

REPORT OF THE

**Virginia Freedom of
Information Advisory Council**

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



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VIRGINIA FREEDOM OF INFORMATION
ADVISORY COUNCIL**

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THE GENERAL ASSEMBLY OF VIRGINIA**

**COMMONWEALTH OF VIRGINIA
DECEMBER 2011**

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OF THE
VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

Senator R. Edward Houck, Chair
Delegate Sal R. Iaquinto, Vice Chair
Kathleen Dooley
Craig T. Fifer
Stephanie Hamlett
Edward Jones
Forrest M. "Frosty" Landon
James Schliessman
John G. Selph
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Staff

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REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

To: The Honorable Robert F. McDonnell, Governor of Virginia
and The General Assembly of Virginia

Richmond, Virginia
December 2011

INTRODUCTION

"Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives"

James Madison
August 4, 1822

Established by the 2000 Session of the General Assembly¹, the Virginia Freedom of Information Advisory Council (the "Council") was created as an advisory council in the legislative branch of state government to encourage and facilitate compliance with the Virginia 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.² 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

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

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

FOIA; although the Council cannot compel the production of documents or issue orders. By rendering advisory opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide the future public access practices of state and local government agencies. Although the Council has no authority to mediate disputes, it may be called upon as a resource to assist in the resolution of FOIA disputes and 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.

EXECUTIVE SUMMARY

In its eleventh year, the Council continues to fulfill its role to the Virginia General Assembly as a clearinghouse for public access issues. The Council has kept abreast of trends, developments in judicial decisions, and emerging issues related to FOIA and access generally. In its 11 year history, the Council has provided more than 14,500 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials; and has conducted approximately 588 FOIA training programs. In addition, the Council is recognized as the forum for evaluating proposed FOIA and related public access legislation. The Council routinely conducts comprehensive studies of FOIA and other Virginia laws to ensure Virginia's commitment to open government while balancing the need to protect the public's negotiating and litigation positions, privacy, and safety.

During this reporting period --December 1, 2010 through November 30, 2011-- the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. The four bills referred to the Council by the General Assembly are as follows:

1. HB 1722 (Marshall, R.G.)--FOIA; designation of records; penalties for certain violations.
2. SB 812 (Martin)--FOIA; access to salary information.
3. SB 1467 (Edwards)--FOIA; disclosure of criminal investigative records.
4. HB 1935 (Ware, O.) -Legal notices; use of websites, radio, and television, etc.³

³ **HB 1722** (Marshall, R.G.) FOIA; designation of records; penalties for certain violations. Requires that at the time of creation of any public record, the custodian of such records that are subject to FOIA shall designate whether the record is subject to FOIA's mandatory disclosure provisions or otherwise exempt from disclosure. The bill requires that such designation shall appear on the face of the record and be updated by the custodian in a timely manner in the event of any changes. Failure to make the required designation shall, upon receipt of a request for such record, waive any charge authorized under FOIA. The bill also provides that in addition to the civil penalty under FOIA, a public employee found to have committed a willful and knowing violation of FOIA may be subject to other disciplinary action, including suspension, demotion, or termination of public employment. The bill contains technical amendments.

SB 812 (Martin) FOIA; access to salary information, etc., of public employees. Allows public access to the records of only the job position, official salary, or rate of pay of, and the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body. The bill specifically excludes the name of any such officer, official, or employee from disclosure.

SB 1467 (Edwards) FOIA; criminal investigative records. Amends the definition of "criminal investigative file" so that the exemption applies to records relating to active or ongoing investigations or prosecutions.

HB 1935 (Ware, O.) Legal notices. Allows localities to meet certain notice requirements by utilizing their web sites, radio or television rather than a newspaper of general circulation.

The Council reviewed **HB 1722** and after discussing the substantial practical difficulties in requiring each public employee creating public records to designate on the record whether it is open or exempt, the Council agreed unanimously not to go forward with **HB 1722**. It was the consensus of the Council that trying to get government more organized vis a vis FOIA is a good idea; the bill, however, has the opposite effect and is unworkable as written.

The Council also considered **HB 1935**. While the issue of publication of legal notices is very important to local governments and citizens, it is not a FOIA issue and therefore not within the purview of the Council. It was suggested that other entities, including the House Committee on Counties, Cities and Towns, the Senate Committee on Local Government, and the Governor's Reform Commission, were more appropriate because they have subject matter jurisdiction over the issue raised by **HB 1935**.

The Council's Personnel Records Subcommittee⁴ was created to examine **SB 812**. Based on the Subcommittee's recommendation, the Council took no action to change to the current law (§ 2.2-3705.8) that requires the mandatory disclosure of the names and salaries/rate of pay of all public employees earning \$10,000 or more annually. Extensive study of this issue included review of the legislative history of § 2.2-3705.8 (formerly § 2.1-342 B), a 50-state review of how other states addressed this issue, and the examination of the recommendations of prior joint subcommittees of the General Assembly that studied FOIA. Section 2.2-3705.8 was enacted in 1978⁵ and there is no legislative history discussing why the threshold was implemented, or why \$10,000 was the chosen amount. What legislative history is available indicates that the law passed the Senate of Virginia without any threshold in place, but the \$10,000 threshold was added by the House of Delegates. It was the House version that ultimately was enacted and continues to be the law. Additional research indicated that Virginia is one of only three states that have any restrictions on the release of name and salary information of public employees. In addition, neither of the two prior joint subcommittees established by the General Assembly to study the provisions of FOIA in the late 1980's and 1990's recommended any change to this provision nor did they suggest an "escalator clause" or other mechanism in the statute to raise the \$10,000 threshold. Further, there appears to be a current trend toward for greater transparency and accountability in government, which is reflected in the online posting of public employee name and salary information in states such as New Mexico. Increased transparency in government is now part of the collective "DNA" of Americans. Disclosure of salary information is also an equity issue for public employees. Transparency regarding salaries and rates of pay of other similarly situated employees ensures fair treatment in the workplace and may reveal instances of nepotism. Compensation decisions should be based on an employee's knowledge, skills, and ability and not some subjective standard. Concerns for embarrassment by lowest level employees, privacy concerns of public employees in general, adverse impact on the morale of the public workforce, and security of individuals against identity theft were thoughtfully considered. FOIA strives for balance between the public's right to know and government needs. Ultimately, it was felt that the current law strikes the appropriate balance between the public's right to know and a public employee's interest in privacy.

⁴ Council members Ed Jones, Frosty Landon, and Kathleen Dooley served on the Subcommittee.

⁵ Chapter 810 of the 1978 Acts of Assembly (SB 67, Senator Mitchell).

The Council's Criminal Investigative Records Subcommittee⁶, created in 2010 was continued in 2011 to examine SB 1467 and to consider a separate proposal concerning access to criminal and other law-enforcement records from the Virginia Press Association (VPA). Senator Edwards, patron of SB 1467, stated that one reason he brought the bill was because there was inconsistency regarding what is released by law-enforcement agencies. While aware of the need for privacy in certain matters, Senator Edwards expressed that his experience was that many law-enforcement agencies would refuse to release records as a matter of policy to avoid improper application of discretion that might be perceived as biased or discriminatory. He further noted that FOIA already contains many other exemptions for information that would need to be protected in criminal investigative files that would still apply even after the investigation was over. The gist of the Subcommittee's work was to see if there is any reason to change the existing exemption for criminal investigative records. The Council adopted the Subcommittee's recommendation not to take any further action on SB 1467, but to continue to study the issues raised because of the amount of interest in access to criminal investigative files and other law enforcement records. Council staff met with interested stakeholders (the Virginia Press Association, the Virginia Coalition for Open Government, the Virginia Association of Chiefs of Police, the Virginia State Police, the Virginia Sheriffs' Association, the Virginia Municipal League, the Virginia Association of Counties, as well as law enforcement representatives from the Culpeper County Sheriff's Office and Fairfax County Police Department) three times this year to see if consensus could be reached about any changes to the existing law. The stakeholder workgroup used a draft prepared by the VPA as a vehicle for discussion at these meetings. The workgroup did not reach agreement on a legislative proposal, but intends to continue its work in 2012. The current plan is for VPA representatives to prepare a position paper regarding issues of concern in the current law, which will be posted on the Council website and shared with the other interested parties. After the stakeholders share the paper with their constituents to get their reactions, the workgroup discussions will resume at a date to be determined after the 2012 Session of the General Assembly.

The Council continued to monitor Virginia court decisions relating to FOIA. In the spring of 2009, the United States District Court for the Eastern District of Virginia heard the case of *McBurney v. McDonnell* (Case No. 3:2009cv44). In this consolidated case, three out-of-state plaintiffs challenged on federal constitutional grounds (privileges and immunities) the provisions of FOIA granting access rights to Virginia citizens. On April 29, 2009, the Court entered an order dismissing the claims of the three out-of-state plaintiffs on procedural grounds.⁷ However, on appeal, the United States Court of Appeals for the Fourth Circuit ruled for two of the three plaintiffs, saying they can proceed with their challenge on the merits to the citizens-only provision of FOIA. On remand, the Eastern District court issued an opinion on the merits in January 21, 2011, that upheld the existing provisions of FOIA limiting access rights to Virginia citizens. The Eastern District determined that the limitation of rights to Virginia citizens did not burden a fundamental right and was closely related to a substantial state interest, therefore it did not violate the Privileges and Immunities clause of the United States Constitution. The court further determined that because Virginia's FOIA does not implicate principles of economic protectionism,

⁶ Council members Craig Fifer, Sandy Treadway, John Selph, and James Schliessman served on the Subcommittee.

⁷ The Court held that the three-out-of-state plaintiff's lacked standing to bring the claims and improperly named the Attorney General as a party to the action.

and any affect on out-of-state business is incidental, it does not violate the dormant Commerce Clause. This decision was appealed to the Fourth Circuit, which heard arguments in the case on October 25, 2011 (*McBurney v. Young*, Case No. 11-1099). As of November 30, 2011, the Fourth Circuit has not yet issued its opinion. Please note that the style of the case has changed several times as the named defendant has changed; in chronological order, this case has been styled *McBurney v. McDonnell*, *McBurney v. Mims*, *McBurney v. Cuccinelli*, and most recently on appeal, *McBurney v. Young*.

On November 4, 2011 the Virginia Supreme Court issued its decision in *Christian v. State Corporation Commission (SCC)* (Record No. 102477), ruling that the SCC is not a public body subject to the provisions of FOIA. George Christian sought records from the SCC. In its reply, the SCC asserted that it was not subject to FOIA and directed Mr. Christian to websites where he might find the sought after information. Mr. Christian petitioned the SCC; his petition was dismissed; he then appealed to the Supreme Court of Virginia. As a threshold argument, the Court considered whether the SCC was subject to FOIA. The Court concluded that the SCC was not subject to FOIA based on three arguments: (1) access to SCC records is governed by a separate set of laws; (2) the SCC's authority is derived from the Virginia Constitution rather than delegated by legislative or executive action; and (3) FOIA does not contain an enforcement mechanism applicable to the SCC. Having concluded that the SCC was not subject to FOIA, the Court affirmed the order of the SCC dismissing Mr. Christian's petition.

The Council continued its commitment to providing FOIA training. The Council views its training duty as its most important mission and welcomes every opportunity to provide FOIA training programs. During 2011, Council staff conducted 62 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. Also all Council-sponsored training programs, whether the statewide workshops or specialized programs, are pre-approved by the Virginia State Bar for continuing legal education credit for licensed attorneys. In addition to Virginia State Bar continuing legal education credit, the training programs are also pre-approved by the Department of Criminal Justice Services for law-enforcement in-service credit, the Virginia Municipal Clerks Association, and the Virginia School Board Association for academy points.

For this reporting period, the Council, with a staff of two attorneys, responded to 1,540 inquiries. Of these inquiries, seven resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: three by government officials, none by media representatives, and four by citizens. The remaining requests were for informal opinions, given via telephone and e-mail. Of these requests, 821 were made by government officials, 560 by citizens, and 152 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 continuing trend appears to stem from the Council's reputation as a creditable source for FOIA guidance before disputes arise and the reliability of its informal opinions.

FOIA was again the subject of significant legislative activity in the 2011 Session. The General Assembly passed a total of 20 bills amending FOIA during the 2011 Session. House Bill 1860 (Anderson) and identical Senate Bill 763 (Puller), which require that the party against whom a FOIA petition is brought must receive a copy of the petition at least three working days prior to the

filing of the petition, both passed as recommendations of the Council. Senate Bill 951 (Houck), which clarifies that the Library of Virginia is the custodian of records transferred to it for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.) and for responding to requests for such records made under FOIA, also passed as a recommendation of the Council. A more detailed report of the bills discussed above and those FOIA and other public access bills passed during the 2011 Session appear on the Council's website and are attached as Appendix D to this report.

In 2011, the Council welcomed Delegate Sal R. Iaquinto, Robert L. Tavenner, James Schliessman, Kathleen Dooley, and Stephanie Hamlett to the Council. Each new member was appointed to serve a four-year term.⁸ Delegate Iaquinto was elected as vice chair by a vote of 11-0-1. The Council also said goodbye to Council members Mary Yancey Spencer, Roger Wiley, E.M. Miller, Jr., and Eric Gregory. Ms. Spencer was appointed by the Governor and served on the Council from 2007 until July 2011 when her term expired. Mr. Wiley, appointed by the Senate Committee on Privileges and Elections, was an original member of the Council, serving faithfully until July 2011 when his term(s) expired. Another original member, Mr. Miller, serving ex officio, retired from state service on July 1, 2011.

The Council also bid farewell to the Honorable R. Edward Houck, Member, Senate of Virginia and the Chair of the Council. Senator Houck was an original appointee to the Council in 2000, and served as both chair and vice chair during his considerable and dedicated service to the Council. His leadership, vision, and commitment to government transparency will be sorely missed.

WORK OF THE COUNCIL

May 3, 2011

The Council held its first meeting of 2011⁹. This meeting was an organizational meeting, which included a 2011 legislative update, review of bills referred to the Council for study, establishment of a work plan with the appointment of necessary subcommittees, and setting future meeting dates. The Council also welcomed its newest member, James Schliessmann, Esquire, a designee of the Attorney General.

Legislative Update

Staff provided a recap of the bills amending the FOIA passed by the 2011 Session of the General Assembly. Twenty bills amending FOIA were passed during the 2011 Session. House Bill 1860 (Anderson) and identical Senate Bill 763 (Puller), which require that the party against whom a FOIA petition is brought must receive a copy of the petition at least three working days prior to the

⁸ Delegate Iaquinto was appointed by the Speaker of the House of Delegates; Mr. Tavenner as Director of the Division of Legislative Services as an ex officio member of the Council with voting privileges; Mr. Schliessman as the designee of the Attorney General; Ms. Dooley was appointed by the Senate Committee on Rules as the local government representative; and Ms. Hamlett was appointed by the Governor as a citizen/state employee representative.

⁹ All members of the Council were present except Mary Yancey Spencer. Note that the vacancy caused by the election of former Delegate H. Morgan Griffith to the U.S. Congress has not been filled.

filing of the petition, both passed as recommendations of the Council. Senate Bill 951 (Houck), which clarifies that the Library of Virginia is the custodian of records transferred to it for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.) and for responding to requests for such records made under FOIA, also passed as a recommendation of the Council. Of the 20 bills, two bills create new records exemptions and 18 amended existing provisions of FOIA. The complete 2011 Legislative Update is available on the Council's website and as Appendix D to this report.

Bill Referred for Study

The Council next reviewed the four bills referred to it by the General Assembly for additional study. A summary of each referred bill appears below.¹⁰

5. **HB 1722 (Marshall, R.G.)**--FOIA; designation of records; penalties for certain violations.
6. **SB 812 (Martin)**--FOIA; access to salary information.
7. **SB 1467 (Edwards)**--FOIA; disclosure of criminal investigative records.
8. **HB 1935 (Ware, O.)** -Legal notices; use of websites, radio, and television, etc.

Senator Martin was present at the Council meeting and presented his SB 812. Senator Martin told the Council that the bill was introduced as a result of the publication of state employees' salaries by the Richmond Times Dispatch in its online publication. He noted that he represents many state employees and that the bill was an attempt to balance the public's right to know and the privacy of state employees. The bill sought to disconnect an employee's name from his salary. He mentioned that he did not think the original intent of FOIA was to require disclosure of lower echelon employees' salaries. Senator Martin stated that he is sensitive to the situation where a janitor whose salary is published in the newspaper goes to choir practice and everyone there knows how much he makes. The situation is embarrassing and an invasion of one's privacy. Senator Martin reminded the Council that when FOIA was first enacted, the threshold below which salary information was not required to be released was, and still is, \$10,000. He pointed out that virtually no public employee makes less than \$10,000 year in 2011. Council member Roger Wiley stated that the Senator had a point with respect to the \$10,000 threshold. Mr. Wiley explained that his first job was as the Charlottesville city attorney and he earned \$18,300 and his name and salary were in the local newspaper. He noted that he was one of the top three paid employees in the city and that most employees earned less than \$10,000 per year. Council members questioned whether the Senator had any figure in mind, based on inflation, to raise the \$10,000 threshold.

¹⁰ **HB 1722** (Marshall, R.G.) designation of records; penalties for certain violations. Requires that at the time of creation of any public record, the custodian of such records that are subject to FOIA shall designate whether the record is subject to FOIA's mandatory disclosure provisions or otherwise exempt from disclosure. The bill requires that such designation shall appear on the face of the record and be updated by the custodian in a timely manner in the event of any changes. Failure to make the required designation shall, upon receipt of a request for such record, waive any charge authorized under FOIA. The bill also provides that in addition to the civil penalty under FOIA, a public employee found to have committed a willful and knowing violation of FOIA may be subject to other disciplinary action, including suspension, demotion, or termination of public employment. The bill contains technical amendments.

SB 812 (Martin) FOIA; access to salary information, etc., of public employees. Allows public access to the records of only the job position, official salary, or rate of pay of, and the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body. The bill specifically excludes the name of any such officer, official, or employee from disclosure.

SB 1467 (Edwards) FOIA; criminal investigative records. Amends the definition of "criminal investigative file" so that the exemption applies to records relating to active or ongoing investigations or prosecutions.

HB 1935 (Ware, O.) Legal notices. Allows localities to meet certain notice requirements by utilizing their web sites, radio or television rather than a newspaper of general circulation.

Staff noted that during the General Assembly Session, it was estimated that in today's dollars, the threshold would be approximately \$35,000. Senator Martin stated that he was told disclosure of salary information by name was bad for agency morale especially when employees found out what their supervisors earn. Council member George Whitehurst stated that every newspaper he has ever worked for has published salary information attributable to each public employee. Mr. Whitehurst stated that all public employees should be held to the same standard, regardless of position. After further discussion, it was a consensus of the Council to create a subcommittee, comprised of Ed Jones, Roger Wiley¹¹, and Frosty Landon to study the issues raised by SB 812, including raising the salary threshold while keeping individual public employee's salaries public. In closing, Senator Martin told the Council that he preferred his amendment proposed in the FOIA subcommittee of the Senate Committee on General Laws that would require the disclosure of both name and salary of all elected and appointed officials, including those holding upper echelon positions.¹²

The Council next reviewed HB 1722 and after discussing the substantial practical difficulties in requiring each public employee creating public records to designate on the record whether it is open or exempt, the Council agreed unanimously not to go forward with HB 1722. It was the consensus of the Council that trying to get government more organized vis a vis FOIA is a good idea; the bill, however, has the opposite effect and is unworkable as written.

Senate Bill 1467 was then discussed by the Council. Staff advised that this bill was substantially the same as SB 711 studied by the Council in 2010. Essentially, SB 1467 exempts criminal investigative files as long as they are "active or ongoing." Based on the Council's 2010 study of SB 711, it is difficult to determine when an investigation becomes inactive or closed. Staff also noted that the SB 711 subcommittee recommended a rewrite of § 2.2-3706 to make it more easily read and understood, but that recommendation did not go forward because of the concern of unnecessary tinkering in an election year. Staff advised that the issue has remained the same over the years--reporters and others want greater access to criminal investigative files and law-enforcement agencies routinely fail to exercise any discretion because of concern for the myriad of personal and other information contained in a criminal investigative file, coupled with the time it takes to review the file. Council member Craig Fifer, who also chaired last year's subcommittee, told the Council that the issue was not going to go away because of significant interest by many parties. He suggested that a subcommittee be appointed, at a minimum, to facilitate further discussion in the hopes of an acceptable resolution. Chairman Houck continued the subcommittee from 2010, which consists of Council members Fifer, Treadway, Selph, and Schliessmann.

The Council next reviewed HB 1935. Roger Wiley told the Council that while the issue of publication of legal notices was very important to local governments and citizens, it was his belief that it was not a FOIA issue and therefore not within the purview of the Council. The Council

¹¹ Kathleen Dooley, who was appointed to replace Roger Wiley when his term expires on July 1, 2011, will serve on the subcommittee when Mr. Wiley's term ends.

¹² The proposed amendment would have deleted the new language in the bill as introduced and inserted the following new language on line 20 after "officers or employees." *For the purposes of clause (ii), no such records shall disclose the name of any such officer, official, or employee unless he (a) is elected, (b) is appointed by the Governor or the General Assembly, (c) holds a position within the Office of the Governor as that term is defined in § 2.2-3705.7, (d) is a state employee who has accepted serving in the capacity of chief deputy or equivalent, or confidential assistant for policy or administration, or (e) is appointed by a political subdivision of the Commonwealth, including school boards and the governing body of any county, city, or town.*

requested staff to identify other entities that may have subject matter jurisdiction over the issue raised by HB 1935. Initially, staff suggested the House Committee on Counties, Cities and Towns, the Senate Committee on Local Government, and the Governor's Reform Commission.

Other Business

Staff updated the Council on its efforts to accomplish last year's Council directive to provide training for legislative agencies, committees and commissions. Staff reported that FOIA training had been provided to the joint committee of conference on the budget bill and that implementation of the advice provided by Council staff resulted in more open budget conference discussions without negative impact to the process. Staff reported that training of legislative agencies, commissions and council will continue.

Maria J.K. Everett, executive director of the Council, advised the Council of staff concerns with the almost exclusive use of email by government entities and its impact on processing FOIA requests and charges made therefore. Ms. Everett reminded the Council that this issue had been discussed last year when the circumstances involving the Department of Environmental Quality's attempts to retrieve electronic records from the Virginia Information Technologies Agency (VITA) and the resulting charges from VITA. Staff related that DEQ had received a FOIA request for records maintained by VITA. Under FOIA, DEQ remains the custodian of these records and was initially charged \$14,000 by VITA to make the records available to DEQ in response to the FOIA request. Ultimately, this charge was reduced by VITA to \$3,800. VITA's initial estimate came one month after the records were requested by DEQ, and the last estimate was almost two months after DEQ's request—neither time period was in compliance with the response times required FOIA and imposed on DEQ as the custodian of the records. At the time, the question to the Council was whether DEQ could charge the requester this additional charge to retrieve records from VITA as part of the actual charges allowed under FOIA, and further, whether it would be reasonable to do so. Ms. Everett advised that after preliminary discussions with VITA, the issue is one of organization of email and other electronic records by state and local government entities. According to VITA, it is not responsible for organizing records of agencies, but merely to maintain them. As a result, if an agency is not properly categorizing/organizing their records, what is maintained by VITA is that lack of organization. The problem is widespread and while email and electronic records were originally perceived to be a tool to help public bodies easily retrieve files and reduce charges to citizens for providing records under FOIA, it has had the opposite effect. Searching for email and electronic records is difficult and time consuming and the charges reflect this. The skill set that applied in the paper world has not transferred to the electronic world. Staff suggested that the Council take the lead in educating public bodies, in conjunction with the Library of Virginia, in an attempt to close this gap or at least keep it from growing wider. No statute dictates how records should be organized; it is incumbent on each governmental entity, however, to set up filing systems that facilitate the rights of the public to access public records under FOIA. Ms. Treadway advised that VITA is working on a potential solution to this problem. Mr. Wiley concurred with staff that this issue is not limited to state government and suggested that it is a different skill set required due to the sheer volume of email sent and received.

The Council unanimously adopted two resolutions honoring Council members Roger Wiley, whose term will expire on July 1, 2011 and E.M. Miller, who will be retiring from state service effective July 1, 2011, for their contributions to the work of the Council.

Public Comment

Megan Rhyne, executive director of the Virginia Coalition for Open Government (VCOG) advised the Council of their 2011 program about FOIA and record retention/management that will be held in several regions of Virginia. She stated that both Craig Fifer and Maria Everett are participating in this program.

James Lawrence, citizen of the City of Fredericksburg, advised the Council of his continuing FOIA issues with the Fredericksburg City Council, including the holding of meetings in violation of FOIA and prohibiting the recording of City Council meetings, also a violation of FOIA

Ginger Stanley, executive director of the Virginia Press Association praised both Messrs. Wiley and Miller for their service on the Council. She advised the Council that HB 1935 had been studied by several committees of the Governor's Reform Commission but was referred to the Council due to the respect for Council and their process for careful consideration of access issues. Ms. Stanley reported that the number of FOIA exemption bill was down considerably in 2011, again in part due to the Council's reputation for fully examining access issues and providing a forum for access discussions.

July 18, 2011

The Council¹³ held its second quarterly meeting in Richmond to continue its deliberation on the bills referred to it for further study by the 2011 General Assembly, receive progress reports from its two subcommittees, welcome its four new members, and elect a vice chair.

Senator Houck welcomed Delegate Sal R. Iaquinto, Robert L. Tavenner, Kathleen Dooley, and Stephanie Hamlett to the Council. Each new member was appointed to serve a four-year term.¹⁴ The next item of business before the Council was the election of a vice chair. Delegate Iaquinto was elected to that position by a vote of 11-0-1.

Subcommittee Reports

Criminal Investigative Records Subcommittee--

Craig Fifer, chair of the Criminal Investigative Records Subcommittee, reported that held its first meeting on earlier today.¹⁵ The purpose of this meeting was to study Senate Bill 1467 (Edwards) regarding access to criminal investigative records, and to consider a separate proposal concerning access to criminal and other law-enforcement records from the Virginia Press Association (VPA). Mr. Fifer reported that Senator Edwards was present and said one reason he had brought the bill was because there was inconsistency regarding what will be released by different law-enforcement agencies. While aware of the need for privacy in certain matters, Senator Edwards expressed that his experience was that many law-enforcement agencies would refuse to release records as a matter

¹³ All members of the Council were present at the meeting (Houck, Iaquinto, Treadway, Fifer, Landon, Whitehurst, Selph, Jones, Schliessmann, Tavenner, Dooley, and Hamlett).

¹⁴ Delegate Iaquinto was appointed by the Speaker of the House of Delegates; Mr. Tavenner as Director of the Division of Legislative Services serves as an ex officio member of the Council with voting privileges; Ms. Dooley was appointed by the Senate Committee on Rules as the local government representative; and Ms. Hamlett was appointed by the Governor as a citizen/state employee representative.

¹⁵ Subcommittee members Fifer (Chair), Schiessman, Selph, and Treadway were present (all members).

of policy to avoid improper application of discretion that might be perceived as biased or discriminatory. He further noted that FOIA already contains many other exemptions for information that would need to be protected in criminal investigative files that would still apply even after the investigation was over. Mr. Fifer told the Council that after considerable discussion, the Subcommittee recommended that no further action be taken on SB 1467. He noted, however, that the VPA had submitted a draft, which was reviewed by the Subcommittee. Staff suggested that it work with the interested parties to try to frame the issues on which there was agreement as well as those where there was no agreement. Staff will provide notice to all interested parties to ensure their participation in this informal facilitation process.

Personnel Records Subcommittee--

Ed Jones, chair of the Personnel Records Subcommittee advised the Council that the Subcommittee will hold its first meeting immediately following the Council meeting.

Disposition of HB 1935 (Ware, O.)¹⁶

The Council next turned its attention to HB 1935--legal notices; use of websites, radio and television, etc. This bill was referred to the Council by the 2011 Session of the General Assembly and at the last Council meeting, Roger Wiley told the Council that while the issue of publication of legal notices was very important to local governments and citizens, it was his belief that it was not a FOIA issue and therefore not within the purview of the Council. Staff suggested that the Council, by letter, request the respective chairs of the Senate Committee on Local Government and the House Committee on Counties, Cities, and Town, to create an ad hoc joint subcommittee of both committees to examine the issues raised by HB 1935. By consensus, the Council agreed to this suggestion and directed staff to prepare the appropriate letters.

The next item of business was public comment. There being none offered, the Council was briefed by staff on the upcoming 2011 FOIA Workshops. The statewide workshops will be held in 7 locations, including two in Richmond. Senator Houck reminded all in attendance about the Council's annual legislative preview scheduled for the November 14, 2011 in Richmond and strongly encouraged any interested party to bring their legislative proposals (conceptual in nature or in draft form) before the Council so that any necessary work on the proposal, including preparing compromise language, may be accomplished before the press of the 2012 General Assembly Session. The purpose of the annual legislative preview is to air FOIA and related access issues before the Council and other interested parties, which issues will or may be the subject of legislation in the upcoming Session of the General Assembly. There being no further business, the Council adjourned.

November 14, 2011

The Council¹⁷ held its third quarterly meeting in Richmond to continue its deliberation on the bills referred to it for further study by the 2011 General Assembly, receive progress reports from its two subcommittees, and hold its annual legislative preview.

¹⁶ **HB 1935 Legal notices.** Allows localities to meet certain notice requirements by utilizing their web sites, radio or television rather than a newspaper of general circulation.

¹⁷ Council members Iaquinto, Treadway, Fifer, Landon, Whitehurst, Jones, Schliessmann, Tavenner, and Hamlett were present at the meeting; members Houck, Selph, and Dooley were absent.

Subcommittee Reports

Personnel Records Subcommittee--

Ed Jones, chair of the Personnel Records Subcommittee advised the Council that the Subcommittee had met twice in Richmond, on July 18 and October 4, and once in Fredericksburg, on November 8. The Subcommittee was appointed to study SB 812 (Martin), concerning access to names and salary information for public employees and officials, which was referred to the Council by the 2011 Session of the General Assembly. The Subcommittee decided not to recommend SB 812, which would have excluded employee names from being disclosed along with their salary or rate-of-pay. Under current law, such information does not have to be disclosed if the annual salary or rate of pay is \$10,000 or less.¹⁸ The Subcommittee looked at the history of this provision, which was enacted in 1978, as well as how other states handle such information. There is no legislative history discussing why the threshold was implemented, or why \$10,000 was the chosen amount. What legislative history is available indicates that the law passed the Senate without any threshold in place, but the \$10,000 threshold was added by the House, and it was this version with the threshold that was enacted. Research indicated that Virginia is one of only three states that has any restrictions upon name and salary information of public employees, and that there appears to be a current trend toward posting online such name and salary information, as evidence in states such as New Mexico. Mr. Jones stated he supported leaving the current law unchanged for three reasons: (1) history - there is no legislative history, two prior subcommittees studying FOIA in the last two decades left this provision unchanged, and there is no "escalator clause" or other mechanism in the statute to raise the \$10,000 threshold; (2) national trends - while recognizing that \$10,000 in 1978 is not the same as \$10,000 today, the more compelling trend is for greater transparency and accountability in government; (3) balancing - the current law strikes a balance between the public's right to know and a public employee's interest in privacy. After considering options including eliminating the \$10,000 threshold amount, raising the threshold to some higher amount, or leaving the law as it is, the Subcommittee voted 2-1 in favor of leaving the law as it is.¹⁹

Mr. Jones further observed that Subcommittee member Dooley could not be at today's meeting, but submitted written remarks on why she favored raising the threshold amount instead Ms. Dooley's dissenting opinions are attached to this report as Appendix G. Mr. Landon also spoke in agreement with Mr. Jones, reiterating that 47 states have no threshold; that since 1978, there has been a growing trend favoring transparency in government; and opining that the question should not be approached as a cost of living issue. Generally, he observed that FOIA strives for balance between the public's right to know and government needs, but stated that such balance is not appropriate here because full disclosure of information on public employee salaries is part of the price of being employed by the public. He opined that if the law was being considered for the first time now, it would likely be passed with no threshold or other limitation on access to public employees' names and salary information.

¹⁸ Specifically, among other things, subsection A of § 2.2-3705.8 requires the disclosure of "records of the position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body" but later provides that "the provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less."

¹⁹ Subcommittee members Jones and Landon voted in favor of leaving the current law as it is; Subcommittee member Dooley voted against.

Having received the Subcommittee's report and recommendation not to change the existing law, Delegate Iaquinto invited comment from the Council and the public. There was none. No motions were made on this matter, and no further action was taken by the Council.

Criminal Investigative Records Subcommittee--

Craig Fifer, chair of the Criminal Investigative Records Subcommittee, reported that the Subcommittee had met on July 18, 2011. As a reminder, he noted that the gist of the subcommittee's work is to see if there is any reason to change the existing exemption for criminal investigative records. In July, the Subcommittee decided not to proceed with SB 1467 (Edwards), but to continue to study the issues raised because of the amount of interest in access to criminal investigative files and other law enforcement records. The Subcommittee directed staff to meet with the interested parties to see if consensus could be reached about any changes to be made to the existing law. Since July, staff has met with interested stakeholders (representing the Virginia Press Association, the Virginia Coalition for Open Government, the Virginia Association of Chiefs of Police, the Virginia State Police, the Virginia Sheriffs' Association, the Virginia Municipal League, the Virginia Association of Counties, as well as law enforcement representatives from the Culpeper County Sheriff's Office and Fairfax County Police Department) three times this year: on August 31, October 12, and November 14. The workgroup used a proposal from the VPA as a vehicle for discussion at these meetings. The workgroup had not reached agreement on a legislative proposal at this time, but intends to continue its work next year. The current plan is for VPA representatives to prepare a position paper regarding issues of concern in the current law, which will be posted on the FOIA Council website and shared with the other interested parties. After the stakeholders share the paper with their constituents to get their reactions, the workgroup discussions will resume at a date to be determined after the 2012 Session of the General Assembly.

Annual Legislative Preview

The purpose of the annual legislative preview is to air FOIA and related access issues before the Council and other interested parties, which issues will or may be the subject of legislation in the upcoming Session of the General Assembly. Cherry Evans and Betty Wilson appeared on behalf of the Virginia Department of Aviation. They indicated concern about access to flight manifests and certain grant information. The Department provides air services to the Governor, other elected officials, and other state agencies; the flight manifests may reveal information about economic development, prisoner transport, or other sensitive matters. The Department also issues grants to promote and enhance air services. Those seeking grants from the Department, such as local airports, are required to provide relevant records, which often contain details about airport operations and ongoing negotiations with other parties. In regard to both grants and flight manifests, there are existing provisions that exempt the records at issue from disclosure when the records are held by other officials or agencies, but the concern is that the records may not be so protected once the records are shared with the Department (i.e., that the relevant existing exemptions are written so narrowly as to exclude the Department from using them). Ms. Wilson indicated that the Department intends to look into the matter in the coming year, but does not intend to introduce legislation on the matter during the 2012 Session of the General Assembly.

Public Comment

The next item of business was public comment. There was none.

Other Business

Delegate Iaquinto took a point of personal privilege to commend Senator Houck for his many years of dedicated and thoughtful service to the FOIA Council and the Commonwealth. The Council briefly adjourned, but immediately reconvened to consider a motion by Delegate Iaquinto that the Council pass a resolution so commending Senator Houck. The motion carried by unanimous voice vote. There being no further business, the Council adjourned.

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. During this reporting period, the Council, with its staff of two, responded to 1,540 inquiries and conducted 62 training seminars statewide. A listing of these training seminars appears as Appendix A.

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 government, media, or citizens. 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 solely on the facts and information provided to the Council by the person requesting the opinion. The Council is not a trier of fact. Thus, it is specifically noted in each opinion, whether written or verbal, that Council opinions are given based on the representations of fact made by the opinion requester.

For the period of December 1, 2010 to November 30, 2011, the Council, with a staff of two attorneys, fielded 1,540 inquiries. Of these inquiries, seven 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 B. The table below profiles who requested written advisory opinions for the period December 1, 2010 through November 30, 2011:

Written Advisory Opinions: 7

State and Local Government	3
Citizens of the Commonwealth	4
Members of the News Media	0

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, 2010 and November 30, 2011:

Telephone and E-mail Responses: 1,533

Government	821
Citizens	560
News Media	152

Appendix E to this report sets out the number of inquiries received by the Council each month from December, 2010 through November, 2011, and separately sets forth the number of different types of inquiries received by category (Records, Meetings, Other).

The Council's Website

The website address for the Council is <http://foiacouncil.dls.virginia>. During the past year, the website received approximately 407,567 visits, for a total of 1,517,777 page views and 5,704,133 hits.²⁰ 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.

²⁰ Please recall that the software used to track website hits changed last year and now presents the information in a different format from prior years.

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 are now offered in odd-numbered years 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 conducted the 2011 FOIA Workshops at seven statewide locations.²¹ Over 700 persons, including government officials, media representatives and citizens, attended the FOIA workshops. Based on course evaluations, these workshops were well received and met or exceeded attendee expectations. One segment of the 2011 FOIA workshops, "Climbing Out of the Abyss," brought to light a troubling trend in both the public and private sectors. This training segment emphasized the importance of the integration of records management and FOIA, especially as it relates to email and electronic records to overcome the problem occasioned by the pervasive use of email. This problem, first identified by the Council, has actually widened the gap between government and its citizens in terms of meaningful access. It is harder to search and more costly to citizens because governments have become complacent or overwhelmed due to the sheer volume of email traffic sent and received. As a result, public records are not well-organized and record management advice is not followed. The skill set for paper records has not transferred to the electronic world. Council staff has created an ad hoc workgroup comprised of Library of Virginia record management professionals, IT professionals at the Virginia Information Technologies Agency, and others to address the problem and formulate concrete recommendations for its solution.

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. 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, 2010 to November 30, 2011, the Council conducted 62 such training programs. A listing of these trainings appears as Appendix A to this report.

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

²¹ Wytheville, Weyer's Cave, Sterling, Danville, Chesapeake and two workshops in Richmond (due to the demand for FOIA training in the seat of government).

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
- 2011 FOIA & Access Bill Summaries
- FOIA Guide for Local Officials²²
- Legislators Guide to FOIA
- Law-Enforcement Records and 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. 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 1,540 inquiries. It formed two 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 62 specialized training sessions throughout the Commonwealth. The Council would like to express

²² Developed in cooperation with the Virginia Association of Counties and the Virginia Municipal League.

its gratitude to all who participated in the work of Council for their hard work and dedication.

Respectfully submitted,

Senator R. Edward Houck, Chair
Delegate Sal R. Iaquinto, Vice-Chair
Kathleen Dooley
Craig T. Fifer
Stephanie Hamlett
Edward Jones
Forrest M. "Frosty" Landon
James Schliessman
John G. Selph
Robert L. Tavenner
Sandra G. Treadway
George T. Whitehurst

APPENDIX A

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, 2010 through November 30, 2011, Council staff conducted 62 training seminars, which are listed below in chronological order identifying the group/agency requesting the training.

December 7, 2010	Department of Accounts Division of State Internal Audit Richmond, VA
	State Compensation Board New Officer Training Richmond, VA
January 8, 2011	Virginia Municipal League Richmond, VA
January 25, 2011	J. Sargeant Reynolds Community College Administrative Practice & Procedure Class Richmond, VA
March 16, 2011	Northern Virginia Regional Conference Fairfax, VA
March 17, 2011	NBC-12 Call 12 Richmond, VA
March 18, 2011	Hampton Roads Transit Hampton, VA
March 21, 2011	City of Manassas Manassas, VA
March 23, 2011	Richmond Area Regional Schools Chesterfield, VA

March 24, 2011	Department for the Aging Virginia Public Guardian and Conservator Advisory Board Richmond, VA
	Hopewell Citizens for Open Government Hopewell, VA
March 25, 2011	Auditor of Public Accounts Richmond, VA
March 29, 2011	City of Charlottesville Supplier Diversity Conference Charlottesville, VA
April 5, 2011	City of Richmond Clerks Office Richmond, VA
April 9, 2011	Society of Professional Journalists Regional Spring Conference Norfolk, VA
April 18, 2011	Department of Juvenile Justice Richmond, VA
April 26, 2011	Arlington County Arlington, VA
April 27, 2011	Virginia Coalition for Open Government Records Management and FOIA Seminar Roanoke, VA
April 28, 2011	Governor's Advisory Board for Volunteerism and National Service Richmond, VA
May 11, 2011	Virginia Health Workforce Development Authority Richmond, VA
May 16, 2011	Department of Juvenile Justice Richmond, VA
May 25, 2011	Virginia Commonwealth University Communications Ethics and Law Class Richmond, VA

June 2, 2011	Department of Social Services Foster Care and Child Protective Services Quarterly Supervisors Meeting Warrenton, VA
June 8, 2011	Office of the Attorney General Richmond, VA
June 9, 2011	Free Lance-Star Fredericksburg, VA
June 10, 2011	Town of Culpeper Council Orientation Culpeper, VA
June 15, 2011	Department of Social Services Richmond, VA
	Library of Virginia Richmond, VA
June 30, 2011	City of Richmond Richmond, VA
July 14, 2011	State Board of Elections Annual Election Uniformity Training Richmond, VA
July 20, 2011	Bangladesh Right to Information Study Tour to the USA University of Maryland School of Journalism College Park, MD
July 27, 2011	Department of Environmental Quality Glen Allen, VA
August 3, 2011	Representatives of the National Government of the Netherlands Richmond, VA
August 17, 2011	Fauquier County Law Enforcement Warrenton, VA
September 7, 2011	2011 FOIA Workshop Wytheville, VA
September 8, 2011	2011 FOIA Workshop Weyer's Cave, VA

September 9, 2011	2011 FOIA Workshop Sterling, VA
September 14, 2011	Falls Church City Communicators Falls Church, VA
	Clarke County, Clarke County Public Schools, Boyce Town Council and Berryville Town Council Berryville, VA
September 16, 2011	Court Clerks' Association Convention Richmond, VA
September 19, 2011	2011 FOIA Workshop Danville, VA
September 20, 2011	2011 FOIA Workshop Richmond, VA
September 22, 2011	2011 FOIA Workshop Chesapeake, VA
September 26, 2011	COVITS Conference Henrico County, VA
	Senior Journalism Class Virginia Commonwealth University Richmond, VA
September 28, 2011	State Special Education Advisory Committee Sandston, VA
October 1, 2011	Virginia Mayors Institute Henrico County, VA
October 11, 2011	Regional Industrial Facility Authority Danville, VA
October 13, 2011	2011 FOIA Workshop Richmond, VA
October 19, 2011	Municipal Clerks Institute Virginia Beach, VA
October 25, 2011	Petersburg Bureau of Police Petersburg, VA

October 27, 2011	Statewide Independent Living Council Richmond, VA
October 27, 2011	Department of Rail and Public Transportation Richmond, VA
October 27, 2011	Division of Legislative Services Richmond, VA
October 29, 2011	Virginia Coalition for Open Government Annual Conference Charlottesville, VA
November 2, 2011	Central Virginia Regional Library Trustees Farmville, VA
November 3, 2011	Virginia Association of Government Archives & Records Administrators Annual Conference Virginia Beach, VA
November 10, 2011	Department of Housing and Community Development Permit Technician's Course Richmond, VA
	Virginia Coalition for Open Government Records Management Seminar McLean, VA
	Department of Aviation Richmond, VA
November 30, 2011	Central Virginia Community Services Board Lynchburg, VA
	New Sheriffs Training Virginia Sheriff Association Richmond, VA

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APPENDIX B

INDEX OF WRITTEN ADVISORY OPINIONS
DECEMBER 1, 2010 THROUGH NOVEMBER 30, 2011

ADVISORY OPINIONS ISSUED
2010

<u>Opinion No.</u>	<u>Issue(s)</u>
May	
AO-01-11	A settlement agreement that settles ongoing litigation and is sealed by court order is exempt from mandatory disclosure under FOIA.
July	
AO-02-11	Pursuant to the exemption for records of persons imprisoned in penal institutions in the Commonwealth related to the imprisonment, the Department of Corrections may withhold a list of female inmates showing the inmates' names, state identification numbers, and facility locations.
August	
AO-03-11	Section 40.1-11 of the Code of Virginia exempts certain records of the Department of Labor and Industry from mandatory disclosure under FOIA.
September	
AO-04-11	The attorney-client privilege exemption must be narrowly construed. If a record contains both exempt and non-exempt material, only the exempt material may be withheld. Whether a record is exempt depends on the contents of the record and the existence of a specific legal provision that allows the record to be withheld.

October

[AO-05-11](#) A rescue squad which is a town department is subject to FOIA for records purposes, but is not subject to the open meetings requirements of FOIA.

[AO-06-11](#) Adult arrestee booking photographs ("mug shots") are public records subject to FOIA.

November

[AO-07-11](#) Summarizes the requirements for making and responding to a FOIA request. Clear communications between the parties are essential. Public bodies are reminded to provide one of the five responses required by statute.

APPENDIX C

2011 MEETINGS OF THE FREEDOM OF INFORMATION ADVISORY COUNCIL

Tuesday, May 3, 2011

House Room D, General Assembly Building, Richmond

Welcome to newest Council member James Schliessmann, OAG Designee. Recap of FOIA and related access bills from 2011 Session of General Assembly and bills referred by General Assembly to Council for study: HB 1722 (Marshall, R.G)--FOIA; designation of records; penalties for certain violations; SB 812 (Martin)--FOIA; access to salary information; SB 1467 (Edwards)--FOIA; disclosure of criminal investigative records; and HB 1935 (Ware, O.) --Legal notices; use of websites, radio, and television, etc. Appointment of subcommittees. Discussion of email and public access.

Monday, July 18, 2011,

House Room C, General Assembly Building, Richmond

Welcome to newest FOIA Council members: Delegate Sal R. Iaquinto, Speaker appointee; Robert L. Tavenner, Director, Division of Legislative Services, ex officio; Kathleen Dooley, Senate Rules appointee, local government representative; and Stephanie Hanlet, Governor appointee, citizen/state employee. Election of Vice Chair. Progress reports from Criminal Investigative Records Subcommittee and Personnel Records Subcommittee. Discussion of plans for 2011 Statewide FOIA Workshops: Wytheville, Weyer's Cave, Loudoun County, Danville, Chesapeake and Richmond

Tuesday, November 14, 2011

House Room C, General Assembly Building, Richmond

Progress reports from Criminal Investigative Records Subcommittee and Personnel Records Subcommittee. Annual Legislative Preview.

APPENDIX D

STATUS OF FREEDOM OF INFORMATION AND OTHER RELATED ACCESS BILLS

NOTE: *Unless otherwise stated, the changes in the law described herein will take effect July 1, 2011.*

I. Introduction

The General Assembly passed a total of 20 bills amending the Virginia Freedom of Information Act (FOIA) during the 2011 Session. House Bill 1860 (Anderson) and identical Senate Bill 763 (Puller), which require that the party against whom a FOIA petition is brought must receive a copy of the petition at least three working days prior to the filing of the petition, and contain technical amendments, both passed as recommendations of the FOIA Council. Senate Bill 951 (Houck), which clarifies that the Library of Virginia is the custodian of records transferred to it for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.) and for responding to requests for such records made under FOIA, also passed as a recommendation of the FOIA Council.

Of the 20 bills, two bills create new records exemptions, one of which also has a corresponding new closed meeting exemption, as follows:

- Creates an exemption from the mandatory disclosure requirements of FOIA for (i) records relating to rate structures or charges for using the facilities of the Commercial Space Flight Authority and (ii) records provided by a private entity to the Commercial Space Flight Authority, to the extent that such records contain (a) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (b) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private entity, where, if the records were made public, the financial interest or bargaining position of the Authority or private entity would be adversely affected. The bill also contains a meeting exemption for the discussion of the above records. SB 1337 (Herring) amending §§ 2.2-3705.6 and 2.2-3711.
- Creates an exemption for certain records of a proprietary nature furnished by an agricultural landowner or operator as part of an agricultural resource management plan. HB 1830 (Scott, E.T.) amending § 2.2-3705.6.

Eighteen bills amend existing provisions of FOIA as follows:

- Doubles the civil penalties imposed for willful and knowing violations of FOIA. The bill also clarifies existing law that officers, employees, and members of public bodies may be subject to the civil penalties for knowing and willful violations of FOIA. HB 1457 (Marshall, R.G.) amending § 2.2-3714;
- Removes the requirement for the Commissioner of the Department of Veterans Services to establish an advisory committee on the administration of veterans care centers established in the Commonwealth. The bill also contains a technical amendment (removes

the corresponding meeting exemption). HB 1666 (Cole) and SB 958 (Miller, J.C.) amending § 2.2-3711;

- Requires that the party against whom a FOIA petition is brought must receive a copy of the petition at least three working days prior to the filing of the petition. The bill contains technical amendments and is a recommendation of the FOIA Council. HB 1860 (Anderson) and SB 763 (Puller) amending § 2.2-3713;
- Clarifies that the definition of a "public record" does not include records that are not prepared for or used in the transaction of public business. The bill is in response to a court case in Loudoun County. HB 2020 (May) amending § 2.2-3701;
- Provides that the Attorney General shall investigate complaints of alleged abuse or neglect of persons in the care or custody of others who receive payments for medical assistance under the state plan for medical assistance, regardless of whether the patient is a recipient of medical assistance. The bill also exempts records or information provided to the Office of the Attorney General's Medicaid Fraud Control Unit from disclosure pursuant to the Freedom of Information Act. HB 2034 (Peace) and SB 1214 (Smith) amending § 2.2-3705.5;
- Allows any commission created by executive order to study and make recommendations concerning the prevention of closure and realignment of federal security installations in Virginia to withhold from public disclosure certain records relating to the relocation of national security facilities. The bill also allows those portions of meetings where such records are discussed to be closed to the public. HB 2041 (Anderson) and SB 1296 (Ruff) amending §§ 2.2-3705.2 and 2.2-3711;
- Establishes the Office of the State Inspector General to be headed by a State Inspector General to investigate complaints alleging fraud, waste, abuse, or corruption by a state agency or nonstate agency or the officers and employees thereof. Among other things, the bill makes corresponding changes to several record exemptions under the Freedom of Information Act. HB 2076 (Landes) and SB 1477 (Stosch) amending §§ 2.2-3705.3, 2.2-3705.6, and 2.2-3706;
- Among other changes, establishes a Research and Technology Investment Advisory Committee to assist the Innovation and Entrepreneurship Investment Authority in making awards from the Commonwealth Research Commercialization Fund by ensuring that applications considered for awards are based upon sound science and research, are in an area of focus identified in the roadmap, and present significant potential for commercialization in the Commonwealth. Makes corresponding amendments to an existing meeting exemption. HB 2324 (Lingamfelter) and SB 1485 (Newman) amending § 2.2-3711;
- Changes the title of the Virginia Liaison Office to the Office of Intergovernmental Affairs, and makes a corresponding technical amendment to an existing records exemption. HB 2479 (Byron) and SB 1414 (Norment) amending § 2.2-3705.7;
- Clarifies that the Library of Virginia is the custodian of records transferred to it for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.) and for responding to requests for such records made under FOIA. This bill is a recommendation of the Freedom of Information Advisory Council. SB 951 (Houck) amending § 2.2-3704;

- Exempts records of the Medicaid Fraud Control Unit from the mandatory disclosure provisions of the Virginia Freedom of Information Act. SB 1255 (Vogel) amending § 2.2-3705.5.

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 2011 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, 2011.

II. Amendments to the Freedom of Information Act

§ 2.2-3701. Definitions.

Virginia Freedom of Information Act; definitions. Clarifies that the definition of a "public record" does not include records that are not prepared for or used in the transaction of public business. The bill is in response to a court case in Loudoun County. HB 2020 (2011 Acts of Assembly, c. 242).

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

Freedom of Information Act; transfer of records. Clarifies that the Library of Virginia is the custodian of records transferred to it for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.) and for responding to requests for such records made under FOIA. This bill is a recommendation of the Freedom of Information Advisory Council. SB 951 (2011 Acts of Assembly, c. 604).

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

Virginia Freedom of Information Act; record and meeting exemption for certain commissions. Allows any commission created by executive order to study and make recommendations concerning the prevention of closure and realignment of federal security installations in Virginia to withhold from public disclosure certain records relating to the relocation of national security facilities. The bill also allows those portions of meetings where such records are discussed to be closed to the public. HB 2041 (2011 Acts of Assembly, c. 111), SB 1296 (2011 Acts of Assembly, c. 536).

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

Office of the State Inspector General. Establishes the Office of the State Inspector General to be headed by a State Inspector General to investigate complaints alleging fraud, waste, abuse, or corruption by a state agency or nonstate agency or the officers and employees thereof. The bill also authorizes the State Inspector General to examine the management and operation of state

agencies. The bill defines "nonstate agency" and provides a record exemption under the Freedom of Information Act for certain investigative/audit documents of the Office. The bill consolidates the offices of inspector general of the Departments of Behavioral Health and Developmental Services, Corrections, Juvenile Justice, and Transportation and the Department of the State Internal Auditor into this new office, and adds responsibility for tobacco indemnification and revitalization. The bill contains technical amendments and has a delayed effective date. HB 2076 (2011 Acts of Assembly, c. 798), SB 1477 (2011 Acts of Assembly, c. 871).

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

Attorney General; investigation of complaints. Provides that the Attorney General shall investigate complaints of alleged abuse or neglect of persons in the care or custody of others who receive payments for medical assistance under the state plan for medical assistance, regardless of whether the patient is a recipient of medical assistance. The bill also exempts records or information provided to the Office of the Attorney General's Medicaid Fraud Control Unit from disclosure pursuant to the Freedom of Information Act. HB 2034 (2011 Acts of Assembly, c. 110), SB 1214 (2011 Acts of Assembly, c. 175).

FOIA exemption; Medicaid Fraud Control Unit. Exempts records of the Medicaid Fraud Control Unit from the mandatory disclosure provisions of the Virginia Freedom of Information Act. SB 1255 (2011 Acts of Assembly, c. 535).

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

Agriculture; resource management plans. Allows owners of agricultural land who implement and maintain a resource management plan to be deemed as being in full compliance with (i) any load allocation contained in a total maximum daily load (TMDL) established under § 303(d) of the federal Clean Water Act addressing benthic, bacteria, nutrient, or sediment impairments; (ii) any requirements of the Virginia Chesapeake Bay TMDL Watershed Implementation Plan; and (iii) applicable state water quality requirements for nutrients and sediment. The presumption does not prevent or preclude enforcement of provisions pursuant to (i) a resource management plan otherwise required by law, (ii) a Virginia Pollutant Discharge Elimination System permit, (iii) a Virginia Pollution Abatement permit, or (iv) requirements of the Chesapeake Bay Preservation Act. The Soil and Water Conservation Board shall by regulation, and in consultation with the Department of Agriculture and Consumer Services and the Department of Environmental Quality, specify the criteria to be included in a resource management plan. The bill sets out minimum criteria for such regulations. The bill includes a FOIA exemption for certain proprietary records. HB 1830 (2011 Acts of Assembly, c. 781).

Office of the State Inspector General. *See summary under § 2.2-3705.3, supra.* HB 2076 (2011 Acts of Assembly, c. 798), SB 1477 (2011 Acts of Assembly, c. 871).

Freedom of Information Act; Commercial Space Flight Authority. Creates an exemption from the mandatory disclosure requirements of FOIA for (i) records relating to rate structures or charges for using the facilities of the Commercial Space Flight Authority and (ii) records provided by a private entity to the Commercial Space Flight Authority, to the extent that such records contain (a) trade

secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (b) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private entity, where, if the records were made public, the financial interest or bargaining position of the Authority or private entity would be adversely affected. The bill also contains a meeting exemption for the discussion of the above records. SB 1337 (2011 Acts of Assembly, c. 541).

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

Virginia Liaison Office; Office of Intergovernmental Affairs; powers and duties. Changes the title of the Virginia Liaison Office to the Office of Intergovernmental Affairs. The bill also reorganizes and clarifies the responsibilities of the Office and removes a general policy statement regarding the support of federal efforts to encourage pooling of health insurance by small businesses. HB 2479 (2011 Acts of Assembly, c. 827), SB 1414 (2011 Acts of Assembly, c. 867).

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

Office of the State Inspector General. *See summary under § 2.2-3705.3, supra.* HB 2076 (2011 Acts of Assembly, c. 798), SB 1477 (2011 Acts of Assembly, c. 871).

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

Department of Veterans Services; duties of Commissioner; establishment of advisory committees for veterans care centers. Removes the requirement for the Commissioner of the Department of Veterans Services to establish an advisory committee on the administration of veterans care centers established in the Commonwealth. The bill also contains a technical amendment. HB 1666 (2011 Acts of Assembly, c. 89), SB 958 (2011 Acts of Assembly, c. 147).

Virginia Freedom of Information Act; record and meeting exemption for certain commissions. *See summary under § 2.2-3705.2, supra.* HB 2041 (2011 Acts of Assembly, c. 111), SB 1296 (2011 Acts of Assembly, c. 536).

Investment in research and technology in the Commonwealth. Amends the Commonwealth Research Commercialization Fund (CRCF) to allow for awards for a matching funds program and an eminent researcher program. The bill also expands upon the Innovation and Entrepreneurship Investment Authority's (IEIA) current responsibility to develop a strategic roadmap for research in the Commonwealth. The roadmap shall identify areas of focus for research investment in the Commonwealth based upon criteria set forth in the bill, and any awards from the CRCF must fall into one of these areas of focus. The bill establishes a Research and Technology Investment Advisory Committee to assist the IEIA in making awards from the CRCF by ensuring that applications considered for awards are based upon sound science and research, are in an area of focus identified in the roadmap, and present significant potential for commercialization in the Commonwealth. HB 2324 (2011 Acts of Assembly, c. 816), SB 1485 (2011 Acts of Assembly, c. 874).

Freedom of Information Act; Commercial Space Flight Authority. *See summary under § 2.2-3705.6, supra.* SB 1337 (2011 Acts of Assembly, c. 541).

§ 2.2-3713. Proceedings for enforcement of chapter.

Freedom of Information Act; proceedings for enforcement. Requires that the party against whom a FOIA petition is brought must receive a copy of the petition at least three working days prior to the filing of the petition. The bill contains technical amendments and is a recommendation of the FOIA Council. HB 1860 (2011 Acts of Assembly, c. 783), SB 763 (2011 Acts of Assembly, c. 133).

§ 2.2-3714. Violations and penalties.

Freedom of Information Act; violations and penalties. Doubles the civil penalties imposed for willful and knowing violations of FOIA. The bill also clarifies existing law that officers, employees, and members of public bodies may be subject to the civil penalties for knowing and willful violations of FOIA. HB 1457 (2011 Acts of Assembly, c. 327).

III. Other Access-Related Legislation

Joint Resolutions

Commending Esson McKenzie Miller, Jr. Among other things, commends Mr. Miller on the occasion of his retirement from public service as one of the original members of the Virginia Freedom of Information Advisory Council, who has provided thoughtful insight as the Council encouraged and facilitated compliance with the Freedom of Information Act. HJ 963, SJ 506.

Uncodified Acts

Personal Property Tax Relief Act; transmission of certain information. Provides that the Department of Motor Vehicles shall include in the information furnished to commissioners of the revenue regarding vehicles qualifying for personal property tax relief whether the vehicle is held in a private trust for nonbusiness purposes by an individual beneficiary. HB 2244 (2011 Acts of Assembly, c. 13).

Title 2.2 Administration of Government

Public procurement; posting on website. Requires all state authorities, agencies, institutions, departments, and other units of state government to put requests for proposal and invitations to bid on the Department of General Services' website. The bill encourages, but does not require, local public bodies to likewise. HB 1592 (2011 Acts of Assembly, c. 332).

Address Confidentiality Program. Expands the Address Confidentiality Program for victims of domestic violence to all jurisdictions within the Commonwealth. The bill also provides that the Office of the Attorney General will prepare an evaluation of the statewide implementation of the program by December 31, 2012, and repeals the enactment clause that conditioned the

continuation of the program upon an appropriation for that purpose. HB 1757 (2011 Acts of Assembly, c. 97), SB 1199 (2011 Acts of Assembly, c. 172).

Title 3.2 Agriculture, Animal Care, and Food

Fertilizer; regulation of application and labeling. Among other things, provides exemptions for personal information collected in reports concerning lawn fertilizer use, and exempts records regarding certain nutrient management plans for golf courses. HB 1831 (2011 Acts of Assembly, c. 341), SB 1055 (2011 Acts of Assembly, c. 353).

Title 10.1 Conservation

Fertilizer; regulation of application and labeling. *See summary under Title 3.2, supra.* HB 1831 (2011 Acts of Assembly, c. 341), SB 1055 (2011 Acts of Assembly, c. 353).

Supplemental environmental projects. Authorizes the Virginia Soil and Water Conservation Board, the Director of the Department of Conservation and Recreation, and courts to provide for the undertaking of supplemental environmental projects through orders. Among other things, provides that nothing in the section requires the disclosure of documents which are exempt from disclosure pursuant to FOIA. HB 2368 (2011 Acts of Assembly, c. 505).

Title 15.2 Counties, Cities, and Towns

Bonds; public notice. Provides that the public notice issued prior to a public hearing held in conjunction with the issuance of bonds shall state the proposed use of the proceeds, and if there is more than one use, state the proposed uses for which more than 10 percent of the total bond proceeds is expected to be used. In addition, a similar notice shall be provided to voters prior to a referendum involving the issuance of bonds. HB 2004 (2011 Acts of Assembly, c. 590).

Special meeting notification. Allows a member of a local governing body to be notified of special meetings via electronic mail or facsimile, in lieu of in writing delivered to his home or business, if he so requests. SB 1302 (2011 Acts of Assembly, c. 180).

Title 16.1 Courts Not of Record

Law-enforcement employment; disclosure of juvenile records. Provides that a person who was adjudicated delinquent may be denied employment with the State Police or a local police department or sheriff's office where such denial is based on the nature and gravity of the offense, the time since adjudication, the time since completion of any sentence, and the nature of the job sought. The bill also provides that juvenile record information may be disseminated to the State Police or a local police department or sheriff's office for the purpose of screening a person for employment. HB 2012 (2011 Acts of Assembly, c. 622).

Title 17.1 Courts of Record

Secure remote access to court records. Provides that restrictions on the secure remote access to court records do not apply to secure access by attorneys in good standing with the Virginia State

Bar and their authorized agents and attorneys admitted to practice pro hac vice. The bill also permits secure remote access by governmental agencies authorized by the clerk. HB 1565 (2011 Acts of Assembly, c. 689), SB 1274 (2011 Acts of Assembly, c. 557).

Report of the Secretary of the Commonwealth; list of local officers. Eliminates the requirement that local governments send to the Secretary of the Commonwealth and that the Secretary of the Commonwealth publish a printed certified list of all local officers and constitutional officers. There is no need to print such a report since it is online. HB 2149 (2011 Acts of Assembly, c. 63).

Title 18.2 Crimes and Offenses Generally

Identity Theft Passport. Makes the issuance of an Identity Theft Passport under certain conditions discretionary with the Office of the Attorney General, rather than mandatory. The bill also provides that the provisions of the Government Data Collection and Dissemination Practices Act denying the right of a government agency to require the disclosure of a social security number do not apply to the Code provisions that provide for issuance of an Identity Theft Passport. HB 1714 (2011 Acts of Assembly, c. 619).

Title 19.2 Criminal Procedure

Public availability of a search warrant affidavit. Provides that the affidavit for a search warrant may be made publicly available only after the warrant that is the subject of the affidavit has been executed or 15 days after issuance of the warrant, whichever is earlier. HB 1479 (2011 Acts of Assembly, c. 196).

Sealing of order; court-ordered disclosure of electronic communication service records. Provides that when a court orders the disclosure of records of a provider of electronic communication services or remote computing services, the order and any written application or statement of facts may be sealed for 90 days for good cause shown upon application of the attorney for the Commonwealth in an ex parte proceeding and that the attorney for the Commonwealth can apply to have the sealing continue for additional 90-day periods. HB 1593 (2011 Acts of Assembly, c. 392).

Criminal history record information; certain agencies. Authorizes the Department of Rehabilitative Services and the Department for the Blind and Vision Impaired to obtain criminal history record information for the purpose of evaluating an individual's fitness for various types of employment and for the purpose of delivering comprehensive vocational rehabilitation services that will assist the individual in obtaining employment. HB 1707 (2011 Acts of Assembly, c. 449), SB 956 (2011 Acts of Assembly, c. 432).

Law-enforcement employment; disclosure of juvenile records. *See summary under Title 16.1, supra.* HB 2012 (2011 Acts of Assembly, c. 622).

Title 23 Educational Institutions

Public procurement; posting on website. *See summary under Title 2.2, supra.* HB 1592 (2011 Acts of Assembly, c. 332).

Title 24.2 Elections

Bonds; public notice. *See summary under Title 15.2, supra.* HB 2004 (2011 Acts of Assembly, c. 590).

Referendum elections; voter petition requirements. Provides that the person circulating a petition calling for a referendum election must include on each page, front and back, of the petition: his name, his residence address, and, if different, his mailing address, and the name of the organization, if any, that he represents. The bill also specifies that a voter signing the petition may provide the last four digits of his social security number rather than the entire number. HB 1646 (2011 Acts of Assembly, c. 333).

Title 32.1 Health

Death certificates; organ procurement organizations. Requires the State Registrar or the city or county registrar to disclose data about or issue a certified copy of a death certificate to a nonprofit organ, eye or tissue procurement organization that is a member of the Virginia Transplant Council for the purpose of determining the suitability of organs, eyes and tissues for donation. HB 2017 (2011 Acts of Assembly, c. 109).

Drinking water community confidence reports; publication. Requires the Board of Health to include in its regulations governing waterworks, water supplies, and pure water a process whereby waterworks serving fewer than 10,000 people may seek and the Board may grant a waiver of the requirement that the waterworks mail copies of its consumer confidence report to each customer of the waterworks at least once annually and provides for an alternate means of notifying customers of the existence of the consumer confidence report in a newspaper of general circulation or by other means as the Board may deem appropriate. HB 2173 (2011 Acts of Assembly, c. 804), SB 1024 (2011 Acts of Assembly, c. 843).

Health records; disclosure requirements. Clarifies that a health care entity is required to share, at the request of the subject of the records, health records with other health care entities, in the format requested by the individual in the manner authorized by the federal law unless (i) the electronic format is not reasonably available without additional cost to the health care entity, (ii) the records would be subject to modification in the format required, or (iii) the health care entity determines that the integrity of the records could be compromised in the electronic format requested. HB 2515 (2011 Acts of Assembly, c. 668).

Title 38.2 Insurance

Virginia Life, Accident and Sickness Insurance Guaranty Association; advertisements. Requires that the Virginia Life, Accident and Sickness Insurance Guaranty Association's summary document be posted on the Association's website. SB 916 (2011 Acts of Assembly, c. 306).

Title 52 Police (State)

Virginia Fusion Intelligence Center; review of databases. Changes the requirement that data in the Virginia Fusion Intelligence Center databases be reviewed every year to a requirement that it be reviewed every three years. Information that is determined to not be related to terrorist activity shall be removed from the database. HB 1948 (2011 Acts of Assembly, c. 467), SB 1259 (2011 Acts of Assembly, c. 556).

Title 54.1 Professions and Occupations

Schedule II drugs; identification required in filling prescriptions. Specifies that certain duties imposed upon a pharmacist in the delivery of Schedule II drugs may be undertaken by the agent of the pharmacist. The bill also provides that if the person seeking to take delivery of a drug listed on Schedule II pursuant to a prescription is not the patient for whom the drug is prescribed and the person is not known to the pharmacist or his agent, the pharmacist or his agent shall either make a photocopy or electronic copy of the person's identification or record the full name and address of the person. The bill also reduces the period of time for which the pharmacist must maintain records of the names and addresses or copies of the proof of identification of persons taking delivery of Schedule II drugs when they are not the person for whom the drug is prescribed from one year to one month. HB 2256 (2011 Acts of Assembly, c. 262), SB 1150 (2011 Acts of Assembly, c. 318).

Title 56 Public Service Companies

Public procurement; posting on website. *See summary under Title 2.2, supra.* HB 1592 (2011 Acts of Assembly, c. 332).

Title 58.1 Taxation

Publication of information contained in local payment warrants. Authorizes local governments to publish aggregated information relating to warrants paid by the locality. HB 2155 (2011 Acts of Assembly, c. 485), SB 844 (2011 Acts of Assembly, c. 597).

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APPENDIX E

Breakdown of Inquiries to Council December 1, 2010 through November 30, 2011

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 government, media, or citizens. 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, 2010 through November 30, 2011

Total number of inquiries: 1,539

A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY MONTH:													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	0	0	0	0	0	1	0	0	0	0	2	0	3
Citizens	0	0	0	0	0	0	0	1	1	1	0	1	4
News Media	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	0	0	0	0	1	0	1	1	1	2	1	7
B. TELEPHONE & EMAIL INQUIRIES, BY MONTH:													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	48	72	47	102	67	73	73	64	82	57	74	62	821
Citizens	46	51	51	64	55	54	56	29	53	27	41	33	560
News Media	8	13	15	24	23	8	12	10	9	6	9	15	152
TOTAL	102	136	113	190	145	135	141	103	144	90	124	109	1533
C. TOTAL NUMBER OF ALL INQUIRIES, BY MONTH:													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	48	72	47	102	67	74	73	64	82	57	76	62	824
Citizens	46	51	51	64	55	54	56	30	54	28	41	34	564
News Media	8	13	15	24	23	8	12	10	9	6	9	15	152
TOTAL	102	136	113	190	145	136	141	104	145	91	126	110	1540

A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:			
	Records	Meetings	Other
Government	2	1	1
Citizens	4	0	0
News Media	0	0	0
TOTAL	6	1	1
B. TELEPHONE & EMAIL INQUIRIES, BY CATEGORY:			
	Records	Meetings	Other
Government	539	194	119
Citizens	332	50	215
News Media	79	52	34
TOTAL	950	296	368
C. TOTAL NUMBER OF ALL INQUIRIES, BY CATEGORY:			
	Records	Meetings	Other
Government	541	195	120
Citizens	336	50	215
News Media	79	52	34
TOTAL	956	297	369

APPENDIX F

OPINIONS ISSUED BY THE COUNCIL JULY 2000 THROUGH NOVEMBER 2011

Written Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Government	4	20	6	8	8	4	4	2	1	3	2	3
Citizens	3	41	11	13	15	11	6	8	8	10	3	4
News Media	1	10	2	3	3	1	0	3	2	0	1	0

Informal Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Government	45	275	465	472	616	756	845	854	827	910	899	820
Public	43	324	360	331	429	687	664	674	641	618	620	560
News Media	21	169	165	198	145	209	232	167	206	150	165	152

Total Number of Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Government	49	295	471	480	624	760	849	856	828	913	901	823
Public	47	365	371	344	444	698	670	682	649	628	623	564
News Media	22	179	167	201	148	210	232	170	208	150	166	152
GRAND TOTAL	118	539	1009	1025	1216	1668	1751	1708	1685	1691	1690	1539

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Minority Report
Kathleen Dooley, Personnel Records Subcommittee

2000

Issue:

Should the General Assembly amend Virginia Code §2.2-3705.8 to make public employee salary information exempt from the mandatory disclosure requirements of the Virginia Freedom of Information Act?

Recommendation:

The General Assembly should amend Virginia Code §2.2-3705.8 to update the \$10,000 “fulcrum” or balancing point established in 1978. The \$10,000 was intended to provide a balance between a public employee’s interest in the privacy of personnel information and the public’s interest in full disclosure of government expenditures. However, the \$10,000 figure is no longer meaningful or effective.

The proposed amendment, attached, would substitute a public employee salary or rate of pay of \$30,000 per year. The proposed amendment, like current law, would not apply to the salary or rate of pay of an elected official. The name, position, job classification and expenses reimbursed for any public official or employee would continue to be public information.

Rationale:

The Virginia Freedom of Information Act establishes a general policy that all public records shall be open to public inspection. One exception to this rule protects “personnel records” from public inspection. “Personnel records” were originally interpreted to include public employee salary information. However, in 1978, the General Assembly adopted a bill that excluded public employee salary information from the “personnel records” exemption, effectively making this information public. The 1978 law established an annual salary of \$10,000 as the point at which the public interest in disclosure outweighed the individual’s interest in the privacy of personnel information. The salary of any public employee making \$10,000 or more annually has been subject to public inspection since 1978.

In 1978, the federal minimum wage was \$2.30/hour.²³ A person working full-time, 40 hours/week 52 weeks per year would earn \$4784.00 annually. Thus, the \$10,000 balance point represented wages of approximately 2 x the minimum wage in 1978. Today, the federal minimum wage is \$7.25/hour, so a full time minimum wage earner makes \$15,080.00 annually. The \$10,000 balance point therefore no longer serves to shield any full-time public employee’s salary from public scrutiny.

²³ United States Department of Labor, Wage and Hour Division, “Changes in Basic Minimum Wages in Non-farm Employment under State Law: Selected Years 1968 to 2011.”

There is a substantial public interest in access to public employee salary information. Fundamentally, it represents a governmental expenditure of public money, and employee salaries typically make up a significant component of any government agency's budget. Access to this information assists the public in determining whether compensation is fair – whether public employees are overpaid or underpaid – and how public compensation compares to private sector compensation. Public scrutiny of this information can serve to expose instances of nepotism, corruption, or discrimination. Public employees should be counted on this side of the balance – they share these interests in access to public salary information.

The Internet has transformed the nature of “public information.” In the past, this would have meant that the salaries of the top-earning public employees might have been published in the newspaper. Now, this information is posted on websites for literally the whole world to see.²⁴ Public access is not limited to residents of a locality or state, but is now available to people in every country on the planet.

The 1978 legislation recognized a public employee's privacy interest in salary information. Salary information is personal in nature, and would be classified as “personnel” information except for Va. Code §2.2-3705.8. The employee has a privacy interest, an interest in being free from simple voyeurism, and an interest in personal dignity all at stake. Publication of this information potentially increases the public employee's exposure to identity theft, as it is a very specific data point linked to the employee's name which, combined with additional information about the employee, could be used for identity or credit theft. Online publication of salary information is a game-changer from the standpoint of the public employee with respect to all of these interests in privacy.

Virginia is in a minority of states that protect some public employee salary information from public disclosure. Hawaii does not disclose exact salaries of any civil service employees, but does disclose the salary range for the position an individual holds.²⁵ South Carolina makes salaries of full time employees of \$50,000 or more public, as are the salaries of all part-time employees. Salaries for employees making less than \$50,000 per year are reported within a range of \$4,000. Salaries of employees making less than \$30,000 per year are reported only as a range of allowable salaries for the position. The other states make all public employee salary information public.²⁶

Virginia has established its public policy and precedent through the use of the \$10,000 balancing point. This legislation should be updated in order to implement that public policy for the current

²⁴ See, for example, the website of the Texas Tribune, which publishes annual base salaries of 660,000 public employees, including the largest state agencies, universities, public schools, cities and mass transit agencies. The Kansas City Star website posts a collection of databases of public employee salary information. The Sacramento (California) Bee website posts salary information for state employees. The Alabama Department of Finance publishes monthly payroll information. Chicago Mayor Rahm Emanuel has posted all city employee name and salary information, as has the Empire Center for New York State Policy.

²⁵ “State Laws Regarding Disclosure of Public Employee Salaries: A Summary,” Virginia Coalition for Open Government.

²⁶ 5 *Id.*

era. The legislature should retain the simple structure of a salary benchmark, but update it to reflect current salary levels. A figure of \$30,000 is recommended as a modern equivalent to the public sector jobs, and Virginia law recognizes a privacy interest in salary information. Updating the \$10,000 balancing point would protect the privacy interests of the lowest-paid public employees. The General Assembly and the FOIA Council should continue to monitor the privacy interests implicated by the publication of salary data on the Internet.

Proposed Amendment to Virginia Code § 2.2-3705.8:

A. Neither any provision of this chapter nor any provision of Chapter 38 (§ 2.2-3800 et seq.) of this title shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1; (ii) records of the position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees.

The provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is *\$30,000* or less.

B. Nothing in this chapter shall be construed as denying public access to the nonexempt portions of a report of a consultant hired by or at the request of a local public body or the mayor or chief executive or administrative officer of such public body if (i) the contents of such report have been distributed or disclosed to members of the local public body or (ii) the local public body has scheduled any action on a matter that is the subject of the consultant's report. **Issue:**

Should the General Assembly amend Virginia Code §2.2-3705.8 to make public employee salary information exempt from the mandatory disclosure requirements of the Virginia Freedom of Information Act?

Recommendation:

The General Assembly should amend Virginia Code §2.2-3705.8 to update the \$10,000 “fulcrum” or balancing point established in 1978. The \$10,000 was intended to provide a balance between a public employee’s interest in the privacy of personnel information and the public’s interest in full disclosure of government expenditures. However, the \$10,000 figure is no longer meaningful or effective.

The proposed amendment, attached, would substitute a public employee salary or rate of pay of \$30,000 per year. The proposed amendment, like current law, would not apply to the salary or rate of pay of an elected official. The name, position, job classification and expenses reimbursed for any public official or employee would continue to be public information.

Rationale:

The Virginia Freedom of Information Act establishes a general policy that all public records shall be open to public inspection. One exception to this rule protects “personnel records” from public inspection. “Personnel records” were originally interpreted to include public employee salary information. However, in 1978, the General Assembly adopted a bill that excluded public employee salary information from the “personnel records” exemption, effectively making this information public. The 1978 law established an annual salary of \$10,000 as the point at which the public interest in disclosure outweighed the individual’s interest in the privacy of personnel

information. The salary of any public employee making \$10,000 or more annually has been subject to public inspection since 1978.

In 1978, the federal minimum wage was \$2.30/hour.²⁷ A person working full-time, 40 hours/week 52 weeks per year would earn \$4784.00 annually. Thus, the \$10,000 balance point represented wages of approximately 2 x the minimum wage in 1978. Today, the federal minimum wage is \$7.25/hour, so a full time minimum wage earner makes \$15,080.00 annually. The \$10,000 balance point therefore no longer serves to shield any full-time public employee's salary from public scrutiny.

There is a substantial public interest in access to public employee salary information. Fundamentally, it represents a governmental expenditure of public money, and employee salaries typically make up a significant component of any government agency's budget. Access to this information assists the public in determining whether compensation is fair - whether public employees are overpaid or underpaid - and how public compensation compares to private sector compensation. Public scrutiny of this information can serve to expose instances of nepotism, corruption, or discrimination. Public employees should be counted on this side of the balance - they share these interests in access to public salary information.

The Internet has transformed the nature of "public information." In the past, this would have meant that the salaries of the top-earning public employees might have been published in the newspaper. Now, this information is posted on websites for literally the whole world to see.²⁸ Public access is not limited to residents of a locality or state, but is now available to people in every country on the planet.

The 1978 legislation recognized a public employee's privacy interest in salary information. Salary information is personal in nature, and would be classified as "personnel" information except for Va. Code §2.2-3705.8. The employee has a privacy interest, an interest in being free from simple voyeurism, and an interest in personal dignity all at stake. Publication of this information potentially increases the public employee's exposure to identity theft, as it is a very specific data point linked to the employee's name which, combined with additional information about the employee, could be used for identity or credit theft. Online publication of salary information is a game-changer from the standpoint of the public employee with respect to all of these interests in privacy.

Virginia is in a minority of states that protect some public employee salary information from public disclosure. Hawaii does not disclose exact salaries of any civil service employees, but does disclose

²⁷ United States Department of Labor, Wage and Hour Division, "Changes in Basic Minimum Wages in Non-farm Employment under State Law: Selected Years 1968 to 2011."

²⁸ See, for example, the website of the Texas Tribune, which publishes annual base salaries of 660,000 public employees, including the largest state agencies, universities, public schools, cities and mass transit agencies. The Kansas City Star website posts a collection of databases of public employee salary information. The Sacramento (California) Bee website posts salary information for state employees. The Alabama Department of Finance publishes monthly payroll information. Chicago Mayor Rahm Emanuel has posted all city employee name and salary information, as has the Empire Center for New York State Policy.

the salary range for the position an individual holds.²⁹ 3 South Carolina makes salaries of full time employees of \$50,000 or more public, as are the salaries of all part-time employees. Salaries for employees making less than \$50,000 per year are reported within a range of \$4,000. Salaries of employees making less than \$30,000 per year are reported only as a range of allowable salaries for the position. The other states make all public employee salary information public.³⁰

Virginia has established its public policy and precedent through the use of the \$10,000 balancing point. This legislation should be updated in order to implement that public policy for the current era. The legislature should retain the simple structure of a salary benchmark, but update it to reflect current salary levels. A figure of \$30,000 is recommended as a modern equivalent to the public sector jobs, and Virginia law recognizes a privacy interest in salary information. Updating the \$10,000 balancing point would protect the privacy interests of the lowest-paid public employees. The General Assembly and the FOIA Council should continue to monitor the privacy interests implicated by the publication of salary data on the Internet.

Proposed Amendment to Virginia Code § 2.2-3705.8:

A. Neither any provision of this chapter nor any provision of Chapter 38 (§ 2.2-3800 et seq.) of this title shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1; (ii) records of the position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees.

The provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is *\$30,000* or less.

B. Nothing in this chapter shall be construed as denying public access to the nonexempt portions of a report of a consultant hired by or at the request of a local public body or the mayor or chief executive or administrative officer of such public body if (i) the contents of such report have been distributed or disclosed to members of the local public body or (ii) the local public body has scheduled any action on a matter that is the subject of the consultant's report.

²⁹ “State Laws Regarding Disclosure of Public Employee Salaries: A Summary,” Virginia Coalition for Open Government.

³⁰ 5 *Id.*

