

**REPORT OF THE**

**Virginia Freedom of  
Information Advisory Council**

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



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**COMMONWEALTH OF VIRGINIA  
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DECEMBER 2008**





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ADVISORY COUNCIL**

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**MEMBERS  
OF THE  
VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

Delegate H. Morgan Griffith, Chair  
Senator R. Edward Houck  
Ralph L. "Bill" Axselle  
Craig T. Fifer  
Forrest M. "Frosty" Landon  
Courtney M. Malveaux  
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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 2008**

## **INTRODUCTION**

*"Without robust, reliable access to government information, members of the public cannot function intelligently as citizens, cannot meaningfully participate in the policy process, and cannot adequately evaluate the performance of their elected representative or hold their government institutions accountable."*

Steven Aftergood  
Federation of American Scientists  
2003

Established by the 2000 Session of the General Assembly<sup>1</sup>, 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 the 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 FOIA<sup>2</sup>. 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.

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 to foster compliance and a better understanding of 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 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 2008, the Council said goodbye to members John B. Edwards and W. Wat Hopkins. Both Mr. Edwards and Mr. Hopkins were original members of the Council who each served two full four-year terms on the Council. In 2008, the Council welcomed Mr. John G. Selph and Mr. Forrest M. "Frosty" Landon to its ranks. Mr. Selph was appointed by the Speaker of the House of Delegates to fill Mr. Hopkins' seat; Mr. Landon was appointed by the Senate Committee on Rules to fill Mr. Edwards' seat.

## **EXECUTIVE SUMMARY**

The Council continues to fulfill its role to the Virginia General Assembly by serving as a clearinghouse for public access issues. For the eighth straight year, the Council has conducted in-depth reviews of FOIA and other public access legislation referred by the General Assembly. Seven bills were referred to the Council for study by the 2008 Regular Session of the General Assembly, all addressing different aspects of access to personal information. These issues ranged from public access to social security numbers (SSNs) contained in public records to information about holders of concealed handgun permits and individuals who donate or loan one or more items of personal property to publicly-owned museums.<sup>3</sup> In addition, the Council undertook the review of legislation passed in 2008<sup>4</sup> concerning electronic communication meetings conducted by the Air Pollution Control Board (Air Board) and the State Water Control Board (Water Board) as part of the environmental permitting process. While this issue was not the central thrust of HB 1332/SB423, these specific provisions conflicted with FOIA requirements for conducting teleconferences and other electronic meetings. There was concern that these conflicting provisions, left untouched, would set a bad precedent for other public bodies to follow thereby denying public access to their actions. To study the above-described issues, the

Council recommissioned two subcommittees.

The Personal Identifying Information Subcommittee (PII Subcommittee), initially formed in 2007, continued its work on public access to SSNs and concealed handgun permit applications. The PII Subcommittee also examined access to personal information about donors to public museums (HB 858/SB 647) and ultimately decided to take no further action on these bills. For a second year, the PII Subcommittee worked jointly with the SSN Subcommittee of the Joint Commission on Technology and Science (JCOTS) on disclosure of SSNs contained in public records. What initially appeared to be a relatively easy issue to resolve, turned out not to be the case. There was consensus from all sides, however, that greater protection of SSNs was desirable to hamper identity theft and other unlawful uses of SSNs. The statutory method by which that goal was achieved, however, proved more elusive and complex. Testimony before the PII Subcommittee indicated that a FOIA exemption for SSNs was problematic for certain entities (e.g. print media, data aggregators, private investigators, and others) because of their need for access to SSNs to verify an individual's identity. These entities and access advocates both argued that a FOIA exemption for SSNs, although discretionary, would be treated by government as a prohibition and effectively no records containing SSNs would be released. It was further noted that an exemption for SSNs in FOIA itself would be counter to its underlying policy that motive for the request (i.e. verification of identity) is immaterial and this approach would require government entities to ascertain the motive behind the request. In contrast, privacy advocates argued that because FOIA exemptions are discretionary and not mandatory, a government entity could choose to release records containing SSNs absent an express prohibition found in some other law. At the recommendation of the PII Subcommittee, the Council considered several approaches to protect the disclosure of SSNs. There were, however, common threads in each approach. First, protection of SSNs should be a separate statute and not a part of FOIA so as not to harm the underlying policy of FOIA as noted above. Secondly, entire SSNs should be treated as confidential and their release prohibited except under limited circumstances, including to law-enforcement and criminal justice agencies or pursuant to proper judicial order. Ultimately, the Council voted to defer action on this issue because none of the approaches appeared to strike the proper balance. The Council felt that the fact that three different legislative proposals were offered to resolve the issue was evidence that a recommendation at this time was premature. The Council remains committed, however, to resolution of the issue.

With the enactment of the Council- and JCOTS-sponsored legislation in the 2008 Session prohibiting the collection by state and local agencies of SSNS, beginning July 1, 2009, except where authorized or required by law and essential to the mission of the agency,<sup>5</sup> the Council, with the concurrence of JCOTS, recommends extending the effective date of this prohibition until July 1, 2010. Given the response from the SSN surveys and the tremendous volume of data to process and verify, the Council and JCOTS agreed that an additional year is necessary to thoroughly process and analyze all of the implementation issues relating to the statutory restriction on collection of SSNs.

Additionally, at the request of the General Assembly, the Council re-examined, the issue of public access to records relating to holders of concealed weapons permits (SB 529, Houck). The Council adopted the position of the PII Subcommittee to recommend again SB 529 in 2008 because of its belief that the bill reflects the proper balance between privacy and public access. The recommendation of the Council would require 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, with a limited exception for access by law-enforcement agencies. Records of the names and addresses of holders of concealed weapons 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 Electronic Communications Meeting Subcommittee (Emeetings Subcommittee) considered public access issues raised by statutory changes made in 2008 that would allow members of the State Air Pollution Control Board (Air Board) and the State Water Control Water Board (Water Board) to meet via teleconference under certain circumstances. The various stakeholders testified before the Emeetings Subcommittee on HB 1332/SB 423, and expressed concern that any recommendation of the Council to resolve the FOIA conflicts in the law would reopen other issues, unrelated to the electronic meeting provisions, in HB1332/SB423. The Council felt that such concerns, while valid, were not a compelling reason not to address the access issue given that General Assembly Sessions are rife with bills involving numerous stakeholders resulting in legislation that represents uneasy compromises. As a result, the Council voted unanimously to approve the Emeetings Subcommittee draft legislation and recommend it to the 2009 Session of the General Assembly.

The Council created two additional subcommittees, the Meeting Minutes Subcommittee (Minutes Subcommittee) and the Database Index Subcommittee (DI Subcommittee). The Minutes Subcommittee was formed to examine issues related to the use of new technologies to record meetings and keep meeting minutes. The Subcommittee recommended legislation that would make explicit the current requirement that meeting minutes be kept in writing. The Council recognized that BoardDocs and similar technological advances may provide improvements to public access, especially in enabling access to meeting materials over the Internet before the meeting is held. However, concerns were expressed that the traditional historical form of meeting minutes has always been a written summary, which is not dependent on technologies which change and grow obsolete over time, and which still serves its traditional purpose of providing a readily-accessible synopsis of events at a public meeting. As a result, the Council voted unanimously to approve the recommendation of the Minutes Subcommittee and include it as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

The DI Subcommittee was formed because of perceived confusion and lack of compliance regarding the requirement that state agencies compile an index of computer databases and annually update it. As a related matter, the DI Subcommittee also examined

the current requirement found in § 2.2-3704.1 that state agencies publish a statement of FOIA rights and responsibilities on their respective websites. The Council adopted the DI Subcommittee recommendation to eliminate the requirement for a database index in favor of expanding the statement of rights and responsibilities to include a requirement that the statements also contain a general description of the types of public records an agency has and the types of exemptions that may apply to those records, ensuring meaningful public information and access. To implement these additional requirements, the Council will be proactive in developing a model document for use by state agencies. Additionally, the Council will offer its expertise to assist in customizing the model document to meet the needs of each agency.

The Council continued to monitor Virginia court decisions relating to FOIA. The U.S. District Court for the Eastern District of Virginia heard the case of Chester Szymecki v. the City of Norfolk, involving the required furnishing of a SSN. The relevant facts are that Mr. Szymecki and his family attended Harborfest, a public festival in Norfolk, Virginia. Mr. Szymecki was carrying openly a holstered handgun. A Norfolk ordinance prohibited such carry. Mr. Szymecki was detained and charged with violation of the ordinance. Mr. Szymecki stated that officers demanded his SSN, telling him he could either provide his SSN and be issued a summons, or be arrested and incarcerated if he refused. The police did not state why they needed his SSN, their authority for collecting it, or how it would be used. He provided his SSN, and was issued a summons. The charges for violating the local ordinance were later dropped. Mr. Szymecki further alleged that when he later went to pick up his personal property from the police, they again demanded his SSN, stating that they would not return his property if he did not provide his SSN. Again, the police did not state why they needed his SSN, their authority for collecting it, or how it would be used. Mr. Szymecki again provided his SSN. Among other claims, Mr. Szymecki alleged a federal Privacy Act Section 7 claim for the improper collection of SSNs.<sup>6</sup> The court first found that Section 7 confers a legal right on individuals, and violations may be enforced through an action under § 1983.<sup>7</sup> The court further found that Mr. Szymecki had alleged facts sufficient to state a claim for violation of subsections (a) and (b) of Section 7.<sup>8</sup> This matter is set for trial on December 16, 2008.

In another U.S. District Court case in the Eastern District of Virginia, *Ostergren v. McDonnell*, the Court considered the prohibition on dissemination of SSNs obtained from public records contained in the Personal Information Privacy Act (PIPA).<sup>9</sup> Ms. Ostergren advocates for the removal of SSNs from public records, especially court records that are published online. She publishes the Virginia Watchdog website to further those efforts. Among other content on the website, Ms. Ostergren republishes public records that contain SSNs in order to emphasize her advocacy and illustrate the problem. As of July 1, 2008, amendments to PIPA prohibit such republication of public records containing SSNs. Violators may be subject to fines up to \$2500 per violation, investigative demands, and injunctions. In its analysis the court reviewed prior Supreme Court decisions and observed that SSNs are generally entitled to privacy as personal identifiers that may be misused. However, the court found that based on the record that the General Assembly did not provide funding for the redaction by court clerks of SSNs from court records, protection of

SSNs is not a state interest of the highest order. The court also found that this matter - the protection of SSNs - is a matter of public significance and that Ms. Ostergren's speech is political in nature and entitled to protection under the First Amendment. The court decided that PIPA is unconstitutional as applied to Ms. Ostergren's website as it presently exists, but further briefing would be required "on the propriety and scope of an injunction other than with respect to Ostergren's website as it exists."<sup>10</sup> As of the date of this report, the parties have submitted additional briefs and are awaiting the final order of the court.

The Council continued its commitment to providing FOIA training. The Council views its training mission as its most important duty and welcomes every opportunity to provide FOIA training programs. During 2008, Council staff conducted a total of 64 FOIA training programs throughout Virginia at the request of state and local government officials, the media, and citizens. 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 2009, the Council plans to conduct its statewide FOIA workshops in at least six statewide locations, but is concerned about the appropriateness of conducting these workshops given the current budget shortfall for state and local governments. The Council is exploring ways to provide the much-requested workshops free of charge. In addition to Virginia State Bar continuing legal education credit, these workshops are also pre-approved by the Department of Criminal Justice Services for law-enforcement in-service credit and the Virginia School Board Association for academy points. The Council expects to reach approximately 600 persons, including government officials, media representatives and citizens, through the 2009 statewide FOIA workshops.

For this reporting period, the Council, with a staff of two attorneys, responded to approximately 1,700 inquiries. Of these inquiries, 11 resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: one by government officials, two by media representatives, and eight by citizens. The remaining requests were for informal opinions, received via telephone and e-mail. Of these requests, 827 were made by government officials, 641 by citizens, and 206 by media. Over the past several years, the Council has seen an increase in the number of informal opinion requests as compared to requests for formal written opinions. This trend appears to stem from the Council's reputation as a valuable resource for answering FOIA questions before disputes arise.

FOIA was again the subject of significant legislative activity in the 2008 Session. The General Assembly passed a total of 21 bills amending FOIA. Of the 21 bills, nine bills created seven new record exemptions to FOIA, three bills added new closed meeting exemptions, and eleven bills amended existing provisions of FOIA. One successful bill amending FOIA--SB 131 (Houck)/HB 854 (Ebbin), concerning emergency meetings of local public bodies--was a recommendation of the Council. Additionally, a joint recommendation of the Council and JCOTS, SB 132 (Houck)/HB 634 (May), amending provisions of the Government Data Collection and Dissemination Practices Act, was

enacted. Similarly, SB 133 (Houck) and HB 633 (May), amending the Personal Information Privacy Act, also passed as a joint recommendation of the Council and JCOTS. SB 529 (Houck), concerning access to concealed carry handgun permits, was introduced as a recommendation of the Council and, as noted above, was re-referred to the Council for further study during the 2008 interim. A more detailed report of the bills passed during the 2008 Session appears on the Council's website and is attached to this report as Appendix E.

In August, the Council elected Delegate H. Morgan Griffith to chair the Council, with Senator Edd Houck elected as vice-chair. The Council also bid farewell to outgoing Council members John B. Edwards and W. Wat Hopkins, both original members of the Council whose membership terms expired July 1, 2008. The Council welcomed new members Forrest M. "Frosty" Landon, appointed by the Senate Committee on Rules, and John G. Selph, appointed by Speaker of the House of Delegates, to fill these vacancies.

Finally the Council adopted, by a vote of 6 to 5, a formal statement concerning the conduct of electronic meetings promoting face-to-face meetings as the preferred standard. The statement of principle, as adopted by the Council, reads as follows:

*The Freedom of Information Advisory Council believes that technology can expand public monitoring of and participation in the affairs of government. It also believes representative government is best served when public officials meet face-to-face in regularly scheduled public meetings.*

*One of the primary responsibilities of accepting public office is the regular participation in face-to-face public meetings. The Council believes such meetings should continue to be the rule rather than the exception.*

*As technology advances, the use of electronic meetings will accelerate. As that occurs, the FOIA Council will continue to balance the preference for face-to-face meetings against the emerging technology in light of the clear policy statement of FOIA to afford citizens every opportunity to witness the operation of government, "since at all times the public is to be the beneficiary of any action taken at any level of government."*

## **WORK OF THE COUNCIL**

### **March 31, 2008**

The Council held its first quarterly meeting of 2008.<sup>11</sup> The purpose of the meeting was to review legislative changes to FOIA made by the 2008 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 21 bills amending FOIA during the 2008 Regular Session. One bill amending FOIA was passed as a recommendation of the Council: SB 131 (Houck)/HB 854 (Ebbin), concerning emergency meetings of local public bodies. Additionally, SB 132 (Houck)/HB 634 (May), amending provisions of the Government Data Collection and Dissemination Practices Act, passed as a joint recommendation of the Council and JCOTS. Similarly, SB 133 (Houck) and HB 633 (May), amending the Personal Information Privacy Act, also passed as a joint recommendation of the Council and JCOTS. SB 529 (Houck), concerning access to concealed carry handgun permits, was introduced as a recommendation of the FOIA Council and was referred to the Council for further study during the 2008 interim. In total, there were seven new records exemptions and three new meetings exemptions added, and eleven bills amend existing provisions of FOIA. A complete listing and description of these and other related access bills considered by the 2008 Session of the General Assembly is available on the Council's website and is attached to this report as Appendix E.

### *Bills Referred to the Council for Study*

Seven bills were referred to the Council for study by the 2008 Regular Session of the General Assembly, all addressing different aspects of access to personal information: SB 529 (Houck), HB 858 (Ebbin)/SB 647 (Ticer), HB 1087 (Sickles), HB 1088 (Sickles), HB 1096 (Sickles), and HB 1102 (Sickles).

In brief, SB 529 concerns public access to concealed carry handgun permits; HB 858 and SB 647 are identical bills that would have provided an exemption for records of a publicly owned museum that could be used to identify an individual who donates or loans one or more items of personal property to the museum; all four of Delegate Sickles' bills concerned different aspects of access to social security numbers (SSNs): HB 1087 would have exempted SSNs contained in local government records, HB 1088 would have exempted SSNs contained in records of the Department of Game and Inland Fisheries, HB 1096 would have established the Protection of Social Security Numbers Act, and HB 1102 would have provided a general FOIA exemption for SSNs. Rather than consider the specifics of each bill referred for study at today's organizational meeting, the Council noted that the bills all fell into the general topic area of personal identifying information issues, and so would be addressed in depth by the PII Subcommittee (see below). Senator Houck directed staff to invite the patrons of these bills to attend the Subcommittee meetings. Additionally, Senator Houck directed staff to also invite Delegate Nutter, whose HB 982 concerned the same subject matter as SB 529, access to concealed carry handgun permits.

### *Appointment of Subcommittees / Study Plan*

Personal Identifying Information Subcommittee. The Council continued the PII Subcommittee to study the seven bills referred to the Council by the 2008 Regular Session of the General Assembly described above. Last year, the PII subcommittee worked with JCOTS regarding HB 2821, a bill concerning access to SSNs that was referred to both the Council and JCOTS. The PII Subcommittee will continue to work with JCOTS regarding SSNs, and within this context, the Council briefly discussed SB 132 (Houck)/HB 634 (May), bills that passed the 2008 Regular Session as joint recommendations of the Council and JCOTS.<sup>12</sup> These bills amend the Government Data Collection and Dissemination Practices Act, and among other changes, require that certain state agencies, cities, counties, and towns with a population in excess of 15,000 shall provide information regarding their collection and use of SSNs to the Council and JCOTS. Staff is to develop forms for this purpose in conjunction with the JCOTS, the Virginia Association of Counties, and the Virginia Municipal League. The completed forms are to be submitted to the chairs of the Council and JCOTS by October 1, 2008. The members of the PII Subcommittee are Senator Houck (Chair), Delegate Griffith, Courtney Malveaux, Stewart Bryan, John Edwards, Wat Hopkins, Mary Yancey Spencer, and Sandra Treadway. Membership was left open for other interested members to join the Subcommittee if they so desire. Staff reviewed the study plan for the protection of SSNs, as detailed in the suggested agenda, in order to help focus the work of the Subcommittee. Generally, the study focuses on answering the questions of why protection of SSNs is needed, what other alternatives are available, and what methods may be used to protect SSNs if such protection is deemed advisable.

Electronic Meetings Subcommittee. During the public comment portion of the meeting, Craig Merritt, on behalf of the Virginia Press Association, pointed out two bills from the Council's legislative update--HB 1332 (Landes) and SB 423 (Puckett)--made changes to electronic meetings provisions outside of FOIA. These bills establish a uniform permit issuance process for the Air Board and the Water Board. Among other changes, the bills provide that if either Board conducts a meeting by electronic communication, it shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public. The Council voted to take up these bills for study, and to continue the EMeetings Subcommittee for that purpose. The members of the EMeetings Subcommittee are John Edwards (Chair), Senator Houck, Roger Wiley, E. M. Miller, Craig Fifer, and Bill Axselle. Membership was left open for other interested members to join the Subcommittee if they so desire.

## *Of Note*

### 1. Expiration of FOIA Council membership terms:

The membership terms of John Edwards, W. Wat Hopkins, and Craig Fifer expire as of July 1, 2008. Mr. Edwards and Mr. Hopkins are not eligible for reappointment, as they each have already served two four-year terms. Having served a single four-year term, Mr. Fifer is eligible for reappointment. The Council noted that the June, 2008 meeting of the Council will be the last with Mr. Edwards and Mr. Hopkins as Council members, and thanked them for the distinguished service they have provided as Council members thus far. Mr. Fifer indicated that he is seeking reappointment to the Council for an additional term.

### 2. Latest statistics on services rendered by the FOIA Council:

Staff reported that for the period December 1, 2007 through February 29, 2008, it had received a total of 418 inquiries. Of the 418 inquiries, 1 request was for a formal written opinion and the remaining 422 inquiries were by telephone and electronic mail. Citizens accounted for 165 of the informal inquiries, the government for 202 inquiries, and the media for 51 inquiries. The formal opinion was requested by a citizen of the Commonwealth. Additionally, the Council expressed its view that these statistics are important as discrete measures of the work done by the Council and staff, and as such, the Council wishes for staff to continue reporting these statistics.

### 3. Possible lawsuit regarding changes to the Personal Information Privacy Act:

The Personal Information Privacy Act was amended by SB 133 (Houck)/HB 633 (May), bills recommended by the Council. As amended, the law will prohibit 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. News reports indicate this law may be the subject of a lawsuit on constitutional grounds as an improper prior restraint on free speech in violation of the First Amendment. It is staff's understanding that no suit would be filed until the changes to the law take effect on July 1, 2008. Staff will keep the Council updated on this matter as further news develops. Additionally, Council member Wiley noted a recent news article that raised a related matter concerning identity theft. The article identified one of the victims as Delegate Robert Brink, and stated that the information used to steal Delegate Brink's identity was obtained from public records published online on the Virginia Watchdog website. The Council directed staff to distribute the article for background information to Council members after the meeting. The original article was by Bob Gibson and appeared in the Charlottesville Daily Progress on March 22, 2008.

## ***Public Comment***

Megan Rhyne, on behalf of the Virginia Coalition for Open Government (VCOG), announced that VCOG will hold its annual conference on May 22-23, 2008 in Fredericksburg. The conference will include VCOG's annual presentation of its Freedom of Information awards.

As described above, Craig Merritt, on behalf of the Virginia Press Association, pointed out the changes to electronic meetings provisions made by HB 1332/SB 423, and suggested the Council take this matter up for study. Council member Axselle indicated that the bill originally was not intended to affect FOIA, but included the meetings provisions at issue as part of a compromise between competing environmental and business interests. Mr. Axselle agreed with Mr. Merritt that the topic was one that should be studied by the Council. Delegate Griffith moved to add these bills to the Council's work agenda; Mr. Edwards seconded the motion. Mr. Fifer suggested continuing the EMeetings Subcommittee for this purpose. The Council then voted unanimously in favor of adding the bills to its agenda and continuing the Subcommittee. Senator Houck directed staff to invite the appropriate administration officials to the next meeting to address this matter.

James Lawrence, a citizen of Fredericksburg, indicated that he was prevented from attending a public meeting of the Fredericksburg Economic Development Authority in February. Mr. Lawrence was issued a notice forbidding him from trespassing at the Fredericksburg Visitor Center where the meeting was held; that notice states "No exception for public meetings or gatherings." Mr. Lawrence further indicated that he believes the City's actions forbidding him from attending public meetings at the Visitor Center are in violation of FOIA, and he intends to file suit against the City.

## **June 9, 2008**

The Council held its second meeting of 2008.<sup>13</sup> The purpose of the meeting was to acknowledge the service of outgoing Council members John B. Edwards and W. Wat Hopkins, whose membership terms expire July 1, 2008.

### ***Acknowledging the service of Council Members Edwards and Hopkins***

Senator Houck stated that both Mr. Edwards and Mr. Hopkins are original members of the Council, having served since the Council's inception in 2000. Because both have served two successive four-year terms, they are ineligible for reappointment.<sup>14</sup> After noting these facts, Senator Houck thanked Mr. Edwards for his years of diligent service and presented a parting gift on behalf of the Council. Further accolades and thanks were expressed by Council members Delegate Griffith, Wiley, Fifer, and Axselle, as well as by Peter Easter (Virginia Association of Broadcasters), Phyllis Errico (Virginia Association of Counties), Ginger Stanley (Virginia Press Association), and Megan Rhyne (Virginia

Coalition for Open Government). The speakers noted Mr. Edwards' thoughtful advocacy, his ability to understand multiple sides of an issue, his consideration to opposing viewpoints, and stated that these qualities, and Mr. Edwards' manner and style of service represent Virginia values and sets a standard that serves as an example to others. Mr. Edwards expressed his thanks, stating that it had been a pleasure and honor to serve, all the way back to a 1989 legislative study committee examining FOIA, on which he served with Mr. Axselle, and that he will miss serving on the Council. Senator Houck also expressed thanks for the diligent service of Mr. Hopkins, and stated that the Council had a parting gift for him as well, but Mr. Hopkins was not in attendance at the meeting.

### *Public Comment*

At the March 31, 2008, meeting of the Council, James Lawrence, a citizen of Fredericksburg, indicated that he was prevented from attending a public meeting of the Fredericksburg Economic Development Authority in February by being prohibited from entering the public building where the meeting was held. Mr. Lawrence appeared before the Council again today to present an update on this matter. He indicated that he had filed suit in general district court against the City Manager for the City of Fredericksburg, but the judge dismissed the petition for lack of subject matter jurisdiction. Delegate Griffith asked staff whether FOIA petitions were included in the jurisdiction of general district courts in Title 16.1 of the Code of Virginia; staff confirmed that they were.<sup>15</sup> Delegate Griffith stated that while understanding there could be special circumstances involved, he did not understand the dismissal for lack of subject matter jurisdiction (given that jurisdiction is explicitly granted in the Code). Senator Houck noted that the Council does not represent individuals in legal matters, but staff does answer questions and provides information about FOIA as part of the Council's duty to educate. Senator Houck thanked Mr. Lawrence for keeping the Council informed regarding this situation. Mr. Lawrence indicated that he intends to appeal to the circuit court, and will keep the Council informed of what happens in the case.

Next, Ginger Stanley of the Virginia Press Association presented articles that appeared in Virginia newspapers during Sunshine Week, which was March 16-22, 2008. Sunshine Week is an annual national effort to educate and inform the public about the importance of open government and freedom of information laws. Ms. Stanley's presentation included representative articles from the Richmond Times-Dispatch, the Roanoke Times, the Manassas Journal-Messenger, the Smithfield Times, the Potomac News, and the Free Lance-Star. The articles covered topics such as general overviews of the procedures involved in a records request, individual stories about using FOIA, the redaction of public records, access to Social Security Numbers, and the balance between access rights and privacy rights. Ms. Stanley expressed that there was excellent participation in Sunshine Week by the Virginia press, and that the efforts were again a success.

## *Other Business*

John Edwards presented a revised version of a statement he presented for the Council's consideration last year concerning the conduct of electronic meetings promoting face-to-face meetings as the preferred standard.<sup>16</sup> Mr. Edwards moved that the statement be adopted as the Council's position regarding electronic meetings; Delegate Griffith seconded the motion. Mr. Malveaux indicated that he largely agreed with the statement, but questioned whether it was the proper role of the Council to set forth such a principle, or whether that should be left to the General Assembly. Mr. Axelle questioned some of the particular language used, indicating he felt it might be too strongly worded. Mr. Fifer suggested the Council might want to make the statement part of its annual report to the General Assembly. Delegate Griffith indicated that he understood concerns regarding the statement, but that this version appears balanced and leaves room for exceptions. Delegate Griffith also observed that the statement cannot bind the legislature or future decisions of the Council. He also stated that he agreed that face-to-face meetings are better because even the best technology cannot fully convey body language and is unequal to participation in person; while such technology might exist in the future, it is not available now. Mr. Wiley stated that he set forth his opinion last year, but wanted to reiterate that FOIA covers a wide range of public bodies, many of which operate "below the radar" of public interest (i.e., members of the public do not attend the meetings of such bodies). For such bodies, it is important to make participation easier, given gas prices and existing recruiting difficulties; Mr. Wiley stated he would object to this statement as it does not provide enough leeway for all public bodies covered by FOIA. Mr. Miller indicated he would vote against adoption of the statement because the situations it addresses need to be reexamined every time they arise, and he felt that the statement would remove future flexibility. Mr. Axelle then moved to strike the first sentence of the second paragraph, which read as follows: "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." The Council approved the motion to strike by vote of seven in favor, three against. Having amended the statement, the Council then voted to adopt it, as amended, by vote of six in favor, five against.<sup>17</sup> The statement of principle, as amended and adopted by the Council, reads as follows:

*The Freedom of Information Advisory Council believes that technology can expand public monitoring of and participation in the affairs of government. It also believes representative government is best served when public officials meet face-to-face in regularly scheduled public meetings.*

*One of the primary responsibilities of accepting public office is the regular participation in face-to-face public meetings. The Council believes such meetings should continue to be the rule rather than the exception.*

*As technology advances, the use of electronic meetings will accelerate. As that occurs, the FOIA Council will continue to balance the preference for face-to-face meetings against the emerging technology in light of the clear policy statement of FOIA to afford citizens every opportunity to witness the operation of government, "since at all times the public is to be the beneficiary of any action taken at any level of government."*

## **August 5, 2008**

The Council held its third meeting of 2008.<sup>18</sup> The purpose of the meeting was to welcome two new Council members, Forrest M. "Frosty" Landon and John G. Selph; to elect a Chair and Vice-Chair; to receive reports from subcommittees; and to bring two other issues before the Council for consideration: (1) whether the Council should examine the database index requirements set forth in subsection J of § 2.2-3704, and (2) whether meeting minutes must be made available in written form.

### ***Election of Chair and Vice-Chair***

After welcoming the new Council members, Senator Houck asked staff to present the statutory requirements regarding the positions of Chair and Vice-Chair of the Council. Subsection D of § 30-178 states that "[t]he members of the Council shall elect from among their membership a chairman and a vice-chairman for two-year terms. The chairman and vice-chairman may not succeed themselves to the same position." The Council then unanimously voted to elect Delegate Griffith as Chair and Senator Houck as Vice-Chair. For purposes of today's meeting, Senator Houck continued to preside as Acting Chair.

### ***Subcommittee Reports***

Personal Identifying Information Subcommittee. Staff reported that the PII Subcommittee had met earlier this morning to continue its work regarding SSNs and other personal identifying information. The meeting began as a joint meeting with the JCOTS Subcommittee Studying SSNs (together with the PII Subcommittee, the Joint Subcommittee). The Joint Subcommittee received a presentation from Richard Varn, CIO of the City of San Antonio, Texas, and Executive Director of the Coalition for Sensible Public Records Access. Mr. Varn focused on the value of strengthened authentication procedures and heightened penalties for misuse as better approaches to prevent identity theft rather than redaction of SSNs or limitations on the use of SSNs. He emphasized that SSNs are already widely available in existing records, making redaction impractical and expensive, and that the majority of current identity theft crimes do not use SSNs at all. The Joint Subcommittee also heard an update on the survey regarding the collection of SSNs by state agencies, cities, counties, and certain towns, as mandated by SB 132/HB 634 (Chapters 843 and 840 of the 2008 Acts of Assembly). The survey forms and instructions have been sent out to the affected parties. It was reported that the responses so far have indicated that the survey process has already revealed valuable information to the affected public bodies about their own practices in regard to the collection of SSNs, including instances where SSNs may not need to be collected. The Joint Subcommittee also considered four bills<sup>19</sup> concerning the protection of SSNs that were referred by the General

Assembly during its 2008 Regular Session. The Joint Subcommittee deferred any action regarding these bills, indicating that it wants to hear first about two other matters: (1) other states' experiences in regard to laws allowing access and use of partial SSNs (four or five digits), and (2) a report from the Department of Motor Vehicles regarding the federal Real ID requirements and their implementation in Virginia. The PII Subcommittee separately (without the JCOTS Subcommittee) considered SB 529 (Houck), concerning access to concealed carry handgun permits. The PII Subcommittee will further study this matter before taking action.

Electronic Meetings Subcommittee. Staff reported that the EMeetings Subcommittee had met to discuss changes made by the 2008 Session of the General Assembly that would allow members of the Air Board and the Water Board to meet via teleconference under certain circumstances during the process of issuing permits (HB 1332 (Landes)/SB 423 (Puckett)). Certain of the provisions in these bills conflict with the electronic meetings requirements of FOIA. At its last meeting the Subcommittee agreed to a partial draft that addressed some of the issues raised, but did not want to bring it before the full Council until the draft is complete. The EMeetings Subcommittee will meet immediately after adjournment of the FOIA Council meeting today. The Council also agreed that Senator Houck will serve as Acting Chair of the Subcommittee for today's meeting, and Craig Fifer will be Chair for future meetings of the Subcommittee.<sup>20</sup>

### *Other Business*

Staff reported receiving inquiries from both citizens and state agencies regarding the requirements of subsection J of § 2.2-3704, which requires public bodies to maintain an index of computer databases.<sup>21</sup> It appears there may be confusion about what this subsection requires and practical difficulties in meeting those requirements. This provision was intended to address issues that arose when agencies first began switching from paper records to electronic databases, and was intended to provide a means for citizens to see what type of records were kept by each agency. Tom Falat, on behalf of the Virginia Information Technologies Agency (VITA), indicated that VITA was willing to work with the Library of Virginia and the FOIA Council on this issue. Additionally, he stated that VITA's audit requirements include relevant definitions and reporting requirements for listing databases for security purposes. While VITA's security interests are likely different from the FOIA interest in providing citizen access to public records, it may be helpful to see if and how these different database provisions might overlap and be made consistent with each other. In order to further study this matter, the Council established a subcommittee consisting of members Landon (Chair), Axselle, and Spencer.<sup>22</sup>

Staff also raised the issue of public bodies using new technologies such as BoardDocs to record their meetings, and consequently not producing written minutes.<sup>23</sup> The Board Docs technology appears to allow the publication online of navigable audio recordings of

meetings with attached document links. FOIA itself speaks to the minimum contents of meeting minutes, but is silent regarding whether minutes must be written or in any particular format. Several Council members expressed the view that written minutes are the traditional and best form for historical and archival purposes, and that other technological formats are often rendered obsolete by newer formats. As examples, reel-to-reel audio tapes and 8-track cassettes were formerly used to make audio recordings of meetings, but few retain the devices needed to play these recordings, even if the recordings themselves still exist. By contrast, written minute books are still as easily used as when they were first written, since no additional technology is needed to use them. Council members also expressed that having a summary and the ability to quickly navigate through minutes are helpful tools to improve citizen access by obviating the need to listen to an entire recording in order to find a particular topic of interest. Council members also observed that there is wide variety in the way minutes are kept by different public bodies: some use audio records merely to check the accuracy of a written summary, then discard the audio recordings; some keep the audio recordings indefinitely; some appear to use audio records without written minutes; some written minutes are nearly verbatim transcripts, while others are very brief summaries. The Council also had questions about the practical use of technologies such as BoardDocs, and suggested that staff arrange a presentation from a public body that has actual experience with BoardDocs. To further study these issues, the Council established a subcommittee consisting of members Wiley (Chair), Malveaux, Selph, and Miller.<sup>24</sup>

## **October 6, 2008**

The Council held its fourth meeting of 2008.<sup>25</sup> The purpose of the meeting was to hold Part I of the Council's annual legislative preview and to receive reports from subcommittees. Part II of the annual legislative preview will be held at the next meeting of the Council on December 1, 2008.

### ***Legislative Preview (Part I)***

The Council heard from Gary McLaren of the Virginia Economic Development Authority (VEDP) concerning expansion of the current record exemption found at subdivision 3 of § 2.2-3705.6. Mr. McLaren stated that the current exemption arguably does not cover government efforts to retain Virginia businesses. He advised that VEDP is working on a statewide business retention database called "Executive Pulse," which is a collection of information from local economic development agencies across Virginia indicating what is of interest and/or concern to businesses. Many local economic development agencies are reluctant to contribute to the statewide database because of concern that such records are not adequately protected from public disclosure. Mr. McLaren indicated that VEDP has been working with the Virginia Press Association (VPA) and the Virginia Coalition for Open Government (VCOG) to craft an exemption that would address the above-stated concerns. In response to draft language offered by VEDP, VPA made a counter proposal that does not protect business retention data, but instead rewrites

the current exemption in a manner patterned after subdivision 11 of § 2.2-3705.6 for confidential proprietary records submitted under the provisions of the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.).

Craig Merritt, representing VPA, distributed VPA's counter proposal to the Council. He stated that generally VPA sought the orderly development of the current exemption and noted that more recent exemptions to FOIA are limited as to time and scope. Mr. Merritt indicated that the substantive issues were the inclusion of counties, cities, and towns and not to over protect business records. He noted that there are current exemptions in FOIA to cover what VEDP felt should be protected, including legal matters and investment of public funds, in addition to the exemption related specifically to economic development. He stated that VPA understands the competitiveness of economic development efforts. He mentioned that the Executive Pulse survey information contains both exempt and nonexempt information and VPA wants to ensure that the entire record is not withheld.

Delegate Griffith asked for an explanation of why the VPA counterproposal did not offer the protection sought by the VEDP. VEDP responded that it did not cover business retention efforts and the earmarking process for protection of proprietary records submitted by businesses was perceived as unworkable as a practical matter. Delegate Griffith requested the VEDP, VPA, and VCOG to continue to work to resolve the issues in conflict and that the Council would revisit the issue at its next meeting in December. Council staff was asked to send notice of these meetings to the Council mailing list.

The Council then heard from Mark Flynn of the Virginia Municipal League (VML) concerning the expansion of the exemption for complainant information related to zoning violations found at subdivision 10 of § 2.2-3705.3. He mentioned that this exemption, enacted in 2002, codified a Virginia Supreme Court decision in the case of Lawrence v. Jenkins (258 Va. 598, 521 S.E. 2d 523 (Va., 1999)). Mr. Flynn indicated that this exemption should also provide protection for individual building code and fire prevention code complaints. He noted that there was reluctance among neighbors and tenants in rental properties to report building or fire code violations for fear of retaliation as the complainant's name and address would be accessible under FOIA. Violations of the Uniform Statewide Building Code and the Fire Prevention Code are misdemeanors. Craig Merritt, representing VPA, told the Council that VPA opposed the exemption in 2002 on the basis that an accused has a right to know his accuser. He indicated that he had just seen the suggested amendment and would like more time to digest it with VPA's membership. Megan Rhyne, acting director of VCOG, noted that while she shares the public safety concerns, the identity of the complainant already can be protected under the criminal investigative information exemption. She suggested that localities consider using anonymous reporting of these violations. Additionally, Ms. Rhyne pointed to the "Christmas tree" effect of expanding the current exemption. B.J. Ostergren, Virginia Watchdog, indicated that while she agreed with Ms. Rhyne's comments, anonymous complaints are not received with the same importance as complaints where the complainant

is identified. The Council unanimously deferred action on this matter until the December Council meeting to allow the parties to work to resolve their differences.

### ***Subcommittee Reports***

Personal Identifying Information Subcommittee. Delegate Griffith reported that the PII Subcommittee had tabled two (HB 1087 and HB 1088) of Delegate Sickle's bills from the 2008 Session, but was still working the remaining two bills (HB 1096 and HB 1102).<sup>26</sup> In addition, with regard to public access to the holders of concealed handgun permits, the PII Subcommittee voted to endorse the original recommendation of the FOIA Council made to the 2008 Session of the General Assembly that would continue public access to these records at the local courthouses, but would prohibit disclosure of the statewide list by the Department of State Police.

Electronic Meetings Subcommittee. Craig Fifer, chair of the EMeetings Subcommittee reported that the subcommittee had met three times concerning the conflict in the basic law for the Air and Water Boards with FOIA's requirements for conducting an Emeeting. Mr. Fifer advised that there was resolution on the issue that the remote locations from which members of these boards participated would be open to the public. He noted that the final sticking point was requiring a physical quorum as a condition precedent for conducting an electronic meeting; but noted that the EMeetings Subcommittee would be meeting again on November 12, 2008 following the PII Subcommittee meeting.

Database Index Subcommittee. Frosty Landon, chair of the Database Index Subcommittee, stated that the subcommittee was meeting for the first time today upon adjournment of the Council's meeting.

Meeting Minutes Subcommittee. Roger Wiley, chair of the Meeting Minutes Subcommittee, advised that his subcommittee had met previously and has recommended that written minutes of meetings held under FOIA be required. Draft legislation was presented for the Council's review. He noted that he viewed this recommendation as a clarification of existing law. He stated that the sole issue before the subcommittee was whether audio recording of meetings are sufficient for minutes. Mr. Wiley stated that by a vote of 3 to 1, the subcommittee adopted the above recommendation. The underlying policy being that written minutes are the best and most lasting historical record. He noted that with other technologies, the data (whether audio or video) would have to be migrated to the current form of technology to be reviewed. The Council voted unanimously to approve the recommendation of the subcommittee and include it as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

### ***Other Business***

Mr. Fifer proposed that the FOIA rights and responsibilities statement currently required for state public bodies under § 2.2-3704.1 be expanded to apply to local public

bodies. The Council directed staff to prepare a draft for the Council's consideration at its December meeting.

## **December 1, 2008**

The Council held its fourth and final meeting of 2008.<sup>27</sup> The purpose of the meeting was to receive reports from subcommittees, decide on final legislative recommendations to the 2009 Session of the General Assembly, and to hold Part II of the Council's annual legislative preview.

### ***Subcommittee Reports***

Personal Identifying Information Subcommittee. Staff reported that the PII Subcommittee had met four times, and each meeting included a joint meeting with members of the SSN Subcommittee of JCOTS. The PII Subcommittee, with the concurrence of the JCOTS SSN Subcommittee, recommended to the Council the following legislative proposals:

1. Amendments to the Government Data Collection and Dissemination Practices Act (GDCDPA):
  - Clarification that the recently enacted prohibition on collection social security numbers without authorization<sup>28</sup> would apply to the collection of all or any portion of a social security number; and
  - Extension of the implementation date of the prohibition to July 1, 2010. Currently, the prohibitions are set to become effective on July 1, 2009. However, due to the response from the social security number surveys and the immense amount of data to process and verify, it was recommended that an additional year might be necessary to thoroughly review and process all of the implementation issues.
2. Protection of Social Security Numbers in Public Records.
  - HB 1096 (Sickles, 2008) would prohibit the release of social security numbers on public records, but would allow the last four digits to be released for purposes of identity verification to certain entities, such as the press, private investigators, and data aggregators. Questions were raised, however, about allowing the last four digits to be released to the press, private investigators, and data aggregators for verification purposes, and not to the general public. Additionally, this provision raised questions about the definition of a news-gathering organization as the proliferation of electronic media makes it difficult to determine. In light of these concerns, the joint subcommittees recommended reintroduction of HB 1096, but would allow anyone to receive the last four digits of a social security number for verification purposes.

Staff presented three approaches to protect the disclosure of SSNs, including the PII Subcommittee recommendation. Staff explained the reason for differing approaches came as a result of questions raised during the drafting of the PII Subcommittee recommendation. Staff reported that there were, however, common threads in each approach. First, protection of SSNs should be a separate statute and not a part of FOIA so as not to harm the underlying policy of FOIA as noted above. Secondly, entire SSNs should be treated as confidential and their release prohibited except under limited circumstances, including to law-enforcement and criminal justice agencies or pursuant to proper judicial order.

- The joint subcommittees voted to table further consideration of HB 1102 (Sickles 2008) that would create a FOIA exemption for social security numbers.

### 3. HB 529--Concealed Handgun Permits.

The PII Subcommittee voted again to recommend SB 529 as introduced in 2008 because of its belief that it reflects the proper balance between privacy and public access. The draft legislation would require 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, with a limited exception for access by law-enforcement agencies. Records of the names and addresses of holders of concealed weapons 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.

Electronic Meetings Subcommittee. Craig Fifer, chair of the EMeetings Subcommittee, reported that the subcommittee had met five times in 2008 and unanimously recommends draft legislation that would allow the Air Board and the Water Board to meet by electronic means provided the meeting is held in compliance with the provisions of the FOIA, specifically § 2.2-3708; except that a quorum of the respective Boards would not be required to be physically assembled at one primary or central meeting location. The draft legislation also required that discussions of the respective Boards held via such electronic communication means must be specifically limited to those matters for which the meeting was called, and no other matter of public business shall be discussed or transacted by the respective Boards.

Database Index Subcommittee. Frosty Landon, chair of the Database Index Subcommittee, reported that the subcommittee had met twice to consider the database

index requirement set forth in subsection J of § 2.2-3704, and as a related matter, the statement of rights and responsibilities required under § 2.2-3704.1. The Subcommittee voted unanimously to recommend to the Council a draft that would repeal the database index requirement as it found that agencies were not complying with the requirement and the public was not inquiring about the indices. The draft would also amend the required rights and responsibilities statement to require agencies to provide a general description, summary, list, or index of the types of records it has and exemptions that may apply to those records. The new requirements would help to increase public oversight without trying to define the term "database." The new provisions could also be used by agencies to help coordinate disclosure with the required retention schedules under the Virginia Public Records Act. Mr. Landon reported that while it may entail a little more work at first, the general reaction from state agencies was supportive, and there was no opposition expressed to the bill.

Meeting Minutes Subcommittee. Staff reported that the Subcommittee had met and recommended draft legislation that would require explicitly that meeting minutes be in writing. The recommendation is declaratory of existing law, and makes technical changes. At its October 6, 2008 meeting the Council voted unanimously to approve the recommendation of the subcommittee and include it as part of the Council's legislative recommendations to the 2009 Session of the General Assembly. There was no further discussion of the recommended draft.

#### ***Council Action on Subcommittee Recommendations***

Personal Identifying Information Subcommittee. The Council voted unanimously to adopt the PII Subcommittee recommendations to amend the GDCDPA as above described and include the draft legislation as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

With respect to the protection of SSNs, the Council discussed the three legislative approaches presented by staff. Ultimately, the Council voted (8 to 3) to defer action on this issue because none of the approaches appeared to strike the proper balance. The Council felt that the fact that three different legislative proposals were offered to resolve the issue was evidence that a recommendation at this time was premature. The Council remains committed, however, to resolution of the issue.

Electronic Meetings Subcommittee. Various stakeholders had testified to the Subcommittee of their concerns that any recommendation by the Council to resolve the FOIA conflicts in the law would reopen other issues, unrelated to the electronic meeting provisions, in HB1332/SB423. The Council felt that such concerns, while valid, were not a compelling reason not to address the access issue given that General Assembly Sessions are rife with bills involving numerous stakeholders resulting in legislation that represents uneasy compromises. As a result, the Council voted unanimously to adopt the EMeetings Subcommittee recommendation as above described and include the draft legislation as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

Database Index Subcommittee. The Council voted unanimously to adopt the Database Index Subcommittee recommendation as described above and include the draft legislation as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

Meeting Minutes Subcommittee. As noted above, the Council had previously voted unanimously to approve the recommendation of the Subcommittee and include it as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

Copies of all Council recommended legislation are available on the Council's website.

### ***Legislative Preview (Part II)***

Delegate Griffith reminded the Council that Part I of the annual legislative preview was held at the October 6, 2008 meeting where the Council heard from the Virginia Economic Development Partnership Authority and the Virginia Municipal League. Delegate Griffith also reminded the Council that the purpose of the legislative preview was not to take action on any particular proposal, but instead to bring the issues to light so that resolution of them might be achieved before Session.

William Watt, Policy and Planning Specialist, Department of the Treasury, advised the Council of the need for a FOIA exemption for the Commonwealth's agency risk management and internal control standards assessments. Mr. Watt explained that the proposal is a result of the Comptroller's directive to implement an annual assessment of agency internal control systems in order to provide reasonable assurances of the integrity of all fiscal processes related to the submission of transactions to the Commonwealth's general ledger and stewardship over the Commonwealth's assets. The concern was that if internal controls were known, they could be defeated at the risk of the Commonwealth's assets.

The Council then heard from Sandy McNinch of the Virginia Economic Development Authority (VEDP) concerning expansion of the current record exemption for economic development to include certain business retention information. Ms. McNinch reported that there was agreement that business retention information should be protected; however, there was disagreement on how to accomplish it. She advised that VEDP prefers the draft option that does not require the "earmarking" of proprietary documents upon submission as it is impracticable in the fast paced economic development setting. Craig Merritt, representing VPA, reported that VPA favored the earmarking provision and suggested that to address VEDP's concerns that earmarking would slow down the economic development process VEDP would not be required to make a written determination of which records would be protected. VEDP responded that this suggestion did not change their position. All parties agreed to continue to work to find a compromise.

James G. Council on behalf of the Prince William County School Board discussed with the Council the School Board proposed legislation to exempt from FOIA records relating to the school system's electronic visitor identification system. He explained that the system was capable of taking government identification and scanning it into a database which captures name, address, SSN, date of birth, and other personal information. He stated that the system was beneficial to the schools because they could cross check this information with sexual predator registries, for example. Craig Merritt, representing VPA, advised the Council that FOIA already covered protection of security systems and that the collection of other personal information was not essential to the school security mission. He suggested that this issue be given to the PII Subcommittee for further examination.

The Council then heard from Mark Flynn of the Virginia Municipal League (VML) concerning the expansion of the exemption for complainant information related to zoning violations found at subdivision 10 of § 2.2-3705.3 to also provide protection for individual building code and fire prevention code complaints. He noted that there had been some compromise with the VPA. Craig Merritt on behalf of VPA explained that the compromise made the proposal better, but not good. VPA opposes the exemption on the basis that there should be no anonymous "snitching" on neighbors.

#### ***Other Business***

Mr. Fifer proposed that the FOIA rights and responsibilities statement currently required for state public bodies under § 2.2-3704.1 be expanded to apply to local public bodies. Mr. Fifer requested the Council to take action on his proposal. After public comment that this issue had not been vetted, the Council by consensus agreed to appoint a subcommittee to work on this issue in 2009.

Staff distributed the executive summary for the Council's 2008 annual report to the Governor and the General Assembly, and requested that any revisions be submitted in a timely fashion.

#### ***Public Comment***

Except for public comment requested and made during the legislative preview, no additional public comment was made.

### **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 hosted, in conjunction with the Virginia Coalition for Open Government, the Virginia Association of Broadcasters, the Virginia Press Association, the now customary Sunshine Reception. The Sunshine Reception, complete with a continental breakfast and open government trinkets, including "Vote for Sunshine" buttons, also celebrated the 40th Anniversary of the enactment of the Freedom of Information Act. During this reporting period, the Council, with its staff of two, responded to approximately 1,700 inquiries and conducted 63 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 1, 2007 to November 30, 2008, the Council, with a staff of two attorneys, fielded approximately 1,700 inquiries. Of these inquiries, 11 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. An index 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 1, 2007 through November 30, 2008:

Written Advisory Opinions: 11

State and Local Government	1
Citizens of the Commonwealth	8
Members of the News Media	2

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 1, 2007 and November 30, 2008:

Telephone and E-mail Responses: 1,685

Government	828
Citizens	649
News Media	208

Appendix F to this report sets out how many inquiries were received by the Council each month from December, 2007 through November, 2008, and separately sets forth the number of different types of inquiries received by category (Records, Meetings, Other). Appendix G to this report provides an overview of the total number of inquiries received by the Council each year from 2000 through 2008.

### 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 534,846 times. About 150,641 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

After conducting annual statewide FOIA workshops in each of the six years since the Council's creation in 2000, 2006 was the first year where statewide FOIA training workshops were not offered. 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 1, 2007 to November 30, 2008, the Council conducted 64 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
- Guides to Electronic Meetings
  - Local and Regional Public Bodies
  - State Public Bodies

- E-Mail: Use, Access & Retention
- E-Mail & Meetings
- Taking the Shock Out of FOIA Charges
- 2008 FOIA & Access Bill Summaries
- FOIA Guide for Local Officials<sup>29</sup>
- Legislators Guide to FOIA

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. Response letters were developed by the Council to facilitate compliance with the procedural requirements of FOIA by public bodies. The Council website also includes a FOIA petition should enforcement of the rights granted under FOIA be necessary.

## **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 eighth 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 approximately 1,700 inquiries. It formed four 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 63 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 John B. Edwards and W. Wat Hopkins for eight years each of service on the Council and for their commitment to the principles of open government.

Respectfully submitted,

Delegate H. Morgan Griffith, Chair  
Senator R. Edward Houck  
Ralph L. "Bill" Axselle  
Craig T. Fifer  
Forrest M. "Frosty" Landon  
Courtney M. Malveaux  
E. M. Miller, Jr.

John G. Selph  
Mary Yancey Spencer  
Sandra G. Treadway  
Roger C. Wiley  
George T. Whitehurst

**2009 Legislative Recommendations**

**1. BILL SUMMARY: Electronic meetings by the Air Pollution Control Board and the State Water Control Board.** Requires that any electronic communication meetings (teleconference) shall be held in compliance with the provisions the Freedom of Information Act, except that a quorum of the Board is not required to be physically assembled at one primary or central meeting location. The bill also requires that discussions of the Air Pollution Control Board or the State Water Control Board held via such electronic communication means shall be specifically limited to a (i) review of certain decisions of the Director, (ii) determination of the Air Pollution Control Board or the State Water Control Board whether or not to grant a public hearing or Board consideration, or (iii) delegation of the permit to the Director for his decision. No other matter of public business shall be discussed or transacted by the Air Pollution Control Board or the State Water Control Board during any such meeting held via electronic communication. The bill also clarifies when certain public hearings may be held and who may preside over the public hearings.

**BILL TEXT:**

A BILL to amend and reenact §§ 10.1-1322.01 and 62.1-44.15:02 of the Code of Virginia, relating to electronic meetings by the Air Pollution Control Board and the State Water Control Board.

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 10.1-1322.01 and 62.1-44.15:02 of the Code of Virginia are amended and reenacted as follows:**

§ 10.1-1322.01. Permits; procedures for public hearings and permits before the Board.

A. During the public comment period on a permit action, interested persons may request a public hearing to contest such action or the terms and conditions thereof. Where public hearings are mandatory under state or federal law or regulation, interested persons may request, during the public comment period on the permit action, that the Board consider the permit action pursuant to the requirements of this section.

B. Requests for a public hearing or Board consideration shall contain the following information:

1. The name, mailing address, and telephone number of the requester;
2. The names and addresses of all persons for whom the requester is acting as a representative (for the purposes of this requirement, an unincorporated association is a person);

3. The reason why a public hearing or Board consideration is requested;
4. A brief, informal statement setting forth the factual nature and the extent of the interest of the requester or of the persons for whom the requester is acting as representative in the application or tentative determination, including an explanation of how and to what extent such interest would be directly and adversely affected by the issuance, denial, modification, or revocation of the permit in question; and
5. Where possible, specific references to the terms and conditions of the permit in question, together with suggested revisions and alterations of those terms and conditions that the requester considers are needed to conform the permit to the intent and provisions of the State Air Pollution Control Law (§ 10.1-1300 et seq.).

C. Upon completion of the public comment period on a permit action, the Director shall review all timely requests for public hearing or Board consideration filed during the public comment period on the permit action and within 30 calendar days following the expiration of the time period for the submission of requests shall grant a public hearing or Board consideration after the public hearing required by state or federal law or regulation, unless the permittee or applicant agrees to a later date, if the Director finds the following:

1. That there is a significant public interest in the issuance, denial, modification, or revocation of the permit in question as evidenced by receipt of a minimum of 25 individual requests for a public hearing or Board consideration;
2. That the requesters raise substantial, disputed issues relevant to the issuance, denial, modification, or revocation of the permit in question; and
3. That the action requested by the interested party is not on its face inconsistent with, or in violation of, the State Air Pollution Control Law (§ 10.1-1300 et seq.), federal law or any regulation promulgated thereunder.

D. Either the Director or a majority of the Board members, acting independently, may request a meeting of the Board to be convened within 20 days of the Director's decision pursuant to subsection C in order to review such decision and determine by a majority vote of the Board whether or not to grant a public hearing or Board consideration, or to delegate the permit to the Director for his decision.

For purposes of this subsection, if a Board meeting is held via electronic communication, the meeting shall be held in compliance with the provisions § 2.2-3708, except that a quorum of the Board is not required to be physically assembled at one primary or central meeting location. Discussions of the Board held via such electronic communication means shall be specifically limited to a (i) review of the Director's decision pursuant to subsection C, (ii) determination of the Board whether or not to grant a public hearing or Board consideration, or (iii) delegation of the permit to the Director for his decision. No other matter of public business shall be discussed or transacted by the Board during any such meeting held via electronic communication.

E. The Director shall, forthwith, notify by mail at his last known address (i) each

requester and (ii) the applicant or permittee of the decision to grant or deny a public hearing or Board consideration.

F. In addition to subsections C, D, and E, the Director may, in his discretion, convene a public hearing on a permit action or submit a permit action to the Board for its consideration.

G. If a determination is made to hold a public hearing, the Director shall schedule the hearing at a time between 45 and 75 days after mailing of the notice required by subsection E.

H. The Director shall cause, or require the applicant to publish, notice of a public hearing to be published once, in a newspaper of general circulation in the city or county where the facility or operation that is the subject of the permit or permit application is located, at least 30 days before the hearing date.

I. The Director may, on his own motion or at the request of the applicant or permittee, for good cause shown, reschedule the date of the public hearing. In the event the Director reschedules the date for the public hearing after notice has been published, he shall, or require the applicant to, provide reasonable notice of the new date of the public hearing. Such notice shall be published once in the same newspaper where the original notice was published.

J. Public hearings held pursuant to these procedures may be conducted by (i) the Board at a regular or special meeting of the Board or (ii) one or more members of the Board. A member of the Board shall preside over the public hearing.

K. The presiding Board member shall have the authority to maintain order, preserve the impartiality of the decision process, and conclude the hearing process expeditiously. The presiding Board member, in order to carry out his responsibilities under this subsection, is authorized to exercise the following powers, including but not limited to:

1. Prescribing the methods and procedures to be used in the presentation of factual data, arguments, and proof orally and in writing including the imposition of reasonable limitations on the time permitted for oral testimony;
2. Consolidating the presentation of factual data, arguments, and proof to avoid repetitive presentation of them;
3. Ruling on procedural matters; and
4. Acting as custodian of the record of the public hearing causing all notices and written submittals to be entered in it.

L. The public comment period will remain open for 15 days after the close of the public hearing if required by § 10.1-1307.01.

M. When the public hearing is conducted by less than a quorum of the Board, the Department shall, promptly after the close of the public hearing comment period, make a report to the Board.

N. After the close of the public hearing comment period, the Board shall, at a regular or special meeting, take final action on the permit. Such decision shall be issued within 90 days of the close of the public comment period or from a later date, as

agreed to by the permittee or applicant and the Board or the Director. The Board shall not take any action on a permit where a public hearing was convened solely to satisfy the requirements of state or federal law or regulation unless the permit was provided to the Board for its consideration pursuant to the provisions of this section.

O. When the public hearing was conducted by less than a quorum of the Board, persons who commented during the public comment period shall be afforded an opportunity at the Board meeting when final action is scheduled to respond to any summaries of the public comments prepared by the Department for the Board's consideration subject to such reasonable limitations on the time permitted for oral testimony or presentation of repetitive material as are determined by the Board.

P. In making its decision, the Board shall consider (i) the verbal and written comments received during the public comment period made part of the record, (ii) any explanation of comments previously received during the public comment period made at the Board meeting, (iii) the comments and recommendation of the Department, and (iv) the agency files. When the decision of the Board is to adopt the recommendation of the Department, the Board shall provide in writing a clear and concise statement of the legal basis and justification for the decision reached. When the decision of the Board varies from the recommendation of the Department, the Board shall, in consultation with legal counsel, provide a clear and concise statement explaining the reason for the variation and how the Board's decision is in compliance with applicable laws and regulations. The written statement shall be provided contemporaneously with the decision of the Board. Copies of the decision, certified by the Director, shall be mailed by certified mail to the permittee or applicant.

§ 62.1-44.15:02. Permits; procedures for public hearings and permits before the Board.

A. During the public comment period on a permit action, interested persons may request a public hearing to contest such action or the terms and conditions thereof. Where public hearings are mandatory under state or federal law or regulation, interested persons may request, during the public comment period on the permit action, that the Board consider the permit action pursuant to the requirements of this section.

B. Requests for a public hearing or Board consideration shall contain the following information:

1. The name, mailing address, and telephone number of the requester;
2. The names and addresses of all persons for whom the requester is acting as a representative (for the purposes of this requirement, an unincorporated association is a person);
3. The reason why a public hearing or Board consideration is requested;
4. A brief, informal statement setting forth the factual nature and the extent of the interest of the requester or of the persons for whom the requester is acting as representative in the application or tentative determination, including an explanation of how and to what extent such interest would be directly and adversely affected by the issuance, denial, modification, or revocation of the permit in question; and

5. Where possible, specific references to the terms and conditions of the permit in question, together with suggested revisions and alterations of those terms and conditions that the requester considers are needed to conform the permit to the intent and provisions of the State Water Control Law (§ 62.1-44.2 et seq.).

C. Upon completion of the public comment period on a permit action, the Director shall review all timely requests for public hearing or Board consideration filed during the public comment period on the permit action and within 30 calendar days following the expiration of the time period for the submission of requests shall grant a public hearing or Board consideration after the public hearing required by state or federal law or regulation, unless the permittee or applicant agrees to a later date, if the Director finds the following:

1. That there is a significant public interest in the issuance, denial, modification, or revocation of the permit in question as evidenced by receipt of a minimum of 25 individual requests for a public hearing or Board consideration;
2. That the requesters raise substantial, disputed issues relevant to the issuance, denial, modification, or revocation of the permit in question; and
3. That the action requested is not on its face inconsistent with, or in violation of, the State Water Control Law (§ 62.1-44.2 et seq.), federal law or any regulation promulgated thereunder.

D. Either the Director or a majority of the Board members, acting independently, may request a meeting of the Board to be convened within 20 days of the Director's decision pursuant to subsection C in order to review such decision and determine by a majority vote of the Board whether or not to grant a public hearing or Board consideration, or to delegate the permit to the Director for his decision.

For purposes of this subsection, if a Board meeting is held via electronic communication, the meeting shall be held in compliance with the provisions § 2.2-3708, except that a quorum of the Board is not required to be physically assembled at one primary or central meeting location. Discussions of the Board held via such electronic communication means shall be specifically limited to a (i) review of the Director's decision pursuant to subsection C, (ii) determination of the Board whether or not to grant a public hearing or Board consideration, or (iii) delegation of the permit to the Director for his decision. No other matter of public business shall be discussed or transacted by the Board during any such meeting held via electronic communication.

E. The Director shall, forthwith, notify by mail at his last known address (i) each requester and (ii) the applicant or permittee of the decision to grant or deny a public hearing or Board consideration.

F. In addition to subsections C, D, and E, the Director may, in his discretion, convene a public hearing on a permit action or submit a permit action to the Board for its consideration.

G. If a determination is made to hold a public hearing, the Director shall schedule the hearing at a time between 45 and 75 days after mailing of the notice required by subsection E.

H. The Director shall cause, or require the applicant to publish, notice of a public hearing to be published once, in a newspaper of general circulation in the city or county where the facility or operation that is the subject of the permit or permit application is located, at least 30 days before the hearing date.

I. The Director may, on his own motion or at the request of the applicant or permittee, for good cause shown, reschedule the date of the public hearing. In the event the Director reschedules the date for the public hearing after notice has been published, he shall, or require the applicant to, provide reasonable notice of the new date of the public hearing. Such notice shall be published once in the same newspaper where the original notice was published.

J. Public hearings held pursuant to these procedures may be conducted by (i) the Board at a regular or special meeting of the Board or (ii) one or more members of the Board. A member of the Board shall preside over the public hearing.

K. The presiding Board member shall have the authority to maintain order, preserve the impartiality of the decision process, and conclude the hearing process expeditiously. The presiding Board member, in order to carry out his responsibilities under this subsection, is authorized to exercise the following powers, including but not limited to:

1. Prescribing the methods and procedures to be used in the presentation of factual data, arguments, and proof orally and in writing including the imposition of reasonable limitations on the time permitted for oral testimony;
2. Consolidating the presentation of factual data, arguments, and proof to avoid repetitive presentation of them;
3. Ruling on procedural matters; and
4. Acting as custodian of the record of the public hearing causing all notices and written submittals to be entered in it.

L. The public comment period will remain open for 15 days after the close of the public hearing if required by § 62.1-44.15:01.

M. When the public hearing is conducted by less than a quorum of the Board, the Department shall, promptly after the close of the public hearing comment period, make a report to the Board.

N. After the close of the public hearing comment period, the Board shall, at a regular or special meeting, take final action on the permit. Such decision shall be issued within 90 days of the close of the public comment period or from a later date, as agreed to by the permittee or applicant and the Board or the Director. The Board shall not take any action on a permit where a public hearing was convened solely to satisfy the requirements of state or federal law or regulation unless the permit was provided to the Board for its consideration pursuant to the provisions of this section.

O. When the public hearing was conducted by less than a quorum of the Board, persons who commented during the public comment period shall be afforded an opportunity at the Board meeting when final action is scheduled to respond to any summaries of the public comments prepared by the Department for the Board's consideration subject to such reasonable limitations on the time permitted for oral testimony or presentation of repetitive material as are determined by the Board.

P. In making its decision, the Board shall consider (i) the verbal and written comments received during the public comment period made part of the record, (ii) any explanation of comments previously received during the public comment period made at the Board meeting, (iii) the comments and recommendation of the Department, and (iv) the agency files. When the decision of the Board is to adopt the recommendation of the Department, the Board shall provide in writing a clear and concise statement of the legal basis and justification for the decision reached. When the decision of the Board varies from the recommendation of the Department, the Board shall, in consultation with legal counsel, provide a clear and concise statement explaining the reason for the variation and how the Board's decision is in compliance with applicable laws and regulations. The written statement shall be provided contemporaneously with the decision of the Board. Copies of the decision, certified by the Director, shall be mailed by certified mail to the permittee or applicant.

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**2. BILL SUMMARY: Government Data Collection and Dissemination Practices Act; collection of social security numbers.** Extends from July 1, 2009, to July 1, 2010, the implementation of the prohibition against collecting an individual's social security number unless collection of such number is (i) authorized or required by state or federal law and (ii) essential for the performance of that agency's duties. The bill contains several technical amendments, all to become effective July 1, 2010.

**BILL TEXT:**

A BILL to amend and reenact §§ 2.2-3800, 2.2-3801, as it is currently effective and as it shall become effective, and 2.2-3808, as it is currently effective and as it shall become effective, of the Code of Virginia and to amend and reenact the second enactments of Chapters 840 and 843 of the Acts of Assembly of 2008, relating to the Government Data Collection and Dissemination Practices Act; collection of social security numbers.

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 2.2-3800, 2.2-3801, as it is currently effective and as it shall become effective, and 2.2-3808, as it is currently effective and as it shall become effective, of the Code of Virginia are amended and reenacted as follows:**

§ 2.2-3800. Short title; findings; principles of information practice.

A. This chapter may be cited as the "Government Data Collection and Dissemination Practices Act."

B. The General Assembly finds that:

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.

C. Recordkeeping agencies of the Commonwealth and political subdivisions shall adhere to the following principles of information practice to ensure safeguards for personal privacy:

1. There shall be no personal information system whose existence is secret.
2. Information shall not be collected unless the need for it has been clearly established in advance.
3. Information shall be appropriate and relevant to the purpose for which it has been collected.
4. Information shall not be obtained by fraudulent or unfair means.
5. Information shall not be used unless it is accurate and current.
6. There shall be a prescribed procedure for an individual to learn the purpose for which information has been recorded and particulars about its use and dissemination.
7. There shall be a clearly prescribed and uncomplicated procedure for an individual to correct, erase or amend inaccurate, obsolete or irrelevant information.
8. Any agency holding personal information shall assure its reliability and take precautions to prevent its misuse.
9. There shall be a clearly prescribed procedure to prevent personal information collected for one purpose from being used for another purpose.
10. The Commonwealth or any agency or political subdivision thereof shall not collect personal information except as explicitly or implicitly authorized by law.

§ 2.2-3801. (Effective until July 1, 2009) Definitions.

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

1. "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 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.
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 agency.
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.

§ 2.2-3801. (Effective July 1, 2009) Definitions.

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

"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.

"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 (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.

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

§ 2.2-3808. (Effective until July 1, 2009) Disclosure or display of social security number.

A. It shall be unlawful for 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. After July 1, 2004, no agency, as defined in § 42.1-77, shall send or deliver 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.

E. 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.

§ 2.2-3808. (Effective July 1, 2009) Collection, disclosure, or display of social security number.

A. It shall be unlawful for any agency to:

1. Require an individual to disclose or furnish his social security 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; or
2. Collect from an individual his social security number or any portion thereof unless the collection of such number is (i) authorized or required by state or federal law and (ii) essential for the performance of that agency's duties.

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. After July 1, 2004, no agency, as defined in § 42.1-77, shall send or deliver 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.

E. The provisions of subsections A and C 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. That the second enactment of Chapter 840 of the Acts of Assembly of 2008 is amended and reenacted as follows:**

**2. That the provisions of this act shall become effective on July 1, 2010.**

**3. That the second enactment of Chapter 843 of the Acts of Assembly of 2008 is amended and reenacted as follows:**

**2. That the provisions of this act shall become effective on July 1, 2010.**

**4. That the provisions of the first enactment of this act shall become effective on July 1, 2010.**

#

**3. 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 nonidentifying statistical information would be available to the general public. This bill is a recommendation of the Freedom of Information Advisory Council.

**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 officer retired from the Division of Capitol 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; (iii) who has reached 55 years of age; or (iv) who is on long-term leave from such law-enforcement agency or board due to a service-related injury, 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 the agency that employs the officer 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. An officer set forth in clause (iv) of this subdivision who receives written proof of consultation to carry a concealed handgun shall surrender such proof of consultation upon return to work or upon termination of employment with the law-enforcement agency. Notice of the surrender shall be forwarded to the Department of State Police for entry into the Virginia Criminal Information Network. However, if such officer retires on disability because of the service-related injury, and would be eligible under clause (i) of this subdivision for written proof of consultation to carry a concealed handgun, he may retain the previously issued written proof of consultation.

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;

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; and

9. Any attorney for the Commonwealth or assistant attorney for the Commonwealth, wherever such attorney may travel in the Commonwealth.

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 an attorney for the Commonwealth or assistant attorney for the Commonwealth may carry a concealed handgun pursuant to subdivision B 9. However, 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, nor shall any proof of demonstrated competence expire:

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 new five-year permit is issued while an existing permit remains valid, the new five-year permit shall become effective upon the expiration date of the existing permit, provided that the application is received by the court at least 90 days but no more than 180 days prior to the expiration of the existing 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. Upon receipt of such notice of a conviction, the court shall revoke the permit of a person disqualified pursuant to this subsection, and shall promptly notify the State Police and the person whose permit was revoked of the revocation.

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. The court shall revoke the permit of 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, and shall promptly notify the State Police and the person whose permit was revoked of the revocation.

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, nor shall such information be withheld from an entity that has a valid contract with any local, state, or federal law-enforcement agency for the purpose of performing official duties of the law-enforcement agency. However, nothing in this subsection shall be construed to prohibit the release of (a) records by the State Police concerning permits issued to nonresidents of the Commonwealth pursuant to subsection P1, or (b) statistical summaries, abstracts, or other records containing information in an aggregate form that does not identify any individual permittees.

K1. The clerk of a circuit court that issued a valid concealed handgun permit shall, upon presentation of the valid permit and proof of a new address of residence by the permit holder, issue a replacement permit specifying the permit holder's new address. The clerk of court shall forward the permit holder's new address of residence to the State Police. The State Police may charge a fee not to exceed \$5, and the clerk of court issuing the replacement permit may charge a fee not to exceed \$5. The total amount assessed for processing a replacement permit pursuant to this subsection shall not exceed \$10, with such fees to be paid in one sum to the person who accepts the information for the replacement permit.

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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4. **BILL SUMMARY: Freedom of Information Act; requirements to publish a database index and a statement of rights and responsibilities.** Strikes the requirement to publish an index of computer databases, and amends the requirement to publish a statement of rights and responsibilities to ensure that the public can find out generally what types of public records a public body has and what exemptions may apply to those records. This bill is a recommendation of the Freedom of Information Advisory Council.

**BILL TEXT:**

A BILL to amend and reenact §§ 2.2-3704 and 2.2-3704.1 of the Code of Virginia, relating to the Virginia Freedom of Information Act; requirements to publish a database index and a statement of rights and responsibilities.

**Be it enacted by the General Assembly of Virginia:**

1. **That §§ 2.2-3704 and 2.2-3704.1 of the Code of Virginia are amended and reenacted as follows:**

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

A. Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

B. A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of this chapter or to impose the time limits for response by a public body. Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

1. The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with this chapter. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

2. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.

3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.

C. Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

D. Subject to the provisions of subsections G and J, no public body shall be required to create a new record if the record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.

E. Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter.

F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a

geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

G. Public records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases are combined or contain exempt and nonexempt records, the public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation or compilation of a new public record.

H. In any case where a public body determines in advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to agree to payment of a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

§ 2.2-3704.1. Posting of notice of rights and responsibilities by state public bodies; assistance by the Freedom of Information Advisory Council.

A. All state public bodies created in the executive branch of state government and subject to the provisions of this chapter shall make available the following information to the public upon request and shall post such information on the Internet:

1. A plain English explanation of the rights of a requester under this chapter, the procedures to obtain public records from the public body, and the responsibilities of the public body in complying with this chapter. For purposes of this subdivision "plain English" means written in nontechnical, readily understandable language using words of common everyday usage and avoiding legal terms and phrases or other terms and words of art whose usage or special meaning primarily is limited to a particular field or profession;
2. Contact information for the person designated by the public body to (i) assist a requester in making a request for records or (ii) respond to requests for public records;
3. A general description, summary, list, or index of the types of public records maintained by such state public body;
4. A general description, summary, list, or index of any exemptions in law that permit or require such public records to be withheld from release; and
5. Any policy the public body has concerning the type of public records it routinely withholds from release as permitted by this chapter or other law.

B. The Freedom of Information Advisory Council, created pursuant to § 30-178, shall assist in the development and implementation of the provisions of subsection A, upon request.

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5. **BILL SUMMARY: Freedom of Information Act; meeting minutes.** Clarifies that minutes of public meetings must be in writing. The bill also contains a technical amendment. The terms "include" and "in writing" that appear in the bill are defined in Title 1 to mean, respectively, "include, but are not limited to," and "any representation of words, letters, symbols, numbers, or figures, whether (i) printed or inscribed on a tangible medium or (ii) stored in an electronic or other medium and retrievable in a perceivable form and whether an electronic signature authorized by Chapter 42.1 (§ 59.1-479 et seq.) of Title 59.1 is or is not affixed." This bill is a recommendation of the Freedom of Information Advisory Council.

**BILL TEXT:**

A BILL to amend and reenact § 2.2-3707 of the Code of Virginia, relating to the Freedom of Information Act; meeting minutes.

**Be it enacted by the General Assembly of Virginia:**

**1. That § 2.2-3707 of the Code of Virginia is amended and reenacted as follows:**

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

A. All meetings of public bodies shall be open, except as provided in §§ 2.2-3707.01 and 2.2-3711.

B. No meeting shall be conducted through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or transact public business, except as provided in § 2.2-3708, 2.2-3709 or as may be specifically provided in Title 54.1 for the summary suspension of professional licenses.

C. Every public body shall give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted and in the office of the clerk of the public body, or in the case of a public body that has no clerk, in the office of the chief administrator. All state public bodies subject to the provisions of this chapter shall also post notice of their meetings on their websites and on the electronic calendar maintained by the Virginia Information Technologies Agency commonly known as the Commonwealth Calendar. Publication of meeting notices by electronic means by other public bodies shall be encouraged. The notice shall be posted at least three working days prior to the meeting. Notices for meetings of state public bodies on which there is at least one member appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.

D. Notice, reasonable under the circumstance, of special or emergency meetings shall be given contemporaneously with the notice provided members of the public body conducting the meeting.

E. Any person may annually file a written request for notification with a public body. The request shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any. The public body receiving such request shall provide notice of all meetings directly to each such person. Without objection by the person, the public body may provide electronic notice of all meetings in response to such requests.

F. At least one copy of all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body.

G. Nothing in this chapter shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting. The notice provisions of this chapter shall not apply to informal meetings or gatherings of the members of the General Assembly.

H. Any person may photograph, film, record or otherwise reproduce any portion of a meeting required to be open. The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting to prevent interference with the proceedings.

I. Minutes shall be recorded at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly; (ii) legislative interim study commissions and committees, including the Virginia Code Commission; (iii) study committees or commissions appointed by the Governor; or (iv) study commissions or study committees, or any other committees or subcommittees appointed by the governing bodies or school boards of counties, cities and towns, except where the membership of any such commission, committee or subcommittee includes a majority of the governing body of the county, city or town or school board.

Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter.

Minutes shall be in writing and shall include (i) the date, time, and location of the meeting; (ii) the members of the public body recorded as present and absent; and (iii) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. In addition, for electronic communication meetings conducted in accordance with § 2.2-3708, minutes of state public bodies shall include (a) the identity of the members of the public body at each remote location identified in the notice who participated in the meeting through electronic communications means, (b) the identity of the members of the public body who were physically assembled at the primary or central meeting location, and (c) the identity of the members of the public body who were not present at the locations identified in clauses (a) and (b), but who monitored such meeting through electronic communications means.

**2. That the provisions of this act are declaratory of existing law.**

#

## 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, 2007 through November 30, 2008, Council staff conducted 64 training seminars, which are listed below in chronological order identifying the group/agency requesting the training.

December 4, 2007	Senate New Member Orientation Richmond, Virginia
December 11, 2007	New Officers Training State Compensation Board Richmond, Virginia
January 5, 2008	2008 County Supervisors' Forum Virginia Association of Counties Richmond, Virginia
March 13, 2008	Virginia Association of Governmental Purchasing Richmond, Virginia
March 18, 2008	City of Chesapeake Chesapeake, Virginia
March 19, 2008	Permit Technician Course Department of Housing and Community Development Manassas, Virginia
March 21, 2008	Staff Coordinators for County Boards and Commissions, Fairfax County Fairfax, Virginia
March 22, 2008	County Boards and Commissions Fairfax County Fairfax, Virginia
March 27, 2008	Prince William Committee of 100 Manassas, Virginia

April 15, 2008	College of William & Mary Student Assembly Williamsburg, Virginia
April 22, 2008	Commonwealth Management Institute Virginia Commonwealth University Charlottesville, Virginia
April 23, 2008	Virginia Tourism Summit Charlottesville, Virginia  NBC12 Television Interview Richmond, Virginia
April 25, 2008	Local Government Attorneys Association 2008 Spring Conference McLean, Virginia
April 28, 2008	Thomas Nelson Community College Hampton, Virginia
April 30, 2008	FOIA CLE Vandeventer Black LLP Norfolk, Virginia
May 6, 2008	Germanna Community College Fredericksburg, Virginia  Richmond Bar Association Richmond, Virginia
May 10, 2008	National Freedom of Information Coalition, 2008 FOI Summit Philadelphia, Pennsylvania
May 16, 2008	Virginia Fire Chiefs Association Richmond, Virginia
May 20, 2008	Virginia Commonwealth University Communications Law Class Richmond, Virginia  City of Suffolk Suffolk, Virginia

May 23, 2008	Virginia Coalition for Open Government Annual Conference Fredericksburg, Virginia
May 28, 2008	Charlottesville Public Schools Charlottesville, Virginia
June 4, 2008	Commonwealth Management Institute Virginia Commonwealth University Williamsburg, Virginia
June 13, 2008	Local Government Attorneys Association 2008 Southwest Virginia Seminar Marion, Virginia
June 16, 2008	Virginia Department of Aviation Richmond, Virginia
June 17, 2008	Virginia Department of Agriculture and Consumer Services Richmond, Virginia
	Capital Area Purchasing Association Richmond, Virginia
June 30, 2008	Virginia Association of Governmental Purchasing Regional Conference Harrisonburg, Virginia
July 3, 2008	Virginia Department of Education Richmond, Virginia
July 10, 2008	Department of Corrections Richmond, Virginia
July 17, 2008	Manassas Police Department Manassas, Virginia
July 18, 2008	New Council Member Training Williamsburg, Virginia
July 24, 2008	National Conference of State Legislatures New Orleans, Louisiana

August 4, 2008	Virginia Port Authority Norfolk, Virginia
August 6, 2008	Forensic Science Board Richmond, Virginia
September 5, 2008	Southwest Regional Recreation Authority St. Paul, Virginia
September 8, 2008	COVITS Conference Williamsburg, Virginia
September 9, 2008	New Kent County, New Kent, Virginia
September 18, 2008	City of Richmond Richmond, Virginia
September 19, 2008	City of Richmond Richmond, Virginia
September 24, 2008	Senate Legislative Assistants Workshop Richmond, Virginia
	Town of Haymarket Haymarket, Virginia
	Town of Leesburg Leesburg, Virginia
September 30, 2008	Town of Vienna Police Department Vienna, Virginia
October 1, 2008	Commonwealth Management Institute Virginia Commonwealth University Richmond, Virginia
October 2, 2008	Conference of Minority Public Administrators Norfolk, Virginia
October 8, 2008	Municipal Clerk Institute and Academy Virginia Beach, Virginia

October 9, 2008	Virginia Department of Medical Assistance Services Richmond, Virginia
October 10, 2008	Virginia State University Petersburg, Virginia
October 14, 2008	Virginia Employment Commission Richmond, Virginia
October 15, 2008	Managing Jail Risk Conference State Compensation Board Lynchburg, Virginia
October 21, 2008	Virginia Municipal League Annual Conference Norfolk, Virginia
October 22, 2008	9th Annual Interstate Investigators Meeting Dobson, North Carolina
October 23, 2008	Commonwealth Management Institute Virginia Commonwealth University Richmond, Virginia
October 28, 2008	Fort Monroe Federal Area Development Authority Fort Monroe, Virginia
October 31, 2008	Virginia Association of Governmental Purchasing Fall 2008 Conference Leesburg, Virginia
November 5, 2008	Virginia Department of Medical Assistance Services Richmond, Virginia  Senior Management Retreat Department of Treasury Richmond, Virginia

Town of Cape Charles  
Cape Charles, Virginia

November 17, 2008

Town of Culpeper  
Culpeper, Virginia

November 19, 2008

Virginia Department of Motor Vehicles  
Richmond, Virginia

November 20, 2008

Virginia Department of Motor Vehicles  
Richmond, Virginia

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**Index Of Written Advisory Opinions  
December 1, 2007 through November 30, 2008**

<u>Opinion No.</u>	<u>Issue(s)</u>
<hr/>	
<b>February</b>	
<hr/>	
<a href="#"><u>AO-01-08</u></a>	Records concerning a public body's employment policies are open to disclosure. If a public body is unsure of the scope of a request, it should contact the requester to clarify the matter. A failure to respond to a records request is deemed a denial of the request and a violation of FOIA.
<hr/>	
<b>March</b>	
<hr/>	
<a href="#"><u>AO-02-08</u></a>	Weekends and legal holidays are not counted as working days when computing the five working day time limit for a response to a request for public records. A public body must inform a requester in writing when it does not have the records the requester seeks. Clear communications are essential to the operation of FOIA.
<hr/>	
<a href="#"><u>AO-03-08</u></a>	The public policy of FOIA requires that exemptions from public access to records and meetings shall be narrowly construed. If a request is unclear, then the public body should contact the requester to clarify the matter.
<hr/>	
<b>April</b>	
<hr/>	
<a href="#"><u>AO-04-08</u></a>	A public body may convene a closed meeting to discuss the formation and award of a procurement contract.
<hr/>	
<b>May</b>	
<hr/>	
<a href="#"><u>AO-05-08</u></a>	FOIA does not require a public body to provide records, or portions thereof, that are not responsive to a request. Implementing a universal security policy requiring all visitors to present identification before entering a public building does not inherently exclude the public from attending public meetings which may be held therein.

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[AO-06-08](#)

Records concerning general law enforcement policy matters must be disclosed, but records specifying how policy will be implemented, i.e. the methods by which officers will conduct investigations, may be withheld as records of investigative techniques or procedures.

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**June**

[AO-07-08](#)

Failure to respond to a request for records is deemed a denial of the request and a violation of FOIA. Clear communications are essential to FOIA transactions.

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**October**

[AO-08-08](#)

A citizen advisory committee that was not created by a public body, does not perform delegated functions of a public body, does not advise a public body, and does not receive public funding, is not a public body subject to FOIA.

[AO-09-08](#)

FOIA provides that public bodies bear the burden of proof to establish an exemption by a preponderance of the evidence. However, FOIA is silent regarding whether a requester may challenge as an abuse of discretion a decision not to disclose records that are excluded from mandatory disclosure pursuant to a valid exemption, once the exemption has been established.

[AO-10-08](#)

The records of a community center created and funded by local government, operated by a nonprofit organization acting pursuant to a contract with the local government, are public records subject to FOIA.

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**November**

[AO-11-08](#)

A record that is not prepared, owned, or possessed in the transaction of public business is not a public record subject to FOIA. When conducting private business, public officials and employees should avoid indicia, such as agency letterhead, that make private records appear to carry the imprimatur of a public body.

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## APPENDIX D

### 2008 Meetings of the Freedom of Information Advisory Council

**Monday, March 31, 2008**

**House Room D, General Assembly Building, Richmond**

Recap of FOIA and Related Access Bills from 2008 Session of General Assembly. Continuation of subcommittee to study Personal Identifying Information in response to seven bills referred to the FOIA Council by the General Assembly. Continuation of subcommittee to study Electronic Meetings in response to public comment regarding changes to electronic meetings requirements of Department of Environmental Quality's Air and Water Boards. Staff presentations of study plan regarding the protection of social security numbers (SSNs); statewide survey regarding the collection of SSNs by public bodies pursuant to SB 132 (Houck)/HB 634 (May); upcoming expiration of membership terms for Council members Edwards, Fifer, and Hopkins; update on number of inquiries to Council for advisory opinions (oral and written); update on possible lawsuit over changes to the Personal Information Privacy Act made by SB 133 (Houck)/HB 633 (May). Public comment by James Lawrence regarding possible suit against city for being barred from public building and consequently barred from public meetings held there.

**Monday, June 9, 2008**

**House Room C, General Assembly Building, Richmond**

Acknowledgement of the service of Council members Edwards and Hopkins. Report on Sunshine Week-- Ginger Stanley, Virginia Press Association. Adoption of statement of principle presented by Mr. Edwards concerning the conduct of electronic meetings. Public comment: update from James Lawrence that suit was dismissed and he planned to appeal.

**Tuesday, August 5, 2008**

**House Room D, General Assembly Building, Richmond**

Welcome new Council members Landon and Selph. Election of Delegate Griffith as Chair of the Council, and Senator Houck as Vice Chair. Progress reports from Personal Identifying Information and Electronic Meetings Subcommittees. Creation of Database Index Subcommittee to study requirement to compile index of computer databases. Creation of Meeting Minutes Subcommittee to study how new technologies affect meeting minutes.

**Monday, October 6, 2008**

**House Room D, General Assembly Building, Richmond**

Annual legislative preview Part I: Gary McLaren, Virginia Economic Development Authority - expansion of economic development exemption to include records related to business retention; Mark Flynn, Virginia Municipal League - expansion of exemption regarding zoning complaints to include building code and fire prevention code complaints. Progress reports from Personal Identifying Information, Electronic Meetings, Database Index, and Meeting Minutes Subcommittees. Adoption of draft legislation recommended by Meeting Minutes Subcommittee. Proposal to expand rights and responsibilities statement to localities.

**Monday, December 1, 2008**

**House Room D, General Assembly Building, Richmond**

Progress reports from Personal Identifying Information, Electronic Meetings, Database Index, and Meeting Minutes Subcommittees. Adoption of draft legislation recommended by Personal Identifying Information, Electronic Meetings, and Database Index Subcommittees. Agreement that Personal Identifying Information Subcommittee will continue studying protection of SSNs next year. Annual Legislative Preview Part II: William Watt, Department of the Treasury - exemption for agency risk management and internal controls standards (ARMICS) assessments; Sandy McNinch, Virginia Economic Development Authority - expansion of economic development exemption to include records related to business retention; James G. Council, Prince William County School Board - exemption for records relating to the school system's electronic visitor identification system; Mark Flynn, Virginia Municipal League - expansion of exemption regarding zoning complaints to include building code and fire prevention code complaints. Agreement to create subcommittee next year to study proposal to expand rights and responsibilities statement to localities. Presentation of executive summary for 2008 annual report.

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**Status of Freedom of Information and Other Related Access Bills  
Considered by the 2008 General Assembly**

**2008 FOIA LEGISLATIVE UPDATE**

NOTE: *Unless otherwise stated, the changes in the law described herein will take effect July 1, 2008.*

**I. Introduction**

The General Assembly passed a total of 21 bills amending the Virginia Freedom of Information Act (FOIA) during the 2008 Regular Session. One bill amending FOIA was passed as a recommendation of the Freedom of Information Advisory Council (FOIA Council): SB 131 (Houck)/HB 854 (Ebbin), concerning emergency meetings of local public bodies. Additionally, SB 132 (Houck)/HB 634 (May), amending provisions of the Government Data Collection and Dissemination Practices Act, passed as a joint recommendation of the FOIA Council and the Joint Commission on Technology and Science (JCOTS). Similarly, SB 133 (Houck) and HB 633 (May), amending the Personal Information Privacy Act, also passed as a joint recommendation of the FOIA Council and JCOTS. SB 529 (Houck), concerning access to concealed carry handgun permits, was introduced as a recommendation of the FOIA Council and was referred to the FOIA Council for further study during the 2008 interim.

Of the 21 bills, nine bills created seven new record exemptions to FOIA as follows:

- Exempts certain records of public institutions of higher education concerning fundraising and donors. (HB 407/SB 130 amending § 2.2-3705.4);
- Exempts certain records of the Virginia Military Advisory Council, the Virginia National Defense Industrial Authority, or a local or regional military affairs organization appointed by a local governing body; also adds a corresponding meetings exemption. (HB 520 amending § 2.2-3705.2);
- Exempts certain proprietary or confidential documents provided by an insurance carrier to the State Health Commissioner. (HB 603/SB 396 amending § 2.2-3705.6);
- Exempts investigator notes, and other correspondence and information with respect to an active investigation conducted by or for the Board of Education related to the denial, suspension, or revocation of teacher licenses; also contains a corresponding meetings exemption. (HB 768 amending § 2.2-3705.3);
- Exempts records maintained by the Department of the Treasury or participants in the Local Government Investment Pool, to the extent such records relate to information required to be provided by such participants to the Department to establish accounts. (HB 1367 amending § 2.2-3705.7);

- Exempts certain records supplied by a private or nongovernmental entity to the Inspector General of the Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Inspector General's Office. (SB 210 amending § 2.2-3705.6);
- Exempts certain records of the Office of the Attorney General acting pursuant to its enforcement authority under the Master Settlement Agreement (regarding certain tobacco product manufacturers), to the extent that such records contain reports, affidavits, correspondence, or other information submitted by a private business entity or principal thereof to the Office of the Attorney General. (SB 545 amending § 2.2-3705.3).

Three bills add new closed meeting exemptions to § 2.2-3711:

- Exempts certain meetings of the Virginia Military Advisory Council, the Virginia National Defense Industrial Authority, or a local or regional military affairs organization appointed by a local governing body; also contains a corresponding records exemption. (HB 520);
- Exempts the discussion or consideration by the Board of Education of records related to the denial, suspension, or revocation of teacher licenses; also adds a corresponding records exemption. (HB 768);
- Exempts the discussion or consideration of confidential proprietary records provided by a private business to certain state, local, or regional industrial or economic development authorities or organizations for business, trade and tourism development to be conducted in meetings not open to the public. (SB 593).

Eleven bills amend existing provisions of FOIA as follows:

- Establishes the Adult Fatality Review Team and adds Adult Fatality Review Team records to the existing exemption for Child Fatality Review Team records. (HB 251 amending § 2.2-3705.5);
- Removes an existing exemption for certain information contained in rabies vaccination certificates; contains provisions outside FOIA addressing the retention and destruction of such records to ensure that treasurers only retain the information required to be collected and made available for public inspection. (HB 537 amending §§ 2.2-3705.7 and 3.1-796.87:1).
- Replaces the term "mentally retarded" with the term "person with intellectual disability" and replaces the term "mental retardation" with the term "intellectual disability" throughout the Code, including technical changes within FOIA. Note that the provisions of this act shall not become effective unless reenacted by the 2009 Session of the General Assembly. (HB 760/SB 620 amending §§ 2.2-3705.3 and 2.2-3705.5);
- Allows certain local public bodies to meet by electronic communication means without a quorum of the public body physically assembled at one location under certain conditions when the Governor has declared a state of emergency. Also contains a technical amendment. (HB 854/SB 131 amending §§ 2.2-3701, 2.2-3708, and 2.2-3714);

- Broadens the current FOIA exemption to apply to any type of franchise and protects certain trade secrets and confidential proprietary information from both bidders for the franchise and the person who is ultimately awarded the franchise. (HB 1271 amending § 2.2-3705.6);
- Abolishes the Department of Charitable Gaming and places the regulation of charitable gaming under the Department of Agriculture and Consumer Services; makes technical changes within FOIA to reflect the departmental change. (HB 1280/SB 199 amending §§ 2.2-3705.3 and 2.2-3705.6);
- Exempts from public disclosure certain proprietary records submitted to the Innovative Technology Authority as part of a grant application by amending current provisions applicable to the Commonwealth Health Research Board (CHRB); also contains a corresponding amendment to the existing CHRB meetings exemption. (HB 1458/SB 726 amending §§ 2.2-3705.6 and 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 2008 Session of the General Assembly.

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, 2008.

## **II. Amendments to the Freedom of Information Act**

### **§ 2.2-3701. Definitions.**

Amends the definition of "meeting" to include a reference to § 2.2-3808.1. HB 854 (2008 Acts of Assembly c. 789), SB 131 (2008 Acts of Assembly c. 233).

### **§ 2.2-3705.2. Exclusions to application of chapter; records relating to public safety.**

Adds an exemption for certain records of the Virginia Military Advisory Council, the Virginia National Defense Industrial Authority, or a local or regional military affairs organization appointed by a local governing body; also adds a corresponding meetings exemption. HB 520 (2008 Acts of Assembly, c. 721).

### **§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.**

Replaces the term "mentally retarded" with the term "person with intellectual disability" and replaces the term "mental retardation" with the term "intellectual disability" throughout the Code, including technical changes within FOIA. Note that the provisions of this act shall not become effective unless reenacted by the 2009 Session of the General Assembly. HB 760 (2008 Acts of Assembly, c. 821), SB 620 (2008 Acts of Assembly, c. 832).

Adds an exemption for investigator notes, and other correspondence and information with respect to an active investigation conducted by or for the Board of Education related to the denial, suspension, or revocation of teacher licenses; also adds a corresponding meetings exemption. HB 768 (2008 Acts of Assembly, c. 668).

Abolishes the Department of Charitable Gaming and places the regulation of charitable gaming under the Department of Agriculture and Consumer Services; makes technical changes within FOIA to reflect the departmental change. HB 1280 (2008 Acts of Assembly, c. 387), SB 199 (2008 Acts of Assembly, c. 689).

Adds an exemption for certain records of the Office of the Attorney General acting pursuant to its enforcement authority under the Master Settlement Agreement (regarding certain tobacco product manufacturers), to the extent that such records contain reports, affidavits, correspondence, or other information submitted by a private business entity or principal thereof to the Office of the Attorney General. SB 545 (2008 Acts of Assembly, c. 758).

**§ 2.2-3705.4. Exclusions to application of chapter; educational records and certain records of educational institutions.**

Adds an exemption for certain records of public institutions of higher education concerning fundraising and donors. HB 407 (2008 Acts of Assembly, c. 665), SB 130 (2008 Acts of Assembly, c. 561).

**§ 2.2-3705.5. Exclusions to application of chapter; health and social services records.**

Establishes the Adult Fatality Review Team and adds Adult Fatality Review Team records to existing exemption for Child Fatality Review Team records. HB 251 (2008 Acts of Assembly, c. 539).

Replaces the term "mentally retarded" with the term "person with intellectual disability" and replaces the term "mental retardation" with the term "intellectual disability" throughout the Code, including technical changes within FOIA. Note that the provisions of this act shall not become effective unless reenacted by the 2009 Session of the General Assembly. HB 760 (2008 Acts of Assembly, c. 821), SB 620 (2008 Acts of Assembly, c. 832).

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

Adds an exemption for certain proprietary or confidential documents provided by an insurance carrier to the State Health Commissioner. HB 603 (2008 Acts of Assembly, c. 71), SB 396 (2008 Acts of Assembly, c. 102).

Broadens the current FOIA exemption to apply to any type of franchise and protects certain trade secrets and confidential proprietary information from both bidders for the franchise and the person who is ultimately awarded the franchise. HB 1271 (2008 Acts of Assembly, c. 736).

Abolishes the Department of Charitable Gaming and places the regulation of charitable gaming under the Department of Agriculture and Consumer Services; makes technical changes within FOIA to reflect the departmental change. HB 1280 (2008 Acts of Assembly, c. 387), SB 199 (2008 Acts of Assembly, c. 689).

Exempts from public disclosure certain proprietary records submitted to the Innovative Technology Authority as part of a grant application by amending current provisions applicable to the Commonwealth Health Research Board (CHRB); also contains a corresponding amendment to the existing CHRB meetings exemption. HB 1458 (2008 Acts of Assembly, c. 743), SB 726 (2008 Acts of Assembly, c. 633).

Adds an exemption for certain records supplied by a private or nongovernmental entity to the Inspector General of the Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Inspector General's Office. SB 210 (2008 Acts of Assembly, c. 266).

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

Repeals an existing exemption for certain information contained in rabies vaccination certificates; contains provisions outside FOIA addressing the retention and destruction of such records to ensure that treasurers only retain the information required to be collected and made available for public inspection. HB 537 (2008 Acts of Assembly, c. 16).

Adds a FOIA exemption for the records maintained by the Department of the Treasury or participants in the Local Government Investment Pool, to the extent such records relate to information required to be provided by such participants to the Department to establish accounts. HB 1367 (2008 Acts of Assembly, c. 739)

**§ 2.2-3708. Electronic communication meetings.**

Allows certain local public bodies to meet by electronic communication means without a quorum of the public body physically assembled at one location under certain conditions when the Governor has declared a state of emergency. Also contains a technical amendment. HB 854 (2008 Acts of Assembly c. 789), SB 131 (2008 Acts of Assembly c. 233).

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

Adds an exemption for certain meetings of the Virginia Military Advisory Council, the Virginia National Defense Industrial Authority, or a local or regional military affairs organization appointed by a local governing body; also adds a corresponding records exemption. HB 520 (2008 Acts of Assembly, c. 721).

Adds an exemption for the discussion or consideration by the Board of Education of records related to the denial, suspension, or revocation of teacher licenses; also adds a corresponding records exemption. HB 768 (2008 Acts of Assembly, c. 668).

Adds an exemption for the discussion or consideration of confidential proprietary records provided by a private business to certain state, local, or regional industrial or economic development authorities or organizations for business, trade and tourism development to be conducted in meetings not open to the public. SB 593 (2008 Acts of Assembly, c. 626).

Amends a current meeting exemption to allow the discussion or consideration of certain proprietary records submitted to the Innovative Technology Authority as part of a grant application; also contains a corresponding records exemption. HB 1458 (2008 Acts of Assembly, c. 743), SB 726 (2008 Acts of Assembly, c. 633).

### **§ 2.2-3714. Violations and penalties.**

Adds a reference to § 2.2-3708.1 in regard to violations willfully and knowingly made. HB 854 (2008 Acts of Assembly c. 789), SB 131 (2008 Acts of Assembly c. 233).

## **III. Other Access-Related Legislation**

### **Title 2.2 Administration of Government**

**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) authorized or required 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 is a recommendation of the Freedom of Information Advisory Council and JCOTS. HB 634 (2008 Acts of Assembly, c. 840), SB 132 (2008 Acts of Assembly, c. 843).

**Address confidentiality for victims of domestic violence; program expanded; penalty.** Expands the address confidentiality for victims of domestic violence program currently implemented in the County of Arlington to the Counties of Albemarle, Augusta, Dickenson, Fairfax, Henry, Lee, Rockbridge, Russell, Scott, Washington, and Wise as well as the Cities of Buena Vista, Charlottesville, Lexington, Martinsville, Norfolk, and

Roanoke. The bill also provides that an applicant to the program may apply in person at a domestic violence program, which is defined as a public and not-for-profit agency the primary mission of which is to provide services to victims of sexual or domestic violence. Currently, such applications are made directly to the Office of the Attorney General. SB 764 (2008 Acts of Assembly, c. 649).

### **Title 6.1 Banking and Finance**

**Payday Loan Act.** Requires the State Corporation Commission, by January 1, 2009, to certify and contract with one or more third parties to develop, implement, and maintain an Internet-accessible database, and requires payday lenders to query the database prior to making any loan to determine whether the loan is permissible. Provides that the information in the database is confidential and exempt from FOIA. HB 12 (2008 Acts of Assembly, c. 849), SB 588 (2008 Acts of Assembly, c. 876).

### **Title 8.01 Civil Remedies and Procedure**

**Circuit Court clerks; electronic filing and recording; digital reproduction; recordation of judgments; secure remote access; deed cover sheets; fees collected by clerks.** Clarifies a number of issues for circuit court clerks including: use of the last four digits of a social security number on judgments (filer is responsible); that the clerk may provide information from a locality to remote access users; filer is responsible for cover sheet accuracy; allowing the clerk to rely on the cover sheet to index; the difference between e-filing of court records and e-recording of land records. The bill also provides standard definitions of subscriber, secure remote access, public access, and electronic recording of land records. The bill also establishes a \$5 per document fee for e-recording of a land record and provides for a \$50 per month subscription rate for remote access to land, civil, and criminal records. HB 1106 (2008 Acts of Assembly, c. 823), SB 622 (2008 Acts of Assembly, c. 833).

### **Title 10.1 Conservation**

**Air and Water Boards permit issuance process.** Establishes a uniform permit issuance process for the Air Pollution Control Board (Air Board) and the State Water Control Board (Water Board). Among other changes, provides that if either Board conducts a meeting by electronic communication, it shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public. HB 1332 (2008 Acts of Assembly, c. 557), SB 423 (2008 Acts of Assembly, c. 276).

### **Title 16.1 Courts Not of Record**

**Expungement of juvenile records.** Requires that when a clerk destroys records pursuant to a juvenile record expungement, he shall destroy all records, including electronic records. HB 1258 (2008 Acts of Assembly, c. 519).

## **Title 17.1 Courts of Record**

**Circuit Court clerks; electronic filing and recording; digital reproduction; recordation of judgments; secure remote access; deed cover sheets; fees collected by clerks.** Clarifies a number of issues for circuit court clerks including: use of the last four digits of a social security number on judgments (filer is responsible); that the clerk may provide information from a locality to remote access users; filer is responsible for cover sheet accuracy; allowing the clerk to rely on the cover sheet to index; the difference between e-filing of court records and e-recording of land records. The bill also provides standard definitions of subscriber, secure remote access, public access, and electronic recording of land records. The bill also establishes a \$5 per document fee for e-recording of a land record and provides for a \$50 per month subscription rate for remote access to land, civil, and criminal records. HB 1106 (2008 Acts of Assembly, c. 823), SB 622 (2008 Acts of Assembly, c. 833).

## **Title 18.2 Crimes and Offenses Generally**

**Database breach notification.** Requires an individual or entity that owns or licenses computerized data that includes personal information to disclose any breach of the security of the system following discovery or notification of the breach to the Office of the Attorney General and any affected resident of the Commonwealth whose unencrypted and unredacted personal information was, or is reasonably believed to have been accessed and acquired by an unauthorized person. A breach is defined as the unauthorized access and acquisition of unencrypted and unredacted computerized data that compromises the security or confidentiality of personal information maintained by an individual or entity as part of a database of personal information regarding multiple individuals and that causes, or the individual or entity reasonably believes has caused, or will cause, identity theft or other fraud to any resident of the Commonwealth. Violations by a state-chartered or licensed financial institution shall be enforceable exclusively by the financial institution's primary state regulator. Violations by an entity regulated by the State Corporation Commission shall be enforceable exclusively by the Commission. All other violations shall be enforced by the Office of the Attorney General, which may impose a civil penalty not to exceed \$150,000 per breach or series of breaches of a similar nature that are discovered in a single investigation. The bill specifies that its provisions do not limit an individual from recovering direct economic damages. HB 1469 (2008 Acts of Assembly, c. 801), SB 307 (2008 Acts of Assembly, c. 566).

## **Title 19.2 Criminal Procedure**

**Juror information confidential.** Provides that a court may in a criminal trial, upon the motion of either party or its own motion, and for good cause shown, issue an order regulating the disclosure of personal information of a juror to any person other than the counsel for either party. Good cause shown includes, but is not limited to, a likelihood of bribery, tampering, or physical injury to or harassment of a juror. The order may be modified as deemed appropriate by the court. "Personal information" is defined as any information collected by the court, clerk, or jury commissioner including, but not limited to,

a juror's name, age, occupation, home and business addresses, telephone numbers, email addresses, and any other identifying information that would assist another in locating or contacting the juror. The bill also directs the Supreme Court to prescribe and publish rules that provide for the protection of a juror's personal information. HB 181 (2008 Acts of Assembly, c. 538).

### **Title 23 Educational Institutions**

**Management agreement with Virginia Commonwealth University.** Provides a management agreement between the Commonwealth of Virginia and Virginia Commonwealth University pursuant to the Restructured Higher Education Financial and Administrative Operations Act. Contains various provisions regarding access to records, particularly procurement records. HB 1124 (2008 Acts of Assembly, c. 594), SB 358 (2008 Acts of Assembly, c. 616).

**Public institutions of higher education; operational authority.** Provides operational authority for public institutions of higher education in the areas of information technology, procurement, and capital outlay pursuant to the Restructuring Act of 2005. Contains various provisions regarding access to records, particularly procurement records. HB 1390 (2008 Acts of Assembly, c. 824), SB 442 (2008 Acts of Assembly, c. 829).

### **Title 37.2 Mental Health, Mental Retardation and Substance Abuse Services**

**Involuntary commitment; outpatient treatment; etc.** Makes numerous changes to this and other titles regarding emergency custody orders, temporary detention orders, and involuntary commitment proceedings. Among other changes, modifies the existing provision of § 37.2-818 stating that records of involuntary commitment hearings are exempt from FOIA by providing that the subject of the hearing may waive confidentiality, and by allowing the court to disclose dispositional orders under certain conditions. HB 499 (2008 Acts of Assembly, c. 850), SB 246 (2008 Acts of Assembly, c. 870).

### **Title 52 Police (State)**

**Virginia Fusion Intelligence Center; confidentiality; immunity.** Provides that papers, records, documents, reports, materials, databases or other evidence or information relative to criminal intelligence or any terrorism investigation in the possession of the Virginia Fusion Intelligence Center within the Department of State Police is confidential and not subject to the Virginia Freedom of Information Act or the Government Data Collection and Dissemination Practices Act. The Department must conduct an annual review of such information and remove any which is determined to not have a nexus to terroristic activity. The bill also provides that people who have access to information maintained by the Fusion Center are not subject to subpoena in any civil action concerning criminal intelligence information maintained by the Fusion Center. The bill restricts the release or dissemination of information without prior authorization from the Fusion Center and punishes any person who knowingly disseminates information with a Class 1 misdemeanor. If such unauthorized release or dissemination results in death or serious bodily injury the penalty is a Class 4

felony. There is an immunity provision for people who furnish information on criminal violations to a governmental entity established for the purposes of detecting and preventing acts of terrorism. HB 1007 (2008 Acts of Assembly, c. 792).

#### **Title 54.1 Professions and Occupations**

**Advance Health Care Directive Registry; creation.** Requires the Department of Health to make available a secure online central registry for advance health care directives. The registry shall be accessible to health care providers licensed by the Board, through a site maintained by the Department of Health. Provides that data in the registry shall be confidential and exempt from FOIA. HB 805 (2008 Acts of Assembly, c. 301), SB 290 (2008 Acts of Assembly, c. 696).

#### **Title 58.1 Taxation**

**Confidentiality of taxpayer information.** Includes as a confidential tax document any document that is required to be filed with the Department of Conservation and Recreation under the land preservation tax credit program. HB 662 (2008 Acts of Assembly, c. 785).

#### **Title 59.1 Trade and Commerce**

**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. HB 633 (2008 Acts of Assembly, c. 820), SB 133 (2008 Acts of Assembly, c. 562).

#### **Title 62.1 Waters of the State, Ports and Harbors**

**Air and Water Boards permit issuance process.** Establishes a uniform permit issuance process for the Air Pollution Control Board (Air Board) and the State Water Control Board (Water Board). Among other changes, provides that if either Board conducts a meeting by electronic communication, it shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public. HB 1332 (2008 Acts of Assembly, c. 557), SB 423 (2008 Acts of Assembly, c. 276).

#### **IV. Resolutions**

**Commending Nolan T. Yelich.** Mr. Yelich served on the FOIA Council from its inception in 2000 until his retirement from state service in 2007. **SJ 238.**

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## APPENDIX F

### Breakdown of Inquiries to Council December 1, 2007 through November 30, 2008

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, 2007 through November 30, 2008

Total number of inquiries: 1685

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Government	0	0	0	0	0	0	0	0	0	0	1	0	1
Citizens	0	0	1	2	0	2	1	0	0	0	2	0	8
News Media	0	0	0	0	1	0	0	0	0	0	0	1	2
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>2</b>	<b>1</b>	<b>2</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>3</b>	<b>1</b>	<b>11</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Government	60	70	72	68	65	64	67	92	68	74	82	45	827
Citizens	42	62	60	51	70	63	51	57	54	49	54	28	641
News Media	13	22	16	19	19	17	14	21	27	14	15	9	206
<b>TOTAL</b>	<b>115</b>	<b>154</b>	<b>148</b>	<b>138</b>	<b>154</b>	<b>144</b>	<b>132</b>	<b>170</b>	<b>149</b>	<b>137</b>	<b>151</b>	<b>82</b>	<b>1674</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Government	60	70	72	68	65	64	67	92	68	74	83	45	828
Citizens	42	62	61	53	70	65	52	57	54	49	56	28	649
News Media	13	22	16	19	20	17	14	21	27	14	15	10	208
<b>TOTAL</b>	<b>115</b>	<b>154</b>	<b>149</b>	<b>140</b>	<b>155</b>	<b>146</b>	<b>133</b>	<b>170</b>	<b>149</b>	<b>137</b>	<b>154</b>	<b>83</b>	<b>1685</b>

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	0	0	1
Citizens	7	1	2
News Media	1	1	0
<b>TOTAL</b>	<b>8</b>	<b>2</b>	<b>3</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	532	188	190
Citizens	363	70	325
News Media	133	50	69
<b>TOTAL</b>	<b>1028</b>	<b>308</b>	<b>584</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	532	188	191
Citizens	370	71	327
News Media	134	51	69
<b>TOTAL</b>	<b>1036</b>	<b>310</b>	<b>587</b>

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**APPENDIX G**

**Opinions Issued By The Foia Council  
July 2000 Through November 2008**

Written Opinions:

	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>
Government	4	20	6	8	8	4	4	2	1
Citizens	3	41	11	13	15	11	6	8	8
News Media	1	10	2	3	3	1	0	3	2

Informal Opinions:

	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>
Government	45	275	465	472	616	756	845	854	827
Public	43	324	360	331	429	687	664	674	641
News Media	21	169	165	198	145	209	232	167	206

Total Number of Opinions:

	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>
Government	49	295	471	480	624	760	849	856	828
Public	47	365	371	344	444	698	670	682	649
News Media	22	179	167	201	148	210	232	170	208
<b>GRAND TOTAL</b>	<b>118</b>	<b>539</b>	<b>1009</b>	<b>1025</b>	<b>1216</b>	<b>1668</b>	<b>1751</b>	<b>1708</b>	<b>1685</b>

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### Sunshine Week

As part of its contribution to commemorate Sunshine Week in 2008, the Council's executive director, Maria Everett wrote an op/ed piece about the importance of FOIA for the *Richmond Times Dispatch*, titled "Striking Public-Private Balance Is a Challenge," which appeared in the *Richmond Times Dispatch* on March 15, 2008. The op/ed piece is reprinted below with the permission of the *Richmond Times Dispatch*.

*Striking Public-Private Balance Is a Challenge*  
By Maria Everett

*Saturday, March 15, 2008*  
*Richmond Times Dispatch*

During the 2008 General Assembly session, several bills were considered to restrict citizen access to public records in order to protect the privacy of certain classes of individuals: those making donations to state universities, those donating or loaning items to public museums, and those who have permits to carry concealed handguns, just to name a few. Regardless of the side one takes, these bills and others like them raise important public policy questions -- where is the point of balance between the privacy of an individual's name, address, and telephone number and government transparency? With many of these bills being referred to the FOIA Council for examination, there is an opportunity to find that balance outside of the press of a General Assembly session.

We all interface with the government in many ways. We pay taxes, send our children to public school, get driver's licenses, and the list goes on. Think for a moment about the amount of information government possesses from just these three examples.

Our names, addresses, and telephone numbers are part of many public records. It is equally true that the same information is a part of many business records. Are you listed in the telephone book? Are your telephone number and address available by dialing the 411 directory? What will a Google search reveal about you? Ever ordered from one catalog only to be inundated with other catalogs?

Maintaining the balance between an individual's privacy and the public's right to know has always been a formidable challenge. Under Virginia's FOIA, records held by government are presumed open to the public; but a request for these records must first be made. In other words, gaining access to public records, whether in paper presumed open to the public; but a request for these records must first be made. In other words, gaining access to public records, whether in paper or electronic form, requires some effort from the requester. In past

years, courts have ruled that the privacy of an individual's name and address is in a sense protected by the barriers of time and inconvenience involved in collecting this information from public records -- a concept known as practical obscurity.

Yet today, personal privacy is a growing concern and the solution seems to be to restrict public access to public records. It is somewhat curious in light of the many ways we voluntarily put our names and addresses in the public domain. The real concern seems to be how a requester uses the public records that have been provided courtesy of the FOIA.

The FOIA guarantees the right of access; but does not concern itself with how the records are thereafter used by a requester. There are other laws for that. When the Roanoke Times chose to publish online the names and addresses of all persons who have permits to carry concealed handguns, this use was objectionable to many. But when the use of public records by a requester is found to be objectionable, the first response is to plug the hole -- to prohibit access to public records. Certainly using public records for objectionable or illegal purposes can be prevented by halting public access altogether. But at what cost?

The FOIA is the embodiment of our tacit agreement that an open government is the preferred government. The FOIA is in place so citizens can find out what government is doing and how tax dollars are being spent. It also allows us to find a community of interest, the ability to identify like-minded individuals for social and political activities. It can be grist for capitalism by allowing persons to participate in the market place.

The FOIA Council was once "foia'd" for the mailing list of the individuals who attend the Council's FOIA Workshops. My first reaction was not unlike others -- they didn't sign up for the workshops to become a mailing list for some company to solicit business. True, but what is the harm? We all receive unsolicited offers and have learned to say, "No." Government doesn't get to choose for us, even altruistically, who may contact us or how we will respond.

This is not to say that there are not vulnerable segments of our population that need protection. In the concealed handgun context, protection for the names and addresses of victims of abuse and other crime can be achieved without closing the entire record. It takes balance. Passions on both sides of the privacy-versus-public access issue run high. That's where the FOIA Council can help. It is a forum where all parties have a place at the table to resolve divergent opinions in an environment marked by thorough examination of issues outside of the press of a General Assembly session.

Privacy issues related to the ease of dissemination of information obtained from public records will likely persist. The FOIA Council is a forum to find the balancing point. It is a process we should embrace.

Maria J.K. Everett is the executive director of the Virginia Freedom of Information Advisory Council. She may be contacted toll free at 1-866-448-4100 or through the Web site <http://dls.state.va.us/foiacouncil.htm>.

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### Subcommittee Meeting Summaries

To provide fuller context for the work of the Council, given that in-depth study of access issues is conducted by Council-created subcommittees, this appendix chronicles the work of the two subcommittees that examined the seven bills referred to the Council by the 2008 Session of the General Assembly. This appendix also chronicles the work of two additional subcommittees created by the Council to address specific issues in FOIA.

#### I. Electronic Meetings Subcommittee

*June 9, 2008*

The Electronic Meetings Subcommittee held its first meeting on June 9, 2008.<sup>30</sup> This meeting was called to study changes made by the 2008 Session of the General Assembly that would allow members of the State Air Pollution Control Board (Air Board) and the State Water Control Water Board (Water Board) to meet via teleconference under certain circumstances (HB 1332 (Landes)/SB 423 (Puckett)). While this issue was not the central thrust of HB 1332/SB423, these specific provisions conflicted with the FOIA provisions for teleconferences and electronic meetings. Delegate Landes and Senator Puckett were invited to attend today's meeting, but neither was able to do so.

The meeting opened with a brief presentation by staff contrasting the electronic meetings requirements set forth in the Virginia Freedom of Information Act (FOIA) with the changes made by HB 1332/SB 423. Generally, electronic meetings held under § 2.2-3708 require that all locations from which members participate must be open to the public. By contrast, provisions in HB 1332/SB 423 provide that either Board, when holding an electronic meeting, "shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public."<sup>31</sup> FOIA also requires that "a quorum of the public body is physically assembled at one primary or central meeting location" in order to hold an electronic meeting. In contrast to this FOIA requirement, provisions of HB 1332/SB 423 would allow public hearings to be held by "less than a quorum of [each] Board," which may be interpreted to imply that these Boards may hold electronic meetings without first physically assembling a quorum.<sup>32</sup>

Cindy Berndt, representing DEQ, presented a brief history regarding these bills. She indicated the original version would have entirely removed permitting authority from the Air and Water Boards, as well as the Virginia Waste Management Board (Waste Board). The version that passed is a compromise agreed to by the various interested parties. The meetings provisions at issue<sup>33</sup> were only meant to apply to a review of a decision whether to

hold a public hearing made by the Director of DEQ. These meetings are not intended to address any other business of the Boards. Ms. Berndt indicated that the law requires such decisions to be reviewed within 20 days, and that five days notice is required before the review, making scheduling difficult. Additionally, members of the Air and Water Boards are located all over the state and these review meetings may only last for a brief time, making it wasteful for members to travel for hours for what may be only a ten-minute meeting. In response to questions from the Subcommittee, Ms. Berndt also clarified that it is a typical procedure, based on current regulations, for public hearings to be held by a single member who takes comments from the public and then later presents the findings to a full Board for a final decision (members of the public also have the opportunity to address the full Board). The "less than a quorum" language in the bills is meant to reflect this practice, not to imply that the Boards would hold electronic meetings with less than a quorum present. In response to questions from the Subcommittee, Ms. Berndt also indicated it may be possible to have members participate from regional offices that are equipped with the necessary electronic communications technology and may be opened to the public. Staff pointed out that the confusing language is the reference to "regular or special meetings" in the context of these public hearings, as set forth in subsection J of § 10.1-1322.01 and subsection J of 62.1-44.15:02 (both "subsection J" hereinafter).<sup>34</sup> Ms. Berndt indicated that the intent was not to imply that a single member could hold a Board meeting; the Subcommittee agreed that that language could be fixed.

Next, Alexander Macaulay, Esq., on behalf of the City of Alexandria and several environmental groups, pointed out several concerns addressed in the negotiations that led to this legislation: maintaining the rights of the Boards to vote on controversial permits while recognizing that many permit decisions are routine and do not require a vote by the respective Board; that the law would be over-inclusive resulting in too many public hearings by the Boards on routine permits; and that the Director may be given too much discretion in deciding whether a permit should have a public hearing. Thus the intermediate step was added allowing the Boards to review the Director's decisions, with the 20-day time limit to address concerns over timeliness. He further indicated that his clients would not oppose having these be public meetings.

Joe Tannery, Virginia Deputy Director and Staff Attorney of the Chesapeake Bay Foundation (CBF), next presented a brief description of how the new law differs from the old system. Under the old system, in the water context, there would be a 30-day public comment period, then the Director would decide whether to have a public hearing. If a public hearing was held, it would be held by one Board member and staff who would receive public comment. Subsequently that member would present the results of the public hearing to the full Board, which would then vote on the permit at a public meeting of the Board. The new legislation changes the process by allowing the Board to review the Director's decision whether to hold a public hearing. CBF supported this legislation in part because it adds this step, providing for additional public participation that did not exist under the old system.

Subcommittee member Bill Axselle indicated that he was on the other side of the negotiations on this issue, but that Messrs. McCauley and Tannery had summarized it well. From a business and agriculture perspective, for example, if 25 letters from citizens are received by DEQ, it indicates public interest, but leaves the question whether that interest is in the permit itself or other issues. Having the intermediary review by the Board provides a safeguard for both sides.

Ginger Stanley, Executive Director of the Virginia Press Association, pointed out that the bills had several last minute changes with insufficient time to work through all the concerns. While better understanding the intent of this legislation, Ms. Stanley expressed remaining concerns, particularly that this legislation codified a regulation and that others will seek to follow suit, and that an exception was just made last year to the quorum requirement for electronic meetings held in response to an emergency as declared by the Governor, and that the quorum requirement remains a huge issue.

Peter Easter, on behalf of the Virginia Association of Broadcasters, expressed his concern that this legislation may set a precedent that will lead to future problems.

In response to further questions from the Subcommittee, Ms. Berndt clarified that DEQ has eight regional offices from which members might participate in electronic meetings.<sup>35</sup> She further clarified that under this process, if 25 requests from the public are received and the Director recommends a hearing be held, there are three possible outcomes: (1) the Board may agree (in which case, generally, one Board member holds a public hearing to be followed by a public meeting of the full Board where the Board votes), (2) the Board may agree and have the Director hold a public hearing, or (3) the Board may disagree, deciding that a public hearing is unnecessary (but in her experience this is never the result). As a practical matter, this is a process by which the Board decides whether the public hearing will be held by the Board or by the Director. Ms. Berndt further stated that while the existing regulation was used as a basis for the legislation, the legislation was not specifically intended to codify that regulation. The Subcommittee then discussed with Ms. Berndt how the compromise was reached that resulted in passage of this legislation, and discussed possible alternative language that might better match the requirements of FOIA while still allowing the intended review process.

The Subcommittee decided first to address the "less than a quorum" language used in subsection J in reference to the public hearing procedure.<sup>36</sup> Staff proposed amended language for subsection J that would clarify that the "public hearing" held is not the same as a "public meeting" under FOIA. In response to questions, Ms. Berndt indicated that there could be a public hearing only, at which no action is taken and where a quorum of the Board is not required, or there could be a Board meeting with a public hearing, where action might be taken (which would require a quorum of the Board). The Subcommittee expressed concern that there would be confusion between the public hearing and public meeting provisions. Mr. Fifer moved to suggest language referring to "one or more members of the

Board" without mentioning any quorum requirement; Mr. Axselle seconded the motion and suggested adding language clarifying that the public hearing requirements are not the same as public meeting requirements under FOIA. The Subcommittee then voted unanimously to recommend amending subsection J to read as follows: "Public hearings held pursuant to these procedures may be conducted by (i) the Board at a regular or special meeting of the Board or (ii) one or more members of the Board. A member of the Board shall preside over the public hearing."

The Subcommittee then discussed the language of subsection D regarding the procedure for the Board to review the Director's decision whether to hold a public hearing.<sup>37</sup> Mr. Axselle suggested two changes: (1) the locations should be open to the public, and (2) the language should be amended to clarify that this procedure is only for review of an administrative decision, and no other purpose. Chairman Edwards identified two issues of concern: (1) the deviation from the quorum requirements of FOIA, and (2) that remote locations could be closed to the public. Further discussion among the Subcommittee and with Ms. Berndt clarified that while the wording of subsection D does not specifically refer to any quorum requirements, it was intended that a Board meeting under subsection D would not require a physically-assembled quorum. Mr. Fifer indicated that this is the same challenge faced by other public bodies, and he was unsure that the circumstances here are any more compelling than those facing other public bodies. Mr. Edwards expressed that public meetings are for the public, not for the convenience of public officials. Mr. Fifer moved to remove the final sentence of subsection D. Mr. McCauley indicated his clients would reserve the right to oppose that motion out of concern that DEQ would re-open the entire issue. Mr. Fifer indicated his motion was intended to be consistent with other policy decisions of the FOIA Council, and that politically it might be better to present separate amendments regarding the quorum issue and the issue of remote locations. Mr. Axselle, who had indicated his support for having remote locations open to the public but not for the physically-assembled quorum, suggested having staff work with Ms. Berndt, Ms. Stanley, and other interested parties to try to come up with amended language for this section. Chairman Edwards stated that the Subcommittee was not ready to make a recommendation on subsection D at this time, and so placed the issue on the table until the next Subcommittee meeting. Staff inquired whether the Subcommittee would like to move the amendment to subsection J; this was also held until the next meeting, so that all recommendations can be presented to the full FOIA Council at one time.

### *August 5, 2008*

The Electronic Meetings Subcommittee held its second meeting on August 5, 2008<sup>38</sup> to continue its examination of the changes made by the 2008 Session of the General Assembly that would allow members of the State Air Pollution Control Board (Air Board) and the State Water Control Water Board (Water Board) to meet via teleconference under certain circumstances (HB 1332 (Landes)/SB 423 (Puckett)). While this issue was not the central thrust of HB 1332/SB423, these specific provisions conflicted with the FOIA provisions for teleconferences and electronic meetings. Delegate Landes and Senator Puckett were invited to attend today's meeting, but neither was able to do so.

The meeting opened with a brief presentation by staff contrasting the electronic meetings requirements set forth in the Virginia Freedom of Information Act (FOIA) with the changes made by HB 1332/SB 423. Generally, electronic meetings held under § 2.2-3708 require that all locations from which members participate must be open to the public. By contrast, provisions in HB 1332/SB 423 provide that either Board, when holding an electronic meeting, "shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public."<sup>39</sup> FOIA also requires that "a quorum of the public body is physically assembled at one primary or central meeting location" in order to hold an electronic meeting. In contrast to this FOIA requirement, provisions of HB 1332/SB 423 would allow public hearings to be held by "less than a quorum of [each] Board," which may be interpreted to imply that these Boards may hold electronic meetings without first physically assembling a quorum.<sup>40</sup>

In addition, staff presented a draft that reflected the consensus of the subcommittee reached at its previous meeting concerning the conduct of public hearings by members of the State Air Pollution Control Board (Air Board) and the State Water Control Water Board (Water Board). Staff advised that the draft language was essentially clarifying. In addition, staff advised that the main issue of controversy was not addressed in the draft and that, as previously requested, staff, representatives of the Virginia Press Association and DEQ would meet before the next Subcommittee meeting to attempt to resolve the conflict between HB 1332/SB423 and FOIA as it related to the presence of a quorum and public accessibility to remote meeting locations. DEQ agreed that individual board members could meet at a public venue, such a community college that has audio/visual capabilities to participate in teleconferences. However, the Subcommittee noted that the quorum issue was still on the table for future deliberation.

### *August 25, 2008*

The Electronic Meetings Subcommittee (the Subcommittee) held its third meeting<sup>41</sup> to continue its deliberations on statutory changes made in 2008 that would allow members of the State Air Pollution Control Board (Air Board) and the State Water Control Water Board (Water Board) to meet via teleconference under certain circumstances (HB 1332 (Landes)/SB 423 (Puckett)). While this issue was not the central thrust of HB 1332/SB423, these specific provisions conflict with the FOIA provisions for teleconferences and electronic meetings. The Subcommittee also welcomed recently appointed FOIA Council members Frosty Landon and John Selph to the Subcommittee.

Staff presented a draft that reflected the consensus the subcommittee reached at its previous meeting concerning the conduct of public hearings by members of the Air Board and the Water Board. Staff advised that the draft language was essentially clarifying. As previously requested by the Subcommittee, staff, representatives of the Virginia Press Association (VPA), and DEQ met to attempt to resolve the conflict between HB 1332/SB423 and FOIA as it related to the presence of a quorum and public accessibility to remote meeting locations. Staff reported that there was agreement that individual board

members could go to public venues, such a community college that has audio/visual capabilities to participate in teleconferences. This agreement was reflected in the draft. However, staff advised that the main issue of controversy--the presence of a quorum--was not addressed in the draft.

Craig Merritt, representing the VPA, told the subcommittee that as passed, subsection D of §§ 10.1-1322.01 and 62.1-44.15:02 (contained in HB 1332/SB 423) made explicit that the remote locations from which respective members of the Water Board or Air Board were participating were not open to the public. Further these same sections implicitly eliminated the physical quorum requirement found in § 2.2-3708 of FOIA. He stated that DEQ was creating for itself a lower bar than what is required by FOIA. He indicated that VPA's concerns were expressed during Session; but given that this issue was a small piece of the entire bill, VPA was asked by the patrons to wait to raise the issue until after passage of the bill. VPA's preference would be to eliminate the last full sentence of subsection D in both §§ 10.1-1322.01 and 62.1-44.15:02. Mr. Merritt thanked DEQ for working with the VPA to resolve its issues.

Rick Linker, Policy Coordinator, DEQ, advised the Subcommittee that DEQ understood the pitfalls of this approach; but noted that it was an 11th hour decision among 40 stakeholders working on the bill to vary from the requirements of FOIA. He noted that it was and is anticipated that these electronic meetings would be extremely brief, lasting only 10 to 15 minutes. Mr. Linker stated that it was difficult to schedule a meeting among seven members within a 20-day period. He stated that if the time frame dictated by statute was coincident with a regular meeting of the respective Boards, the issue would be added to the agenda for that regular meeting. Mr. Linker presented a compromise draft on the quorum issue, which provided, "[A] quorum of the Board shall be physically assembled at a single meeting location when possible." He indicated that the DEQ proposal had not been shared with the wider community of stakeholders; however he noted that several of the stakeholders were in attendance at the Subcommittee meeting. He told the Subcommittee that ultimately DEQ did not want to adversely affect the permit process, nor did it want to use its resources to reimburse individual Board members for travel to Richmond for what they anticipate to be a brief meeting.

The Subcommittee discussed alternative methods for addressing the quorum issue, including setting a lower quorum by law for these types of meetings thereby allowing a physical quorum to be assembled in one location as required by FOIA. Subcommittee discussions also included increasing the 20-day meeting requirement to 30 or 45 days to allow more flexibility in scheduling a meeting of the respective Boards. Mr. Linker noted that the permit process takes about nine months and the 20-day period does not adversely affect that. However, any longer period would add to the nine months.

August Wallmeyer, representing the Virginia Independent Power Producers and the Virginia Energy Providers Association, explained that during the 2008 Session, the

stakeholders took a blood oath not to touch this legislation. He noted that in the DEQ permitting process generally, there was no lack of public participation in the process as concerned citizens find out about permit application that affect them.

Subcommittee member E.M. Miller inquired whether the permitting process was different from the process required by the Administrative Process Act (APA) (§ 2.2-4000 et seq.) Mr. Linker advised that it was a different and shorter process for issuing permits than for promulgating regulations under the APA, which he noted takes about 18 to 24 months from start to finish.

Chairman Fifer arrayed for the Subcommittee the various options presented at the meeting to resolve the remaining issue in dispute. Specifically, (i) adopting the VPA suggestion to delete the last full sentence in subsection D, (ii) adopting the DEQ suggestion to require a quorum of the respective board to be physically assembled in a single meeting location when possible, (iii) specifying a smaller quorum required for the respective boards to review the Director's decision, or (iv) stating explicitly in the relevant code sections that any electronic communication meeting conducted to review to the Director's decision is subject to § 2.2-3708 of FOIA in all other respects except for the requirement for a physical quorum in one location.

Subcommittee member Bill Axelle noted that the bill was a balance between allowing the respective board to have input but not having to be burdened with hearing every permit application. Mr. Fifer suggested language that the decision of the Director stands unless a certain number of board members request a review of the Director's decision. Mr. Linker advised that approach was considered by the stakeholders during Session but discarded because they felt it eliminates openness of the process altogether. Mr. Linker noted that the requirements of FOIA were taken into account and the sentiment of the stakeholders was to ensure openness even though some procedural requirements of FOIA would not be met.

Mr. Axelle suggested the following amendment to DEQ's proposal requiring a quorum of the respective board to be physically assembled in a single meeting location when possible. Instead of "when possible," insert "when practical, in consideration of the board members' availability, as determined by the Director." Mr. Merritt, VPA, told the Subcommittee that the difficulty with this suggestion and DEQ's proposal was interpretation by a court of either phrase "when possible" or "when practical." He noted that the terms are indefinable and the end result would be that the courts would defer to DEQ's decision. As a result, this provision would be difficult to enforce in any meaningful way.

The Subcommittee generally agreed that if there was a time to reduce the importance of a quorum, it should not be for a matter of consequence, and this issue appears to be a matter of considerable consequence. In response to a question asking about the public policy behind the requirement for a physically-assembled quorum for electronic meetings, Subcommittee member Frosty Landon stated it was about access. Mr. Landon elaborated that the requirement represented a delicate compromise between "troglodytes and geeks,"

(i.e. those resistant to technology and those who embrace every technology) noting that there is more quality to a meeting when public officials are meeting face-to-face. He reminded the Subcommittee of the policy statement recently adopted by the FOIA Council concerning electronic meetings.<sup>42</sup> Mr. Landon also stated that it is part of public service to attend meetings and if a member could not meet that obligation, appointment to the position should be declined.

Senator Houck noted that the Subcommittee had suggested language to ensure the public access to the electronic meetings of the respective boards, but felt that the quorum issue did not make sense as the meeting was essentially an administrative function. In response, Craig Merritt, VPA, stated that testimony today was that 90% of permit decisions were done by DEQ; however HB 1332/SB 423 contemplates a permit issue controversial enough that the respective board may be lobbied to take the permit decision away from DEQ. He averred that the stakeholders are really indifferent to access but going for speed. DEQ is arguing that it is inconvenient to get four board members together looking from the point of view of the convenience to the board members, when the convenience ought to belong to the public. Mr. Merritt told the Subcommittee that this issue was common to every public body and therefore it is indistinguishable for future decisions of how important is it for a quorum to be physically assembled. Mr. Wallmeyer told the Subcommittee that it may get to a point where it becomes difficult to get qualified citizens to serve on boards. He mentioned that the issue to the stakeholders was making a correct permitting call in an expeditious manner. Ginger Stanley, VPA, reminded the Subcommittee that during the 2008 Session, VPA was told it was correct with regard to the FOIA implications of HB 1332/SB423 and was given support in both the House and Senate to fix the FOIA problem after passage. Senator Houck opined that would be hard to get anything passed in the 2009 Session on this issue without the agreement of the stakeholders. He stressed the importance of trying to build consensus among the stakeholders on this issue. The subcommittee also discussed the idea of adding a sunset clause to the draft to ensure that the issues would be revisited later, but there was no consensus to do so.

For purposes of discussion at its next meeting, the Subcommittee unanimously voted to have staff prepare a new draft incorporating three features: (1) a requirement that members participate from locations open to the public (as previously agreed by consensus), (2) a requirement that the topic addressed be limited to a review of the Director's decision whether to hold a public hearing, including a prohibition on the discussion or transaction of other business, and (3) an explicit exception to the requirement that a quorum be physically assembled that includes a reference to FOIA.

### *November 12, 2008*

The Electronic Meetings Subcommittee (the Subcommittee) held its fourth meeting<sup>43</sup> to continue its deliberations on statutory changes made in 2008 that would allow members of the State Air Pollution Control Board (Air Board) and the State Water Control Water Board (Water Board) to meet via teleconference under certain circumstances (HB 1332 (Landes)/SB 423 (Puckett)). While this issue was not the central thrust of HB 1332/SB423,

these specific provisions conflict with the FOIA provisions for teleconferences and electronic meetings. Additionally, there was concern that this language if left untouched would set a bad precedent denying public access to actions of other public bodies.

Although a quorum of the Subcommittee was not present, the Subcommittee met informally to consider draft legislation and to take public comment on the draft. In addition to consensus language agreed to by the Subcommittee at its August meeting, the latest draft would allow the Air Board and the Water Board to meet by electronic means provided the meeting is held in compliance with the provisions of the FOIA, specifically § 2.2-3708; except that a quorum of the respective Boards would not be required to be physically assembled at one primary or central meeting location. The latest draft also required that discussions of the respective Boards held via such electronic communication means must be specifically limited to those matters for which the meeting was called, and no other matter of public business shall be discussed or transacted by the respective Boards. Due to the lack of quorum, however, no action was taken on the draft.

Rick Linker of DEQ told the Subcommittee that DEQ likes the draft and believes it to be an improvement. He noted, however, that he shared the draft with stakeholders who indicated they were not in favor of any amendment of the language that was enacted in 2008 as the law was only six months old and for fear of reopening other, unrelated issues that were at the heart of the compromise for HB1332/SB423. As a result, Mr. Linker stated that DEQ favors leaving the status quo. A representative of the City of Alexandria stated that the City's position was the same as DEQ's. Ginger Stanley of the Virginia Press Association (VPA) noted that all of the issues were thoroughly vetted by the Subcommittee, with ample opportunity for public comment. She indicated that VPA is comfortable with the draft as presented and supports it.

When asked about any consequences if the FOIA Council recommends the draft, Mr. Linker and the representative of the City of Alexandria answered that there is concern that other issues, unrelated to the electronic meeting provisions, in HB1332/SB423 would be reopened. Ms. Stanley noted that the FOIA Council has conducted three years' study of electronic communications meetings and the law in this area has become more liberal. In addition, she pointed out that access folks were not invited to the table at the 2008 Session when the compromise on HB1332/SB423 was being worked out. Finally, she stated that the FOIA Council was a great resource for a fair and balance approach with regard to public access, noting that the General Assembly created the FOIA Council to assist the General Assembly to determine what is for the public's benefit concerning issues of access. Responding to the issue that a Council-recommended draft would reopen issues that were the subject of uneasy compromise, staff advised that in Virginia there are two specific limitations on amendments to bills--the one object rule found in the Virginia Constitution and a germaneness rule which provides that any amendment to a bill must be germane to the original purpose of the bill. Staff indicated that it could draw a tighter title to the bill to limit the possibility that additional, nongermane amendments would be offered. Staff noted that the presiding officer of each house made determinations about germaneness.

Additional comment was provided by Megan Rhyne, Executive Director of the Virginia Coalition for Open Government, who noted that during General Assembly Sessions, there are plenty of bills having lots of stakeholders and which represent uneasy compromises. While stating that she was not trying to minimize the struggle that enactment of HB1332/SB423 represented, she maintained that this situation is not unique at the legislature. Ms. Rhyne echoed that the FOIA Council was created to identify and resolve public access issues. She stated that the fact that concerns about additional issues being reopened if the FOIA Council recommended legislation, while valid, was not a compelling reason not to address the access issue.

Mr. Fifer, chair of the Subcommittee, questioned why not recommend the draft given that all agree that the latest draft is better than the status quo and coupled with the fact that the access advocates were not part of the "blood oath" taken with respect to the stakeholders of HB1332/SB423. The Subcommittee directed staff to work on the title of the latest draft to limit the possibility that additional, nongermane amendments would be offered.

#### *December 1, 2008*

The Electronic Meetings Subcommittee (the Subcommittee) held its fifth and final meeting<sup>44</sup> to continue its deliberations on statutory changes made in 2008 that would allow members of the State Air Pollution Control Board (Air Board) and the State Water Control Water Board (Water Board) to meet via teleconference under certain circumstances (HB 1332 (Landes)/SB 423 (Puckett). While this issue was not the central thrust of HB 1332/SB423, these specific provisions conflict with the FOIA provisions for teleconferences and electronic meetings. Additionally, there was concern that this language if left untouched would set a bad precedent denying public access to actions of other public bodies.

In addition to consensus language agreed to by the Subcommittee at its August meeting, the latest draft would allow the Air Board and the Water Board to meet by electronic means provided the meeting is held in compliance with the provisions of the FOIA, specifically § 2.2-3708; except that a quorum of the respective Boards would not be required to be physically assembled at one primary or central meeting location. The latest draft also required that discussions of the respective Boards held via such electronic communication means be specifically limited to those matters for which the meeting was called, and no other matter of public business shall be discussed or transacted by the respective Boards.

The Subcommittee voted unanimously to recommend the draft to the Council.

## II. Personal Identifying Information Subcommittee

*June 9, 2008*

The Personal Identifying Information Subcommittee (PII Subcommittee) held its first meeting of 2008 to discuss several bills referred to the FOIA Council for study by the 2008 General Assembly<sup>45</sup>. This meeting began as a joint meeting with the Joint Commission on Technology and Science (JCOTS) Social Security Number Subcommittee,<sup>46</sup> continuing work begun last year regarding the collection, use, and dissemination of social security numbers (SSNs). After the joint meeting of both subcommittees (collectively, the Joint Subcommittee) adjourned, the PII Subcommittee reconvened by itself to consider bills concerning access to concealed carry handgun permits and a proposed exemption allowing anonymous donations to museums.

### Joint Meeting with JCOTS Subcommittee Studying Social Security Numbers

The meeting began with presentations by staff of the FOIA Council and JCOTS on legislation passed by the 2008 Session of the General Assembly concerning SSNs, including the upcoming survey on the collection of SSNs by state and local government. With the passage of SB 132/HB 634 (Chapters 843 and 840 of the 2008 Acts of Assembly), every state agency subject to the provisions of the Government Data Collection and Dissemination Practices Act (GDCDPA) and every county and city, and any town with a population in excess of 15,000, is required to conduct an analysis and review of its collection and use of social security numbers. For state agencies, this survey is to be submitted to the chairmen of the Freedom of Information Advisory Council and the Joint Commission on Science and Technology (JCOTS) by October 1, 2008. For localities, the survey is to be provided to the Virginia Municipal League (VML) or the Virginia Association of Counties (VACO), as appropriate, by September 10, 2008. In turn, VML and VACO are to submit the survey results to the chairmen of the FOIA Council and JCOTS by October 1, 2008. Staff is currently developing the forms and instructions for the survey; draft forms were presented today. Staff emphasized that the survey is not intended to single out particular localities or agencies, but instead to help ensure that current practices are not disrupted by identifying ahead of time areas where legislation may be needed in the 2009 Session of the General Assembly. As such, staff and the Joint Subcommittee briefly discussed the possibility of allowing anonymous responses to the survey and methods to ensure compliance.

Next, staff presented four of Delegate Sickles' bills concerning SSNs that were referred by the 2008 Session of the General Assembly to the FOIA Council and JCOTS for further study: HB 1087,<sup>47</sup> HB 1088,<sup>48</sup> HB 1096,<sup>49</sup> and HB 1102.<sup>50</sup> Staff indicated that among these four bills, Delegate Sickles had indicated a preference for HB 1096, which would establish a separate "Protection of Social Security Numbers Act." The Joint Subcommittee then discussed how the Act would work in conjunction with FOIA, whether to cross-reference such an Act within FOIA, and the provisions concerning the release of the last

four digits of SSNs for identification purposes when necessary. The Joint Subcommittee then indicated it intended to take up each of these bills at its next meeting for further discussion, but would entertain public comment at this time.

B.J. Ostergren, representing the Virginia Watchdog, indicated that she could not support HB 1087 and HB 1102 because they failed to address SSNs in circuit court records available online through the courts' remote access systems. Ms. Ostergren indicated she supported HB 1088, because she had used Department of Game and Inland Fisheries records to obtain SSNs and other information regarding various individuals, including an unlisted telephone number. She indicated she felt HB 1096 would be under the GDCDPA and therefore would not include court systems, and that she was unsure whether the federal Driver Privacy Protection Act would apply or not.<sup>51</sup> Ms. Ostergren further related that a recent television program showed a copy of an arrest warrant that included the SSN of a person wrongfully convicted and later exonerated, and she further emphasized the need to address SSNs in court records.

Ginger Stanley, Executive Director of the Virginia Press Association (VPA), in reference to HB 1096, indicated that while the VPA supports allowing access to the last four digits of SSNs for identification purposes, VPA does not support any particular carve-out for access to SSNs by the news media that is not shared with citizens in general.

The Joint Subcommittee then discussed its study plan for future meetings, to continue to look at these bills in greater depth, to review the SSN survey information after it comes back in October, and to continue its policy analysis to compile a comprehensive record examining in detail the various issues regarding access to SSNs. It was suggested that if possible, it would be helpful if some survey results might be reviewed before October. The Joint Subcommittee also briefly discussed two other related issues: (1) access to court records and what efforts were being made to protect SSNs in those records, and (2) the Virginia Enterprise Application Program, an uncodified program in the Office of the Governor that seeks to provide a single portal for citizens to access all government services, which may entail the use of a unique identifier different from but similar to SSNs, with many of the same policy implications. The Joint Subcommittee agreed to this study plan to give further consideration to the issues identified at its next meeting.

#### Reconvened PII Subcommittee Meeting

The joint meeting then adjourned, and the PII Subcommittee reconvened without the JCOTS Subcommittee. The PII Subcommittee first took up the issue of access to concealed carry handgun permits (CCHP), as presented in SB 529 (Houck)<sup>52</sup> referred to the Subcommittee by the 2008 Session of the General Assembly. Delegate Nutter, who was patron of a bill similar to SB 529, was invited to today's meeting but was unable to attend. Senator Houck indicated he requested the bill be referred to the FOIA Council for further study because the amended bill presented to the Senate was more restrictive than the version recommended by the FOIA Council. Senator Houck asked for further comments or suggestions; there were none. No action was taken on this matter.

The PII Subcommittee then considered HB 858 (Ebbin) and SB 647 (Ticer), identical bills that would have exempted from FOIA records of a publicly owned museum that can be used to identify an individual who donates or loans one or more items of personal property to the museum. Bernard Caton and Lance Mallamo appeared on behalf of the City of Alexandria, which had originally requested this exemption as part of its legislative package for 2008. Mr. Mallamo explained that while most people who donate to museums are happy to have their names associated with their donations, others seek anonymity because of concerns over becoming targets for other solicitations and possibly crime. In response to questions from the Subcommittee, Mr. Mallamo further stated that while there were no known specific instances where a donation led to crime, there were suspicions that it had happened, and there were donors who refused to donate because of the perception of vulnerability involved. The PII Subcommittee indicated they would like to hear about concrete examples and numbers of such instances before deciding how to proceed further. Mr. Wiley related a story of a woman who gave money to plant flowers in her local community, but did so anonymously out of modesty; he opined that such philanthropy should be encouraged by allowing donors to withhold their names. No action was taken on this matter.

*August 5, 2008*

The Personal Identifying Information Subcommittee (PII Subcommittee) held its second meeting of 2008 to discuss several bills referred to the FOIA Council for study by the 2008 General Assembly<sup>53</sup>. This meeting began as a joint meeting with the Joint Commission on Technology and Science (JCOTS) Social Security Number Subcommittee,<sup>54</sup> continuing work begun last year regarding the collection, use, and dissemination of social security numbers (SSNs). After the joint meeting of both subcommittees (collectively, the Joint Subcommittee) adjourned, the PII Subcommittee reconvened by itself to consider bills concerning access to concealed carry handgun permits and a proposed exemption allowing anonymous donations to museums.

#### Joint Meeting with JCOTS Subcommittee Studying SSNs

Staff provided an update to the Joint Subcommittees on the survey regarding the collection of SSNs by state agencies, cities, counties, and certain towns, as mandated by SB 132/HB 634 (Chapters 843 and 840 of the 2008 Acts of Assembly). The survey forms and instructions have been sent out to the affected parties. It was reported that the responses so far have indicated that the survey process has already revealed valuable information to the affected public bodies about their own practices in regard to the collection of SSNs, including instances where SSNs may not need to be collected.

The Joint Subcommittees also received a presentation from Richard Varn, CIO of the City of San Antonio, Texas, and Executive Director of the Coalition for Sensible Public

Records Access. Mr. Varn focused on the value of strengthened authentication procedures and heightened penalties for misuse as better approaches to prevent identity theft rather than redaction of SSNs or limitations on the use of SSNs. He emphasized that SSNs are already widely available in existing records, making redaction impractical and expensive, and that the majority of current identity theft crimes do not use SSNs at all.

Staff also presented a memo to the Joint Subcommittees detailing other states' approaches to protecting social security numbers. It appears that in recent years, the trend is to prohibit the public release of SSNs which are contained in any public record. The Joint Subcommittee also considered four bills<sup>55</sup> concerning the protection of SSNs that were referred by the General Assembly during its 2008 Regular Session. The Joint Subcommittee deferred any action regarding these bills, indicating that it wants to hear first about two other matters: (i) other states' experiences in regard to laws allowing access and use of partial SSNs (four or five digits), and (ii) a report from the Department of Motor Vehicles regarding the federal Real ID requirements and their implementation in Virginia.

#### PII Subcommittee of the FOIA Council

The PII Subcommittee separately (without the JCOTS Subcommittee) considered SB 529 (Houck), concerning access to concealed carry handgun permits. Senator Houck stated that the legislative recommendation from the FOIA Council and JCOTS to the 2008 General Assembly reflected the proper balance between privacy and public access. He noted, however, that other approaches were offered during the 2008 Session that adversely affected that balance. As a result, SB 529 was sent back to the FOIA Council for further deliberation.

Public comment was requested on SB 529. Mr. Theron Keller of Fredericksburg, Virginia opined that the bill helped somewhat. He noted that holders of concealed handgun permits were intended to be concealed from the public and that there was an Attorney General's opinion to the same effect. He stated that he wants all concealed handgun permit holder information protected from public access.

Mr. Phillip Van Cleave, Virginia Citizens Defense League, told the PII Subcommittee to either close the door on access to concealed handgun permit holders or leave it open. He stated that people have these permits for very good reasons and it serves no public purpose to have it open because permit holders are law-abiding citizens.

B.J. Ostergren, Virginia Watchdog, noted that Hanover County has concealed handgun permits as part of its land records, although it just shows the name of the permit holder.

Ginger Stanley, Virginia Press Association, stated that SB 529 represented a good compromise and as with compromise generally, no one side was completely happy. The fact that it was a hard fought compromise made it a good bill.

For the next meeting of the PII Subcommittee, Senator Houck suggested that the Subcommittee review the information publically available concerning concealed handgun permits and discuss, from a public policy point of view, the nature of that information. He noted that it was his understanding that the concealed handgun permit list was the only list where street address was included. In addition, it was suggested that the Subcommittee hear from the Department of State Police and the Office of the Attorney General.

### *October 6, 2008*

The Personal Identifying Information Subcommittee (PII Subcommittee)<sup>56</sup> held its third meeting of 2008 to discuss several bills referred to the FOIA Council for study by the 2008 General Assembly. This meeting began as a joint meeting with the Joint Commission on Technology and Science (JCOTS) Social Security Number Subcommittee,<sup>57</sup> continuing work begun last year regarding the collection, use, and dissemination of social security numbers (SSNs). In addition, the Subcommittees were advised of recent court cases involving disclosure of SSNs. After the joint meeting of both subcommittees adjourned, the PII Subcommittee reconvened by itself to consider bills concerning access to concealed carry handgun permits.

### Recent Court Cases

Council Staff advised the Subcommittees of recent court cases involving SSNs. The U.S. District Court for the Eastern District of Virginia heard the case of Chester Szymecki v. the City of Norfolk, involving the required furnishing of an individual's SSN. Procedurally, this opinion ruled on a motion to dismiss that argued that Mr. Szymecki's complaint alleged insufficient facts to state a claim upon which relief could be granted. On such a motion, the court must view the facts in the light most favorable to plaintiff. The relevant facts, so viewed and stated in brief, are that Mr. Szymecki and his family attended Harborfest, a public festival in Norfolk, Virginia. Mr. Szymecki was carrying openly a holstered handgun. A Norfolk ordinance prohibited such carry. Mr. Szymecki was detained and charged with violation of the ordinance. Mr. Szymecki stated that officers demanded his SSN, telling him he could either provide his SSN and be issued a summons, or be arrested and incarcerated if he refused. The police did not state why they needed his SSN, the authority for collecting it, or how it would be used. He provided his SSN, and was issued a summons. The charges for violating the local ordinance were later dropped. Mr. Szymecki further alleged that when he later went to pick up his personal property from the police, they again demanded his SSN, stating that they would not return his property if he did not provide his SSN. Again, the police did not state why they needed his SSN, the authority for collecting it, or how it would be used. Mr. Szymecki again provided his SSN. Among other claims, Mr. Szymecki alleged a federal Privacy Act Section 7 claim for the improper collection of SSNs.<sup>58</sup> The court first found that Section 7 confers a legal right on individuals, and violations may be enforced through an action under § 1983.<sup>59</sup> The court further found that Mr. Szymecki had alleged facts sufficient to state a claim for violation of subsections (a) and (b) of Section 7.<sup>60</sup> It is staff's understanding that this matter is set for trial on December 16, 2008.

In another U.S. District Court case in the Eastern District of Virginia, *Ostergren v. McDonnell*, the Court considered the prohibition on dissemination of SSNs obtained from public records contained in the Personal Information Privacy Act (PIPA).<sup>61</sup> Ms. Ostergren advocates for the removal of SSNs from public records, especially court records that are published online. She publishes the Virginia Watchdog website to further those efforts. Among other content on the website, Ms. Ostergren republishes public records that contain SSNs in order to emphasize her advocacy and illustrate the problem. As of July 1, 2008, amendments to PIPA would prohibit such republication of public records containing SSNs. Violators may be subject to fines up to \$2500 per violation, investigative demands, and injunctions. The court found that Ms. Ostergren has standing to seek an injunction, as she has alleged an injury-in-fact traceable to enforcement of PIPA that may be redressed by court, and that the case is ripe for decision. In its analysis the court reviewed prior Supreme Court decisions, each of which was decided narrowly on its own facts, and each of which was decided in favor of allowing the publication of public records lawfully obtained. The general legal principal to be derived from these prior decisions would be that the government cannot punish publication of truthful information lawfully obtained about a matter of public significance, but again the court emphasized that the Supreme Court had decided each case narrowly and left open the possibility that a different set of facts might lead to a different conclusion. The court observed that SSNs are generally entitled to privacy as personal identifiers that may be misused. However, the court found that based on the record that the General Assembly did not provide funding for the redaction by court clerks of SSNs from court records, protection of SSNs is not a state interest of the highest order. The court also found that this matter - the protection of SSNs - is a matter of public significance, and that Ms. Ostergren's speech is political in nature and entitled to protection under the First Amendment. The court decided that PIPA is unconstitutional as applied to Ms. Ostergren's website as it presently exists, but further briefing would be required "on the propriety and scope of an injunction other than with respect to Ostergren's website as it exists."<sup>62</sup> It is staff's understanding that the parties have submitted additional briefs and are awaiting the final order of the court.

#### SSN Survey Update

Staff advised the Subcommittees that the deadline for submission of the SSN surveys was October 1, 2008 and that the survey information was being compiled, the results of which would be presented at the November meeting of the Subcommittees. Staff also suggested that the amendments to the Government Data Collection and Dissemination Practices Act (GDCDPA), which are not effective until July 1, 2009, be revisited to ensure that the law, once effective, is clear on its face. Staff noted that any suggested amendments would be clarifying and/or technical in nature.

#### REAL ID

D. B. Smit, Commissioner of the Virginia Department of Motor Vehicles (DMV) informed the Subcommittees of the impact of federal law on driver's licenses and national

security. Mr. Smit noted that previously a Virginia driver's license was merely a permit to operate a motor vehicle on public roads. Now, however, following the September 11, 2001 attacks and heightened requirements for proof of legal presence, the nature of driver's licenses has changed. Driver's licenses are unique identifiers. Mr. Smit stated that both state and federal law have changed to improve the integrity and security of state-issued driver's licenses and the issuance of identification cards in the U.S generally. He advised that the REAL ID Act was passed by the U.S. Congress in 2005 with a delayed effective date of May 2008. In conjunction with this act, the U.S. Department of Homeland Security issued final regulations in January 2008. He noted that Virginia and several other states have been given until December 2009 to implement REAL ID. Mr. Smit indicated that no states have REAL ID in place now, and that nine states have stated that they will not comply with its provisions because compliance is not currently mandatory.<sup>63</sup> He explained the REAL ID establishes national, minimum standards for the issuance of driver's licenses and ID cards, which include (i) information and security features incorporated into each card; (ii) applicant's proof of identity and U.S. citizenship status, and verification of the documents the applicant submits as proof; and (iii) security standards for DMV employees who issue driver's licenses and ID cards.<sup>64</sup> Essentially, driver's licenses and ID cards under REAL ID are an approved credential to get on an airplane or to gain access to certain public buildings. It is all about verification of identity. The full text of Mr. Smit's prepared remarks are available on the Council's website under the PII Subcommittee heading.

Discussion among the members of the Subcommittees relating to Mr. Smit's presentation focused on public access to sensitive information that will be submitted by Virginia citizens to DMV to verify their identity. Noting that the federal Drivers Privacy Protection Act and § 46.2-208 of the Code of Virginia currently protects against the release of personal information on individual licensed drivers, Mr. Wiley stated that § 46.2-208 needs to be revisited to insure the adequacy of protection of all of the additional information DMV will possess after REAL ID goes into effect in Virginia. The Subcommittees directed staff to work with the Office of the Attorney General on this issue.

The only public comment received was from Mike Stollenwerk, representing the Fairfax County Privacy Council, who suggested that Virginia should join the nine other states in refusing to comply with the REAL ID Act. He noted that one can still fly without REAL ID but will be subject to increased questioning and screening.

#### Review of SSN bills

The Subcommittees turned their attention to the four SSN bills introduced by Delegate Sickles during the 2008 Session. Delegate Griffith indicated that without objection, HBs 1087 and 1088 would not be recommended by the Subcommittees, as they are too limited in scope. It was the unanimous recommendation of the Subcommittees that HBs 1096 and 1102 continue to be the subject of their deliberations in the hopes that consensus may develop for one or the other approach offered by these two bills to protect SSNs. Public comment was asked for and Mike Stollenwerk advised that he favors both bills.

With regard to HB 1096, establishing a Protection of Social Security Numbers Act, the Subcommittees discussed what they perceived to be the real problem with the bill. Specifically the provision that allow the disclosure of the last four digits of a SSN to enumerated entities, but not to the general public. Ginger Stanley of VPA indicated that VPA, as one of the enumerated entities in the bill, did not want any greater rights than the public, and suggested that the last four digits of a SSN be given out to the public. Staff indicated that under the bill, the release of the last four digits was limited to verification of identity and not a release of an actual redacted record. The Subcommittees asked for public comment on this provision. Mike Stollenwerk of the Fairfax County Privacy Council indicated that the last four digits of a SSN are the best part of an SSN, and that his organization objected to making the four digits public. He stated that the last four digits of a SSN are used the Department of Defense as a "PIN" (personal identification number). Mr. Wiley suggested that this provision be rewritten to allow public access to the last four digits of a SSN, notwithstanding this new act or FOIA. Mr. Wiley indicated that the real issue is how to deal with legitimate needs to verify identification of an individual. He stated that any system that may be adopted will be misused and there are criminal penalties for such misuse. Delegate Griffith asked whether there might be any middle ground for HB 1096. Delegate May asked what the VPA and data aggregators such as Lexis Nexis do in states that restrict access to SSNs. Delegate May stated that for verification of identity, with access to the last four digits of a SSN, there is a one in 2000 chance that one would have the correct person. He suggested legislation that would allow the release of the last four digits, but not the entire SSN. Mr. Theron Keller, interested citizen, indicated that because SSN is viewed as a key item, even release of the last four digits could lead to identity theft.

There being no additional public comment or other business, the joint meeting of the Subcommittees was adjourned. The Subcommittees set Wednesday, November 12, 2008 in Richmond from 10:00 a.m. to 2:00 p.m. (if needed) as their next meeting date. It is anticipated that this will be the last meeting of the Subcommittees and the time allotted to the meeting reflects the amount of work still to do, including review of the SSN survey results and any legislative fixes necessitated thereby.

#### PII Subcommittee of the FOIA Council

The PII Subcommittee separately (without the JCOTS Subcommittee) considered SB 529 (Houck), concerning access to concealed carry handgun permits. Delegate Griffith asked whether there were any proposed amendments to SB 529. Delegate Griffith arrayed the options for the PII subcommittee. It could (i) recommend again SB 529 in its current form<sup>65</sup>, (ii) amend SB 529 to allow access to the database maintained by the Department of State Police to gun groups, (iii) propose a new approach to this issue, or (iv) close access to these records at the local courthouses. Public comment was requested and Mike Stollenwerk, Fairfax County Privacy Council, told the PII Subcommittee that all access to this information should be shut down; the concept expressed in Delegate Nutter's HB 982 (2008). There was no additional public comment. The PII Subcommittee voted unanimously to adopt SB 529 in its current form because they felt it reflected the proper balance between privacy and public access.

*November 12, 2008*

The Personal Identifying Information (PII) Subcommittee<sup>66</sup> met jointly with the JCOTS SSN Subcommittee<sup>67</sup> on Wednesday, November 12. The joint group reviewed the results of the social security number surveys received from state and local agencies, and reviewed potential legislation for recommendation to the FOIA Council and JCOTS for consideration.

#### Update on SSN Surveys

Staff presented an update on the social security number surveys received from state and local agencies. Pursuant to Chapters 840 and 843 of the 2008 Acts of Assembly, which were recommendations of the joint FOIA Council/JCOTS subcommittee, all state agencies, all counties, all cities, and all towns with a population of more than 15,000 were required to complete a survey indicating each instance where the agency or locality collected social security numbers. For each instance of collection, the survey asked if the collection was currently authorized by law, and if it was essential to the agency or locality's mission. The local surveys were submitted to the Virginia Municipal League and the Virginia Association of Counties by September 10, 2008; the state agency surveys were due to the FOIA Council and JCOTS by October 1, 2008.

Staff reported that over 500 survey responses were received. The responses were very thorough and complete, and provided a wealth of information for review and analysis. Preliminary review of the surveys indicate that various agencies and localities had noted that in particular instances, they had determined that a current collection practice was not necessary, and that the collection had ceased or was in the process of being eliminated. Some responses also raised concerns about the practical effects of the new law that would limit future collection of social security numbers.

Each survey that was received was reviewed by staff to verify whether collection was currently authorized by law. Each unique instance of collection was entered into a spreadsheet. Currently, the spreadsheet is about 40 pages in length. The collection appears to fall in a few broad categories: professional regulation, education, personnel, law enforcement and courts, health/medicine, social services, taxes and revenues, and miscellaneous (which includes DMV, housing, and several stand-alone instances of collection). Analysis of the surveys raised several other issues that require continued substantive review, such as: how specific of an authorization is necessary to comply with the new law, should the new law only prohibit the collection of the entire social security number (as opposed to collection, for example, of only the last four digits), and should the joint subcommittee recommend statutory changes for situations where an agency determines collection necessary but is not currently authorized? If additional authorizing legislation is determined to be necessary, should the legislation be specific or general in nature?

### Suggested Amendments to the Government Data Collection & Dissemination Practices Act

Staff presented a bill that would make several technical amendments to the Government Data Collection & Dissemination Practices Act (GDCDPA) in light of the SSN survey responses and review of Chapters 840 and 843 of the 2008 Acts of Assembly. The proposed amendments do present two substantive changes. The first change would clarify that the recently enacted prohibition on collection social security numbers without authorization would apply to the collection of the entire social security number, and not a portion thereof. Without objection, the joint subcommittee agreed to change this so that the law would apply to the collection of any portion of a social security number. The second change would extend the implementation date to July 1, 2010. Currently, the prohibitions are set to become effective on July 1, 2009. However, due to the response from the social security number surveys and the immense amount of data to process and verify, staff recommended that an additional year might be necessary to thoroughly review and process all of the implementation issues. The joint subcommittee voted to recommend the proposed changes to the GDCDPA.

### Consideration of Bills Referred by the 2008 Session

Two bills creating exemptions for the disclosure of social security numbers on public records were referred to the FOIA Council and JCOTS for further review. HB 1096 (Sickles) would prohibit the release of social security numbers on public records, but would allow the last four digits to be released for purposes of identity verification to certain entities, such as the press, private investigators, and data aggregators. HB 1102 (Sickles) would create a FOIA exemption for social security numbers. As with all FOIA exemptions, the social security numbers exemption would be discretionary, and would allow an agency to withhold the social security numbers.

Public comment was heard regarding public access to social security numbers. B.J. Ostegren stated that she had researched the idea of allowing access to only the last four digits of a social security number, and that a person can do a lot with the last four digits, such as access a credit report (from which the entire nine digits can then be obtained). She suggested that access to the last three digits only might be a better solution. She also indicated that she believed that social security numbers should be protected from public access in documents subject to FOIA. Audrey Robinson, with Reed-Elsevier, said that her company provides products used by law-enforcement, debt collectors, and financial institutions, and for their purposes, the more complete identifiers they can use, the better the product. However, they would not oppose legislation that would allow access to the last four digits. Mike Stollenwerk with the Fairfax County Privacy Council said that without a law allowing social security numbers to be redacted from public records, agencies are currently in a quandary. If they redact the numbers, they are violating FOIA, but if they provide the numbers, they are violating federal law. Ginger Stanley with the Virginia Press Association said that complete social security number redaction would cause a problem for the press, but that keeping three or four digits in the public record would solve these problems.

Senator Houck said that in light of the information received in the survey responses, he believed that social security numbers should be protected. However, in light of the current fiscal situation causing agency reductions, he was concerned about the additional burden that requiring redaction might cause. Other subcommittee members indicated that the public doesn't understand that social security numbers are not currently protected, and some agencies are currently redacting social security numbers without specific authorization. Senator Houck asked the agencies represented in the audience to comment on what kind of burden would be created by requiring social security numbers to be redacted from public records prior to dissemination. The general consensus was that it would not be a burden, as it would fall under the existing FOIA requirements allowing five days to respond to a records request and that actual costs were allowed to be collected under FOIA.

The joint subcommittee agreed to pursue discussion of HB 1096, the bill that mandates redaction of social security numbers contained in public records, and to leave HB 1102, the bill that creates a discretionary FOIA exemption, on the table. In turning to HB 1096 specifically, questions were raised about the language that would allow the last four digits to be released to the press, private investigators, and data aggregators for verification purposes. Delegate Griffith said that the provision concerning the press raised questions, as the proliferation of electronic media makes it difficult to determine who is considered a news-gathering organization. In light of this concern, the joint subcommittee recommended HB 1096, but would allow anyone to receive the last four digits of a social security number for verification purposes.

The final bill, SB 529 (Houck) concerning access to concealed carry handgun permits, introduced in 2008 as a recommendation of the Council, was discussed by the PII Subcommittee. The Subcommittee unanimously agreed to again recommend SB 529 as introduced in 2008 because it reflects the proper balance between privacy and public access. The bill would require 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, with a limited exception for access by law-enforcement agencies. Records of the names and addresses of holders of concealed weapons 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.

### **III. Database Index Subcommittee**

*October 6, 2008*

The Database Index Subcommittee held its first meeting on October 6, 2008<sup>68</sup> to consider the requirement of subsection J of § 2.2-3704 that every public body of state

government shall compile, and annually update, an index of computer databases.<sup>69</sup> The Subcommittee discussed the history of this provision, whether it served its intended purpose, and whether it should be amended or eliminated.

The Subcommittee expressed that the original purpose of the database index requirement, which took effect July 1, 1997, was to insure that there would be no secret government databases, and that information would not disappear when government agencies converted from paper to electronic records. Additionally, there was concern over inconsistent policies among different agencies regarding how they would charge for copies of electronic records. The Library of Virginia receives annual agency reports regarding these indices, and indicated that many agencies report the same thing year-to-year, and many more report nothing at all. As a practical matter, there appears to be widespread non-compliance with the database index requirement. An additional consideration is that the rights and responsibilities statement, required under § 2.2-3704.1 since it was enacted in 2004, appears to address at least some of the issues the database index requirement was originally intended to address. As such, it was suggested that perhaps the database index requirement might be eliminated and the rights and responsibilities section be amended instead. The Subcommittee then opened the meeting to public comment.

Phil Smith, representing the Department of Game and Inland Fisheries (DGIF), reported that DGIF had just completed its report regarding 62 databases. In looking deeper, he indicated that the definition of "database" may actually encompass a far greater number of items. One problem is that the definition of "database" used by information technology professionals may be different from that in the statute, for example, when databases may be created as by-products of producing webpages or when individual employees create databases that are not necessarily shared or used agency-wide. Mr. Smith further illustrated many practical difficulties in complying with the database index requirement, due to the sheer number and volume of databases and data fields involved. Mr. Smith further distributed his observations to the Subcommittee and the public in written form, a copy of which is available on the FOIA Council website.<sup>70</sup>

Subcommittee Member Clark stated that she agreed with Mr. Smith's observations, based upon her own experience at the Library of Virginia. She further noted that when the database index requirement was first adopted, the Library was one of the few state agencies with its own website, and that was one of the reasons it was chosen to receive and post the annual reports about the databases. In all, the Library reported 51 database indices in the first year the law took effect, and has never added to that number. She also stated that since 2001, the Library has received a total of six inquiries regarding these database indices. She observed that there is essentially no compliance and no enforcement of these requirements.

Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), indicated that the indices are helpful to the public to help citizens understand what types of records a public body has. She suggested leaving the definitions of what a database is and what it contains. She stated that VCOG often hears from citizens that they have no idea what information is available or how to ask for it.

Subcommittee Member Spencer agreed with Mr. Smith's observations, based upon her experiences with database indexing at the Virginia State Bar. She observed that it is now understood that electronic records are generally subject to disclosure just as paper or any other public record, regardless of format, and that if a public body does not have a requested record, it must say so. She opined that given that understanding, the database index requirement is one whose time has come and passed; there appears no reason to keep it.

Tom Falat of the Virginia Information Technologies Agency cautioned against using language that may have a different meaning when used by information technologies professionals, particularly as there may be disagreement on the meaning of particular terms. He also suggested that given the lack of compliance and lack of inquiries about the database indices, it may be better to include instead a statement that if a requester is unsure what records an agency has, he or she should ask the agency. He noted that the Government Data Collection and Dissemination Practices Act already mandates that government may not keep any secret personal information systems.<sup>71</sup>

After further discussion, the Subcommittee directed staff to prepare a draft bill that would eliminate the database index requirement of subsection J of § 2.2-3704 and amend the language of the rights and responsibilities statement of § 2.2-3704.1 to address the original intent of the database index requirement - i.e., to insure that the public has the means to find out what types of records a public body has. The draft will be considered at the next meeting of the Subcommittee, to be held at 11:00 AM on December 1, 2008.

### *December 1, 2008*

The Database Index Subcommittee held its second meeting on December 1, 2008<sup>72</sup> to consider draft legislation that would make two changes to current law: (1) it would repeal subsection J of § 2.2-3704, which requires that every public body of state government shall compile, and annually update, an index of computer databases,<sup>73</sup> and (2) it would amend § 2.2-3704.1, the rights and responsibilities statement state public bodies in the executive branch must publish, to add provisions requiring such public bodies to identify generally the type(s) of records they have and exemptions that apply to those records. The Subcommittee had directed staff to prepare this draft after discussing the various issues involved with the database index requirement at its last meeting, held October 6, 2008.

The Subcommittee stated that the goal of the legislation is to increase public awareness of what records are available, but not to impose an overly burdensome requirement upon public bodies. The subsequent discussion<sup>74</sup> addressed the actual language of the draft amending § 2.2-3704.1. The language at issue would require state agencies in the executive branch to publish upon request, and to post on the Internet, a "general description, summary, list, or index of the types of public records maintained by such state public body," and a "general description, summary, list, or index of any exemptions in law

that permit or require such public records to be withheld from release." Some concern was expressed over the use of the term "index" and whether that might cause confusion, as the term may be used differently by information technology professionals and in other contexts. Staff clarified that the language chosen - "general description, summary, list, or index" - would give the affected public bodies choices and flexibility in how they comply with the new requirement, particularly as it uses the disjunctive "or." The discussions also clarified the intent that the information so published should be general in nature and address categories or types of records, but need not be an exhaustive list of every record held by a public body. While there may be some initial burden placed on public bodies by this requirement, it is meant to be a less onerous burden than compiling a database index as required by current law, and the new listing is not required to be updated every year. It was suggested that an agency's record retention schedules under the Virginia Public Records Act might be used by reference or as examples in helping to compile the general description, summary, list, or index of types of records held. It was also expressed that such a listing would be a useful tool for agencies as a reference to help direct requesters' inquiries. Similarly, the list of exemptions to be published would be those exemptions commonly used or likely to be used by a public body, not an exhaustive list of every exemption that might possibly apply in every situation. Most, if not all, affected agencies already have such a list of exemptions published as part of their current rights and responsibilities statement. Furthermore, the FOIA Council is already tasked with assisting in the development and implementation of these requirements under subsection B of § 2.2-3704.1. The Council currently publishes guidance and a sample template for the rights and responsibilities statement, and will update that guidance and the template as necessary to accommodate legislative changes.<sup>75</sup>

Through these discussions it appeared that the various representatives of state agencies present generally agreed that the draft would achieve the stated goal of increasing public awareness while eliminating the overly burdensome database index requirement, and that the new amendments to the rights and responsibilities statement would not be overly burdensome. The Subcommittee then asked representatives of the Virginia Press Association (VPA) and the Virginia Municipal League (VML) for their reactions to the proposed legislation, as they had not yet spoken. Ginger Stanley, Executive Director of VPA, stated that VPA had no problems with it, and she believed it would be helpful. Phyllis Errico, General Counsel for VML, indicated that she felt the legislation might be burdensome if it applied to local governments, because local governments perform a wide variety of governmental functions and hold a corresponding wide variety of types of records. However, as the rights and responsibilities statement is only required to be published by state agencies in the executive branch, Ms. Errico indicated she had no objections to the draft as written.

Following this discussion, the Subcommittee voted unanimously (3-0) to recommend the legislation as drafted to the full FOIA Council. The work of the Subcommittee being concluded, the meeting adjourned without setting any future meeting date.

## **IV. Meeting Minutes Subcommittee**

*September 3, 2008*

The Meeting Minutes Subcommittee held its first meeting on September 3, 2008<sup>76</sup> to consider the current requirements for meeting minutes in FOIA in light of new technologies, especially whether FOIA should require minutes be kept in written form. Current law does not explicitly require minutes to be in writing, or any particular format or medium.

After the call to order and introductions of those present, Fred S. Morton IV, Supervisor of Henrico County Schools (the School), presented an overview of the Schools' experience using BoardDocs.<sup>77</sup> Superintendent Morton emphasized that the School uses "technology as a tool, not a target," and pointed out that there are other competing vendors with a similar product to BoardDocs. The School chose BoardDocs over those competitors because the Virginia School Board Association (VSBA) made arrangements with the company to provide BoardDocs at a better price (approximately \$10,000/year). He indicated that the School began using BoardDocs this spring and is still in the process of implementing all of the features of BoardDocs. Superintendent Morton stated that he wanted to share both the good and bad aspects of the experience. He demonstrated how traditional minutes are made available by the School on its website as a text file. By comparison, BoardDocs allows one to browse an agenda index online to find particular topics of interest, then to select summaries, other relevant text document attachments, power point presentations, audio files of the meeting discussion of that topic, and other linked records all from within the same webpage. Additionally, because BoardDocs puts the materials on the School's website, it allows the public to access agenda materials at the same time the materials are made available to members. Superintendent Morton indicated that having the materials available this way on the front-end before meetings has saved a great deal of staff time and money in copying expenses, and allowed staff to spend more time verifying the accuracy of records and correcting any errors. Additionally, materials such as maps can be published in color using BoardDocs, whereas paper copies were often black-and-white only. Another advantage is that the BoardDocs software keeps back-up copies of materials on other servers in case of computer failure; the Superintendent indicated that the School keeps its own back-up copy as well.

Superintendent Morton stated that one of the practical difficulties has been to have speakers consistently identify themselves for the benefit of those who choose to listen to the audio files, but who cannot identify speakers by the sound of their voices. Another issue is the size of the audio files, which can become quite large in the case of long discussions, making it very time-consuming to download the files. A similar issue is that some documents do not readily fit on a computer screen, so one cannot see the entire document at once unless one has a physical copy (such documents can still be viewed through BoardDocs, but one has to scroll through it on the screen). Superintendent Morton indicated that the Schools are working to break the large audio files into smaller portions

that are quicker to download, especially for users who do not have high-speed Internet connections. Another potential issue is that some people do not have Internet access at home and cannot access BoardDocs as readily as others. Superintendent Morton stated that the Schools still make available all materials in more traditional formats, and that the public libraries offer free high-speed Internet access that can be used to access the Schools' website and BoardDocs. The Superintendent stated that most people now view the online versions of the materials before and after meetings. The Schools still get requests for paper copies, but very few.

The Subcommittee then discussed the presentation and the implications such technology has in regard to access to meeting minutes. The Subcommittee recognized that BoardDocs and similar technological advances may provide improvements to public access, especially in enabling access to meeting materials over the Internet before the meeting is held. However, the Subcommittee also expressed concerns that the traditional historical form of meeting minutes has always been a written summary, which is not dependent on technologies which change and grow obsolete over time, and which still serves its traditional purpose of providing a readily-accessible synopsis of events at a public meeting. The Subcommittee expressed its view that while the use of additional technologies such as BoardDocs to further enhance the public's awareness of governmental activities is welcomed and encouraged, traditional written minutes should still be required under the law. It was further expressed that the common understanding is that FOIA requires written minutes, even though it is not explicitly stated in the law. In order to clarify this requirement, the Subcommittee moved to recommend to the full FOIA Council that subsection I of § 2.2-3707 be amended by explicitly requiring meetings minutes to be in writing. The motion carried by vote 3-1.<sup>78</sup> No further meeting dates were set.

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<sup>1</sup> Chapters 917 and 987 of the 2000 Acts of Assembly.

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

<sup>3</sup> In brief, SB 529 concerned public access to concealed carry handgun permits; HB 858 and SB 647 were identical bills that would have provided an exemption for records of a publicly owned museum that could be used to identify an individual who donates or loans one or more items of personal property to the museum; four bills concerned different aspects of access to social security numbers (SSNs): HB 1087 would have exempted SSNs contained in local government records, HB 1088 would have exempted SSNs contained in records of the Department of Game and Inland Fisheries, HB 1096 would have established the Protection of Social Security Numbers Act, and HB 1102 would have provided a general FOIA exemption for SSNs.

<sup>4</sup> Chapters 276 and 557 of the 2008 Acts of Assembly (SB 423 (Puckett/HB 1332 (Landes))).

<sup>5</sup> Chapters 840 and 843 of the 2008 Acts of Assembly, amending the Government Data Collection and Dissemination Practices Act.

<sup>6</sup> 5 U.S.C. § 552a Note ("Section 7" refers to § 7 of Pub. L. No. 93-579, 88 Stat. 1909 (1974)).

<sup>7</sup> Apparently the federal circuit courts are split on these points, and there is no relevant precedent in the Fourth Circuit.

<sup>8</sup> *Id.* (the relevant portions of Section 7 read as follows: "(a)(1) It shall be unlawful for any Federal, State, or local government agency to deny any individual any right, benefit, or privilege provided by law because such individual's refusal to disclose his social security account number .... (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.")

<sup>9</sup> Code § 59.1-443.2.

<sup>10</sup> In full, the Court concluded "that Virginia Code §59.1-443.2 is unconstitutional as applied to Ostergren's website as it presently exists. However, given the significant public interest issues presented by the spreading of SSNs on the Internet, the Court will require further briefing on the propriety and scope of an injunction other than with respect to Ostergren's website as it exists."

<sup>11</sup> All Council members were present except E.M. Miller and Dr. Sandra Treadway.

<sup>12</sup> This item was originally under "Other Business" on the suggested agenda, but was moved up as a topic to be addressed by the Personal Identifying Information Subcommittee.

<sup>13</sup> All Council members were present except Wat Hopkins.

<sup>14</sup> As limited by subsection C of § 30-178 of the Code of Virginia ("No nonlegislative citizen member shall be eligible to serve for more than two successive four-year terms.")

<sup>15</sup> § 16.1-77 provides that general district courts shall have civil "[j]urisdiction to try and decide any cases pursuant to § 2.2-3713 of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), for writs of mandamus or for injunctions."

<sup>16</sup> The original statement was presented at the September 10, 2007, meeting of the Council.

<sup>17</sup> Council members Delegate Griffith, Edwards, Axselle, Fifer, Treadway, and Whitehurst voted in favor of adopting the statement as amended. Council members Senator Houck, Miller, Wiley, Malveaux, and Spencer voted against it.

<sup>18</sup> All Council members were present except Dr. Treadway and Mr. Whitehurst. Due to a temporary medical condition that prevented him from physically attending today's meeting, Mr. Fifer participated from Alexandria, Virginia via telephone as allowed pursuant to subdivision A 2 of § 2.2-3708.1.

<sup>19</sup> HB 1087, HB 1088, HB 1096, and HB 1102, all introduced by Delegate Sickles.

<sup>20</sup> John Edwards was the Chair of this Subcommittee, but his membership term expired July 1, 2008.

<sup>21</sup> In full, subsection J of § 2.2-3704 reads as follows: "Every public body of state government shall compile, and annually update, an index of computer databases that contains at a minimum those databases created by them on or after July 1, 1997. 'Computer database' means a structured collection of data or records residing in a computer. Such index shall be a public record and shall include, at a minimum, the following information with respect to each database listed therein: a list of data fields, a description of the format or record layout, the date last updated, a list of any data fields to which public access is restricted, a description of each format in which the database can be copied or reproduced using the public body's computer facilities, and a schedule of fees for the production of copies in each available form. The form, context, language, and guidelines for the indices and the databases to be indexed shall be developed by the Virginia Information Technologies Agency in consultation with the Librarian of Virginia and the State Archivist. The public body shall not be required to disclose its software security, including passwords."

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<sup>22</sup> Because of the Library's statutory charge to develop guidelines for these indices jointly with VITA, Dr. Treadway will also be invited to join this subcommittee.

<sup>23</sup> More information about the BoardDocs technology is available at <http://www.boarddocs.com/> (last visited August 8, 2008). The information on the website states that "BoardDocs has been developed for school boards, local governments, private and public boards to help alleviate the enormous task of assembling, printing, distributing and revising agenda items and policies. With BoardDocs you not only have the ability to process agenda items, supporting documents, policies and procedures, but you also determine who has access to each document - such as board members and staff, or the general public. Plus, you can make last minute revisions, and redistribute your materials – in mere minutes."

<sup>24</sup> Because of the Library of Virginia also administers the Virginia Public Records Act and its record retention schedules, Dr. Treadway will also be invited to join this subcommittee.

<sup>25</sup> All Council members were present except Senator Houck and Messrs Axselle and Miller.

<sup>26</sup> HB 1087 (Sickles)--providing a social security number exemption outside of FOIA for local government records;

HB 1088 (Sickles)--providing a social security number exemption outside FOIA for Department of Game & Inland Fisheries records; HB 1096 (Sickles)--establishing the Protection of Social Security Numbers Act; and HB 1102 (Sickles)--providing a general FOIA exemption for social security numbers.

<sup>27</sup> All Council members were present except Mr. Wiley.

<sup>28</sup> Chapters 840 and 843 of the 2008 Acts of Assembly.

<sup>29</sup> Developed in cooperation with the Virginia Association of Counties and the Virginia Municipal League.

<sup>30</sup> Chairman Edwards, and Messrs. Axselle, Miller, and Fifer were present; Senator Houck was absent.

<sup>31</sup> Subsection D of § 10.1-1322.01, regarding the State Air Pollution Control Board, and subsection D of 62.1-44.15:02, regarding the State Water Control Board (both "subsection D" hereinafter). Both use identical language, which reads in full as follows: *Either the Director or a majority of the Board members, acting independently, may request a meeting of the Board to be convened within 20 days of the Director's decision pursuant to subsection C in order to review such decision and determine by a majority vote of the Board whether or not to grant a public hearing or Board consideration, or to delegate the permit to the Director for his decision. For purposes of this subsection, if a Board meeting is held via electronic communication, the Board shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public.*

<sup>32</sup> Subsections J, M, and O of § 10.1-1322.01 (regarding the State Air Pollution Control Board) and subsections J, M, and O of 62.1-44.15:02 (regarding the State Water Control Board).

<sup>33</sup> Note that these provisions apply only to the Air and Water Boards, not the Waste Board.

<sup>34</sup> Both subsections use identical language which reads, in full, as follows: *Public hearings held pursuant to these procedures may be conducted by the Board at a regular or special meeting of the Board and shall be presided over by a member of the Board. Public hearings may be held before less than a quorum of the Board.*

<sup>35</sup> The eight regional offices identified are located in Richmond, Glen Allen, Virginia Beach, Abingdon, Roanoke, Lynchburg, Harrisonburg, and Woodbridge.

<sup>36</sup> See n. 5, *supra*.

<sup>37</sup> See n. 2, *supra*.

<sup>38</sup> Senator Houck and Messrs. Axselle, Miller, Fifer, Landon and Selph were present. Due to a temporary medical condition that prevented him from physically attending today's meeting, Mr. Fifer participated from Alexandria, Virginia via telephone as allowed pursuant to subdivision A 2 of § 2.2-3708.1. Messrs. Landon and Selph were appointed at the FOIA Council meeting on August 5, 2008 to serve on this subcommittee.

<sup>39</sup> Subsection D of § 10.1-1322.01, regarding the State Air Pollution Control Board, and subsection D of 62.1-44.15:02, regarding the State Water Control Board (both "subsection D" hereinafter). Both use identical language, which reads in full as follows: *Either the Director or a majority of the Board members, acting independently, may request a meeting of the Board to be convened within 20 days of the Director's decision pursuant to subsection C in order to review such decision and determine by a majority vote of the Board whether or not to grant a public hearing or Board consideration, or to delegate the permit to the Director for his decision. For purposes of this subsection, if a Board meeting is held via electronic communication, the Board shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public.*

<sup>40</sup> Subsections J, M, and O of § 10.1-1322.01 (regarding the State Air Pollution Control Board) and subsections J, M, and O of 62.1-44.15:02 (regarding the State Water Control Board).

<sup>41</sup> All members of the Subcommittee, specifically, Messrs. Fifer (chair), Axselle, Landon, Miller, and Selph, and Senator Houck were present.

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<sup>42</sup> "The Freedom of Information Advisory Council believes that technology can expand public monitoring of and participation in the affairs of government. It also believes representative government is best served when public officials meet face-to-face in regularly scheduled public meetings. One of the primary responsibilities of accepting public office is the regular participation in face-to-face public meetings. The Council believes such meetings should continue to be the rule rather than the exception. As technology advances, the use of electronic meetings will accelerate. As that occurs, the FOIA Council will continue to balance the preference for face-to-face meetings against the emerging technology in light of the clear policy statement of FOIA to afford citizens every opportunity to witness the operation of government, "since at all times the public is to be the beneficiary of any action taken at any level of government."

<sup>43</sup> Mssrs. Fifer (chair), Miller, and Selph were present at the meeting. Senator Houck and Mssrs. Axselle and Landon were absent.

<sup>44</sup> Mssrs. Fifer (chair), Landon, Miller, and Selph, and Senator Houck were present at the meeting. Mr. Axselle was absent.

<sup>45</sup> Senator Houck, Delegate Griffith, and subcommittee members Edwards, Malveaux, Spencer, Treadway, Whitehurst, and Wiley were present; none were absent.

<sup>46</sup> Delegates Alexander and Nixon were present; Delegate May and Senator Watkins were absent.

<sup>47</sup> HB 1087 would have provided that the social security number of any individual contained in the public records of a local government shall be confidential and exempt from disclosure under FOIA. The bill provides, however, that a social security number may be released (i) in accordance with a proper judicial order; (ii) to any law-enforcement agency, officer, or authorized agent thereof acting in the performance of official law-enforcement duties; or (iii) to any data subject exercising his rights under the Government Data Collection and Dissemination Practices Act.

<sup>48</sup> HB 1088 would have provided that records of the Department of Game and Inland Fisheries (DGIF) shall be subject to the disclosure provisions of FOIA, except that the SSN of individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of DGIF shall be withheld from public disclosure. The bill provides, however, that such information may be released (i) in accordance with a proper judicial order or (ii) to any law-enforcement agency, officer, or authorized agent thereof acting in the performance of official law-enforcement duties.

<sup>49</sup> HB 1096 would have created the Protection of Social Security Numbers Act, which prohibits every agency from releasing those portions of a public record that contain the SSN of any individual. The bill contains several exemptions from this general rule and also allows disclosure of the last four digits of an SSN to certain entities for the purpose of verifying identity. The bill provides for penalties for violation and contains technical amendments.

<sup>50</sup> HB 1102 would have exempted from the mandatory disclosure requirements of FOIA those portions of records containing an individual's SSN; 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.

<sup>51</sup> Note that HB 1102 would in fact create a new and separate Act that does not fall within the GDCDPA.

<sup>52</sup> SB 529 would have protected 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. This bill was a recommendation of the FOIA Council.

<sup>53</sup> Senator Houck, Delegate Griffith, and subcommittee members were present; Subcommittee members Wiley, Malveaux, Spencer, Treadway, and Whitehurst were absent.

<sup>54</sup> Delegates May and Alexander, and Senator Watkins were present. Delegate Nixon was absent.

<sup>55</sup> HB 1087, HB 1088, HB 1096, and HB 1102, all introduced by Delegate Sickles.

<sup>56</sup> Delegate Griffith, and subcommittee members Wiley, Malveaux, Spencer, Treadway, and Whitehurst were present; Senator Houck was absent.

<sup>57</sup> Delegate May and Senator Watkins were present. Delegates Nixon and Alexander were absent.

<sup>58</sup> 5 U.S.C. § 552a Note ("Section 7" refers to § 7 of Pub. L. No. 93-579, 88 Stat. 1909 (1974)).

<sup>59</sup> Apparently the federal circuit courts are split on these points, and there is no relevant precedent in the Fourth Circuit.

<sup>60</sup> *Id.* (the relevant portions of Section 7 read as follows: "(a)(1) It shall be unlawful for any Federal, State, or local government agency to deny any individual any right, benefit, or privilege provided by law because such individual's refusal to disclose his social security account number .... (b) Any Federal, State, or local government

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agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.")

<sup>61</sup> Code § 59.1-443.2.

<sup>62</sup> In full, the Court concluded "that Virginia Code §59.1-443.2 is unconstitutional as applied to Ostergren's website as it presently exists. However, given the significant public interest issues presented by the spreading of SSNs on the Internet, the Court will require further briefing on the propriety and scope of an injunction other than with respect to Ostergren's website as it exists."

<sup>63</sup> The nine states are Arizona, Idaho, Louisiana, Maine, Montana, New Hampshire, Oklahoma, South Carolina, and the State of Washington.

<sup>64</sup> Excerpted from prepared remarks of D.B. Smit, Commissioner of Virginia DMV to the PII Subcommittee on October 6, 2008.

<sup>65</sup> The 2008 legislative recommendation of the FOIA Council.

<sup>66</sup> Senator Houck, Delegate Griffith, and subcommittee members Spencer, Treadway, and Whitehurst were present. Stephanie Hamlett was present representing subcommittee member Courtney Malveaux. Subcommittee members Malveaux and Wiley were not present.

<sup>67</sup> Delegate May, Delegate Alexander, and Senator Watkins were present. Delegate Nixon was not present.

<sup>68</sup> Subcommittee Members Landon (Chair), Spencer, and Clark were present; Mr. Axselle was absent. Note that Mary Clark sat as a member of the Subcommittee by designation of Dr. Sandra Treadway, Librarian of Virginia.

<sup>69</sup> In full, subsection J of § 2.2-3704 reads as follows: "Every public body of state government shall compile, and annually update, an index of computer databases that contains at a minimum those databases created by them on or after July 1, 1997."Computer database" means a structured collection of data or records residing in a computer. Such index shall be a public record and shall include, at a minimum, the following information with respect to each database listed therein: a list of data fields, a description of the format or record layout, the date last updated, a list of any data fields to which public access is restricted, a description of each format in which the database can be copied or reproduced using the public body's computer facilities, and a schedule of fees for the production of copies in each available form. The form, context, language, and guidelines for the indices and the databases to be indexed shall be developed by the Virginia Information Technologies Agency in consultation with the Librarian of Virginia and the State Archivist. The public body shall not be required to disclose its software security, including passwords."

<sup>70</sup> Mr. Smith's written comments are available on the FOIA Council website under the 2008 Subcommittees link at [http://dls.state.va.us/groups/foiacouncil/subcom\\_mtgs/2008/observations.pdf](http://dls.state.va.us/groups/foiacouncil/subcom_mtgs/2008/observations.pdf).

<sup>71</sup> Subdivision C 1 of § 2.2-3800 ("There shall be no personal information system whose existence is secret.").

<sup>72</sup> Subcommittee Members Landon (Chair), Spencer, and Clark were present; Mr. Axselle was absent. Note that Mary Clark sat as a member of the Subcommittee by designation of Dr. Sandra Treadway, Librarian of Virginia.

<sup>73</sup> In full, subsection J of § 2.2-3704 reads as follows: "Every public body of state government shall compile, and annually update, an index of computer databases that contains at a minimum those databases created by them on or after July 1, 1997."Computer database" means a structured collection of data or records residing in a computer. Such index shall be a public record and shall include, at a minimum, the following information with respect to each database listed therein: a list of data fields, a description of the format or record layout, the date last updated, a list of any data fields to which public access is restricted, a description of each format in which the database can be copied or reproduced using the public body's computer facilities, and a schedule of fees for the production of copies in each available form. The form, context, language, and guidelines for the indices and the databases to be indexed shall be developed by the Virginia Information Technologies Agency in consultation with the Librarian of Virginia and the State Archivist. The public body shall not be required to disclose its software security, including passwords."

<sup>74</sup> Aside from the subcommittee members, several members of the public participated in this discussion, including Megan Rhyne, Executive Director of the Virginia Coalition for Open Government; Tom Falat, representing the Virginia Information Technologies Agency; Wendy Thomas, Senior Policy Analyst from the Virginia Department of Transportation; and Martha Brissette, from the State Board of Elections.

<sup>75</sup> Available on the FOIA Council website at [http://dls.state.va.us/groups/foiacouncil/rts\\_resp.htm](http://dls.state.va.us/groups/foiacouncil/rts_resp.htm).

<sup>76</sup> Subcommittee Members Wiley (Chair), Miller, Treadway, and Malveaux were present; Mr. Selph was unable to attend today's meeting.

<sup>77</sup> Generally, BoardDocs is a computer-based data and document management system designed to facilitate online access to agendas, minutes, and related documents. More information is available on the company's website at [www.boarddocs.com](http://www.boarddocs.com).

<sup>78</sup> Mr. Wiley, Mr. Malveaux, and Dr. Treadway voted in favor of the motion; Mr. Miller voted against.



