request; charges.

Adds an additional response to address situations when a public body receives a request for public records under FOIA but cannot find the requested records or the requested records do not exist. The bill also clarifies the other responses to requests for public records under FOIA. The bill also contains technical amendments. HB 1791 (2007 Acts of Assembly, c. 439)

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

Amends an existing proprietary records exemption to include such records held by a nonprofit, nonstock corporation created by the Virginia Economic Development Partnership Authority pursuant to § 2.2-2240.1. HB 3171 (2007 Acts of Assembly, c. 693)

Amends existing subdivision 11 of § 2.2-3705.6 to allow memoranda, staff evaluations, or other records prepared by the responsible public entity, its staff,

outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the PPTA and PPEA to be withheld from public disclosure, where if such records were made public prior to or after the execution an interim or a comprehensive agreement, the financial interest or bargaining position of the public entity would be adversely affected. Also provides a meeting exemption in § 2.2-3711 and contains technical amendments. SB 1002 (2007 Acts of Assembly, c. 374)

§ 2.2-3705.7. Exclusions to application of chapter; records of specific public bodies and certain other limited exemptions.

Amends the current record exemption for state or local park and recreation departments to include local and regional park authorities. HB 2259 (2007 Acts of Assembly, c. 406)

Adds an exemption that provides that the identities of persons designated by the Director to conduct an execution shall be exempt from FOIA, and shall not be subject to discovery or introduction as evidence in any civil proceeding, unless good cause is shown. HB 2418 (2007 Acts of Assembly, c. 652), SB 1295 (2007 Acts of Assembly, c. 737)

Adds an exemption for the identification of the breed of a vaccinated animal and any personal identifying information relating to the animal owner that is not made a part of an animal license application. This bill was passed with a one-year sunset provision such that it expires July 1, 2008, and was referred to the FOIA Council for a one-year study. HB 2558 (2007 Acts of Assembly, c. 660)

Consolidates the State Air Pollution Control Board, the State Water Control Board, and the Waste Management Board into one eleven-member citizen board--the Virginia Board of Environmental Quality--with the authority to adopt regulations, including general permit regulations. All other responsibilities of the existing boards, including the authority to issue licenses and permits, shall be transferred to the Department of Environmental Quality. Contains a technical amendment to the existing exemption in subdivision 16 of § 2.2-3705.7 to correspond to these changes. The bill includes a "re-enactment clause" that requires the General Assembly of 2008 to reaffirm the legislation and delays the effective date until July 1, 2008. HB 3113 (2007 Acts of Assembly, c. 838), SB 1403 (2007 Acts of Assembly, c. 841)

Adds an exemption for the Virginia Retirement System (VRS) and a local retirement system for trade secrets provided by a private entity to the extent that the disclosure of such records would have an adverse impact on the financial interest of the VRS or local retirement system. Also adds a corresponding closed meeting exemption to § 2.2-3711. Passed with an emergency enactment clause effective March 21, 2007. SB 1369 (2007 Acts of Assembly, c. 739)

§ 2.2-3706. Disclosure of criminal records; limitations.

Makes numerous technical changes throughout the Code to update standard nomenclature for community probation services, including changes in §§ 2.2-3706 and 2.2-3711 of FOIA. HB 2858 (2007 Acts of Assembly, c. 133)

§ 2.2-3707. Meetings to be public; notice of meetings; recordings; minutes.

Clarifies that meeting notices of state public bodies must be posted on the Commonwealth Calendar website. HB 2758 (2007 Acts of Assembly, c. 300)

§ 2.2-3707.1. Posting of minutes for state boards and commissions.

Clarifies that the minutes of certain state public bodies must be posted on the Commonwealth Calendar website. HB 2758 (2007 Acts of Assembly, c. 300)

§ 2.2-3708. Electronic communication meetings.

Allows state public bodies to meet by electronic communication means without a quorum of the public body physically assembled at one location when (i) the Governor has declared a state of emergency in accordance with § 44-146.17, (ii) the meeting is necessary to take action to address the emergency, and (iii) the public body otherwise complies with the electronic communication meetings law. HB 2669 (2007 Acts of Assembly, c. 512)

Reduces the notice requirement for electronic communication meetings from seven to three working days and clarifies that political subdivisions, other than units of local government, may conduct electronic communication meetings. The bill also allows an individual member of a public body to participate in a meeting through electronic communication means from a remote location that is not open to the public in the event of an emergency, temporary or permanent disability or other medical condition, or when a member of a regional public body's principal residence is more than 60 miles from the primary meeting location. For a member to participate in the above described manner, the bill requires that a quorum of the public body be physically assembled at the primary or central meeting location and that the public body make arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location. Also adds definitions to § 2.2-3701 and contains technical amendments. SB 1001 (2007 Acts of Assembly, c. 374)

§ 2.2-3711. Closed meetings authorized for certain limited purposes.

Makes numerous technical changes throughout the Code to update standard nomenclature for community probation services, including changes in §§ 2.2-3706 and 2.2-3711 of FOIA. HB 2858 (2007 Acts of Assembly, c. 133)

Amends existing subdivision A 29 of § 2.2-3711 to allow any independent review panel appointed to review PPTA proposals and advise the responsible public entity

concerning such records to meet in a closed meeting. Also amends a record exemption in § 2.2-3705.6 and contains technical amendments. SB 1002 (2007 Acts of Assembly, c. 945)

Amends existing subdivision A 20 of § 2.2-3711 to add a closed meeting exemption for the discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure. SB 1111 (2007 Acts of Assembly, c. 566)

Adds a closed meeting exemption for the Board of Trustees of VRS, the Investment Advisory Committee, and local retirement systems corresponding to the records exemption added to § 2.2-3705.6 (see above). Effective March 21, 2007. SB 1369 (2007 Acts of Assembly, c. 739)

§ 2.2-3713. Proceedings for enforcement of chapter.

Clarifies that venue for the enforcement of FOIA rights and privileges against state public bodies, including state institutions, may be brought in general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond. SB 1003 (2007 Acts of Assembly, c. 560)

III. Other Access-Related Legislation

Title 2.2 Administration of Government

Government Data Collection and Dissemination Practices Act; rights of data subjects. Requires agencies covered by the Government Data Collection and Dissemination Practices Act to respond to a data subject for inspection of his record in five working days after receiving the request or within a time period as may be mutually agreed upon by the agency and the data subject. The bill references the pertinent section of the Virginia Freedom of Information Act (FOIA) so as to treat requests made under the Government Data Collection and Dissemination Practices Act in the same manner as requests under FOIA, in terms of response time and invoking applicable exemptions, etc. The bill also clarifies that charges for document production shall be in accordance with FOIA provisions.²⁷ HB 2527 (2007 Acts of Assembly, c. 232)

Security of confidential state data. Requires the Chief Information Officer of the Commonwealth to develop policies, procedures, and standards relating to the security data maintained and used by state agencies.²⁸ SB 845 (2007 Acts of Assembly, c. 769)

²⁷ Amends § 2.2-3806.

²⁸ Amends §§ 2.2-2006 and 2.2-2009.

Address Confidentiality Program; victims of domestic violence. Requires the Statewide Facilitator for Victims of Domestic Violence in the Office of the Attorney General to establish the "Address Confidentiality Program" to protect victims of domestic violence by authorizing the use of designated addresses for such victims. The bill limits its application to Arlington County with a report from the Office of the Attorney General on evaluation of the program by December 31, 2007.²⁹ SB 938 (2007 Acts of Assembly, c. 599)

State and Local Government Conflict of Interests Act. Provides that if the disqualification of a state or local government officer or employee who has a personal interest in a transaction leaves fewer than the number required by law to act, the remaining member or members shall constitute a quorum for the conduct of business and have authority to act for the agency by majority vote.³⁰ SB 1400 (2007 Acts of Assembly, c. 613)

Title 8.01 Civil Remedies and Procedure.

Privileged communications; physician peer review and physician accreditation entities. Clarifies that privilege attaches to the proceedings, minutes, records, and reports of a quality assurance, quality of care, or peer review committee of a national or state physician peer review entity or physician accreditation entity.³¹ fHB 3090 (2007 Acts of Assembly, c. 530)

Title 15.2 Counties, Cities, and Towns.

Traffic signal enforcement programs; civil penalty. Grants localities the authority to operate traffic signal enforcement systems. Among other provisions, limits the use and retention of images recorded and provides other parameters and limitations for localities.³² SB 829 (2007 Acts of Assembly, c. 903)

Title 18.2 Crimes and Offenses Generally.

Public records; protection of law-enforcement officers; penalty. Includes identification of the person's primary residence address in the statute prohibiting the publishing of a person's name or photograph as well as their identifying information. Also states that if any person violates the statute (§ 18.2-186.3), and he knew or had reason to know that the person he was identifying was a law-enforcement officer, then he is guilty of a Class 6 felony instead of a Class 1 misdemeanor.³³ SB 1282 (2007 Acts of Assembly, c. 736)

Title 22.1 Education.

²⁹ Amends § 2.2-515.1; adds new § 2.2-515.2.

³⁰ Amends §§ 2.2-3112 and 15.2-1415.

³¹ Amends § 8.01-581.17.

³² Adds new § 15.2-968.1.

³³ Amends § 18.2-186.4.

School crisis, emergency management, and medical emergency response plans. Requires that local school boards annually review the written school crisis, emergency management, and medical emergency response plans and that the local division certify that review in writing to the Virginia Center on School Safety no later than August 31 of each year. Provides that local school boards have the authority to withhold or limit the review of any security plans and specific vulnerability assessment components as provided in subdivision 7 of § 2.2-3705.2.³⁴ HB 2271 (2007 Acts of Assembly, c. 44)

Standards of Quality; changes in provisions. Among other changes, requires local school divisions to post a current copy of the school division policies, including the Student Conduct Policy, on the local division's website while ensuring that printed copies of such policies are available, as needed, to citizens who do not have Internet access.³⁵ SB 795 (2007 Acts of Assembly, c. 234)

Title 24.2 Elections.

Elections; voter registration records. Clarifies the duties of local electoral boards, general registrars, and the State Board of Elections regarding voter registration records and exceptions from public inspection. Requires State Board to provide general registrars with lists of registered voters and persons denied registration for public inspection.³⁶ HB 1642 (2007 Acts of Assembly, c.311)

Elections; voter registration records; authorize matching with lists of other states; State Board of Elections to develop security policies and make annual report. Authorizes the State Board of Elections to furnish voter lists to other states with protections for privacy of voter social security numbers. Authorizes cancellation of voter registration based on information from registration officials of other states. Makes conforming changes to sections referring to social security numbers to prohibit disclosure of parts of numbers. Requires State Board of Elections to (i) approve security procedures for transmitting voter lists to other states' Chief Election Officers, and (ii) monitor implementation with annual statistical reporting to the General Assembly starting July 1, 2008.³⁷ HB 2141 (2007 Acts of Assembly, c. 318)

Title 30 General Assembly.

Public-Private Partnership Advisory Commission. Establishes the Public-Private Partnership Advisory Commission to review and advise responsible public entities that are agencies or institutions of the Commonwealth on detailed proposals for qualifying projects under the Public-Private Education Facilities and Infrastructure

³⁴ Amends § 22.1-279.8.

³⁵ Amends §§ 22.1-253.13:1 and 22.1-253.13:3 through 22.1-253.13:7.

³⁶ Amends §§ 24.2-101, 24.2-107, 24.2-442, 24.2-443.3, and 24.2-444.

³⁷ Amends §§ 24.2-107, 24.2-405, 24.2-406, 24.2-407.1, 24.2-411.1, 24.2-411.2, 24.2-416.5, 24.2-427, 24.2-444, 24.2-533, 24.2-706, and 24.2-1002.1.

Act of 2002 (§ 56-575.1 et seq.). Adds section stating that records and information afforded the protection under subdivision 11 of § 2.2-3705.6 that are provided by a responsible public entity to the Commission shall continue to be protected from disclosure when in the possession of the Commission.³⁸ SB 756 (2007 Acts of Assembly, c. 764)

Title 32.1 Health.

Medical Examiner's reports and findings. Requires that all Medical Examiner's reports shall be confidential and not available for discovery except as provided and creates additional exceptions for reports concerning the death of a prisoner committed to the custody of any local correctional facility. The bill also eliminates allowance for any form of disclosure other than aggregate or statistical form of disclosure.³⁹ HB 2393 (2007 Acts of Assembly, c. 868)

Child Fatality Review Team to obtain presentence reports. Authorizes the Chief Medical Examiner to obtain and review presentence reports of any person convicted of a crime that led to the death of a child investigated by the Child Fatality Review Team.⁴⁰ HB 2523 (2007 Acts of Assembly, c. 411)

Human research review committees; publication of results. Provides that each human research review committee of an institution or agency shall ensure that the approved human research projects and the results of such projects are made public on the institution's or agency's website unless otherwise exempt from disclosure under the Virginia Freedom of Information Act.⁴¹ HB 2567 (2007 Acts of Assembly, c. 413)

Title 37.2 Mental Health, Mental Retardation and Substance Abuse Services.

Sexually violent predators; civil commitment. Among numerous other provisions, grants access to a variety of records to the Department of Mental Health, the CRC, and the Department of Corrections and provides that the existence of prior convictions or charges may be shown with affidavits or documentary evidence at the probable cause hearing.⁴² HB 2671 (2007 Acts of Assembly, c. 876)

Title 42.1 Libraries.

Technology protection measures; public libraries. Contains provisions regarding limitations on access to child pornography, obscenity, and materials deemed harmful to minors through library computers.⁴³ SB 1393 (2007 Acts of Assembly, c. 583)

³⁸ Amends §§ 56-575.1, 56-575.3:1, 56-575.4, and 56-575.16; adds new §§ 30-278 through 30-281 and 56-575.18.

³⁹ Amends §§ 32.1-283 and 32.1-283.4.

⁴⁰ Amends § 32.1-283.1.

⁴¹ Amends § 32.1-162.19.

⁴² Amends §§ 19.2-169.3, 37.2-900, 37.2-901 through 37.2-905, 37.2-906, 37.2-907, 37.2-908, 37.2-910, and 37.2-912 ; adds new §§ 37.2-905.1 and 37.2-905.2.

⁴³ Amends § 42.1-36.1.

Title 45.1 Mines and Mining.

Coal miner certification and mine safety. Provides for the confidentiality of certain records and meetings regarding substance abuse test results of certified persons.⁴⁴ HB 3190 (2007 Acts of Assembly, c. 894), SB 1091 (2007 Acts of Assembly, c. 914)

Title 46.2 Motor Vehicles.

Regulation of taxicab service by localities; public access to financial records.

Provides that financial data collected by local governing bodies shall be used only for consideration of rates or charges, or to determine financial responsibility, and shall be kept confidential by the governing body. The bill provides, however, that any certificate of insurance, bond, letter of credit, or other certification that the owner or operator has met the requirements of this chapter or of any local ordinance with regard to financial responsibility is not confidential.⁴⁵ SB 1000 (2007 Acts of Assembly, c. 238)

Title 51.5 Persons with Disabilities.

Brain and spinal cord injury registry. Specifies that the registry shall include all brain and spinal cord injuries, regardless of severity, and updates the language relating to research on human subjects to be consistent with state and federal law. The bill also exempts physicians from the reporting requirement, and changes the timeline for reporting to within 30 days of identification for spinal cord injuries, to be consistent with the requirement for brain injuries.⁴⁶ HB 2732 (2007 Acts of Assembly, c. 666)

Title 54.1 Professions and Occupations.

Board of Medicine; disciplinary procedure. Among other related provisions, requires the Board of Medicine to make available via any department website information regarding any final orders together with any associated notices which impose disciplinary action against a licensee of the Board.⁴⁷ HB 2157 (2007 Acts of Assembly, c. 861)

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⁴⁴ Amends §§ 45.1-161.31, 45.1-161.32, 45.1-161.35, 45.1-161.37, 45.1-161.39, 45.1-161.64, 45.1-161.76, 45.1-161.78, 45.1-161.87, and 45.1-161.257.

⁴⁵ Amends § 46.2-2062.

⁴⁶ Amends § 51.5-11.

⁴⁷ Amends §§ 54.1-2900, 54.1-2910.1, and 54.1-2912.3; adds new § 54.1-2910.2.

APPENDIX F

Breakdown of Inquiries to Council December 2006 through November 2007

The Council offers FOIA guidance to the public, representatives and employees of state and local government, and members of the news media. The Council issues both formal, written opinions as well as more informal opinions via the telephone or e-mail. At the direction of the Council, the staff has kept logs of all FOIA inquiries. In an effort to identify the users of the Council's services, the logs characterize callers as members of state government, local government, law enforcement, media, citizens, or out-of-state callers. The logs help to keep track of the general types of questions posed to the Council and are also invaluable to the Council in rendering consistent opinions and monitoring its efficiency in responding to inquiries. All opinions, whether written or verbal, are based on the facts and information provided to the Council by the person requesting the opinion. During this reporting period, the Council has answered a broad spectrum of questions about FOIA. This appendix provides a general breakdown of the type and number of issues raised by the inquiries received by the Council.

Time period: December 1, 2006 through November 30, 2007

Total number of inquiries: 1708

I. Who Made Inquiries of the FOIA Council

A. REQUESTS FOR WRITTEN ADVISORY OPINIONS:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Federal Government	0	0	0	0	0	0	0	0	0	0	0	0	0
State Government	0	0	0	0	0	0	0	0	0	0	0	0	0
Local Government	0	0	0	1	0	0	0	1	0	0	0	0	2
Law Enforcement	0	0	0	0	0	0	0	0	0	0	0	0	0

A. REQUESTS FOR WRITTEN ADVISORY OPINIONS: (Con't)

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Citizens of the Commonwealth	0	0	0	2	0	0	1	1	0	0	3	0	7
Members of the News Media	0	1	0	0	0	1	0	1	0	0	0	0	3
Out-of State	0	0	0	0	0	0	0	1	0	0	0	0	1
TOTAL	0	1	0	3	0	1	1	4	0	0	3	0	13

B. TELEPHONE & EMAIL INQUIRIES:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Federal Government	0	1	0	0	0	0	0	1	0	0	0	0	2
State Government	23	34	30	46	42	29	27	41	20	18	27	16	353
Local Government	25	43	23	61	33	37	27	38	47	26	39	22	421
Law Enforcement	3	6	4	10	9	5	5	10	4	7	6	9	78
Citizens of the Commonwealth	44	74	69	70	65	56	33	53	36	47	38	43	628
Members of the News Media	8	14	11	18	10	19	15	16	18	9	16	13	167
Out-of State	1	10	3	4	5	3	7	1	5	3	2	2	46
TOTAL	104	182	140	209	164	149	114	160	130	110	128	105	1695

II. Types of Inquiries Received

A. RECORDS INQUIRIES:

1. Inquiries regarding FOIA procedures for records requests:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Making a request (i.e. how to make a request, who may request records, custodian of record, etc.)	10	21	8	14	16	13	7	17	13	19	10	8	156
Responding to a request (i.e. response time, appropriate response, FOIA applies to existing records, etc.)	14	20	21	26	28	18	15	19	18	17	16	17	229
Charges for records	7	7	12	10	8	9	5	12	8	6	6	3	93
Definition of "public records"	1	9	4	9	6	5	3	9	5	5	10	7	73
Format of records	1	3	0	2	2	1	0	1	0	2	0	0	12
Other inquiries regarding FOIA procedure for records requests	1	1	0	2	0	0	4	1	0	3	1	2	15
SUBTOTAL	34	61	45	63	60	46	34	59	44	52	43	37	578

II. Types of Inquiries Received (Con't)

2. Inquiries regarding specific types of records or exemptions:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Draft records	0	0	0	0	0	0	0	0	1	1	0	0	2
E-mail as a public record	4	1	1	3	2	2	1	3	1	0	2	1	21
Court records	4	0	2	2	1	3	5	1	2	2	2	2	26
Personnel records (including access to salary & job position of public employees)	9	22	13	19	17	10	11	15	14	10	9	5	154
Licensing records exemption	0	1	3	0	0	3	1	0	14	0	0	0	22
Law enforcement records	6	15	15	13	19	11	11	24	2	12	13	12	153
Tax records exemption	0	2	2	3	3	1	3	4	1	2	2	2	25
Scholastic records exemption	0	1	3	5	2	4	1	2	0	0	0	0	18
Medical records exemption	0	2	1	1	1	3	1	1	4	5	0	2	21
Working papers exemption	4	3	7	7	2	4	0	3	3	0	1	1	35
Attorney/client privilege & work product exemptions	0	1	0	1	3	2	0	1	1	3	4	1	17
Terrorism & public safety	0	0	0	1	2	3	1	3	5	2	1	3	21
Procurement	2	6	3	7	5	6	6	4	17	0	3	3	62

2. Inquiries regarding specific types of records or exemptions: (Con't)

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Other inquiries regarding specific types of records or exemptions	5	14	8	18	14	16	9	12	0	10	13	5	124
SUBTOTAL	34	68	58	80	71	68	50	73	65	47	50	37	701

3. Total number of records-related inquiries:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
TOTAL	68	129	103	143	131	114	84	132	109	99	93	74	1279

B. MEETING INQUIRIES:

1. Inquiries regarding FOIA meeting procedures:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Definition of a "meeting"	6	7	8	10	2	1	4	10	4	3	3	4	62
Closed meeting procedure	2	3	3	7	6	4	4	4	1	3	5	3	45
Electronic meetings	0	2	3	5	4	2	6	4	3	3	4	1	37
Voting	2	0	0	1	1	2	2	3	0	3	2	1	17
Minutes	3	1	2	6	1	1	1	4	1	1	3	1	25
Chance meetings	0	1	1	0	0	0	0	0	0	0	2	0	4

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Agenda	0	0	0	1	1	0	0	0	0	1	1	0	4
Notice	2	0	3	5	0	5	2	4	3	0	6	1	31
Public Comment	0	0	1	0	0	0	0	1	0	1	3	0	6
Polling	0	0	0	0	0	0	0	0	0	0	0	0	0
Special & emergency meetings	0	0	0	0	0	0	0	0	0	0	0	0	0
Public forum	0	1	1	0	0	1	0	2	0	1	1	1	8
Agenda packets	1	0	1	3	1	0	0	0	2	2	0	0	10
Other inquiries regarding procedural matters	3	2	2	7	1	1	1	1	5	2	4	5	34
SUBTOTAL	19	17	25	45	17	17	20	33	19	20	34	17	283

2. Inquiries Regarding the Subject Matter of Meetings and Meeting Exemptions:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Personnel	3	2	1	3	4	2	2	1	1	1	1	2	23
Real Estate	0	0	1	1	0	1	1	0	1	1	2	0	8
Consultation with legal counsel	0	1	0	3	4	3	0	5	3	0	2	1	22
Scholastic	0	0	1	0	0	0	1	0	0	0	0	0	2
Terrorism & public safety	0	0	0	0	0	0	0	0	0	0	0	0	0
Other inquiries regarding subject-matter	2	2	1	4	4	1	1	4	0	0	0	0	19
SUBTOTAL	5	5	4	11	12	7	5	10	5	2	5	3	74

3. Total Number of Meetings-Related Inquiries:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
TOTAL	24	22	29	56	29	24	25	43	24	22	39	20	357

C. GENERAL INQUIRIES:

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Remedies	6	5	6	8	5	5	4	4	8	3	8	9	71
Definition of a public body	11	6	10	14	1	11	6	15	4	4	4	7	93
Role of FOIA Council	6	10	2	4	3	2	1	4	3	5	6	4	50
Privacy issues (GDCDPA)	0	0	0	2	2	0	0	1	1	0	0	2	8
Request for document review	0	1	0	0	0	0	1	0	0	0	1	0	3
Suggestions/ FYI	5	5	1	3	6	2	2	0	0	1	2	0	27
Request for FOIA Materials	2	9	4	7	1	6	3	2	3	3	6	3	49
Request for FOIA Training	0	5	8	2	7	9	6	6	1	3	4	1	52
Public Records Act	4	1	3	1	4	1	3	0	1	6	5	3	32
Outside scope of FOIA	11	15	10	18	9	3	6	10	11	9	13	13	128
Specific request for records held by other public bodies	0	3	2	3	4	1	2	1	1	8		4	29

C. GENERAL INQUIRIES: (Con't)

	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
FOIA Legislation	1	5	5	10	3	2	1	5	2	1	2	1	38
Other general inquiries	4	12	9	14	19	13	8	8	9	7	8	12	123
TOTAL	50	77	60	86	64	55	43	56	44	50	59	59	703

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APPENDIX G

**OPINIONS ISSUED BY THE FOIA COUNCIL
JULY 2000 THROUGH NOVEMBER 2007**

RAW DATA (NUMBER OF OPINIONS)

Written Advisory Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007
State Government	1	20	0	1	1	1	3	
Local Government	3		6	7	6	0	1	2
Law Enforcement	0	0	0	0	1	3		
Citizens of the Commonwealth	3	41	11	13	15	11	6	7
Members of the News Media	1	10	2	3	3	1		3
Out-of-state	0	0	0	0	0	0		1
TOTAL	8	71	19	24	26	16	10	13

Written Opinions Aggregated Categories:

	2000	2001	2002	2003	2004	2005	2006	2007
Government	4	20	6	8	8	4	4	2
Citizens	3	41	11	13	15	11	6	8
News Media	1	10	2	3	3	1	0	3

Telephone and E-mail Responses:

	2000	2001	2002	2003	2004	2005	2006	2007
State Government	20	275	161	200	230	360	408	353
Local Government	25		266	224	328	325	381	421
Federal Government	0	0	0	0	2	2	3	2
Law Enforcement	0	0	38	48	56	69	53	78
Citizens of the Commonwealth	43	324	339	313	397	627	611	628
Members of the News Media	21	169	165	198	145	209	232	167
Out-of-state	0	0	21	18	32	60	53	46
TOTAL	109	768	990	1001	1190	1652	1741	1695

Informal Opinions Aggregated Categories:

	2000	2001	2002	2003	2004	2005	2006	2007
Government	45	275	465	472	616	756	845	854
Public	43	324	360	331	429	687	664	674
News Media	21	169	165	198	145	209	232	167

NOTES:

- The 2000 and 2001 Annual Reports did not use the same categories as later years, and so those numbers may not correspond exactly to the numbers for later years (see the excerpts from the Annual Reports, below, for details.) In particular, these years did not list separate totals for federal government, law enforcement, and out-of-state inquiries.
- The 2000 reporting period was July 1, 2000 through November 30, 2000.

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APPENDIX H

Virginia Supreme Court Decision: Fenter v. Norfolk Airport Authority (September 14, 2007)⁴⁸

John Fenter, a citizen of Virginia, made multiple requests for records from the Norfolk Airport Authority (the Authority) concerning certain signs near the airport relating to vehicle searches. In response to two of his requests, the Authority referred Mr. Fenter to its attorney and indicated that it had referred his requests to the federal Transportation Safety Administration. The Court held that the Authority had violated the Freedom of Information Act (FOIA), as the responses given by the Authority did not correspond to any of the mandatory responses set forth in subsection B of § 2.2-3704. The Court also remanded the case for a determination of costs and attorney's fees to be awarded to Mr. Fenter.*

*It is significant to note that prior to filing suit, Mr. Fenter sought an advisory opinion from the Council, issued on May 25, 2006 (AO-05-06), which reached essentially the same conclusion as the Court that the Authority had failed to provide a proper response under FOIA. The Court in its opinion referenced AO-05-06.

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⁴⁸ 274 Va. 524, 649 S.E.2d 704.

APPENDIX I

As part of its contribution to commemorate Sunshine Week in 2007, the Council's executive director, Maria Everett wrote an op/ed piece about the importance of FOIA for the *Richmond Times Dispatch*, titled "All of Us Must Do Better," which appeared in the *Richmond Times Dispatch* on March 16, 2007, along with a positive editorial by the *Richmond Times Dispatch* about the work of the FOIA Council. Those articles are reprinted below with the permission of the *Richmond Times Dispatch*.

The FOIA Council
Friday, March 16, 2007
Richmond Times Dispatch
Edition: Final, Section: Editorial, Page A-14

Advocates of open government won major victories during the 2000 session of the General Assembly. First, legislators formed the Virginia Freedom of Information Advisory Council - which according to its 2006 annual report "was created as an advisory council in the legislative branch of state government to encourage and facilitate compliance with the Freedom of Information Act (FOIA)." Second, members named Maria Everett executive director of the council.

The commonwealth's FOIA stipulates that all public documents and public meetings are open to Virginia's citizens unless a specific exemption to openness exists. Determining what those exemptions cover doesn't always prove as easy as one might think. Everett and the FOIA Council attempt to head off any confusion so that the parties can avoid taking such matters to court. (Media General Chairman J. Stewart Bryan III serves the council.)

Here's how the process might work: If a local sheriff receives a request for document production but thinks a reason may exist to withhold the records, he can call one of the council's attorneys and ask for an opinion. Given the presumptive openness created by Virginia's FOIA - one of the nation's strongest - the records likely will have to be provided.

Often inquiries result in a determination from the FOIA Council within 24 hours, usually with just an informal communication. There were 1,751 opinions issued verbally or by e-mail 2006, as well as 10 formal written drafts. Anyone can ask the FOIA Council for an opinion - legislators, government employees, citizens, or members of the media. The office also heads out on the road frequently to offer open training sessions on Virginia's sunshine laws, and produces educational materials to keep government actors and members of the public up to date.

Everett, who discusses freedom of information on today's Op/Ed page, fills the role of Virginia's open-government czar perfectly. She is nonpartisan and has a knack for boiling down complicated scenarios into easy-to-understand explanations. Looking to simplify her message, Everett turns to a baseball analogy when educating officials about what they have to share after someone makes a FOIA request: When a citizen asks for something, it's on deck. The question is whether an exemption will return it to the bench. If there is no specific

exemption in the Code of Virginia, the materials must head out of the dugout - and that applies to records about everything from the Virginia Tech French Club to the Office of the Governor.

Given the valuable resources the FOIA Council provides to citizens and government alike, "I didn't know" is never an appropriate response when open-government laws are abused.

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All of Us Must Do Better
By Maria Everett

Friday, March 16, 2007
Richmond Times Dispatch
Edition: Final, Section: Editorial, Page A-15

The Virginia Freedom of Information Advisory Council, a state agency, was established in July 2000. I have had the privilege of serving as its executive director since that time. With thousands of advisory opinions on the interpretation of FOIA and nearly as many FOIA training sessions under my belt, I've recognized one constant - we all need to do better. We need to be better government officials, better journalists, and better-informed citizens. We all need a better understanding of FOIA, how it works, and why it is important. James Madison understood and tried to communicate that understanding when he observed in 1822, "A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which Knowledge gives." Madison's time seems long ago, but if it was apparent then, are we no less equipped to comprehend it today?

BEGIN WITH government officials and what "doing better" means for us. First, we need to be clear who our client is. We are public servants and it is the public as a whole that we serve; when that conflicts with industry representatives, developers, or other organized subsets with whom we deal, the public should be the victor. FOIA is clear: All records owned or prepared by or merely in the possession of state or local government in the transaction of public business are presumed open to the public unless an exception to public release is specifically stated in law. We need to adjust our collective attitude to be predisposed to disclose.

All public records have the same value - they are all important and belong to our clients. A matter of public record denotes the public domain, available for the asking. As human beings we have an innate sense of fairness; however, in our professional lives it is not our individual sense of fairness that dictates whether a record should be released. It is the collective sense as expressed in the law. FOIA is replete with exemptions to protect public safety, privacy of individuals, and proprietary records. My experience is that government

officials want to do the right thing. In the realm of FOIA, we just need to know what that is. FOIA training is one answer. For better or worse, only we can violate FOIA.

LOOK NOW to what "doing better" means to the media. They could benefit from FOIA training, too, in order to understand how the law works and not rely on their perception of the law. The FOIA audits conducted by the media to gauge government compliance with FOIA are very important and necessary tools. To be instructive, however, the audits need to be scientifically designed and tested to yield meaningful and reliable data - not just anecdotal information.

The people conducting the audits must also be instructed on proper methodology. For example, a government response advising of allowable charges for a requested record is not a denial of the request, as has been reported in the most recent audit. Most newspapers around the state carried the same story about the same public official who did not know his obligations under the law and responded in- appropriately. This anecdote did not give a sense of how government is doing - it only pointed out that specific deficiency. Where were the statistics on the results of the audit as a whole?

IT IS HARDER to find fault with citizens, as they are the beneficiaries of the law. Government of, by, and for the people - that means all of us. FOIA is where that principle, first expressed by Abraham Lincoln, finds its meaning in the day-to-day practice in a democratic republic.

FOIA guarantees the right to inspect and/or copy public records, but does not require government officials to summarize their contents or to provide explanations. FOIA is not free, and there may be charges for providing records.

Significant progress has been made, but we should not rest on our laurels. We all need to continue to do better. Equipped with a better understanding of the mechanics of FOIA and an appreciation of its intrinsic value, we can do better.

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Maria Everett is the executive director of the Virginia Freedom of Information Advisory Council.

APPENDIX J

Subcommittee Meeting Summaries

To provide fuller context for the work of the Council, given that in-depth study of issues is conducted through subcommittees of the Council, this appendix chronicles the work of the two subcommittees created by the Council to examine the 12 bills referred to the Council by the 2007 Session of the General Assembly.

I. Work of the Electronic Meetings Subcommittee

May 10, 2007

The Electronic Meetings Subcommittee (the Subcommittee)⁴⁹ of the Virginia Freedom of Information Advisory Council held its first meeting of the 2007 interim to begin its deliberations on the three bills referred to the FOIA Council for study.⁵⁰ Although invited to discuss their respective bills, neither Senator Whipple or Delegate Ebbin were able to attend this meeting, but requested an opportunity at future meeting of the Subcommittee to present their bills. Delegate McClellan was present and discussed HB 2293 with the Subcommittee. Delegate McClellan indicated that the bill was requested by the chair of the Richmond City School Board and would allow a local governing body, school board, or any subcommittee thereof to meet by electronic communication means provided (i) no purpose of the meeting is to take action on any matter before the governing body, school board, or subcommittee, or to otherwise transact any business of the governing body, school board, or subcommittee; (ii) the meeting is not called or prearranged with any purpose of transacting any business of the local governing body, school board, or subcommittee; and (iii) the local governing body, school board, or subcommittee otherwise complies with the electronic communication meetings law. Delegate McClellan stated that local government officials are part time, volunteer members with other jobs. She indicated that the goal of the bill is to allow locally elected officials to take advantage of technology as do businesses currently. She reiterated that the bill would authorize teleconferencing only for receiving information by the local public body and for no other purpose. She urged the Subcommittee to keep practical realities in mind. Local elected officials serve part time while juggling jobs in the private sector. She reiterated that the bill is narrowly drawn to limit use of teleconferencing to information gathering only.

John Edwards, chair of the Subcommittee called for public comment on the three bills under study by the subcommittee. A representative of the Virginia Press Association (VPA) advised the Subcommittee that it opposed all three bills during session and indicated that its opposition was based generally on the following. First, with regard to HB 2293, equating government access based on a business model is fundamentally flawed and an inappropriate model for government. In addition, limiting electronic meetings to state public bodies is appropriate because of geographic diversity of the membership of state bodies. With regard to HB 2553, VPA believes allowing local public bodies to have electronic meetings in the

⁴⁹ Mr. John Edwards was present; Mssrs. Wiley, Miller, Fifer, and Axselle, and Senator Houck were absent.

⁵⁰ HB 2293 (McClellan), HB 2553 (Ebbin), and SB 1271 (Whipple).

event of a local emergency is too open ended. For example, a water shortage is a local emergency, but clearly not one that would justify meeting electronically. Finally with regard to SB 1271, there has been significant erosion of electronic meeting rules over the years, with the latest assault being on the physical assemblage of a quorum at one location. There is a value in face-to-face meetings not only for the public but for the members of the public body as well. All three bills represent the crossing of significant thresholds and the elimination of core concepts that have long stood in the law. As a result, VPA urged the Subcommittee to move cautiously and seriously consider the long term effect on public accessibility to open meetings.

A representative of the Virginia Association of Counties advised the subcommittee that, with regard to HB 2553, there are many emergency situations faced by local government, including natural disasters, acts of violence, contagion, and other public health emergencies. HB 2553 is narrowly tailored to emergency situations and limited only to those situations. She remarked that suggesting, in the event of a catastrophic emergency, that a local governing body not comply with the law does not address the issue or resolve problems faced by localities.

A representative of the State Independent Living Council (SILC) noted that SILC supported HB 1271, which eliminates the requirement for the physical assemblage of a quorum of a state public body at a main meeting location as a prerequisite for conducting electronic communication meetings.

John Edwards wrapped up the meeting by indicating that over the course of the Subcommittee's study of electronic meeting issues over the last several years, the one constant is a predisposition to retain the face-to-face quorum requirement. He noted, however, that the Subcommittee will keep an open mind as it proceeds. Further, he advised that the patrons who were unable to attend this meeting would be given the opportunity to present their bills at future meetings of the Subcommittee.

June 7, 2007

The Electronic Meetings Subcommittee held its second meeting on June 7, 2007.⁵¹ The Subcommittee reviewed the three bills⁵² referred to it. The Subcommittee first asked for public comment on HB 2293 (McClellan), which allows a local governing body to meet by electronic communication means only when gathering information and no action will be taken at the meeting. Frosty Landon of the Virginia Coalition for Open Government noted that what may be included in the term "no action" was unclear. Craig Merritt, presenting the Virginia Press Association (VPA), reiterated VPA's objections made at the Subcommittee's May 10, 2007 meeting. VPA indicated that it opposed all three bills during

⁵¹ Messrs. Edwards, Wiley, Miller, and Fifer were present; Senator Houck and Mr. Axelle were absent.

⁵² HB 2293 (McClellan)--Allows a local governing body to meet by electronic communication means only when gathering information and no action will be taken at the meeting.

HB 2553 (Ebbin)--Allows a local governing body to meet by electronic communication means when a local state of emergency has been declared; and

SB 1271 (Whipple)--Eliminates the requirement that a quorum of a state public body be physically assembled in one primary location in order for the public body to conduct a meeting through electronic communications means. Instead of the quorum, the bill provides that at least two members of the public body be physically assembled at one location.

session and stated that its opposition to HB 2293 was based what it considered the flawed premise of the bill. VPA noted that equating government access based on a business model is fundamentally flawed and an inappropriate model for government. VPA stated that a business model for government was neither the highest or best way for government to operate because of the need for public trust and transparency. In addition, limiting authority for conducting electronic meetings to state public bodies is appropriate because of geographic diversity of the membership of state bodies. Phyllis Errico of the Virginia Association of Counties noted that with complicated issues, a work session is usually scheduled to brief the membership of a local governing body and no action is taken or prearranged to be taken. She indicated that this method yields better informed members and thus better decision making. Council member Craig Fifer stated that as with other FOIA issues, it is a question of balance. In this context, the balance is the public's right to witness the operation of government against the convenience of locally elected officials. He opined that protection of the public's right of access is paramount. He reminded the Subcommittee that last year the Subcommittee had made this decision and he saw no reason for departure now. Council member Roger Wiley explained that adoption of a budget is a good example of a no action agenda. At such meetings, there is no discussion among members of the governing body, only the executive of the locality doing the talking and showing charts and other visual aids relative to the budget. He noted that there is technology, "Skype" for example, which is available, free of charge to allow a virtual meeting. He noted that he used it to talk with his daughter when she was overseas. He also mentioned that other than governing bodies, the rest of local public bodies are not paid and do not get their expenses reimbursed. He argued that essentially what is being said is that it is better for a meeting to proceed without a member(s) than having an electronic meeting with all members present and participating. Subcommittee chair John Edwards stated that he believes face-to-face meetings are better because of the presence of visual cues and the interplay of group dynamics. Face-to-face meetings are the highest and best use of the public's money. He noted that a better approach has already been established by the Council and enacted into law (July 1, 2007) that provides limited exemptions for *individual* members. Mr. Fifer indicated that he has not heard the argument that government is not able to recruit good people for public service because of any convenience issue. Mr. Wiley responded that he could make that argument. Mr. Wiley argued that the issue is not an open government issue; but about a notion of how a meeting is to operate. He stated that nothing is being concealed from the public. He also noted that preserving the dynamics of a meeting is not expressed in the policy of FOIA. Mr. Landon responded that that may be the case; however it is inherent in the quality of a meeting and the best use of public money. Mr. Merritt stated that the 2007 changes, yet to be effective, may address the practical issues and that evolving technology should be used to enhance access by the public. Mr. Miller averred that discussions so far by the Subcommittee are identical to those had over the last several years and he believes that no compelling reasons have been shown to change the policy of FOIA. A motion, properly seconded, was made to recommend against HB 2293. The motion carried by a vote of 4 to 0.

The Subcommittee next took up HB 2553 (Ebbin). VPA stated that by allowing local public bodies to have electronic meetings in the event of a local emergency is too open ended. For example, a water shortage is a local emergency, but clearly not one that would justify

meeting electronically. A representative of Arlington County indicated that Arlington County preferred a bill limited to catastrophic emergencies, such as contagion, terrorism, or natural disasters. Mr. Wiley agreed and indicated that the exemption should be limited to Governor-declared emergencies and not locally-declared emergencies. Mr. Wiley stated that the universal concern among localities is that the public know that the government is still functioning. He cited Hurricane Katrina as an example of a catastrophic emergency and the need to reassure the public that the government is not shut down. Mr. Wiley noted that the Governor has the authority to include suspension of procedural laws in the event of a declaration of a state of emergency. The Subcommittee discussed the Governor's authority under § 44-146.17 and agreed that a bill with the limitations discussed above would be preferable to having the Governor designate which laws would be suspended. The Subcommittee directed staff to draft a bill that reflected the above discussion. The Subcommittee also decided that the minutes of any such meeting should reflect the nature of the emergency and the fact that the meeting was held by electronic communication means.

Finally with regard to SB 1271 (Whipple), VPA renewed its objections to the bill stating that there has been significant erosion of electronic meeting rules over the years, with the latest assault being on the physical assemblage of a quorum at one location. VPA opined that there is a value in face-to-face meetings not only for the public but for the members of the public body as well. All three bills represent the crossing of significant thresholds and the elimination of core concepts that have long stood in the law. As a result, VPA urged the Subcommittee to move cautiously and seriously consider the long term effect on public accessibility to open meetings. The Subcommittee inquired how many state public bodies exist in Virginia. Staff indicated that while not having an exact number, there are literally hundreds of public bodies at the state level. Mr. Wiley mentioned that in light of environmental issues with green house gases caused by car emissions, SB 1271 was significant and he urged the Subcommittee to think about electronic meetings in this context as well. Mr. Fifer stated that there has been extensive discussion of the physical quorum issue and noted that nothing has changed. He agreed that the environmental issue was a new perspective that is compelling, but indicated that the priority of the Subcommittee should be open government. Mr. Edwards acknowledged that someday virtual meetings through electronic means are going to happen as technology develops. He noted, however, that technology is not there yet. To demonstrate his point, he pointed to the speaker on the table used for teleconferences. The Subcommittee agreed by a vote of 4-0 to table further discussion of SB 1271 unless Senator Whipple requests further consideration by the Subcommittee.

July 12, 2007

The Electronic Meetings Subcommittee⁵³ held its third meeting to continue its deliberations of the consensus draft suggested by the Subcommittee at its last meeting in response to HB 2553. HB 2553 would have allowed a local governing body to meet by electronic communication means when a local state of emergency has been declared provided the meeting is necessary to take action to address the emergency. As drafted, the Subcommittee's proposal was limited to Governor-declared emergencies (and not locally-

⁵³ Messrs. Edwards, Axselle, Fifer, and Miller, and Senator Houck were present. Mr. Wiley was absent.

declared emergencies) involving catastrophic emergencies, such as contagion, terrorism, or natural disasters. The draft required the minutes of any such meeting to reflect the nature of the emergency and the fact that the meeting was held by electronic communication means. Delegate Ebbin, patron of HB 2553, was also in attendance at the meeting and offered a technical amendment to the Subcommittee draft.

Subcommittee chair Edward pointed out that the draft was limited to local governing bodies and school boards and questioned whether the draft should authorize all public bodies at the local level (i.e. industrial development authorities, regional authorities, planning commissions, etc.) to meet by electronic means in the event of a Governor-declared emergency. The Subcommittee voted 5 to 0 to authorize all local public bodies to meet by electronic means in the event of a Governor-declared emergency.

The Subcommittee next considered the issue of whether the Subcommittee should try to articulate the types of catastrophic emergencies for which an electronic meeting was authorized. It was suggested the real issue is that the nature of the emergency inhibits the ability of members of a local public body to physically assemble in a single location. After extensive discussions, the Subcommittee voted 5 to 0 to adopt language offered by the Virginia Press Association that essentially provides that the nature of the catastrophic emergency inhibits the ability of members of the public body to physically assemble, whether by making it unsafe or impractical.

Subcommittee member Fifer inquired whether discussions by local public bodies in such instances would be limited to only the declared emergency or whether the agenda for such meetings could include other matters before the local public body. It was the consensus of the Subcommittee to limit discussions to those related to the Governor's declaration of the emergency.

The Subcommittee directed staff to revise the draft in accordance with the above decisions and to e-mail a copy of the revised draft to Subcommittee members and interested parties, in addition to posting the draft on the FOIA Council's website. The Subcommittee voted 5 to 0 to recommend the draft, revised in accordance with its discussions, to the FOIA Council for introduction to the 2008 Session of the General Assembly.

Subcommittee Edwards asked the Subcommittee to review a larger policy statement concerning electronic communication meetings generally that he had prepared, which reflects the consensus of the FOIA Council over the last several years. The policy statement reads as follows:

The Freedom of Information Advisory Council has perennially reviewed numerous proposals to modify and expand the use of remote technology in public meetings. The Council's findings have led to FOIA amendments that have given public bodies greater meeting flexibility at the state, regional and local level.

Though the council, as evidenced by its findings in these numerous proposals, believes that technology can protect and, in some instances, even expand public monitoring of and participation in the affairs of government, it has also concluded consistently that the cause of

representative government is best served when face-to-face meetings of public officials are the standard, rather than the exception.

The dynamics of having policy makers, staff and the general public in the same room cannot be replaced by audio devices, and are limited even where full audio/visual connections are possible. Persons who accept elected or appointed public office accept certain responsibilities which, the Council believes, include their regular participation in face-to-face public meetings. With that as a guiding principle, the FOIA Council remains convinced that local public bodies should continue to be required to hold their meetings only where they are physically assembled in one location, and that state public bodies continue to be required to have a quorum physically assembled.

Mr. Edwards indicated that he will present his suggested policy statement to the full FOIA Council at its next meeting on September 10, 2007.

II. Work of the Personal Identifying Information Subcommittee

May 10, 2007

The Personal Identifying Information Subcommittee (the Subcommittee)⁵⁴ of the Virginia Freedom of Information Advisory Council held its first meeting of the 2007 interim to begin its deliberations on the nine bills referred to the FOIA Council for study.⁵⁵ Senator Houck, chair of the Subcommittee, opened the meeting by explaining the need for, and the charge of the Subcommittee. Senator Houck mentioned that a number of bills introduced during the 2007 Session concerned public access to personal identifying information, including social security numbers; addresses of citizens; rabies vaccination information; and holders of boat, fishing, and hunting licenses. He indicated that each bill represented a differing, piecemeal approach and it was the intent of the Subcommittee to devise a uniform rule concerning access to personal identifying information after careful consideration of all sides. Additionally, Senator Houck noted that a related issue, public access to holders of concealed handgun permits, would be included as part of the Subcommittee's work. He advised that although this was not the subject of legislation in the 2007 Session, it came to light following the publication of the names and addresses of holders of concealed handgun permits in the Roanoke Times and the resulting controversy.

Although invited to discuss their respective bills, Senators Chichester, Cuccinelli, and Hanger, and Delegates Cole and Sickles, were unable to attend this meeting, but requested an opportunity to present their bills at a future meeting of the Subcommittee. Delegate Carrico and Senator Deeds were present and discussed their identical bills (HB 3118 and SB 883) with the Subcommittee. Delegate Carrico indicated that his intent was to expand the current exemption to include the names, addresses, and social security numbers of holders of boat, fishing, hunting, and other licenses/permits issued by the Department of Game and Inland Fisheries. Delegate Carrico indicated that HB 3118 as drafted contained an "opt

⁵⁴ Senator Houck, Stewart Bryan, John Edwards, Courtney Malveaux, and Mary Yancey Spencer were present; Delegate Griffith and Mssrs. Hopkins and Yelich were absent.

⁵⁵ SB 1106 (Chichester)/HB 3097 (Cole), HB 2558 (Brink), SB 883 (Deeds)/HB 3118 (Carrico), HB 2821 (Sickles), SB 819 (Cuccinelli), and SB 1404 (Hanger)/HB 3161 (Marshall, D.W.).

out" provision.⁵⁶ He stated that he was not in favor of citizens having the burden to opt out in order to protect their personal information. Senator Deeds told that Subcommittee that most licenses issued by the Department of Game and Inland Fisheries (DGIF) can be obtained online and include social security numbers. He also did not favor the opt out requirement. Senator Deeds did, however, admit that he has taken advantage of the availability of contact information (i.e., names and addresses) for his work as a public official. A spokesman for DGIF informed the Subcommittee that the Department has extensive databases containing names, addresses, social security numbers and financial account information on persons to whom licenses are issued by the Department. He advised that currently there are 250,000 registered boats in Virginia. With regard to hunting and fishing licenses, he indicated that the Department uses a point-of-sale electronic licensing system, which contains credit card information. The Department stated that they receive many requests for licensee/permittee lists and databases. In response to requests for these records, the Department regularly records the records on CDs and provides them at cost, as required by FOIA. He noted, however, that they do redact social security numbers even though there is no current exemption for this redaction.

Subcommittee member John Edwards asked if the social security numbers and other sensitive information can be segregated in the database. The Department indicated that the system was designed to do that. Subcommittee member Courtney Malveaux noted that there was a potential for identity theft with access to social security numbers, but questioned whether release of names and addresses threatened any harm. In response, the Department indicated that potentially one could use FOIA to get the address of nicer boats, for example, and the addresses to be used to steal the boats. Mr. Edwards questioned whether this has happened and was told no. The Department compared the information they hold to records of DMV, which are not publicly accessible under state and federal law. The Department indicated that the Virginia Information Technologies Agency (VITA) routinely combines and sells public records. A spokesman for VITA indicated that it does combine public records and makes them available through "Virginia Interactive," but would need to find out more about how they system works and would report back to the Subcommittee.

Next, Delegate Brink discussed HB 2558 (released of rabies certificate information), which was enacted into law in 2007. The bill, however, contained a sunset provision of July 1, 2008 in order to allow the FOIA Council to study the issues raised by the bill. Delegate Brink noted that, but for a bill passed in 2006 sponsored by Delegate Orrock, the information held by a veterinarian on an animal and the animal owner would never be shared with the government. However, Delegate Orrock's bill, which does not become effective until January 1, 2008, required the filing of rabies certificates by veterinarians with local treasurers as a measure to enforce animal licensing laws that have been in place for 30 years. John Edwards inquired what information was contained in animal license application. A representative of the Virginia Veterinary Association responded that the application can be either oral or written along with the presentation of the rabies certificate. She indicated that most are written applications, but there is no uniform application used by

⁵⁶ Opt out provisions require the individual who is the subject of the record to affirmatively inform the public body that he does not want his personal information released. Absent the exercise of this option, the information will be released if requested.

local treasurers and sometimes the rabies certificate is the application. The goal of the legislation is to keep dog specific information out of the public domain. John Edwards asked if the bill was some sort of HIPPA for dogs and questioned from what are we protecting dogs. The response was that the biggest concern was that insurance companies would not write homeowner insurance for "powerful" breeds. In addition, there was concern that this may lead to the theft of rare breeds. A representative of the Virginia Treasurer's Association indicated that animal health information is sensitive information. He reiterated that the goal of Delegate Orrock's bill was the enforcement of animal vaccination and licensing laws. He indicated that there were three different goals of the licensing scheme and HB 2558. First as a designated revenue measure for animal control. Secondly, for the safety of animal control officers, and third, for the privacy of animal owners. He likened privacy of animal owners to personal property roll books in which only certain information is available with the remainder being considered confidential under state law. He noted, however, that the proponents of HB 2558 were working together to develop a uniform license application, part of which is public and part of which is confidential, and finally to eliminate the retention of the rabies certificate by local treasurers. Rabies certificates were generated by individual veterinarians through a veterinary software program, which contain information required by law. The net effect of recent legislation in this area has made veterinarians and treasurers part of animal control.

Council staff briefed the Subcommittee on the remaining bills referred by the 2007 Session to the Council. Senator Houck then discussed concealed handgun permits and the publication of this permit database by the Roanoke Times. Senator Houck stated that he believed it would be advantageous to take a long term look at this issue and recommend an approach to head off the number of legislative requests already made on this topic. Such an approach gives ample time for reflection and consideration of the attendant issues without the pressure of session.

The Council briefly discussed a work plan for future meetings. Staff noted that the issues can be divided into three categories: unique identifying information (i.e., social security numbers, etc), financial account information, and contact information (i.e., name and address). Staff suggested, however, that because all of the issues were essentially access to personal identifying information, the Subcommittee may want to begin its work by looking at the issues as a whole and, as the need to subdivide the issues becomes apparent, to create subgroups of the Subcommittee. Staff briefly discussed how FOIA currently protects citizen personal identifying information. Staff prepared a table titled "Protection of Citizens' Personal Identifying Information under the Virginia Freedom of Information Act." which was distributed at the meeting to the Subcommittee members and the public alike. This document is available on the Council's website.

July 12, 2007

The Personal Identifying Information Subcommittee (the PII Subcommittee) held its second meeting on July 12, 2007.⁵⁷ For the first part of the meeting, the PII Subcommittee was joined by a JCOTS Subcommittee consisting of Delegates May and Alexander and Senator Watkins to jointly consider HB 2821 (Sickles) and SB 819 (Cuccinelli), which bills were referred by the 2007 General Assembly to both the FOIA Council and JCOTS for further examination. HB 2821 would have exempted from the mandatory disclosure requirements of FOIA those portions of records containing an individual's social security number, except that access could not be denied to the person who is the subject of the record. HB 2821 also provided that any person, 18 years of age or older, who is the subject of the record may waive these protections. If the protections are so waived, the public body shall open such records for inspection and copying. SB 819 would have exempted those portions of records containing personal information concerning an identifiable individual, including date of birth, social security number, driver's license number, bank account numbers, credit or debit card numbers, personal identification numbers, electronic identification codes, automated or electronic signatures, biometric data, or fingerprints. Like HB 2821, SB 819 contained provision for the waiver of protection for record subjects.

Delegate May, chair of the JCOTS Subcommittee, indicated that his subcommittee was approaching the issue of access to social security numbers (SSNs) from a slightly different perspective - one of evolving technology to scrub SSNs from databases. He stated that development of the policy belonged to the FOIA Council on whether to use available technology. Senator Houck, chair of the FOIA Subcommittee, agreed with Delegate May's assessment and noted that the PII Subcommittee was seriously considering the development of one sound public policy governing access. Senator Houck called on Delegate Sickles, patron of HB 2821, to provide information on the genesis of the bill. Delegate Sickles stated that he originally considered an approach similar to SB 819, but upon reflection limited HB 2821 to protection of SSNs. He noted that the public's expectation is that SSNs are protected by government and not readily made available to the public. He informed the Subcommittees that 19 other states protect SSNs in some form. Following Delegate Sickles' remarks, staff provided an overview of SB 819 on behalf of Senator Cuccinelli who was not present at the meeting.

There was discussion among the Subcommittees about how SSNs come into the possession of government. Concern was also expressed about individual financial information contained in government records, which should likewise be protected from release. There was a sense that entire records should not be excluded from the public, but only those portions that contain personal identifying information. Delegate Griffith noted that from a historical perspective, he is easy to identify because he has a relatively unique name. He pointed out, however, that to verify the identity of an individual, one needs to use biometric data. He stated that he was aware that the Library of Virginia standard makes public records containing personal identifying information available 25 or more years after death of the individual to protect against identity theft, among other things. Delegate May indicated that he believed that SB 819 was over reaching and would have unintended consequences.

⁵⁷ Senator Houck, Delegate Griffith, Ms. Spencer, and Mssrs. Edwards, and Malveaux were present; Mr. Bryan was absent.

HB 2821 was preferred as the approach because SSN is as nearly a unique identifier as is one's DNA. He noted that the SSN stays associated with the individual for the individual's lifetime and provides specificity as to a particular individual. He suggested limiting access to the last four digits of a SSN as those digits increase the specificity of correctly identifying an individual.

The Subcommittees next called for public comment. Mike Stollenwerk of the Fairfax County Privacy Council indicated that his council supports both bills. He noted that with the passage of HB 2062 court records are now outside the provisions of FOIA. At the same time other sectors of records are subject to FOIA and currently there is limited protection for release of SSNs. He advised the Subcommittees that the federal FOIA contains an exemption for SSNs. Next the Subcommittees heard from Mark Dudenhefer, Vice Chairman of the Stafford County Board of Supervisors, who stated that he is employed at the federal level and the federal government is now taking unnecessary SSNs out of federal records. He averred that access to the last four digits of a SSN is not a good idea and will lead to identity theft. He concluded that the public would be appalled to know that SSNs are not protected in Virginia. Nicole Bocra, a registered private investigator, told the Subcommittee that she conducts investigations of white collar crime and needs access to SSNs to verify identity. She suggested that perhaps an exclusion could be made for private investigators to allow them access to SSNs should there be a move to remove SSNs from public records generally. Eric Ellman, Consumer Data Industry Association (CDIA), reported that members of his association use SSNs to confirm the identities of individuals as part of risk management decisions. He indicated that for employment screening purposes, SSNs are used to match the correct "John Smith" to judgment liens, criminal convictions and arrests. Marc Greidinger, representing himself, told the Subcommittees that in 1991 he sued the Commonwealth of Virginia regarding the requirement that one have an SSN in order to register to vote. He stated that as a consequence of his lawsuit the General Assembly passed laws restricting access to voter registration and driver's license records. He opined that there is hemorrhage of public information and that 13 years after his lawsuit, we are still trying to prevent access to records that should already be protected. Craig Merritt, on behalf of the Virginia Press Association (VPA), advised the subcommittee that VPA agreed that being able to correctly identify individuals is important. He noted that the real issue that was not being addressed was the over-collection of personal information by government. He stated that VPA offered an amendment to HB 2821 during the 2007 Session that would prevent disclosure of a complete SSN, but would allow access to the last four digits of a SSN. Frosty Landon, former executive director of the Virginia Coalition for Open Government (VGOG), stated that the VCOG board of directors voted four years ago that bank card numbers and SSN should be removed from public records. He urged the Subcommittees to do no harm to access to public records generally and cautioned them not to use a sweeping approach to address the issue. He suggested that the Subcommittees consider allowing an individual to opt out from release of his personal information. In addition, he suggested they consider an approach that would make SSNs unavailable, but a portion of the SSN would be available to private investigators and others who could demonstrate a need for access. Mr. Landon concluded that the government should not collect information it does not need and if it does, whatever is deemed confidential should be carefully protected and all other government information should be open.

Senator Houck then asked for comment from representatives of government agencies. Karen Grim, Division of Motor Vehicles, stated that DMV collects SSNs as required by federal law for commercial drivers and by state law for child support enforcement. She indicated that § 46.2-208 exempts this and other classes of information from release by deeming them privileged records. Nicole Bocra indicated that there is a carve out under DMV law for private investigators having a legitimate use for the information.

At the conclusion of the public comment segment, Senator Houck observed that there appeared to be little appetite for SB 819 as drafted. He indicated that with the concurrence of both subcommittees, further discussion would be limited to HB 2821, as access to SSNs is the most pressing concern. He suggested that one approach might be to shift the onus in that government has to ask for the authority to collect SSNs instead of government having free reign to collect whatever it wanted. Delegate May agreed that focusing on SSNs as a unique identifier would be the best approach. By consensus, the Subcommittees agreed to include consideration of the Virginia Public Records Act and records retention as part of their examination of the issue. The Subcommittees asked staff to gather information relative to what other states' are doing with regard to release of SSNs. Mr. Edwards asked the Subcommittees to give consideration to two principles consistently followed throughout FOIA to date: (1) that a requester's purpose in seeking records does not affect whether the records will be released, and (2) that no special exceptions are made within FOIA for particular categories of requesters. The joint meeting between the PII Subcommittee and the JCOTS subcommittee was adjourned. The next joint meeting is scheduled for Wednesday, August 22, 2007 at 10:00 a.m.

After a short break, the PII Subcommittee discussed the remaining bills referred to it by the 2007 General Assembly⁵⁸. Senator Houck indicated that there would be an opportunity for public comment as each bill was discussed. The PII Subcommittee first considered HB 3097(Cole) and SB 1106 (Chichester).⁵⁹ Subcommittee member Fifer stated that he was in favor of protecting financial account information, but indicated that the name of the sender should be public. He noted that the provision in the bill that was added by the House of Delegates that attempted to limit the scope of the exemption was hard to apply. The relevant provision read as follows: "unless the correspondence relates to a public matter before such public body." Frosty Landon said that VCOG had opposed the bill during the Session as it would allow anonymous contact with government officials. He noted that an email address can be anonymous anyway. Mike Stollenwerk said he supported the bills because it adds heightened protection of personal information. He noted that currently members of the General Assembly enjoy an exemption from release of their correspondence. Mark Dudenhefer stated that he believed that citizens have an expectation of privacy. He averred that high and mighty laws such as FOIA and concepts of open

⁵⁸ Delegate Griffith had a prior engagement in his district and was to stay for a portion of the second part of the meeting.

⁵⁹ HB 3097 and SB 1106 were identical and would have exempted the name, physical address, telephone number, e-mail address, social security number, and bank or other financial account information contained in correspondence to and from an individual and a member of a local governing body, school board or other local public body in which the individual is a resident, unless the correspondence relates to a public matter before such public body. The bill also provides, however, that no record, which is otherwise open to inspection under FOIA, shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any such correspondence.

government should shrink as compared to ordinary folks' expectations of personal privacy. Phyllis Errico, VaCo, noted that there is a distinction between what state officials may protect as compared to local officials and questioned the underlying reason for the distinction. She mentioned that generally it is government officials and media representatives that take advantage of FOIA training offered by the FOIA Council. She pondered how to reach citizens to increase their understanding of FOIA. Ginger Stanley, VPA, noted that VPA opposed the correspondence exemption for members of the General Assembly when it was proposed. She indicated that media perform a watchdog role that corresponds with the philosophy behind FOIA, namely, accountability. Ms. Stanley stated that there needs to be a way to question the actions of government and look behind an issue. Delegate May advised the PII Subcommittee that the Supreme Court has already ruled that an individual in the workplace has no expectation of privacy. Mr. Landon pointed out that the identity of the sender is essential for government accountability and transparency. He suggested that of the 110 records exemptions, many protect sensitive information but don't give anonymity. If a "cozy relationship" exists between a citizen and elected officials, let the public know and let the public make its decisions based on the information. Subcommittee member John Edwards reminded the PII Subcommittee that bad facts make bad law. Local government is very personal and that is the reason for openness. Senator Houck suggested that there should be a way to separate correspondence that relates to public business, which should be open and publicly vetted, from strictly personal correspondence. He requested staff to draft a bill that makes the above distinction for the Subcommittee's consideration at their next meeting.

The Subcommittee next considered HB 3161 (Marshall, D.W.) and SB 1404 (Hanger) relating to access to complainant information involving an investigation of a violation of a local ordinance. Delegate Griffith stated that he believed that complainant information should be open. John Edwards agreed and stated that he believed it was a mistake to have the exemption in the first place. He noted that the right to face your accuser is fundamental. Ms. Spencer agreed with both comments. Phyllis Errico, VaCo, told the Subcommittee that VaCo supported the bill because there may be instances where the origins of the complaint may be a personal squabble. She indicated that investigations are complaint driven. Senator Houck stated that he sensed that there was a consensus that the bills were overreaching and moved to table further discussion of these two bills. The motion carried 4 to 0.

Tom Falat, representing the Virginia Information Technologies Agency (VITA), addressed the Subcommittee to provide information regarding access to certain records of the Department of Game and Inland Fisheries (DGIF) that had come up at the May 10, 2007 meeting of the PII Subcommittee. At the prior meeting, DGIF represented that VITA combined and sold databases of DGIF information through VITA and Virginia Interactive. As a follow-up, Mr. Falat related that Virginia Interactive provides access to certain records through a subscription service. VITA itself is not directly involved, but instead Virginia Interactive (a separate entity) contracts directly with various other agencies, including DGIF, to provide these subscription services.

The Subcommittee next considered the topic of concealed handgun permits. A representative of the Department of State Police (DSP) indicated that pursuant to an opinion from the Office of the Attorney General (OAG) issued in April, 2007, DSP no longer releases information about concealed carry permit holders. Delegate Griffith indicated that he felt that while the OAG opinion addressed the permit records held by DSP, it does not cover similar records held by the local circuit courts. Staff indicated other members of the General Assembly had expressed interest in codifying the OAG opinion. Senator Houck directed staff to prepare a draft limiting access to DSP databases for consideration at the next meeting.

Senator Houck then recapped the status of the many bills and issues that had been referred to this Subcommittee. Regarding HB 2558 (Brink)(release of rabies certificate information), the Virginia Treasurers' Association and the Virginia Veterinarians' Association are working on a form for use state-wide that limits the amount of personal information available to the public. The Subcommittee is waiting to see that form before taking further action on the bill. Regarding HB 3097 (Cole) and SB 1106 (Chichester), as discussed above, staff was directed to prepare a revised draft for consideration at the next Subcommittee meeting. Regarding HB 3118 (Carrico) and SB 883 (Deeds)(DGIF licenses and boat registrations), Senator Houck directed staff to invite the patrons and DGIF back again before the next full Council meeting. HB 3161 (Marshall, D.W.) and SB 1404 (Hanger) were tabled at today's meeting, as discussed above. HB 2821 (Sickles), also as discussed above, will be the subject of the next joint meeting of the PII Subcommittee and the JCOTS Subcommittee. SB 819 (Cuccinelli) may also be considered further at the request of the patron.

August 22, 2007

The Personal Identifying Information Subcommittee (PII Subcommittee) held its third meeting to discuss several bills referred to the FOIA Council for study by the 2007 General Assembly⁶⁰. This meeting was also the second joint meeting with the JCOTS Social Security Number Subcommittee⁶¹ to examine HB 2821 (Sickles), which would exempt from the mandatory disclosure requirements of FOIA those portions of records containing an individual's social security number.

The bulk of the meeting involved staff presentations to assist the Subcommittees in their deliberations and in response to requests for information made at the prior joint meeting. Specifically, staff reported on (i) other states' law concerning access to social security numbers (SSNs) for both the private and public sectors; (ii) federal law and trends on the subject; (iii) specific Virginia laws governing access/availability to SSNs, including the Personal Information Privacy Act (§ 59.1-442 et seq.), FOIA (§ 2.2-3700 et seq.), and the Government Data Collection and Dissemination Practices Act (§ 2.2-3800). A summary of each staff report follows. Copies of the staff reports are posted on the FOIA Council's website.

⁶⁰ Senator Houck, Delegate Griffith, and subcommittee members John Edwards, Mary Yancey Spencer, Sandra Treadway, and Courtney Malveaux were present. No members were absent.

⁶¹ Delegates May and Alexander and Senator Watkins.

OTHER STATES' LAWS

Preliminary research reveals that many states have enacted laws that restrict access to SSNs in public records and in the private sector. The language and specifics of these laws differ from state to state. Some states' law applies only to the private sector and imposes restrictions on the collection and dissemination of SSNs in connection with commercial transactions. In examining the various means through which the acts restrict access to SSNs, however, there appear to be some common themes.

Many states, including Virginia, restrict the display of SSNs on government-issued identification cards and restrict the mailing of documents in which SSNs are visible either on the envelope or through a window on such envelop. Other states, in a commercial setting, prohibit requiring individuals to transmit SSNs over the Internet unless the connection is secure or the SSN is encrypted. According to research conducted by Gail Hillebrand, Financial Services Campaign Manager, Consumers Union, "...California enacted legislation in 2001 that generally prohibited businesses from engaging in certain activities with SSNs, such as posting or publicly displaying SSNs, mailing documents that display SSNs before the document is opened, printing SSNs on cards necessary for accessing products or services, or requiring people to transmit a SSN over the Internet..." According to Ms. Hillebrand's research, "[T]wenty one states have passed laws similar to California's-- Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Illinois, Maryland, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, and Virginia." It is important to note, however, that by its express terms, California law "does not apply to documents that are recorded or required to be open to the public" pursuant to law.⁶²

Public Records Specifically

Research in this area was limited for the most part to those states that have had a separate FOIA ombudsman program in place since 2000-- namely New York, Connecticut, Minnesota, Hawaii, and Indiana. In addition, North Carolina and Florida were included based on unique provisions in their statutes restricting the collection and dissemination of SSNs in public records. Statutory trends among these states reveal differing approaches, although four general approaches emerge.

- Statutory presumptions that SSNs collected or maintained by a state agency, statewide system, or political subdivision are private data, except to the extent that access to SSN is specifically authorized by law. See § 13.355 of the Government Data Practices Act of Minnesota and § 119.071 of the Florida Public Records Act.
- Statutory prohibitions on agencies of the state or its political subdivisions, or any agent or employee of a government agency from doing any of the following: (i) collect a SSN unless authorized by law to do so or unless collection of a SSN is

⁶² See § 1798.85 of the California Civil Code (2007).

imperative for the performance of that agency's duties and such need is clearly documented; (ii) fail to segregate a SSN from the remainder of the public record; or (iii) intentionally communicate or otherwise make available to the general public a person's SSN or other identifying information. See § 132.1.10 of the North Carolina Public Records Act, § 4-1-8 of the Indiana Code, and § 119.071 of the Florida Public Records Act.

- A statutory exemption restricting release if it would constitute
 - (i) "An unwarranted invasion of personal privacy." See § 89 of the Freedom of Information Law of New York and § 96 of the Personal Privacy Protection Law of New York; or
 - (ii) "An invasion of personal privacy." See § 1-210 of the Freedom of Information Act of Connecticut.

- A statutory exemption restricting release of entire SSNs, with some exceptions; although release of last four digits only is permissible. See § 487J of the Social Security Number Protection Act of Hawaii and § 4-1-10-1 of the Indiana Code. NOTE: Hawaii law provides for civil penalties for violation by businesses and liability in equal amount to the sum of actual damages sustained by the injured party. Indiana law provides for criminal penalties in the event of violation by state agencies and for fraudulently obtaining a SSN from a state agency.

In conclusion

Preliminary research appears to show that most of the legislative activity relative to the release of SSN is found in laws governing the actions of the private sector. This may be due in large part because historically it is breaches in the private sector that have put individuals at heightened risk of identity theft. As noted above, however, several states have enacted laws to govern the release of SSNs found in public records and such laws appear to focus on limiting the collection of SSNs by governmental entities in the first instance, followed by a restriction on the release of an entire SSN as a matter of law or, as in New York and Connecticut, where release of the SSN would constitute an invasion of personal privacy.

FEDERAL LAW AND TRENDS

Social Security Numbers: Federal Actions Could Further Decrease Availability in Public Records, though Other Vulnerabilities Remain (GAO-07-752, June 2007)

The federal government has recently examined the availability of social security numbers in public records. This June, 2007 Government Accountability Office report recommended, at a minimum, that social security numbers be truncated in liens and lien releases issued by the Internal Revenue Service, and that federal agencies should continue to take steps to mitigate the availability of social security numbers in public records.

Memo: Safeguarding Against and Responding to the Breach of Personally Identifiable Information (M-07-16, May 22, 2007)

The United States Office of Management and Budget also recently issued a memo to the heads of all federal executive agencies and departments directing each agency to safeguard against the breach of personally identifiable information. The memo requires all agency and department heads to implement a framework for ensuring proper safeguards are in place to protect personal information collected by the agency, and to develop a breach notification policy.⁶³ Most notably, however, for purposes of discussion of this FOIA/JCOTS Subcommittee, is the directive to agencies to review their use of social security numbers and to identify when such use or inclusion of such information in a document or program is superfluous. Agencies were directed to eliminate the unnecessary collection and use of social security numbers within eighteen months (roughly the end of 2008). Agencies were also directed to participate in a government-wide effort to explore alternatives to the use of a social security number as a personal identifier.⁶⁴

VIRGINIA LAW--CURRENT RESTRICTIONS ON USE OF SOCIAL SECURITY NUMBERS

A survey of Virginia law relative to the use of SSNs was conducted by staff and revealed that certain steps have been taken by the General Assembly to limit the dissemination of SSNs in both the private and public sectors. Much of Virginia law on this topic mirrors what has been done in other states. But like other states, Virginia's law has taken a piecemeal approach rather than addressing these issues in a comprehensive, systematic manner. That is the goal of the Subcommittees' work. A summary of relevant Virginia law follows:

I. Government/Public Sector (excluding FOIA):

- Health Insurance ID Number for State Health Plan shall not be an individual's social security number (§ 2.2-2818 (N)).
- No agency can require an individual to supply his social security number or refuse services to an individual for refusal to supply his social security number, unless the disclosure is specifically required by state or federal law (§ 2.2-3808 (A)).
- No agency-issued ID cards (such as student identification cards and license certificates) may display an **entire** social security number -- all such existing cards were required to be replaced by July 1, 2006 (§ 2.2-3808 (B)).
- Voter registration cards displaying a social security number must all be reissued by December 31 following the completion of redistricting after the 2010 census (§ 2.2-3808 (C)).

⁶³ JCOTS has previously discussed the issue of database breach notification as it relates to private entities, but recommended that federal legislation be adopted to address this issue to ensure uniformity of response to a breach. However, JCOTS work did not examine database breach notification as it might apply to information held by public bodies. Because the focus of HB 2821 and SB 819 is about public access to personal information, this memo will not delve into the database breach issue. However, substantial information about this topic could be made available, upon request.

⁶⁴ *Federal Initiatives*, prepared by Lisa Wallmeyer, Executive Director, JCOTS.

- A clerk of court may refuse to accept any instrument submitted for recordation that includes a grantor's, grantee's, or trustee's social security number (§ 17.1-227).
- No clerk of court shall disclose a social security number, other identification number, or financial information provided to the clerk to pay fee, fines, taxes, or other charges (§ 17.1-293(A)).
- No clerk may post social security numbers or other specified identifying information on the Internet, except as provided in remote access subscription services (§ 17.1-293 (B)).
- The clerk of court may withhold from public disclosure a social security number provided on an application for a concealed handgun permit (§ 18.2-308(D)).
- Petitions, pleadings, motions, orders, etc. regarding divorce and child custody shall not contain the social security numbers of any party or of any minor child. If required by law, social security numbers shall be provided on a separate addendum that will not be made available to the public (§ 20-121.03).
- Election records containing social security numbers shall not be made available to the public (§ 24.2-107).
- Social security numbers shall only apply on applications for marriage licenses retained by the officer issuing the license, and on the copy of the license forwarded to the State Registrar. Marriage licenses that were filed after July 1, 1997 and that are not configured to prevent disclosure of a social security number shall not be available for public inspection (§ 32.1-267 (E), (F)).
- Social security numbers shall not be used as driver's license numbers (§ 46.2-342 (A)).

II. Private Sector:

- A consumer may request that a supplier not use the consumer's social security number as his account number (§ 59.1-200 (A)(35)).
- A person may not intentionally communicate an individual's social security number to the general public. However, this prohibition does not apply to public bodies or public records (§ 59.1-443.2 (A)(1), (D)).
- A person may not print an individual's social security number on any card required to access or receive products or services. (§ 59.1-443.2(A)(2)).
- A person may not require an individual to use his social security number to access an Internet website, unless a password or other authentication is also required (§ 59.1-443.2(A)(3)).
- A person may not send any letter or package that displays a social security number on its face or from which the social security number is visible (§ 59.1-443.2 (A)(4)).
- No person can embed a social security number (even if encrypted) in or on a document using a bar code, magnetic strip, or other technology, in place of

removing a social security number as required by the Personal Information Privacy Act (§ 59.1-443.2 (E)).⁶⁵

III. FOIA:

A review of FOIA and exemptions contained therein allowing the withholding/redaction of SSNs in particular and personal identifying information in general, revealed that such information is protected in 39 specific instances from release in records relating to, but not limited to, protection in the context of public employment, scholastic records, health records, rape crisis centers and programs for battered spouses, subscriber data provided to state and local government by telecommunication carriers for implementation of the E-911 emergency dispatch system, certain license and permit applications, involuntary admission proceedings, public assistance programs, child support enforcement, and child welfare, recipients of public housing assistance, recipients of TANF transportation services, state and local tax information, public library records, certain customer account information (public utilities and SmartTag, etc.), witnesses and victims of crime, neighborhood watch, citizen emergency response teams, and statewide alert network participants. A complete list of the protection of citizens' personal identifying information under FOIA is available on the FOIA Council website.

IV. Government Data Collection and Dissemination Practices Act (GDCDPA): Enacted in 1976 under the name of the Privacy Protection Act of 1976, the GDCDPA does not in actuality protect privacy. The Privacy Protection Act was renamed in 2003 to the GDCDPA because it is more akin to the Fair Credit Reporting Act in that it gives "data subjects" the right of access to government records of which they are the subject and the right to correct inaccurate information contained in those records. In 1976, the General Assembly made the following findings which are embodied in the GDCDPA:

1. An individual's privacy is directly affected by the extensive collection, maintenance, use and dissemination of personal information;
2. The increasing use of computers and sophisticated information technology has greatly magnified the harm that can occur from these practices;
3. An individual's opportunities to secure employment, insurance, credit, and his right to due process, and other legal protections are endangered by the misuse of certain of these personal information systems; and
4. In order to preserve the rights guaranteed a citizen in a free society, legislation is necessary to establish procedures to govern information systems containing records on individuals.

With the advent of the Internet, widespread use of computers, and the automated collection and storage of data, the principles expressed in the GDCDPA have been given renewed attention. It is important to note, however, that the GDCDPA has no provisions for enforcement.

⁶⁵ *Current Restrictions on Use of Social Security Numbers in Virginia*, prepared by Lisa Wallmeyer, Executive Director, JCOTS.

STUDY PLAN OPTIONS AND CONSIDERATIONS

To assist the Subcommittees in achieving a systematic and comprehensive examination of the collection and dissemination of SSNs in Virginia, staff prepared relevant questions for the consideration and development of sound public policy relating to SSNs. The following outline will serve as a basis for the Subcommittees' work and to focus deliberations.

- I. Protection of SSN:
 - A. Why is protection needed?
 - Fraud--real or perceived?
 - To what extent are government records implicated?
 - Online access vs. practical obscurity; is one more dangerous than the other?
 - B. Other alternatives:
 - Protection of victims of abuse and other vulnerable persons;
 - Others attempting to protect their privacy (i.e. unpublished numbers)
 - Heightening penalties for existing crimes (SB 1282, 2007)
 - C. If protection of SSN deemed necessary/advisable--
 - Protect in whole or in part;
 - General exemption or context specific (i.e. FOIA model);
 - Advisability of "opt out" provisions;
 - Advisability of allowing access to certain persons based on showing of legitimate business or other interest?
 - Limit collection by governmental entities of SSN:
 - *Should* this be addressed? (GDCPDPA attempts it; FOIA Council preaches it--(i.e., collect only if required by law and essential to mission) (See AO-08-06)); and
 - *How to* address? (Legislation or executive order).
 - Appropriateness of a separate law from FOIA dealing with collection and access to SSN:
 - Establish general rule about access to SSNs/unique identifiers--(include collection limitations on government?)
 - Exceptions to general rule--access rights to persons with "legitimate business or other interests" (i.e. private investigators, media representatives, mortgage brokers, and real estate title companies, etc).
- II. What is "personal information?" Should definition be revised since original definition crafted in 1976? Under the current GDCDPA, "personal information" means:

"...[a]ll information that describes, locates or indexes anything about an individual including his real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record, or that affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done

by or to such individual; and the record of his presence, registration, or membership in an organization or activity, or admission to an institution. "Personal information" shall not include routine information maintained for the purpose of internal office administration whose use could not be such as to affect adversely any data subject nor does the term include real estate assessment information." (See § 2.2-3801 of GDCDPA).

- **III. Government (public records) vs. private sector (Personal Information Privacy Act § 59.1-442)**--Should there be a distinction in protection of SSNs and other unique identifying numbers?

DISCUSSION AND PUBLIC COMMENT

The members of the Subcommittees discussed several issues pertinent to the collection and dissemination of SSNs. Delegate Griffith pointed out that SSNs are collected on election petitions that end up in the possession of political party personnel who are not public officials or employees; it was not clear whether the petitions retain the SSNs when so disseminated. Delegate May indicated that someone had posted a public record containing his sister's SSN on the Internet, and because it was from a public land record, that posting did not violate Virginia law. Delegate Griffith noted that the current language of § 59.1-442 would prohibit someone from disseminating his or her own SSN to the general public. A man does just that in advertising his commercial identity protection service on television and radio. Senator Houck stated that it does not seem right that § 59.1-442 does not apply to public bodies and public records. Delegate Griffith suggested changing the relevant statutory language of § 59.1-442 to allow individuals to disseminate their own SSNs voluntarily; to exempt its application to court clerks, the DMV and other public officials and employees who need to use and disseminate SSNs to carry out their work; but to prevent others from disclosing SSNs to the general public through dissemination of public records. Delegate May pointed out there are good uses of SSNs, such as allowing credit agencies to easily maintain individuals' credit histories and thus providing quick and easy access to lines of credit. Senator Houck asked for public comment from access advocates on this topic.

Dick Hammerstrom of the Free Lance-Star asked whether the person who published Delegate May's sister's SSN online did so just to show that she could. Delegate May responded that that was the stated reason. Jennifer Perkins, of the Virginia Coalition for Open Government (VCOG), indicated that as a general rule VCOG was not opposed to restricting the dissemination of SSNs, but was concerned that the actual language used not be overly broad. Additionally, the discussion leads to the question of how one defines a "beneficial use" of SSNs. Tom Falat, Virginia Information Technologies Agency (VITA), pointed out that in addressing secure remote access to court records, one of the questions was why someone wanted access. This process contrasts with the FOIA process, because it has never been part of FOIA to ask why someone wants records. Megan Rhyne, speaking as a Virginia citizen, indicated her concern that saying "shall not" in regard to SSNs is a slippery slope that could lead to restrictions on access to other personal information that should be publicly available, such as contact information. Craig Merritt, on behalf of the Virginia Press Association (VPA), suggested that one reason public bodies and public

records may have been excluded from § 59.1-442 was so that that statute would not set FOIA policy "through the back door." Nicole Bocra, a private investigator, indicated that she regularly uses SSNs in her investigations, and that SSN information is easily available online from court records. She also asked how a restriction on dissemination would be enforced. Staff indicated enforcement would be through an individual right of action. Fred Norman, representing Northrop Grumman, indicated that the actual cost to the Commonwealth and localities to remove SSNs from public records would be huge.

Through further discussion among the Subcommittees, there was a consensus that the definition of "personal information" found in § 2.2-3801 of the GDCDPA should be updated for current use, and that there is a need to address the sheer amount of personal information collected by government. Senators Houck and Watkins and Delegate May all expressed their agreement that government simply is collecting too much personal information, and that it would be better to limit collection in the first place rather than try to restrict subsequent dissemination. There was also consensus to look at the possibility of using a single, uniform set of data that could be collected, rather than having various agencies collect different amounts and types of data on the same individuals. Senator Houck suggested that it would be best to approach the protection of SSNs in both the public and private sectors through legislation outside of FOIA, because these topics are more general and concern more than just access to public records. In addition, such an approach would do no violence to FOIA principles where motive for the request is immaterial. Senator Watkins suggested that FOIA Council and JCOTS staff contact various agency staff to find out what type(s) of personal data agencies really need.

Senator Houck then asked whether anyone from the public would like to comment; there was no public comment in response. At this point, the joint meeting of the FOIA and JCOTS Subcommittees adjourned. The meeting then continued solely as a FOIA Subcommittee meeting to address two pieces of draft legislation, one concerning access to concealed handgun permits, the other addressing access to constituent correspondence (HB 3097 (Cole) and SB 1106 (Chichester)).

The draft bill concerning concealed handgun permits codifies the opinion of the Attorney General issued in April, 2007, by providing that the Department of State Police (DSP) shall withhold from public disclosure permit information submitted to DSP for purposes of entry into the Virginia Criminal Information Network (VCIN). Delegate Griffith pointed out that in addition to collecting permit information from the circuit courts to enter into VCIN, DSP itself also issues permits directly to nonresidents.⁶⁶ The draft as written does not address how DSP is to treat information collected for the purpose of issuing permits to nonresidents. It was agreed by general consensus that the draft should be amended to clarify that records about nonresident permits issued by DSP should be open, just as records held by the clerks of court concerning resident permits are open. Mr. Merritt indicated this was the first time he had seen this draft and so he reserved the right to comment upon it until after giving it a more thorough review. There was no other public comment on this draft.

⁶⁶ Virginia residents may obtain concealed handgun permits from the circuit court of the county or city in which they reside. Nonresidents may obtain such permits directly from DSP.

Next the Subcommittee considered a draft bill regarding access to constituent correspondence sent to members of local government. The Subcommittee had asked staff to prepare this draft at its last meeting after considering the identical bills HB 3097 (Cole) and SB 1106 (Chichester). After staff presented the draft, the Subcommittee discussed how public records "in the transaction of public business" are subject to disclosure under FOIA, but other records of a purely personal nature are not. Mr. Edwards pointed out, for example, that a personal invitation to dinner sent to a local supervisor or council member would not be considered a public record because it is not in the transaction of public business. By contrast, a letter attempting to sway the vote of the supervisor or council member on a matter before the board or council would be "in the transaction of public business" and subject to disclosure under FOIA. Acknowledging that General Assembly members do have a correspondence exemption while members of local governing bodies do not, it was pointed out that there are significant differences between the General Assembly and a local governing body. For example, Delegate Griffith pointed out that three or four members is often a majority on a local body, whereas one would have to assemble 40 or more members of the House of Delegates to have an equivalent voting block. David Gayle, representing Stafford County, provided the example of a constituent who wrote to his supervisor about tax issues and included information about the constituent's own income and personal budget, including personal expenses for the constituent's own medical care. Mr. Gayle also provided the example of correspondence sent to a supervisor that contained personal information about a minor student. He stated that it was those types of personal information for which protection was sought. Mr. Hammerstrom provided the actual example of an email message forwarded to School Board members stating that they should meet (without public notice) at a private individual's home on a Saturday morning to discuss budget issues. His concern was that any correspondence exemption might be used improperly or worded too broadly, such that it withheld access to correspondence that should be accessible to the public. Senator Houck observed that despite continued research and discussion, there was little agreement regarding this issue and no apparent consensus to move forward. Delegate Griffith moved to table the draft legislation; the motion carried without objection. Senator Houck then adjourned this meeting of the Subcommittee.

October 8, 2007

The Personal Identifying Information Subcommittee (PII Subcommittee)⁶⁷ of the Freedom of Information Advisory Council (FOIA Council) held its third joint meeting with the Social Security Number Subcommittee of the Joint Commission on Technology and Science (JCOTS Subcommittee)⁶⁸ to continue their deliberations on public access to social security numbers (SSNs) contained in public records (HB 2821, 2007, Delegate Sickles).

Staff reminded the PII Subcommittee of the disposition of the bills referred to the FOIA Council for study by the 2007 Session of the General Assembly, which had been examined by the PII Subcommittee at previous meetings. Specifically:

⁶⁷ Senator Houck, Delegate Griffith, and Messrs. Edwards and Malveaux were present at the meeting. Mary Yancey Spencer and Sandra Treadway were absent. J. Stewart Bryan no longer serves on the PII Subcommittee as he declined reappointment to the FOIA Council.

⁶⁸ Delegates May and Alexander and Senator Watkins were present.

- HB 2821 (Sickles)--*Still under consideration.*
- SB 819 (Cuccinelli)--*Tabled pending reconsideration request by patron.*
- HB 2558 (Brink)--*Awaiting final agreement between Virginia Veterinary Association and Treasurer's Association concerning development of uniform dog license application.*
- HB 3097 (Cole)/SB 1106 (Chichester)--*Tabled.*
- HB 3118 (Carrico)/SB 883 (Deeds)--*Patrons and DGIF invited to full FOIA Council meeting on December 3, 2007 for further discussion.*
- HB 3161 (Marshall, D.W.)/SB 1404 (Hanger)--*Tabled.*⁶⁹

The PII Subcommittee directed staff to contact the Virginia Veterinary Association and Treasurer's Association to ascertain the status of their undertaking to develop a uniform dog application license. As passed into law, the provisions of HB 2558 will expire on July 1, 2008 and thus the need for a final recommendation from the FOIA Council.

The PII Subcommittee next continued its consideration of access to information about holders of concealed handgun permits, which information was published in March 2007 by the Roanoke Times. The PII Subcommittee had previously heard from a representative of the Department of State Police (DSP) who indicated that pursuant to an opinion from the Office of the Attorney General (OAG) issued in April, 2007, DSP no longer releases information about concealed carry permit holders. At that time, staff indicated other members of the General Assembly had expressed interest in codifying the OAG opinion. The PII Subcommittee reviewed a staff draft limiting access to DSP databases and invited comment from the JCOTS Subcommittee and the public. Essentially, with a limited

⁶⁹ HB 2821 (Sickles)--Exempts from the mandatory disclosure requirements of the Freedom of Information Act those portions of records containing an individual's social security number; except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any such record and who is 18 years of age or older may waive, in writing, these protections. If the protections are so waived, the public body shall open such records for inspection and copying.

SB 819 (Cuccinelli)--Exempts those portions of records containing personal information concerning an identifiable individual, including date of birth, social security number, driver's license number, bank account numbers, credit or debit card numbers, personal identification numbers, electronic identification codes, automated or electronic signatures, biometric data, or fingerprints; except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any such record and who is 18 years of age or older may waive, in writing, these protections. If the protections are so waived, the public body shall open such records for inspection and copying.

HB 2558 (Brink)--Exempts the identification of breed of a vaccinated animal and any personal identifying information relating to the animal owner that is not made a part of an animal license application from the mandatory disclosure provisions of the Freedom of Information Act.

HB 3097 (Cole)/SB 1106 (Chichester)--Exempts the name, physical address, telephone number, e-mail address, social security number, and bank or other financial account information contained in correspondence to and from an individual and a member of a local governing body, school board or other local public body in which the individual is a resident, unless the correspondence relates to a public matter before such public body. The bill also provides, however, that no record, which is otherwise open to inspection under FOIA, shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any such correspondence.

HB 3118 (Carrico)/SB 883 (Deeds)--Exempts personal information concerning individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department of Game and Inland Fisheries, including social security or other identification numbers appearing on a driver's license or other form of identification, credit card or bank account data, home address, phone number, and date of birth, provided the individual has requested in writing that the Department not release such information.

HB 3161 (Marshall, D.W.)/SB 1404 (Hanger)--Exempts certain personal identifying information of a complainant with respect to an investigation of a violation of a local ordinance may be withheld. Currently, such information may only be withheld with respect to an investigation of an individual zoning enforcement complaint.

exception for law-enforcement, the draft would require the DSP to withhold from public disclosure permittee information submitted to the DSP for purposes of entry into the Virginia Criminal Information Network. The Virginia Press Association offered technical amendments to the draft that would incorporate language used in FOIA for uniformity. The Subcommittees discussed the amendments and suggested further technical changes. FOIA Council staff remarked that it would be preferable to use tried and true language used in FOIA that was familiar to public employees and to the courts alike. It was the consensus of the Subcommittees to adopt the draft with the technical amendments, noting that these same issues will be debated during the 2008 Session. Senator Houck indicated that before further action is taken on the draft, it should be posted on the FOIA Council website for additional public comment.

The Subcommittee then considered a staff draft amending the Personal Information Privacy Act (§ 59.1-442 et seq.) to clarify that it is not a violation of that act for an individual to release his own SSN. Additionally, the draft attempted to limit secondary use (or republication) of a public record that contained a SSN. The Subcommittees discussed this latter issue in depth and were concerned about the unintended consequences of limiting secondary use of a public record. It was the consensus of the Subcommittees that secondary use/republication of a public record containing a SSN is not objectionable if done in accordance with lawful means. The Subcommittees discussed specific examples of lawful republication of SSN. For instance, a funeral director is required by law to send a death certificate that contains the decedent's SSN and that of the decedent's next-of-kin to the Social Security Administration. Additionally, with real estate transactions, a title company shares such information with the entity providing the financing, whether it is a refinance of an existing mortgage or the purchase of a house. In both examples, such secondary use/republication should be permissible. The Subcommittees agreed that one goal of the draft should be to capture misuse. The choice to be made is either to include a provision addressing republication done with malice or other bad intent, or to limit republication of a SSN on an internet website. Staff recommended language that would prohibit disseminating a public record containing a SSN without redaction of the SSN on the Internet or other publicly accessible website. The Subcommittees preferred this narrower approach offered by staff. They requested that a new draft reflecting the above discussions be presented at the next meeting of the Subcommittees.

The Subcommittee next reviewed a staff draft, part of which would amend the definition of "personal information" contained in the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) (GDCDPA). At previous meetings, staff had suggested to the Subcommittee that the definition of "personal information" may be somewhat archaic given it was drafted in 1976. Staff advised that it had done a survey of other states' statutory definitions of "personal information" and had found some similarity with the language in the GDCDPA. There was consensus among the Subcommittees that the definition of personal information was not central to the issue currently under discussion and further, there did not appear to be a compelling reason to radically change the current definition, except to list SSN, driver's license numbers, and agency-issued identification specifically in the definition.

The remainder of the draft concerned a three-part approach to the issue of collection of SSNs by state agencies. Specifically the draft (i) would prohibit the collection of SSNs by state and local public bodies unless the collection is (a) expressly authorized by law or (b) essential for the performance of that agency's duties and such need is clearly documented in writing; (ii) would require agencies to review their current SSNs collection practices by October 2008; and (iii) to provide for damages for any person aggrieved by the action of an agency in contravention of the law. In addition, the draft would contain a delayed effective date to allow for the required agency review and to give agencies sufficient notice of the proposed statutory change. The draft reflects the Subcommittees' steadfast belief, repeatedly expressed during the course of its work, that the widespread inclusion of SSNs in public records is precipitated by the practice of over collection of SSNs by government in the first instance. With regard to prohibiting the collection of SSNs unless it is authorized by law or essential to the government's mission, the Subcommittees agreed that giving a government agency the authority to collect SSNs if it is essential to its mission, but not legally authorized, was too broad a grant of authority. Instead the Subcommittees preferred the standard for collection to be legal permission *and* that collection is essential to the mission of the agency. Further discussion led to expanding the prohibition against collection of SSNs to agency-issued identification numbers. The Subcommittees next focused on the requiring agencies to review their collection and use of SSNs by October 1, 2008. They questioned whether there would be sufficient time to complete the review and whether the draft should allow for more time. It was noted that this issue would be likely debated during the Session and could be resolved then. In connection with the required review and reporting to the FOIA Council and JCOTS, the Subcommittees considered the provision in the draft, which provides that "[T]he chairmen of the Council and the Commission may withhold from public disclosure any such lists or portions of lists as legislative working papers, if it deems that the public dissemination of such lists or portions of lists would cause an potential invasion of privacy." Staff explained the reason for this inclusion stating that there may be concern that the agency reports would reveal vulnerabilities and other databases for which there are no exemptions from public access. It was the consensus of the Subcommittee to keep the language as drafted to allow more time for further public comment. Finally, on the issue of damages, the Subcommittees agreed to keep the language as drafted for further public comment. In the meantime, however, staff will look further into the issue whether the remedy should be the award of damages versus a civil penalty which would go to the Literary Fund (as currently is done in FOIA). The revised draft will be posted on the FOIA Council website for additional public comment.

In preparation for the next meeting of the Subcommittees, staff was asked to conduct a Code of Virginia search to identify the instances where the collection of SSNs is specifically authorized or required. Anticipating strong reaction to the draft discussed above, staff suggested that the Subcommittees may want to issue something like a press release about the contents of the draft and inviting comment.

Senator Houck invited further public comment on the subjects discussed at the meeting and no comments were offered. The Subcommittees decided to continue their joint consideration of access to SSNs in 2008 to follow through on any recommendations made

this year. It was also noted that because of the complexity of the issue, a thorough examination would require more than several months of study.

November 9, 2007

The Personal Identifying Information Subcommittee (PII Subcommittee)⁷⁰ of the Freedom of Information Advisory Council (FOIA Council) held its fourth joint meeting with the Social Security Number Subcommittee of the Joint Commission on Technology and Science (JCOTS Subcommittee)⁷¹ to continue their deliberations on public access to social security numbers (SSNs) contained in public records (HB 2821, 2007, Delegate Sickles).

The meeting began with consideration of a revised draft amending the Personal Information Privacy Act (PIPA)(§ 59.1-442 et seq.). The revised draft clarifies that an individual may disseminate his or her own SSN without violating PIPA. Additionally, draft language would have prohibited publication on the Internet of other individuals' SSNs obtained from public records. However, concerns were raised regarding whether (i) limiting the prohibition to online publication would be too narrow and (ii) the retroactive effective of such a prohibition, especially in regard to already existing and already published public records that contain SSNs, would be feasible. Additionally, staff expressed the need for further legal analysis to be conducted because preliminary research had revealed potential conflicts between the proposed prohibition and constitutional freedom of speech protections. The subcommittees agreed that further analysis of the constitutional and other issues would be needed before the subcommittees recommend any further action on the draft. The subcommittees directed staff to research the issues for presentation at the next joint meeting.

Next, the subcommittees considered a revised draft amending the Government Data Collection and Dissemination Practices Act (GDCDPA)(§ 2.2-3800 et seq.). This draft adds certain specific categories to the definition of personal information, prohibits agencies from requiring SSNs unless such collection is both authorized by law and essential to the agencies duties, strengthens the remedies provisions of the GDCDPA by adding civil penalties matching those in FOIA, and makes a technical change to allow general district courts to hear GDCDPA cases. Additionally, the draft has enactment clauses giving it a delayed effective date of July 1, 2009, and requiring agencies to study their own collection and use of SSNs and report to the FOIA Council and JCOTS on such collection and use by October 1, 2008. The draft also sets forth protections for the information so received (which might otherwise reveal means of obtaining unprotected SSNs in public records). A press release about this draft was issued to the Office of the Governor and his Secretaries, the Virginia Municipal League, the Virginia Association of Counties, the FOIA Council and JCOTS mailing lists, and other interested parties on November 8, 2007 in order to apprise them of the subcommittees' work and potential legislation.

Subcommittee members inquired whether the draft as worded would require lists from every entity of local government as well as state government. Because the definition of "agency"

⁷⁰ Senator Houck, Delegate Griffith, Mary Yancey Spencer, and Dr. Sandra Treadway were present at the meeting. Messrs. Edwards and Malveaux were absent.

⁷¹ Delegate Alexander and Senator Watkins were present.

in § 2.2-3801 includes units of local government, the draft as written would require lists to be compiled by local governments. Roger Wiley⁷² expressed his belief that requiring lists regarding the collection of SSNs to be submitted by every unit of local government would be excessive in scope and redundant in result. He suggested that alternative means be used to gather this information on localities, rather than having every individual locality respond separately. Senator Watkins suggested examining Title 15.2 to find approved and required uses of SSNs by localities. Mary Yancey Spencer observed that the GDCDPA generally excludes courts from its provisions, which was confirmed by staff. Senator Watkins suggested changing the draft wording from "authorized by law" to "authorized by statute" in order to avoid any questions of whether a locality could itself authorize collection of SSNs by ordinance. Senator Watkins also suggested adding a limitation to the same effect in Title 15.2. There were no other suggested changes by the subcommittees' members.

Senator Houck then requested public comment on both the PIPA and GDCDPA drafts, beginning with the PIPA draft. Mike Stollenwerk, speaking on behalf of the Fairfax County Privacy Council, observed that certain constitutional issues had been recognized during the last session of the General Assembly that resulted in HB 2060⁷³ being tabled in committee. He noted, however, that allowing SSNs in the public domain is still a problem. He related a story whereby a private investigator provided personal information obtained from a commercial data aggregator and other sources to a person who used it to stalk and harm someone else. Mr. Stollenwerk expressed the view that the public availability of SSNs is a continuing harm that should be eliminated. A representative of Virginia Issues expressed concerns regarding provisions of another law concerning secure remote access to court records. Audrey Robinson, on behalf of Lexis-Nexis and its parent company, Reed Elsevier, suggested replacing the word "publish" on line 29 of the PIPA draft⁷⁴ with "publicly post" or "publicly display," defined to mean "to communicate to the general public." She indicated that such a change would comport with other states' practices and help with continuity in usage by commercial businesses. Marc Greidinger, a private attorney, stated that Delegate Sickles' bill providing a FOIA exemption for SSNs merits further consideration, as it makes no sense to discuss republication of SSNs by others when government still releases SSNs to any requester. Delegate Sickles stated his belief that his bill would have given agencies the ability to say "no" to requests for SSNs, and right now agencies do not have that ability. Delegate Sickles further opined that addressing overcollection is good, but there is also a need to address the issue of SSNs that the government already has in public records.

The subcommittees then heard public comment on the GDCDPA draft. Nicole Bocra, a private investigator, suggested adding language to allow for the collection of SSNs to

⁷² Mr. Wiley spoke as a member of the FOIA Council and representative of the Virginia Municipal League; he is not a member of the PII Subcommittee.

⁷³ HB 2060; Public dissemination of social security numbers. Proscribes under the Personal Information Privacy Act and the Government Data Collection and Dissemination Practices Act the intentional communication to the general public of another's social security number regardless of whether the social security number was obtained from a public record or from a private source. The bill adds a punishment for violation of the Personal Information Privacy Act subjecting a violator to civil penalties of \$1,000 per day, with each day being a separate violation.

⁷⁴ The relevant sentence from lines 28 through 30 reads as follows: "However, a person who receives a public record that contains another individual's social security number shall not intentionally publish the social security number on an Internet website."

confirm identities. She further opined that licensed and regulated private investigators should have greater access to SSNs and other identifying personal information than the general public, and that she hopes government continues to collect such information because she uses it in her work. Mark Glaser of the Fairfax County Federation of Teachers indicated that his organization uses SSNs to identify individual employees of the school system, especially when two employees share the same name. Jennifer Perkins of the Virginia Coalition for Open Government expressed concern that there may be a huge barrage of legislation to allow individual uses of SSNs, leading to a situation where the exceptions swallow the rule. Marc Greidinger stated that under § 7A of the Privacy Act it is already unlawful in most cases for government to collect, use and disseminate SSNs unless it was allowed prior to 1975. Roger Wiley stated that much SSN collection at the local level, both in government and in the private sector, carries on by force of habit rather than need (for example, writing one's SSN on a check at the grocery store or when filling out a shipping label). Mr. Wiley further stated that it is a good idea to limit collection and to allow redaction of SSNs as a FOIA exemption, but (in regard to the study proposed under the draft enactment clauses) it would not be good to create impossible mandates for local government. Instead, Mr. Wiley expressed the better approach to be to examine what all units of local government can and cannot do, rather than ask what each and every one individually does. Audrey Robinson commented that there are no known cases of identity theft based on agency-issued identification numbers, and that such numbers are very useful for things such as looking up malpractice cases, enabling professionals licensed in one state to help with disaster relief in other states, and that limitations on the disclosure of such numbers may limit interagency communications. She also opined that the use of the word "and" in line 43 of the draft⁷⁵ established too high of a threshold standard that may cause problems with legitimate business usage. Eric Ellman, Consumer Data Industry Association (CDIA), expressed his support for Ms. Robinson's comments, and especially that the "and" in line 43 should be changed to "or." Delegate Griffith indicated he supported the use of "and" on line 43. Mike Stollenwerk expressed that the bill is well intended, and he supports the "and" clause, but that a FOIA exemption for SSNs is still necessary. Additionally, he suggested that the draft be changed so that aggrieved individuals may collect damages as allowed under the PIPA damages provisions.

The subcommittees' members then discussed the various suggestions and proposed changes to the drafts. The subcommittees directed staff to perform additional legal research regarding the constitutional freedom of speech issues identified in relation to the PIPA draft. The members also agreed generally that the GDCDPA draft was headed in the right direction, but not ready to be introduced. The subcommittees directed staff to reexamine the language concerning agency-issued identification numbers, as the real interest was in protecting drivers' license numbers specifically, not necessarily all agency-issued identification numbers. Additionally, staff was directed to reexamine the last enactment clause of the GDCDPA as it would be applied to local government, keeping in mind the magnitude of the undertaking if every unit of local government must generate a list of all of

⁷⁵ The relevant sentence from lines 41 through 43 reads as follows: "No agency shall require an individual to furnish or disclose his social security number or agency-issued identification number unless the furnishing or disclosure of such number is (i) expressly authorized by law and (ii) essential for the performance of that agency's duties."

its uses of SSNs and the relevant legal authority for each such use. The joint meeting of the two subcommittees then adjourned.

The PII Subcommittee then reconvened to discuss the final matter on its agenda, the concealed carry handgun permits draft. Lisa Wallmeyer, Division of Legislative Services, presented the revised draft as incorporating the changes suggested by the subcommittee at its last meeting. In essence, the draft as presented would allow the Department of State Police (DSP) to withhold records concerning concealed carry permits held by Virginia residents (although such records would remain available at the clerk of court's offices where the permits are issued), while permitting access to nonresident's permit information (permits originally issued by DSP) and to statistical information that does not identify individual permittees. Senator Houck then requested comments.

Mike Stollenwerk, on behalf of the Virginia Citizens Defense League, stated that the draft was headed in a good direction but he would like to see the committee consider alternatives because the lists are useful for membership and political activism. To this end he suggested that the draft should allow the release of permittees' names and mailing addresses with use limitations. Audrey Robinson indicated that Lexis-Nexis receives concealed handgun permit information from various states which it compiles for use by law enforcement agencies. Currently such information is provided by contract with DSP, and Lexis-Nexis would like to continue this practice, but the draft as written might interfere. To address this issue, Delegate Griffith suggested adding law enforcement agencies to the draft and the subcommittee generally agreed. In further discussion Mr. Stollenwerk suggested providing access to lists of permittees in a fashion similar to the access currently provided for voter registration lists, which received mixed reactions from the committee members. The subcommittee directed staff to research this suggestion and prepare an alternative draft incorporating appropriate language for consideration at the next meeting. The subcommittee then adjourned.

December 3, 2007

The Personal Identifying Information Subcommittee (PII Subcommittee)⁷⁶ of the Freedom of Information Advisory Council (FOIA Council) held its fifth joint meeting with the Social Security Number Subcommittee of the Joint Commission on Technology and Science (JCOTS Subcommittee)⁷⁷ to continue their deliberations on public access to social security numbers (SSNs) contained in public records (HB 2821, 2007, Delegate Sickles).

The meeting began with consideration of a revised draft amending the Personal Information Privacy Act (PIPA) (§ 59.1-442 et seq.). As with the prior draft, this version clarifies that an individual may disseminate his or her own SSN without violating PIPA. By striking certain language in the law as it is currently enacted, this version would also apply its prohibitions on the dissemination of SSNs to those obtained from public records. This version is not

⁷⁶ Senator Houck, Delegate Griffith, John Edwards, Courtney Malveaux, Mary Yancey Spencer, and Dr. Sandra Treadway were present at the meeting. Mr. Roger Wiley, who is a member of the FOIA Council but not a member of this subcommittee, also attended.

⁷⁷ Delegate Alexander and Senator Watkins were present. Delegate May was absent.

limited to publication of SSNs online as was the previous draft. Following up on concerns raised at the last joint meeting, staff presented an outline of the constitutional issues that may come into play should the draft be passed into law. Staff discussed two relevant lines of jurisprudence. First, staff presented a series of cases where laws restricting the publication of truthful information lawfully obtained were consistently struck down as unconstitutional infringements upon citizens' freedoms of speech. Second, staff set forth cases and statutes highlighting the importance of SSNs and the compelling privacy interest in protecting individuals' SSNs. Under the first line of cases, the Supreme Court of the United States has consistently refused to set forth a blanket rule, but has instead held out the possibility that a law restricting the publication or dissemination of truthful information lawfully obtained might be constitutional if it serves to protect a sufficiently compelling interest. However, in every specific case that has come before it, the Court has struck down such laws as unconstitutional restraints violating the First Amendment right to freedom of speech. None of these cases have specifically addressed the publication or dissemination of SSNs obtained from public records. Other cases from various courts have consistently held that there is a compelling privacy interest in protecting individuals' SSN information. By contrast, there is relatively little public interest in disseminating SSN information from public records that do not otherwise reveal government conduct. In assessing all these cases together, staff concluded that while the draft presented today could be challenged as an improper prior restraint on freedom of speech under the first line of cases, because of the compelling interest in protecting SSNs, there is nevertheless an even chance that a court would find the law constitutional. Senator Houck then inquired whether other states had passed similar laws providing "blanket protection" of SSNs, whether those laws had been challenged in court, and if so, what were the results of those challenges. Staff indicated that while several states have passed such laws, research revealed no legal challenges to date. Specifically, Maryland passed such a law two years ago and staff at the Maryland Attorney General's Office indicated there have been no challenges to that law or inquiries as to its constitutionality.

Next, the subcommittees considered a revised draft amending the Government Data Collection and Dissemination Practices Act (GDCDPA)(§ 2.2-3800 et seq.). As with the version presented at the last joint meeting, this draft adds certain specific categories to the definition of personal information, prohibits agencies from requiring SSNs unless such collection is both authorized by law and essential to the agencies duties, strengthens the remedies provisions of the GDCDPA by adding civil penalties matching those in FOIA, and makes technical changes to allow general district courts to hear GDCDPA cases. Additionally, the draft has enactment clauses giving it a delayed effective date of July 1, 2009, and requires state agencies to study their own collection and use of SSNs and report to the FOIA Council and JCOTS on such collection and use by October 1, 2008. This version of the draft also contains a fourth enactment clause providing for the gathering of similar information about the use and collection of SSNs by cities, counties and towns with a population greater than 15,000. This clause was designed to address concerns raised at the last meeting regarding the volume and redundancy of collecting such information from all localities, and directs staff of the FOIA Council and JCOTS to work with the Virginia Municipal League (VML) and the Virginia Association of Counties (VACO) to develop a form for the efficient collection of such information. The draft also sets forth protections for

the information so received (which might otherwise reveal means of obtaining unprotected SSNs in public records). A press release was issued November 8, 2007 to notify affected parties about the proposed draft.

The subcommittee members raised several concerns and points of clarification about the draft. Senator Watkins indicated his concern about the venue provisions as they would apply to persons who are not citizens of Virginia, such as hunters from out of state who purchase a Virginia hunting license. The draft indicates suit could be brought "where the aggrieved person resides or where the agency made defendant has a place of business," leading to the question whether someone from out-of-state could attempt to bring suit against a Virginia agency in another state's courts. Staff indicated venue would be where the defendant agency in question has a place of business, as other states' courts would lack jurisdiction to enforce Virginia state law. Roger Wiley indicated a concern that the draft with its enactment clauses "put the cart before the horse" by passing a prohibition on the collection of SSNs before conducting the study to determine exactly how and why government agencies are currently collecting and using SSNs. In the interest of making sure the enforcement provisions match the intent of the law, Courtney Malveaux pointed out that while FOIA provides for civil penalties to be assessed against individuals who commit knowing and willful violations of FOIA, the enforcement provisions of this draft do not contain an equivalent "knowing and willful" standard for individual violators. Discussion among the members and staff also clarified that federal law indicates that local and state governments may not start collecting SSNs after January 1, 1975, unless they already were doing so before that date or are specifically authorized by law to do so. This draft is meant to comply with the federal law, and would not prohibit collection and use of SSNs that are allowed under the federal law. Mr. Wiley's inquiries clarified that the draft law would not suddenly prohibit any collection of SSNs that is currently lawful.

Senator Houck then opened the meeting to public comment. B.J. Ostergren, representing the Virginia Watchdog, indicated she felt that these bills were specifically directed at her and her website, which publishes public records containing social security numbers on the Internet. She further indicated that a federal case declared a similar Washington state law unconstitutional, that there were United States Supreme Court cases holding such laws unconstitutional, that two similar bills were withdrawn by their patrons in the 2006 Session of the General Assembly over constitutional concerns, and she believed this draft would be unconstitutional as well. Mike Stollenwerk, representing the Fairfax County Privacy Council, indicated that he supports the direction of both bills, but felt that in addition there should be legislation providing a FOIA exemption for SSNs and that the state should move to redact SSNs from existing public records. Also, under the GDCDPA draft, Mr. Stollenwerk felt that the enforcement provision should be amended to award damages to the plaintiff rather than to the Literary Fund, as an incentive to enforcement. Craig Merritt, on behalf of the Virginia Press Association, made a technical point about the use of the word "list" in the enactment clauses of the GDCDPA draft. Jennifer Perkins, Executive Director of the Virginia Coalition for Open Government, requested clarification about the differences in the damages provisions of the GDCDPA draft as compared to the PIPA draft and FOIA. FOIA and the GDCDPA generally contemplate violations committed by government entities, and so damages are awarded to the Literary Fund instead of to individual plaintiffs

due to sovereign immunity issues. PIPA violations, by contrast, are generally committed by individuals; sovereign immunity is not an issue in these instances, and so damages are awarded to the plaintiff. Marc Greidinger, a private attorney, commended the GDCDPA draft as a step in the right direction, but indicated he did not believe the draft goes far enough. Mr. Greidinger expressed support for Delegate Sickles' original bill that would add a FOIA exemption for SSNs, and indicated that he believes that for-profit data aggregators contribute to problems with identity theft and fraud, as do public officials selling individuals' personal information (Mr. Greidinger clarified that he meant situations such as online subscription access to court records and did not mean to allege improper private sales of public records for profit by individual public officials). Others pointed out that neither the PIPA draft nor the GDCDPA draft, as presented today, would apply to court records. Chris Whyte, representing Lexis-Nexis, expressed agreement that the draft "put the cart before the horse" and urged the subcommittee to consider the use of "or" rather than "and" on line 43 of the draft (regarding the requirement that collection be authorized by law *and* essential to the agency's duties), while recognizing the subcommittee had made a policy choice favoring "and" as a higher standard. Phyllis Errico, representing VACO, requested clarification about whether and why the draft refers to driver's license numbers as well as SSNs; staff responded that the draft includes driver's license numbers because those numbers are unique identifiers that are being used and may be subject to misuse just as are SSNs. In reference to Mr. Greidinger's comments, B.J. Ostergren stated that clerks in Texas and Nevada had been removed from office for selling individuals' personal information for profit, but she had not heard of a Virginia case where that had happened. Mike Stollenwerk spoke against the suggestion of using "or" instead of "and" on line 43 of the GDCDPA draft because it would effectively allow a loophole for agencies to collect SSNs any time the agency deemed it essential, regardless of whether such collection was authorized by law. In response to a question from Fred Norman of Commonwealth of Virginia Consulting, it was further clarified that the GDCDPA draft addressed collection of SSNs in all formats, whether paper or electronic.

The subcommittees then voted unanimously by voice vote to recommend the PIPA draft to the FOIA Council and JCOTS. After further discussion of the use of the term "lists" in the enactment clauses of the GDCDPA draft, it was agreed that the clauses were acceptable as written. The subcommittees then voted unanimously by voice vote to recommend the GDCDPA draft to the FOIA Council and JCOTS. At this point, the joint meeting of the PII and JCOTS subcommittees was adjourned.

The PII Subcommittee then reconvened to consider the concealed carry handgun permits (CHPs) draft. As previously discussed by the subcommittee, the draft would restrict access to the statewide list of Virginia citizens who hold CHPs compiled by the Department of State Police (DSP), but would allow access to the lists of permittees held by individual court clerks, the lists of out-of-state permittees held by DSP, and any aggregate or statistical information that does not identify individual permittees. The latest draft also contains a provision (subsection K2) to allow certain groups access to the statewide list of Virginia permittees for political advocacy and similar purposes, drafted to correspond to laws allowing access to voter registration lists. This addition was requested at the last subcommittee meeting for consideration by the subcommittee. Delegate Griffith questioned

both whether such a limited access provision is constitutional (answer: probably) and whether it is fair to others. Senator Houck noted that previously the Free Lance-Star published the list of CHP holders in its local jurisdiction, and that he had heard from constituents who did not know that their personal information entered the public domain because they held CHPs. Further, he questioned how we could tell constituents that there will be a distinction in the access granted; instead, access should be an all or nothing proposition. Mr. Edwards agreed, stating that he appreciated Senator Houck and Delegate Griffith's sentiments. As a possible solution, Senator Houck suggested an "opt-out" provision allowing citizens to choose whether to grant access to their own information, keeping in mind the paramount policy consideration in this instance is the privacy of the individual. He then opened the meeting to public comment.

B.J. Ostergren commented against such an "opt-out" provision, stating that she has gotten "sealed" court records through online subscriber access, and that mistakes are made. She agreed there should be protection for abused persons and other vulnerable populations. Mike Stollenwerk, speaking as a member of the Virginia Citizens Defense League (VCDL), stated that he is a permit holder but he is served by being able to be contacted by interested groups (such as VCDL), and that the real privacy invasion occurs at DSP. Phillip Van Cleave, President of the VCDL, stated that in publishing the list of CHP holders on the Internet the Roanoke Times had acted irresponsibly. He indicated he generally likes this bill, and pointed out that his organization has been very careful in how it uses permittee information. Mr. Merritt indicated that the bill would be stronger if the first part (subsection K1) was kept but the second part removed (subsection K2, granting certain political advocacy groups and others limited access to the statewide CHP holder list). The subcommittee moved to strike subsection K2; the motion carried unanimously. The subcommittee then moved to recommend the draft as amended to the full FOIA Council; this motion also carried unanimously. The meeting was then adjourned.

