

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**

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

**COMMONWEALTH OF VIRGINIA
DECEMBER 2012**

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

Senator Richard H. Stuart, Chair
Delegate Sal R. Iaquinto, Vice Chair
Christopher Ashby
Kathleen Dooley
Stephanie Hamlett
Edward Jones
Forrest M. "Frosty" Landon
James Schliessman
John G. Selph
Robert L. Tavenner
Sandra G. Treadway
George T. Whitehurst

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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 2012

INTRODUCTION

"Nothing could be more axiomatic for a democracy than the principle of exposing the process of government to relentless public criticism and scrutiny."

Rourke, Francis E. 1960. Administrative Secrecy: A Congressional Dilemma.
The American Political Science Review 54 (3):684-694

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 twelfth 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 12 year history, the Council has provided more than 17,000 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials; and has conducted approximately 665 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, 2011 through November 30, 2012-- the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. The three bills referred to the Council by the General Assembly are as follows:

1. **HB 397 (Hope) Virginia Parole Board; exceptions to the Freedom of Information Act.** Requires guidance documents of the Board to be available as public records under the Freedom of Information Act. The bill has a delayed effective date to give the Council an opportunity to review the legislation and report on its implementation.
2. **HB 1105 (Greason) Freedom of Information Act; electronic communication meetings.** Revises the rules for which meetings of state public bodies may be conducted by audio or video means. The bill provides that (i) at least one member of the public body must be physically assembled at the principal meeting location, (ii) the quorum of the public body is determined by members participating in person or by electronic means in the meeting, (iii) a member of the public shall pay for the documented marginal cost that a public body may incur in expanding public participation to the meeting, and (iv) the number of meetings a public body may conduct through electronic communications means is limited to 50 percent of its regular meetings in any calendar year. The bill contains technical amendments.

3. **HB 1149 (Dudenhefer) Freedom of Information Act; electronic communication meetings by local and regional public bodies.** Expands the authority for the conduct of electronic communication meetings to all public bodies. Currently, local public bodies are prohibited from conducting public meetings in this manner, except when the Governor declares a state of emergency. The bill contains technical amendments.

The Council created two subcommittees to study the referred bills. The Parole Board Subcommittee, consisting of Council members Robert Tavenner, James Schliessman, and Frosty Landon, studied HB 397 during the 2012 interim. The second subcommittee, the Electronic Meetings Subcommittee, consisting of Council members Craig Fifer, John Selph, and George Whitehurst,³ examined HB 1105 and HB 1149. The Council also continued its Criminal Investigative Records Subcommittee, consisting of Council members Craig Fifer, James Schliessmann, John Selph, and Sandra Treadway,⁴ originally created in 2010 and reconstituted in 2011, to address issues related to criminal and law-enforcement records.

The Council worked with Delegate Hope and the Virginia Parole Board in its examination of HB 397. Delegate Hope told the Council that he introduced HB 397 in order to allow for public inspection of guidance documents regarding the Parole Board's policies and procedures. He pointed out concerns about restrictions on civil liberties, the costs of incarceration, and that currently no policy or procedural documents are available from the Parole Board.⁵ Steve Northup, from the law firm of Troutman Sanders, elaborated that based on his experience in litigation, the Parole Board generally operates in secrecy, and that what published information is available is not helpful. He further noted concerns for prisoners who were convicted before the abolition of discretionary parole in Virginia, effective in 1995. He related that many such prisoners were given very lengthy sentences with the expectation that they would be released on parole once eligible, but many have not been so released. The result is that those convicted before 1995 often serve longer sentences than those convicted after 1995, for the same offenses. He also noted that the bill would not only address documents about granting discretionary parole, but would also make available guidance documents about the revocation of parole. Delegate Hope and Mr. Northup both indicated that the bill was not intended to reach individual case information, but only general policy guidelines and procedures. Carla Peterson also spoke to the bill, as Director of Virginia CURE, an advocacy organization for prisoners and their families. She indicated they supported the bill because they would like to know how the Parole Board makes its decisions to ensure the process is fair. Mr. Fifer stated that the general approach under FOIA was to make all records public, and to place the burden on government to show why a record should be exempt. With that in mind, he suggested a possible approach to this issue would be to make the Parole Board subject to FOIA just as any other public body would be, but to give it the exemptions it would need both for meetings and records, particularly those involving the discussion of individual case files and criminal history.

³ Having served two consecutive four-year terms, Mr. Fifer was term limited as of July 1, 2012. After he left the Council, the Electronic Meetings Subcommittee consisted of Council members Kathleen Dooley, Stephanie Hamlett, John Selph, and George Whitehurst.

⁴ After Mr. Fifer left the Council due to term limits, the Criminal Investigative Records Subcommittee consisted of Council members James Schliessmann, John Selph, and Sandra Treadway.

⁵ With certain limited exceptions, the Parole Board currently is not subject to FOIA, pursuant to subdivision A 1 of § 2.2-3703.

The Parole Board Subcommittee met once in 2012 to consider HB 397 (Hope). That meeting was attended by the Chair, William Muse, and Vice-Chair, Karen Brown, of the Parole Board, who expressed their opposition to the bill. Mr. Muse stated that the Parole Board is already required to publish on its website its policies, procedures, and actions regarding the parole of prisoners.⁶ The Subcommittee then recommended that the patron and supporters of the bill meet with representatives of the Parole Board, as it was unclear to the Subcommittee what was the purpose of the bill in light of current law requiring certain disclosures from the Parole Board. Delegate Hope and Mr. Muse met on August 6, 2012, and agreed that they could work together to craft future legislation. In light of that agreement, the Subcommittee reported to the Council that its work on the matter was done, unless the parties requested further assistance. That being the case, the Council made no recommendation on HB 397.

The Council examined the issues raised by HB 1149. Delegate Dudenhefer advised the Council that he introduced HB 1149 to allow local and regional bodies to conduct meetings by electronic means. He noted that technology has come a long way in recent years, and he had personal experience with world-wide electronic conferences. As an example, he described a recent dinner in Virginia where the guest speaker was in Afghanistan. He noted that at times the restrictions on electronic meetings prevent good people from running for office or other public service due to scheduling conflicts that would not allow them to attend meetings in person. He further indicated he was open to the idea of having a test case to see how the bill would work if implemented on a limited basis. Mark Flynn, speaking on behalf of the Virginia Municipal League (VML) and the Virginia Association of Counties (VACo), indicated support for the approach of looking at the ability to use technology to conduct meetings. Delegate Iaquinto asked if there were problems getting quorums assembled at the local level. Mr. Flynn indicated it was sometimes a problem, but not all the time. Delegate Dudenhefer stated that from his experience as a former Board of Supervisors member, Board meetings were usually not a problem, but there were problems with committee meetings and in just getting good people with demanding jobs to serve at all.

Reviewing HB 1105, the Council was advised that currently only state public bodies are permitted to conduct electronic meetings as a general rule,⁷ because state officials are often geographically separated whereas officials serving on local and regional bodies generally live in the same area. HB 1105 would eliminate the requirement to have a quorum physically assembled in one location, and would require the public to pay to participate in public meetings by electronic means. A policy statement adopted by the Council in 2008 by a vote of 6-5 generally expressed support for face-to-face meetings but recognized continuing improvements in communications technology.⁸ The Council established an Electronic Meetings Subcommittee each year from 2005 through 2008, which over those years recommended loosening the requirements for conducting electronic meetings.

⁶ See Va. Code § 53.1-136.

⁷ There are certain limited exceptions where a local or regional public body, or individual members thereof, may participate in meetings by electronic means, as set forth in §§ 2.2-3708 and 2.2-3708.1.

⁸ The discussion, vote, and full text of the statement are set forth in the minutes for the June 9, 2008 meeting of the Council, available on the Council website.

The Electronic Meetings Subcommittee met five times in 2012. It decided not to recommend either HB 1105 or HB 1149 as written, but did consider several alternative drafts. At its last meeting the Subcommittee voted to recommend two drafts to the full Council: one draft would allow state level public bodies that are solely advisory in nature to conduct electronic meetings without a physical quorum present in a single location, if certain other conditions are met; the other draft would expand individual participation by electronic means to include "personal matters" in the same subdivision that currently allows such participation in the case of personal emergencies. The Subcommittee reported these recommendations to the Council on December 17, 2012. The Council voted to recommend the content of both drafts to the 2013 Session of the General Assembly, but to have staff consolidate the two drafts into one, as both are germane to the subject matter of electronic meetings.

The Council's Criminal Investigative Records Subcommittee⁹, 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). In 2011, 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 (VPA, the Virginia Coalition for Open Government, the Virginia Association of Chiefs of Police, the Virginia State Police, the Virginia Sheriffs' Association, VML, VACo, as well as law enforcement representatives from the Culpeper County Sheriff's Office and Fairfax County Police Department) three times in 2011, using a draft prepared by VPA as a vehicle for discussion at these meetings. The workgroup did not reach agreement on a legislative proposal, but agreed that work on this topic should continue in 2012. While no bill was referred on this topic by the General Assembly in 2012, the Subcommittee did continue the work begun in 2010 and 2011. VPA prepared a position paper regarding issues of concern in the current law, which was posted on the Council website and shared with the other interested parties. The stakeholders shared the position paper with their constituents to get their reactions. The Subcommittee met three times in 2012 with participation from the stakeholders, and at its last meeting voted to recommend an amended draft that would reorganize the existing law into subsections addressing (A) required, discretionary, and prohibited releases; (B) noncriminal records; (C) 911 calls; and (D) conflict resolution. The only substantive changes intended were to add subsection (C) to address 911 calls explicitly, and to amend the existing exemption for noncriminal records to allow it to be used by all public bodies engaged in law-enforcement activities. Under current law, the noncriminal records exemption applies only to records of sheriffs and local police departments. Due to concerns about a case recently granted an appeal to the Virginia Supreme Court,¹⁰ the draft also clarifies that law enforcement personnel records are subject to the specific exemption for background investigations and other administrative investigations under § 2.2-3706, as well as the general personnel records exemption in § 2.2-3705.1, but such personnel records are not governed by the exemption for noncriminal records in § 2.2-3706. The Subcommittee reported its recommendation to the Council on December 17, 2012. The Council then voted to recommend the draft to the 2013 Session of the General Assembly.

⁹ Council members Craig Fifer, Sandy Treadway, John Selph, and James Schliessman served on the Subcommittee.

¹⁰ *Harmon v. Ewing*, *infra*.

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.¹¹ 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.¹² 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, and any effect 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). The Fourth Circuit issued its opinion on February 1, 2012, affirming the judgment of the Eastern District. The case was appealed to the Supreme Court of the United States, which granted certiorari on October 5, 2012 (Case No. 12-17). As of this writing, briefs have been filed but the case has not yet been argued before the Supreme Court. 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 June 7, 2012 the Virginia Supreme Court decided the case of *Hill v. Fairfax County School Board*.¹³ Ms. Hill contended that the School Board had conducted an improper closed meeting by using electronic mail to discuss public business concerning the closure of a school in advance of a public meeting. The trial court ruled in favor of the School Board, and the Supreme Court affirmed that decision, finding that the School Board had not violated FOIA because the electronic mail in question was sent from member-to-member on a one-on-one basis, involving no more than two members at a time, and did not generate any simultaneous group discussions that would constitute a meeting subject to FOIA.

On September 7, 2012 the Virginia Supreme Court granted an appeal in the case of *Harmon v. Ewing* (Record No. 121118), which was appealed from a decision of the Circuit Court for the City of Williamsburg & James City County. It does not appear that the Circuit Court decision has been reported. The three assignments of error in this case include issues over the use of the personnel exemption by law enforcement agencies; whether a request for information, as opposed to a request for an existing public record, falls within the ambit of FOIA; and the granting of attorney's

¹¹ *McBurney v. Mims*, (Mem. opinion)(2009 U.S. Dist. LEXIS 36971)(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.)

¹² *McBurney v. Cuccinelli*, 780 F.Supp.2d 439 (E.D.Va. 2011).

¹³ 284 Va. 306, 727 S.E.2d 75.

fees by the Circuit Court. As of the time of this writing, it appears that briefs have been filed but the case has not yet been docketed for oral argument.

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 2012, Council staff conducted 78 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 1,408 inquiries. Of these inquiries, five resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: three by government officials, none by media representatives, and two by citizens. The remaining requests were for informal opinions, given via telephone and e-mail. Of these requests, 846 were made by government officials, 433 by citizens, and 124 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 2012 Session. The General Assembly passed a total of 10 bills amending FOIA during the 2012 Session. Of the 10 bills, two bills create new records exemptions as follows:

- Creates an exemption for personal information in constituent correspondence, unless the correspondence relates to the transaction of public business. HB 141 (Cole) amending § 2.2-3705.7;
- Creates an exemption for records of a fire/EMS company or fire/EMS department, to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties. SB 193 (Miller) amending § 2.2-3705.2.

Eight bills amend existing provisions of FOIA as follows:

- Establishes the Virginia All-Payer Claims Database. Among other changes, amends an existing exemption for certain records disclosed to the State Health Commission to exempt certain records of the Virginia All-Payer Claims Database as well. HB 343 (O'Bannon) and SB 135 (Puller) amending § 2.2-3705.6;
- Provides that a member of a public body shall be permitted to attend a closed meeting held by any of its committees or subcommittees, provided such member does not

participate in any discussions held by the committee or subcommittee conducting the closed meeting. The bill requires that the minutes of the committee or subcommittee include the identity of such member who attended the closed meeting. HB 480 (Albo) amending § 2.2-3712;

- Changes the terminology used for mental health and developmental services, including technical changes within several existing provisions of FOIA. HB 552 (Garrett) and SB 387 (Martin) amending §§ 2.2-3705.3, 2.2-3705.5, and 2.2-3711;
- Reorganizes the executive branch of state government. The bill contains numerous technical amendments to FOIA and other laws to accomplish this reorganization. HB 1291 (Gilbert) and SB 678 (McDougle) amending §§ 2.2-3705.2, 2.2-3705.3, 2.2-3705.5, and 2.2-3711;
- Amends an existing exemption to include certain information furnished to the Attorney General under the Virginia Fraud Against Taxpayers Act. SB 451 (Vogel) amending § 2.2-3705.5.

A more detailed report of the bills discussed above and those FOIA and other public access bills passed during the 2012 Session appears on the Council's website and is attached as Appendix D to this report.

In 2012, the Council welcomed Christopher Ashby to its ranks. Mr. Ashby, appointed by the Governor, will serve a four-year term. Senator Stuart was elected chair and Delegate Iaquinto continued to serve as vice chair. The Council also said goodbye to Council member Craig Fifer. Mr. Fifer, a citizen member and gubernatorial appointee to the Council, dutifully served on the Council from July 2004 until June 2012. During his tenure, Mr. Fifer chaired several Council subcommittees, including Fifth Response to FOIA Requests, Electronic Meetings, Public Records, and Criminal Investigative Records. Mr. Fifer's contributions to the Council and to the cause of meaningful public access have been greatly appreciated.

WORK OF THE COUNCIL

May 23, 2012

The Council held its first meeting of 2012.¹⁴ This meeting was an organizational meeting, which included a 2012 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.

Legislative Update

The General Assembly passed a total of 10 bills amending FOIA during the 2012 Session.

¹⁴ All Council members were present, except Senator Stuart, Msrs. Jones and Whitehurst.

Of the 10 bills, two bills create new records exemptions as follows:

- Creates an exemption for personal information in constituent correspondence, unless the correspondence relates to the transaction of public business. **HB 141 (Cole)** amending § 2.2-3705.7;
- Creates an exemption for records of a fire/EMS company or fire/EMS department, to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties. **SB 193 (Miller)** amending § 2.2-3705.2.

Eight bills amend existing provisions of FOIA as follows:

- Establishes the Virginia All-Payer Claims Database. Among other changes, amends an existing exemption for certain records disclosed to the State Health Commission to exempt certain records of the Virginia All-Payer Claims Database as well. **HB 343 (O'Bannon)** and **SB 135 (Puller)** amending § 2.2-3705.6;
- Provides that a member of a public body shall be permitted to attend a closed meeting held by any of its committees or subcommittees, provided such member does not participate in any discussions held by the committee or subcommittee conducting the closed meeting. The bill requires that the minutes of the committee or subcommittee include the identity of such member who attended the closed meeting. **HB 480 (Albo)** amending § 2.2-3712;
- Changes the terminology used for mental health and developmental services, including technical changes within several existing provisions of FOIA. **HB 552 (Garrett)** and **SB 387 (Martin)** amending §§ 2.2-3705.3, 2.2-3705.5, and 2.2-3711;
- Reorganizes the executive branch of state government. The bill contains numerous technical amendments to FOIA and other laws to accomplish this reorganization. **HB 1291 (Gilbert)** and **SB 678 (McDougle)** amending §§ 2.2-3705.2, 2.2-3705.3, 2.2-3705.5, and 2.2-3711;
- Amends an existing exemption to include certain information furnished to the Attorney General under the Virginia Fraud Against Taxpayers Act. **SB 451 (Vogel)** amending § 2.2-3705.5.

The complete 2012 Legislative Update is available on the Council's website.

Bill Referred for Study

The Council next reviewed the three bills referred to it by the General Assembly for additional study. A summary of each referred bill appears below.¹⁵

¹⁵ **HB 397 (Hope) Virginia Parole Board; exceptions to the Freedom of Information Act.** Requires guidance documents of the Board to be available as public records under the Freedom of Information Act. The bill has a delayed effective date to give the Council an opportunity to review the legislation and report on its implementation.

HB 1105 (Greason) Freedom of Information Act; electronic communication meetings. Revises the rules for which meetings of state public bodies may be conducted by audio or video means. The bill provides that (i) at least one member of the public body must be physically assembled at the principal meeting location, (ii) the quorum of the public body is determined by members participating in person or by electronic means in the meeting, (iii) a member of the public shall pay for the documented marginal cost that a public body may incur in expanding public participation to the meeting, and (iv) the number of meetings a public body may conduct through electronic communications means is limited to 50 percent of its regular meetings in any calendar year. The bill contains technical amendments.

HB 1149 (Dudenhefer) Freedom of Information Act; electronic communication meetings by local and regional public bodies. Expands the authority for the conduct of electronic communication meetings to all public bodies. Currently, local public bodies are prohibited from conducting public meetings in this manner, except when the Governor declares a state of emergency. The bill contains technical amendments.

- HB 397 (Hope)--FOIA; guidance documents of the Virginia Parole Board.
- HB 1105 (Greason)--FOIA; electronic communication meetings.
- HB 1149 (Dudenhefer)--FOIA; electronic communication meeting by local and regional bodies.

Delegate Hope was present at the meeting and told the Council that he introduced HB 397 in order to allow for public inspection of guidance documents regarding the Parole Board's policies and procedures. He pointed out concerns about restrictions on civil liberties, the costs of incarceration, and that currently no policy or procedural documents are available from the Parole Board.¹⁶ Steve Northup, from the law firm of Troutman Sanders, elaborated that based on his experience in litigation, the Parole Board generally operates in secrecy, and that what published information is available is not helpful. He further noted concerns for prisoners who were convicted before the abolition of discretionary parole in Virginia, effective in 1995. He related that many such prisoners were given very lengthy sentences with the expectation that they would be released on parole once eligible, but many have not been so released. The result is that those convicted before 1995 often serve longer sentences than those convicted after 1995, for the same offenses. He also noted that the bill would not only address documents about granting discretionary parole, but would also make available guidance documents about the revocation of parole. Delegate Hope and Mr. Northup both indicated that the bill was not intended to reach individual case information, but only general policy guidelines and procedures. Carla Peterson also spoke to the bill, as Director of Virginia CURE, an advocacy organization for prisoners and their families. She indicated they supported the bill because they would like to know how the Parole Board makes its decisions to ensure the process is fair. Mr. Fifer stated that the general approach under FOIA was to make all records public, and to place the burden on government to show why a record should be exempt. With that in mind, he suggested a possible approach to this issue would be to make the Parole Board subject to FOIA just as any other public body would be, but to give it the exemptions it would need both for meetings and records, particularly those involving the discussion of individual case files and criminal history.

Delegate Dudenhefer was also present at the meeting and advised the Council that he introduced HB 1149 to allow local and regional bodies to conduct meetings by electronic means. He noted that technology has come a long way in recent years, and he had personal experience with worldwide electronic conferences. As an example, he described a recent dinner in Virginia where the guest speaker was in Afghanistan. He noted that at times the restrictions on electronic meetings prevent good people from running for office or other public service due to scheduling conflicts that would not allow them to attend meetings in person. He further indicated he was open to the idea of having a test case to see how the bill would work if implemented on a limited basis. Mark Flynn, speaking on behalf of VML and VACo, indicated support for the approach of looking at the ability to use technology to conduct meetings. Delegate Iaquinto asked if there were problems getting quorums assembled at the local level. Mr. Flynn indicated it was sometimes a problem, but not all the time. Delegate Dudenhefer stated that from his experience as a former Board of Supervisors member, Board meetings were usually not a problem, but there were problems with committee meetings and in just getting good people with demanding jobs to serve at all.

¹⁶ With certain limited exceptions, the Parole Board currently is not subject to FOIA, pursuant to subdivision A 1 of § 2.2-3703.

Delegate Greason was unable to attend, but indicated that he was interested in participating in the work of the Council as it relates to HB 1105. Staff indicated that currently, only state public bodies are permitted to conduct electronic meetings as a general rule,¹⁷ because state officials are often geographically separated whereas officials serving on local and regional bodies generally live in the same area. Staff related that the Council had a continuing Electronic Meetings Subcommittee from 2005 through 2008, which over those years recommended loosening the requirements for conducting electronic meetings. Staff highlighted that HB 1105 would eliminate the requirement to have a quorum physically assembled in one location, and would require the public to pay to participate in public meetings by electronic means. As further background, staff described a policy statement adopted by the Council in 2008 by a vote of 6-5 that generally expressed support for face-to-face meetings but recognized continuing improvements in communications technology.¹⁸

The Council created two subcommittees to study the referred bills. The Parole Board Subcommittee, consisting of Council members Robert Tavenner, James Schliessman, and Frosty Landon, will study HB 397 during the 2012 interim. The second subcommittee, the Electronic Meetings Subcommittee, consisting of Council members Craig Fifer, John Selph, and George Whitehurst will study HB 1105 and HB 1149. Staff will check with Senator Stuart and Ed Jones about serving on either or both of the above subcommittees.

Other Business

Craig Fifer briefed the Council on the work of the Criminal Investigative Subcommittee, which is continuing to work in 2012. Mr. Fifer told the Council that the Criminal Investigative Records stakeholders group will continue to meet. Included in the work of the stakeholders group will be the consideration of the release of adult arrestee photographs ("mug shots") and access to criminal history records.

Delegate Iaquinto commended Mr. Fifer for his service to the Council. Delegate Iaquinto noted that during his tenure on the Council, Mr. Fifer has participated in and chaired several subcommittees, and has made other significant contributions to the work of the Council and to open government in general. Mr. Fifer's second four-year term expires on July 1, 2012 and he is not eligible for reappointment according to the Council's enabling statute. Mr. Fifer will continue to serve on the Council until his successor is appointed by the Governor.

Delegate Iaquinto noted that at the next Council meeting, the election of the chair and vice-chair will take place. Delegate Iaquinto next called for public comment and there was none.

The Council by consensus agreed that a resolution commending Senator R. Edward Houck for his years of service to the Council be prepared and presented to Senator Houck at a subsequent Council meeting that is convenient for Senator Houck.

¹⁷ There are certain limited exceptions where a local or regional public body, or individual members thereof, may participate in meetings by electronic means, as set forth in §§ 2.2-3708 and 2.2-3708.1.

¹⁸ The discussion, vote, and full text of the statement are set forth in the minutes for the June 9, 2008 meeting of the Council, available on the Council website.

July 2, 2012

The Council held its second meeting of 2012.¹⁹ This meeting was held to elect a chair and vice-chair and to hear subcommittee reports.

Election of Chair and Vice-Chair

As the first order of business, the Council elected Senator Stuart as Chair (all members present voted unanimously in favor, except Senator Stuart abstained) and Delegate Iaquinto as Vice-Chair (by unanimous vote).

Subcommittee Reports

Electronic Meetings Subcommittee

Mr. Fifer, Chair of the Electronic Meetings Subcommittee, reported that the Subcommittee held its first meeting on Thursday, June 28, 2012 to consider HB 1105 (Greason) and HB 1149 (Dudenhefer).²⁰ He observed that the Subcommittee met periodically to review questions regarding electronic meetings, and that there were two schools of thought, one favoring the status quo, the other favoring expansion of electronic meetings. In response to an inquiry from Delegate Iaquinto, Mr. Fifer elaborated that the first view reflects a preference for face-to-face meetings, while the second reflects practical considerations where technology may allow participation when it is difficult to get together physically. The Subcommittee asked staff to query stakeholders who used electronic meetings to identify problems based on their experience. The Subcommittee will meet again to continue its discussions. Mr. Landon noted that the Joint Committee on Technology and Science (JCOTS) also had a subcommittee on electronic meetings, but that the JCOTS subcommittee had not yet met.

Criminal Investigative Records Subcommittee

Mr. Fifer, Chair of the Criminal Investigative Records Subcommittee, reported that the Subcommittee also held its first meeting on Thursday, June 28, 2012 to continue the work it began in 2010 and 2011 considering access to criminal investigative files and other law enforcement records. Mr. Fifer identified four major issues considered by the Subcommittee, in descending order of the likelihood of achieving a consensus: (1) rewriting existing § 2.2-3706 for clarity without substantive changes; (2) amending existing law to address 911 records explicitly; (3) establishing a clear time limit to produce criminal incident information, as there as conflicting interpretations of the current law; and (4) addressing whether criminal case files should ever be opened, and if so, under what circumstances and to what extent. He further reported that the Subcommittee had asked the interested stakeholders to poll their constituents for practical examples and suggestions regarding these issues, to be considered at the next meeting of the Subcommittee. Mr. Fifer also encouraged other Council members to consider participating in the work of the Electronic

¹⁹ Council members Sen. Stuart, Del. Iaquinto, Ms. Hamlett, and Mssrs. Fifer, Jones, Landon, Schliessmann, Selph and Tavenner were present; Ms. Dooley, Dr. Treadway, and Mr. Whitehurst were absent.

²⁰ **HB 1105 (Greason) Freedom of Information Act; electronic communication meetings.** Revises the rules for which meetings of state public bodies may be conducted by audio or video means. The bill provides that (i) at least one member of the public body must be physically assembled at the principal meeting location, (ii) the quorum of the public body is determined by members participating in person or by electronic means in the meeting, (iii) a member of the public shall pay for the documented marginal cost that a public body may incur in expanding public participation to the meeting, and (iv) the number of meetings a public body may conduct through electronic communications means is limited to 50 percent of its regular meetings in any calendar year. The bill contains technical amendments.

HB 1149 (Dudenhefer) Freedom of Information Act; electronic communication meetings by local and regional public bodies. Expands the authority for the conduct of electronic communication meetings to all public bodies. Currently, local public bodies are prohibited from conducting public meetings in this manner, except when the Governor declares a state of emergency. The bill contains technical amendments.

Meetings and Criminal Investigative Records Subcommittees, as his second term on the Council had expired July 1, 2012, and he was therefore term limited.²¹ Mr. Selph thanked Mr. Fifer for his service.

Parole Board Subcommittee

Mr. Landon, Chair of the Parole Board Subcommittee, reported that the Subcommittee held its first meeting this morning, July 2, 2012 to consider HB 397 (Hope).²² The Subcommittee heard from representatives from the Parole Board, the Virginia Coalition for Open Government (VCOG), and VPA, but the patron and advocates for HB 397 were not present. The Subcommittee decided it would be best if the patron, representatives of the Parole Board, and interested parties would meet together to discuss the goals and intent of the bill and then report back to the Subcommittee. Mr. Landon reported that based on today's meeting, it appears that there already is access to the Parole Board's policies and procedures, therefore the objectives of HB 397 are unclear. Additionally, the exemption for parole boards has existed since FOIA was first enacted in 1968, and it was not clear to the Subcommittee why change is needed now.

Other Business

Staff noted that the 2012 version of FOIA which went into effect on July 1, 2012, has been posted on the Council website. Megan Rhyne stated that the new FOIA is also available on the VCOG website.

Public Comment

Mark Flynn, of VML, stated that he had spoken with Delegate Dudenhefer regarding HB 1149 and as a result, VML was working on a survey considering the electronic meetings provisions for regional public bodies. He indicated that VML did not support HB 1149 as written, but was considering an expansion for local public bodies similar to the existing provision that allows members of regional public bodies to participate electronically if they are 60 or more miles away from the central meeting location.²³ As an example, Mr. Flynn pointed out that a member of a local public body on a business trip 100 miles or more away from a meeting could not participate electronically under the current law, even if the means to do so were available. In response to inquiry from Senator Stuart, Mr. Flynn indicated he had not spoken with members of the Stafford Board of Supervisors, on whose behalf Delegate Dudenhefer had introduced HB 1149, but that he would do so.

Patrick Cushing of the Williams Mullen law firm stated that he was working with Stafford County and Delegate Dudenhefer, and that he would ensure someone representing Stafford County would come to the next Electronic Meetings Subcommittee meeting. He noted that the bill seeks to put local governments on parity with the state regarding the conduct of electronic meetings, and stated that he would work with VML and VACo on it.

²¹ Mr. Fifer has served two successive four-year terms on the Council, and is therefore term limited pursuant to § 30-178. He remains a de facto member of the Council until the Governor appoints his successor.

²² **HB 397 (Hope) Virginia Parole Board; exceptions to the Freedom of Information Act.** Requires guidance documents of the Board to be available as public records under the Freedom of Information Act. The bill has a delayed effective date to give the Council an opportunity to review the legislation and report on its implementation.

²³ Current subdivision A 3 of § 2.2-3708.1 provides as follows: *If, on the day of a meeting, a member of a regional public body notifies the chair of the public body that such member's principal residence is more than 60 miles from the meeting location identified in the required notice for such meeting and the public body holding the meeting (a) approves such member's participation by a majority vote of the members present and (b) records in its minutes the remote location from which the member participated.*

Ms. Hamlett observed that from her experience representing state agencies, there was a problem in the current electronic meetings law in that if an electronic meeting was scheduled, but a member did not call in from a remote location, it stops the meeting, based on advice from the Office of the Attorney General. Mr. Fifer noted that the issue had been raised at the Electronic Meetings Subcommittee meeting; he suggested asking staff for a formal opinion on the matter, as there may be some misunderstanding of the requirements of current law.

September 5, 2012

The Council held its third meeting of 2012.²⁴ This meeting was held to welcome a new member to the Council, to hear subcommittee reports, and to hold the annual legislative preview.

Senator Stuart began the meeting by welcoming Christopher Ashby, Esq., as the newest member of the Council. Mr. Ashby replaces Craig Fifer, who has served two full four-year terms on the Council and is therefore term-limited. Senator Stuart thanked Mr. Fifer for his service and without objection, the Council agreed to prepare a resolution to that effect. As Mr. Fifer was present, Senator Stuart invited him to speak. Mr. Fifer welcomed Mr. Ashby to the Council and thanked the Council, access advocates, and staff for the opportunity to serve. He gave special thanks to Frosty Landon, Ginger Stanley of VPA, and Maria Everett, Executive Director of the Council.

Subcommittee Reports

Electronic Meetings Subcommittee

Ms. Dooley, Chair of the Electronic Meetings Subcommittee, reported that the Subcommittee had met three times to consider HB 1105 (Greason) and HB 1149 (Dudenhefer)²⁵ and planned to meet again in October.²⁶ The Subcommittee had no recommendation at this time, but had asked staff to prepare a draft for consideration at its next meeting.

Criminal Investigative Records Subcommittee

Mr. Selph, Chair of the Criminal Investigative Records Subcommittee, reported that the Subcommittee had met twice and planned to meet again in October.²⁷ The Subcommittee had a thorough discussion of the issues and had asked staff to prepare a draft for consideration at its next meeting, but had no recommendation at this time. Mr. Selph indicated the draft did not intend to

²⁴ Council members Sen. Stuart, Ashby, Dooley, Hamlet, Jones, Landon, Payne (sitting by designation of the Attorney General in place of Mr. Schliessmann), Selph, Treadway, and Whitehurst were present; Del. Iaquinto and Mr. Tavenner were absent.

²⁵ **HB 1105 (Greason) Freedom of Information Act; electronic communication meetings.** Revises the rules for which meetings of state public bodies may be conducted by audio or video means. The bill provides that (i) at least one member of the public body must be physically assembled at the principal meeting location, (ii) the quorum of the public body is determined by members participating in person or by electronic means in the meeting, (iii) a member of the public shall pay for the documented marginal cost that a public body may incur in expanding public participation to the meeting, and (iv) the number of meetings a public body may conduct through electronic communications means is limited to 50 percent of its regular meetings in any calendar year. The bill contains technical amendments.

HB 1149 (Dudenhefer) Freedom of Information Act; electronic communication meetings by local and regional public bodies. Expands the authority for the conduct of electronic communication meetings to all public bodies. Currently, local public bodies are prohibited from conducting public meetings in this manner, except when the Governor declares a state of emergency. The bill contains technical amendments.

²⁶ The next meeting of the Electronic Meetings Subcommittee is scheduled to be held at 10:00 AM on Wednesday, October 17, 2012, in the Fourth Floor West Conference Room of the General Assembly Building.

²⁷ The next meeting of the Criminal Investigative Records Subcommittee is scheduled to be held at 1:30 PM on Tuesday, October 2, 2012, in the Speaker's Conference Room, Sixth Floor, General Assembly Building.

change the substance of current law, but was to reorganize and clarify the law for better understanding and compliance.

Parole Board Subcommittee

Mr. Landon, Chair of the Parole Board Subcommittee, reported that the Subcommittee held its first meeting on July 2, 2012 to consider HB 397 (Hope).²⁸ The Subcommittee then recommended that the patron and supporters of the bill meet with representatives of the Parole Board, as it was unclear to the Subcommittee what was the purpose of the bill in light of current law requiring certain disclosures from the Parole Board.²⁹ Delegate Hope and Bill Muse, Chair of the Parole Board, met on August 6, 2012, and agreed that they could work together to craft future legislation. In light of that agreement, there appears to be no further reason for the Subcommittee to meet.

Annual Legislative Preview

No proposed legislation was brought before the Council.

Public Comment

Senator Stuart invited public comment, but there was none.

Other Business

Senator Stuart asked the Council how the members felt regarding the use of subcommittees to study bills referred to the Council. Dr. Treadway related that the subcommittee system worked well, especially for matters where a large number of interested parties wish to speak on complex topics, such as access to criminal records. She indicated having such in-depth discussions in full Council meetings might be unwieldy. Mr. Landon indicated the subcommittee process has worked well as an informal give and take. Mr. Jones stated that there is a lot of good and detailed work done at the subcommittee level, but the full Council should not give too much deference to subcommittee recommendations, as all members of the Council should be ready and informed on the issues. Mr. Whitehurst expressed support for the detailed work done at the subcommittee level. Mr. Selph stated that the subcommittee system works well, especially due to its informality and the freer give and take which helps lead to consensus moving forward.

Staff brought the issue of license plate readers to the Council's attention. There have been numerous news articles on the topic, which indicate various law enforcement agencies across the state and the nation have technology which automatically reads and stores information about passing vehicles, including license plate numbers, location, time, and sometimes other data. Staff noted that the concern is more about over-collection of information, length of retention, and potential misuse, rather than access under FOIA.

Megan Rhyne, Executive Director of VCOG, informed the Council that last week a judge had imposed fines for a knowing and willful violation of FOIA. She indicated that this was only the second such imposition in the past 15 years, and that in the prior case, the fines were overturned on appeal to the circuit court.

²⁸**HB 397 (Hope) Virginia Parole Board; exceptions to the Freedom of Information Act.** Requires guidance documents of the Board to be available as public records under the Freedom of Information Act. The bill has a delayed effective date to give the Council an opportunity to review the legislation and report on its implementation.

²⁹ See Va. Code § 53.1-136.

Senator Stuart stated that he had received an inquiry from a constituent as to the status of the State Corporation Commission (SCC) under FOIA. Staff related a brief history of the case law in the Virginia Supreme Court which culminated in the recent holding that the SCC is not subject to FOIA.³⁰

December 17, 2012

The Council held its fourth meeting of 2012.³¹ This meeting was held to hear subcommittee reports, act on subcommittee recommendations, and to hold the annual legislative preview.

Subcommittee Reports

Electronic Meetings Subcommittee

Ms. Dooley, Chair of the Electronic Meetings Subcommittee, reported that the Subcommittee had met five times in 2012 to consider HB 1105 (Greason) and HB 1149 (Dudenhefer).³² She reported that in addition to considering the bills, the Subcommittee had heard from staff of the Joint Committee on Technology and Science (JCOTS) regarding virtual audio/visual meetings technology, had considered background on the history of electronic meetings legislation and subcommittee work, as well as the 2008 policy statement of the Council on electronic meetings, and had reviewed a compilation of the annual electronic meetings reports received by the Council since 2000. Ms. Dooley briefly reviewed the current law on electronic meetings for state public bodies, and observed that state agency representatives had testified about difficulties assembling a quorum in one location for committees, subcommittees, and other subsidiary entities of a larger parent body. As an example, a committee might schedule a 30-minute meeting, but may have difficulty getting members who are dispersed throughout the Commonwealth to attend it in a single location when their travel times are longer than the meeting itself. Ms. Dooley noted concerns that eliminating a physical quorum might affect the quality of meetings, especially when they were conducting using only audio communication (i.e. speaker phone). The Subcommittee recommended draft legislation that would allow state-level advisory public bodies to hold electronic meetings without a physical quorum if audio-visual technology was used. The proposed draft would also have an improved reporting requirement, requiring that public bodies submit copies of their agendas with their annual electronic meetings reports, and that they provide a form for public feedback that the public could use and send directly to the Council or JCOTS.

³⁰ *Christian v. State Corporation Commission*, 282 Va. 392, 718 S.E.2d 767 (2011)(holding that FOIA is inapplicable to the SCC); *see also Gannon v. State Corporation Commission*, 243 Va. 480, 416 S.E.2d 446 (1992) and *Atlas Underwriters, Ltd. v. State Corporation Commission*, 237 Va. 45, 375 S.E.2d 733 (1989).

³¹ Council members Sen. Stuart, Del. Iaquinto, Ashby, Dooley, Hamlet, Jones, Schliessmann, Selph, Tavenner, and Treadway were present; members Landon and Whitehurst were absent.

³² **HB 1105 (Greason) Freedom of Information Act; electronic communication meetings.** Revises the rules for which meetings of state public bodies may be conducted by audio or video means. The bill provides that (i) at least one member of the public body must be physically assembled at the principal meeting location, (ii) the quorum of the public body is determined by members participating in person or by electronic means in the meeting, (iii) a member of the public shall pay for the documented marginal cost that a public body may incur in expanding public participation to the meeting, and (iv) the number of meetings a public body may conduct through electronic communications means is limited to 50 percent of its regular meetings in any calendar year. The bill contains technical amendments.

HB 1149 (Dudenhefer) Freedom of Information Act; electronic communication meetings by local and regional public bodies. Expands the authority for the conduct of electronic communication meetings to all public bodies. Currently, local public bodies are prohibited from conducting public meetings in this manner, except when the Governor declares a state of emergency. The bill contains technical amendments.

Additionally, due to concerns that the proposed draft might be too broad, it would have a one-year sunset clause.

Senator Stuart requested public comment on the proposed draft. Craig Merritt, on behalf of VPA, stated that VPA appreciated the thorough opportunity to address the proposal and the productive discussion with Mr. Palmore from the Office of the Governor. He called the Council's attention to the letter from Ginger Stanley, Executive Director of VPA, which proposes a pilot program as an alternative to the subcommittee's proposal. Mr. Merritt stated that VPA is not opposed to using meetings technology moving forward to improve efficiency and facilitate public access, but was concerned that the subcommittee's proposal was too broad. In particular, VPA expressed concern that the definition of "advisory public body" may apply to too many public bodies, and that removing the physical quorum requirement is a significant change. Through question and answer with the Council, Mr. Merritt indicated that VPA's concern was over the quality of the meetings and interaction with the public, and that it was unknown how the quality of such meetings would be affected. Mr. Merritt stated that the unknown was not a reason not to go forward, but it was the reason VPA suggested a pilot program affecting only a limited number of public bodies, so that it could be determined how the quality of meetings would be affected before applying this change broadly.

In response to inquiries from the Council, staff pointed out that the draft provided for recording any such meeting conducted electronically without a quorum, except that closed meetings (if held) would not have to be recorded. Additionally, staff indicated that many other states currently allow electronic meetings with few restrictions.

Mr. Selph stated that as a member of the Subcommittee, he appreciated Mr. Merritt's comments and VPA's work in bringing the pilot proposal, but the problem would be identifying in advance who would use the pilot program. He stated that that was the reason the Subcommittee opted to include a one-year sunset provision in the draft instead. Observing that the proposed draft is limited to public bodies that are advisory only, that the meeting technology used must be both audio and visual, and that the draft has the one-year sunset, he hoped it was an incremental change.

Mr. Jones stated that the Subcommittee did an excellent job trying to find a balance and embrace technology more fully, but he had concerns about the final recommendation. Noting that the vote to recommend was three in favor and one against, he stated he would have voted against the proposed draft. He noted that the requirement for a physically assembled quorum is a core basis of open government in Virginia, and thus he would describe this change as "fundamental" rather than "incremental." He stated that he would favor the pilot program as a way to test the waters, rather than opening the floodgates.

Mr. Ashby asked about whether the state currently has the technology and administrative capability to actually implement the changes in the proposed draft (i.e., whether state agencies already have the equipment and training needed to conduct audio/visual meetings). Staff noted that it would take money, and that as a state, the overwhelming number of electronic meetings reported were conducted as audio-only teleconferences. Mr. Ashby stated his concern that the one-year sunset would not be enough time to implement the changes needed in education and acquisition of technology, and so suggested a two-year sunset might be better.

Delegate Iaquinto inquired whether electronic meeting participants would still be paid a per diem; staff indicated that they would, as they were still doing the people's business.

Jeff Palmore, of the Office of the Governor, observed that a quorum would still be required to conduct business, it just would not have to be a quorum assembled in one physical location. He stated that this change may move more public activity into the public realm. As an example, he noted that some small bodies will have a series of one-on-one conversations rather than holding meetings, but this change might make it easier for them to meet as bodies and give the public opportunities to participate from multiple locations. Mr. Palmore also indicated that he did not know how many public bodies would qualify as "advisory" and be able to use the proposed provisions to hold electronic meetings without a physical quorum.

Ms. Dooley moved to recommend the proposed draft, and the motion was seconded. Mr. Ashby offered a substitute motion to recommend an amended version of the proposed draft with a two-year sunset provision rather than the one-year sunset; the substitute motion failed for lack of a second. Returning to Ms. Dooley's motion, the Council voted to recommend the proposed draft to the 2013 Session of the General Assembly by vote of nine in favor, one against (Mr. Jones voted against).

Ms. Dooley next described the second proposed draft that had been recommended by the Subcommittee, which would include "personal matters" along with "personal emergencies" in the existing provision that allows individuals to participate in a meeting by electronic means when a personal emergency prevents physical attendance.³³ She stated that the problem presented to the Subcommittee was that some localities are akin to state public bodies in that members may have difficulties attending meetings in person due to traffic conditions, length of commute, or distance, and many localities did not feel these conditions qualified as "emergencies." She related that the Subcommittee did not feel that localities should be able to hold electronic meetings generally, but that more flexibility was needed to address the problems presented. She explained that the addition of "personal matters" in the draft would allow electronic participation in situations that were not emergencies, but such participation would still be subject to a vote of the public body, the nature of the personal matter would have to be specified in the meeting minutes, and there would be the same limit on the number of times it could be used (no more than twice annually, or one-quarter of the bodies' meetings, whichever is fewer). In response to a question, Ms. Dooley confirmed that this provision would apply to each member of the public body.

Senator Stuart opened the floor to public comment. Phyllis Errico of VACo indicated that VACo supported this change and that the draft was a compromise based on responses to a survey conducted by VML and VACo that would give a little flexibility to address these problems. Mark Flynn, speaking on behalf of VML, stated his support for the bill for the same reasons. Patrick Cushing, speaking on behalf of Stafford County, also indicated support for the bill, which had begun as Delegate Dudenhefer's bill that was referred to the Council for study, and stated that the proposal was on Stafford County's legislative agenda for 2013. Megan Rhyne, Executive Director of VCOG, stated her belief that the current language is adequate and that the problems are due to

³³ Va. Code § 2.2-3708.1.

a misinterpretation of what constitutes an "emergency" under current law. She stated that she did not feel any change is necessary.

There being no further public comment, Ms. Dooley moved to recommend the proposed draft to the 2013 Session of the General Assembly. The motion was seconded and carried by unanimous vote. Later in the meeting (following the report of the Parole Board Subcommittee), concerns were expressed about limitations imposed by the House and Senate on the number of bills each General Assembly member may introduce. Staff offered to combine the two drafts recommended by the Electronic Meetings Subcommittee into one, as both were germane to the subject of electronic meetings. The Council voted unanimously in favor of combining both recommended drafts into one.

Criminal Investigative Records Subcommittee

Mr. Selph, Chair of the Criminal Investigative Records Subcommittee, reported that the Subcommittee had met several times over the course of three years. He recognized Subcommittee members Treadway and Schliessmann, as well as former Subcommittee chair Craig Fifer, for their contributions. Mr. Selph stated that the Subcommittee's work began by considering bills introduced by Senator Edwards that would have opened access to criminal investigative files after any investigation or prosecution had ended. The Subcommittee heard from many interested parties over the years, including police, sheriffs, VPA, VCOG, VACo, VML, and many others. After much input and consideration, the Subcommittee had decided not to go forward with Senator Edwards' bills but to recommend a proposed draft that would clarify and reorganize the existing law. The proposed draft is arranged into subsections addressing (A) required, discretionary, and prohibited releases; (B) noncriminal records; (C) 911 calls; and (D) conflict resolution.

Senator Stuart invited public comment on the draft. Dana Schrad of the Virginia Association of Chiefs of Police stated that there is a lot of turnover in law enforcement positions that deal with the media and the public, and that the reorganization would help with training officers in those positions. She thanked the Subcommittee and staff for their work. There was no further public comment. Mr. Selph moved that the Council recommend the draft to the 2013 Session of the General Assembly. The motion was seconded and carried by unanimous vote.

Parole Board Subcommittee

Staff reported that the Subcommittee had met once in 2012 to consider HB 397 (Hope).³⁴ At that meeting the Subcommittee suggested that the patron and supporters of the bill meet with representatives of the Parole Board, as it was unclear to the Subcommittee what was the purpose of the bill in light of current law requiring certain disclosures from the Parole Board.³⁵ Delegate Hope and Bill Muse, Chair of the Parole Board, met in August and agreed that they could work together to craft future legislation. In light of that agreement, the Subcommittee took no action

³⁴**HB 397 (Hope) Virginia Parole Board; exceptions to the Freedom of Information Act.** Requires guidance documents of the Board to be available as public records under the Freedom of Information Act. The bill has a delayed effective date to give the Council an opportunity to review the legislation and report on its implementation.

³⁵ See Va. Code § 53.1-136.

and did not meet again. There was no recommendation from the Subcommittee. The Council took no action on this bill.

Annual Legislative Preview

No proposed legislation was brought before the Council.

Public Comment

Roger Wiley, Esq., an attorney who has represented local governments and state agencies, and who is a former member of the Council, announced a new (5th) edition of his Local Government Officials' Guide to the Virginia Freedom of Information Act, published by the Weldon-Cooper Center for Public Service of the University of Virginia.

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 1,408 inquiries and conducted 78 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, 2011 to November 30, 2012, the Council, with a staff of two attorneys, fielded 1,408 inquiries. Of these inquiries, five 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, 2011 through November 30, 2012:

Written Advisory Opinions: 5

State and Local Government	3
Citizens of the Commonwealth	2
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, 2011 and November 30, 2012:

Telephone and E-mail Responses: 1,403

Government	846
Citizens	433
News Media	124

Appendix E to this report sets out the number of inquiries received by the Council each month from December, 2011 through November, 2012, 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 418,787 visits, for a total of 1,421,175 page views and 4,368,495 hits.³⁶ 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

³⁶ Please recall that the software used to track website hits changed in 2010 and now presents the information in a different format from prior years.

Records Act. To facilitate compliance with FOIA, sample response letters for each of the five mandated responses to a FOIA request as well as a sample request letter are available on the website. Written advisory opinions have been available on the website since January 2001 and are searchable by any visitor to the website. The opinions are also listed in chronological order with a brief summary to assist website visitors.

FOIA Training

After conducting annual statewide FOIA workshops in each of the six years since the Council's creation in 2000, 2006 was the first year where statewide FOIA training workshops were not offered. The Council viewed declining attendance over the previous two years as a sign that its basic training mission had been successfully accomplished. Statewide workshops 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 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, 2011 to November 30, 2012, the Council conducted 78 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 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 Officials³⁷
- 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 1408 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 78 specialized training sessions throughout the Commonwealth. The Council would like to express its gratitude to all who participated in the work of Council for their hard work and dedication.

Respectfully submitted,

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

³⁷ Developed in cooperation with VACo and VML.

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, 2011 through November 30, 2012, Council staff conducted 78 training seminars, which are listed below in chronological order identifying the group/agency requesting the training.

December 1, 2011	New Members of the General Assembly Richmond, VA
December 6, 2011	Senate Legislative Assistants Richmond, VA
December 7, 2011	State Compensation Board New Officer Training Richmond, VA
	Virginia Association of Counties Newly Elected Officials Conference Richmond, VA
December 8, 2011	Department of Rehabilitative Services Community Integration Advisory Commission Richmond, VA
December 9, 2011	State Compensation Board New Officer Training Richmond, VA
January 6, 2012	Virginia Municipal League Newly Elected Officials Conference Charlottesville, VA
January 23, 2012	State Rehabilitation Council Richmond, VA
January 24, 2012	Virginia Board of Accountancy Henrico, VA

January 25, 2012	J. Sargeant Reynolds Community College Administrative Law Class Richmond, VA
January 31, 2012	Department of Education Special Education Advisory Council Regional Meeting Henrico, VA
February 7, 2012	Virginia Commonwealth University Communications Law Class Richmond, VA
February 15, 2012	Page County Department of Social Services Stanley, VA
February 22, 2012	Department of Accounts Division of State Internal Audit Richmond, VA
February 28, 2012	Department of Education Special Education Advisory Council Regional Meeting Newport News, VA
February 29, 2012	Department of Education Special Education Advisory Council Regional Meeting Tappahannock, VA
March 14, 2012	Fairfax County Water Fairfax, VA
March 22, 2012	Virginia State University Purchasing Department Petersburg, Virginia
March 23, 2012	Virginia Association of Government Purchasing Spring Conference Williamsburg, VA
March 27, 2012	Department of Education Special Education Advisory Council Regional Meeting Nokesville, VA
March 29, 2012	Department of Education Special Education Advisory Council Regional Meeting Waynesboro, VA

April 11, 2012	Commonwealth Council on Aging Richmond, Virginia
April 19, 2012	Virginia League of Governmental Webmasters Association Winchester, VA
April 20, 2012	Board of Corrections Richmond, VA
April 25, 2012	Special Education Advisory Committee, Roanoke Region Roanoke, VA
April 26, 2012	Special Education Advisory Committee, Southwest Region Marion, VA
May 1, 2012	Fairfax County Water Fairfax, VA
May 3, 2012	Virginia Coalition for Open Government Records Management and FOIA Seminar Richmond, VA
May 17, 2012	Peninsula Alcohol Safety Action Program Virginia Beach, VA
May 22, 2012	Virginia Association of School Business Officials Newport News, VA
May 31, 2012	Department of Education Special Education Advisory Council Regional Meeting Victoria, VA
June 4, 2012	Hanover County Hanover, VA Senate of Virginia Senate Committee Operations Richmond, VA
June 6, 2012	Department of Housing and Community Development Permit Technician Academy Fairfax, VA
June 7, 2012	Virginia Commonwealth University Mass Communications and Law Class Richmond, VA

June 18, 2012	Town of Lebanon Lebanon, VA
June 20, 2012	Culpeper County Sheriff's Office Culpeper, VA
June 22, 2012	Virginia Commission on Uniform State Laws Richmond, VA
July 12, 2012	Salem City Public Schools Salem, VA
July 23, 2012	Hampton Roads Law-Enforcement Public Information Officers Hampton, VA
July 24, 2012	Virginia Office of Protection and Advocacy Richmond, VA
July 25, 2012	Virginia Government Communicators Summer Conference Fairfax, VA
July 27, 2012	Virginia Municipal League Newly Elected Officials Conference Richmond, VA
July 31, 2012	Town of Glade Spring Glade Spring, VA
August 2, 2012	Virginia-Israel Advisory Board Richmond, VA
	Virginia League of Governmental Webmasters Association Lexington, VA
August 6, 2012	Treasurers/Commissioners of the Revenue Joint Continuing Education Conference Wintergreen, VA
August 15, 2012	Administration Conference Arlington County Public Schools Arlington, VA
August 16, 2012	Administration Conference Arlington County Public Schools Arlington, VA

August 24, 2012	Clerk's Office, House of Delegates Richmond, VA
September 12, 2012	Central Shenandoah Police Academy Weyers Cave, VA
	Virginia Commonwealth University Communications Ethics Class Richmond, VA
September 14, 2012	Charlotte County Administrators Charlotte County, VA
September 17, 2012	Virginia Beach Fire Department (and other first responders) Virginia Beach, VA
September 20, 2012	Virginia Association of Centers for Independent Living Danville, VA
	James Madison University Administrators Harrisonburg, VA
	Local Government Law Class Washington and Lee University Lexington, VA
September 24, 2012	Small Law Enforcement Agency Executive Symposium Wytheville, VA
September 25, 2012	Virginia Municipal League Annual Conference Williamsburg, VA
September 27, 2012	Virginia Health Workforce Development Authority Richmond, VA
October 3, 2012	American Society of Legislative Clerks and Secretaries National Conference of State Legislatures Richmond, VA
October 4, 2012	Virginia Municipal Clerks Association Municipal Clerk Institute and Academy Virginia Beach, VA

October 5, 2012	Local Government Attorneys Association Fall Conference Alexandria, VA
October 11, 2012	Virginia Law Enforcement Accreditation Coalition 2012 Annual Conference Lynchburg, VA
October 16, 2012	Amherst County Board of Supervisors Amherst, VA
October 19, 2012	Chesapeake Chapter of the National School Public Relations Association Conference Alexandria, VA
October 23, 2012	Department of Environmental Quality Piedmont Regional Office Richmond, VA
October 25, 2012	Department of Criminal Justice Services Richmond, VA
October 29, 2012	City of Lynchburg Lynchburg, VA
November 1, 2012	Virginia Capitol Police Richmond, VA
November 7, 2012	Franklin County Rocky Mount, VA
	Virginia Administrative Law Conference Richmond, VA
November 12, 2012	Lord Fairfax Community College Middletown, VA
November 13, 2012	Town of Coeburn Abingdon, VA
November 19, 2012	Southwest Virginia Health Authority Lebanon, VA
November 28, 2012	Fairfax-Falls Church Community Services Board Fairfax, VA
November 29, 2012	Prince William Committee of 100 Lake Ridge, VA

November 30, 2012

Virginia Coalition for Open Government
Access 2012
Lynchburg, VA

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Index of Written Advisory Opinions
December 1, 2011 through November 30, 2012

ADVISORY OPINIONS ISSUED
2012

<u>Opinion No.</u>	<u>Issue(s)</u>
<hr/>	
March	
<hr/>	
<u>AO-01-12</u>	911 records are public records under FOIA. Whether any exemptions apply to 911 records must be determined on a case-by-case basis.
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<u>AO-02-12</u>	In responding to a request for public records, a public body is responsible to provide the public records prepared by, owned by, or in the possession of the responding public body. When it provides all such responsive public records that it has, no additional response is required under FOIA.
<hr/>	
April	
<hr/>	
<u>AO-03-12</u>	A public official may only charge his or her rate of pay as a public official when responding to requests for public records.
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October	
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<u>AO-04-12</u>	A telephone billing record paid by a public official in his personal capacity that was not prepared for or used in the transaction of public business is not a public record subject to FOIA. Such a telephone billing record is not paid with public funds, only indicates that a call was made (it does not reveal the contents of the call or who made it), and is prepared by the service provider in order to receive payment as part of a commercial transaction.
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<u>AO-05-12</u>	Subsection F of § 2.2-3707 requires that agenda packets be made available for public inspection at the same time they are furnished to members of the public body

December

[AO-06-12](#)

Considering three different records exemptions, an adult arrestee photograph ("mug shot") may not be withheld as a noncriminal incident record; may be withheld if its release would jeopardize a felony investigation; and may be withheld if the subject depicted is also a witness.

[AO-07-12](#)

A public instrumentality exercising public and essential governmental functions is a public body subject to FOIA.

2012 Meetings of the Council

Wednesday, May 23, 2012

House Room 1, State Capitol Building, Richmond

Recap of FOIA and related access bills from 2011 Session of General Assembly and bills referred by General Assembly to Council for study: HB 397 (Hope)--FOIA; guidance documents of the Virginia Parole Board; HB 1105 (Greason)--FOIA; electronic communication meetings; and HB 1149 (Dudenhefer)--FOIA; electronic communication meeting by local and regional bodies. Appointment of subcommittees; continuation of Criminal Investigative Records Subcommittee from 2010-2011.

Monday, July 2, 2012

House Room C, General Assembly Building, Richmond

Election of Chair and Vice-Chair. Progress reports from the Electronic Meetings, Criminal Investigative Records and Parole Board Subcommittees.

Wednesday, September 5, 2012

House Room D, General Assembly Building, Richmond

Welcome to newest Council member Christopher Ashby (appointed by the Governor). Progress reports from the Electronic Meetings, Criminal Investigative Records and Parole Board Subcommittees. Annual Legislative Preview. Discussion of the use of subcommittees by the Council in studying bills referred by the General Assembly.

Monday, December 17, 2012

House Room C, General Assembly Building, Richmond

Progress reports and recommendations from the Electronic Meetings, Criminal Investigative Records and Parole Board Subcommittees. Annual Legislative Preview.

**STATUS OF FREEDOM OF INFORMATION
AND OTHER RELATED ACCESS BILLS**

NOTE: *Unless otherwise stated, the changes in the law described herein became effective on July 1, 2012.*

I. Introduction

The General Assembly passed a total of 10 bills amending FOIA during the 2012 Session.

Of the 10 bills, two bills create new records exemptions as follows:

- Creates an exemption for personal information in constituent correspondence, unless the correspondence relates to the transaction of public business. HB 141 (Cole) amending § 2.2-3705.7;
- Creates an exemption for records of a fire/EMS company or fire/EMS department, to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties. SB 193 (Miller) amending § 2.2-3705.2.

Eight bills amend existing provisions of FOIA as follows:

- Establishes the Virginia All-Payer Claims Database. Among other changes, amends an existing exemption for certain records disclosed to the State Health Commission to exempt certain records of the Virginia All-Payer Claims Database as well. HB 343 (O'Bannon) and SB 135 (Puller) amending § 2.2-3705.6;
- Provides that a member of a public body shall be permitted to attend a closed meeting held by any of its committees or subcommittees, provided such member does not participate in any discussions held by the committee or subcommittee conducting the closed meeting. The bill requires that the minutes of the committee or subcommittee include the identity of such member who attended the closed meeting. HB 480 (Albo) amending § 2.2-3712;
- Changes the terminology used for mental health and developmental services, including technical changes within several existing provisions of FOIA. HB 552 (Garrett) and SB 387 (Martin) amending §§ 2.2-3705.3, 2.2-3705.5, and 2.2-3711;
- Reorganizes the executive branch of state government. The bill contains numerous technical amendments to FOIA and other laws to accomplish this reorganization. HB 1291 (Gilbert) and SB 678 (McDougle) amending §§ 2.2-3705.2, 2.2-3705.3, 2.2-3705.5, and 2.2-3711;
- Amends an existing exemption to include certain information furnished to the Attorney General under the Virginia Fraud Against Taxpayers Act. SB 451 (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 2012 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, 2012.

II. Amendments to the Freedom of Information Act

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

Governor's reorganization of executive branch of state government. Reorganizes the executive branch of state government. The bill contains numerous technical amendments to FOIA and other laws to accomplish this reorganization. HB 1291 (2012 Acts of Assembly, c. 803) and SB 678 (2012 Acts of Assembly, c. 835).

Freedom of Information Act; exemption for cell phone numbers for EMS personnel and firefighters. Provides an exemption from the mandatory disclosure provisions of the Freedom of Information Act for records of a fire/EMS company or fire/EMS department, to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties. SB 193 (2012 Acts of Assembly, c. 617).

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

Mental health and developmental services; terminology. Replaces the terms "mental retardation" and "mental deficiency" with the term "intellectual disability" when referring to the diagnosis of, and with the term "developmental" when referring to services for, individuals with intellectual disabilities; replaces the terms "mentally retarded," "mentally deficient," and "mentally defective" with the term "individual with intellectual disability"; replaces the terms "consumer," "patient," and "resident" with the term "individual receiving services" when used in connection with mental health or developmental services; updates the Code to reflect proper terminology for state hospitals for individuals with mental illness and state training centers for individuals with intellectual disabilities; defines the terms "behavioral health services," "developmental services," "individual receiving services," "intellectual disability," and "mental health services"; and revises the definition of "training center." This bill contains technical amendments. HB 552 (2012 Acts of Assembly, c. 507) and SB 387 (2012 Acts of Assembly, c. 476).

Governor's reorganization of executive branch of state government. *See summary under § 2.2-3705.2, supra.* HB 1291 (2012 Acts of Assembly, c. 803) and SB 678 (2012 Acts of Assembly, c. 835).

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

Mental health and developmental services; terminology. *See summary under § 2.2-3705.3, supra.* HB 552 (2012 Acts of Assembly, c. 507) and SB 387 (2012 Acts of Assembly, c. 476).

Governor's reorganization of executive branch of state government. *See summary under § 2.2-3705.2, supra.* HB 1291 (2012 Acts of Assembly, c. 803) and SB 678 (2012 Acts of Assembly, c. 835).

Virginia Fraud Against Taxpayers Act; regulation of medical assistance. Makes several changes to the Virginia Fraud Against Taxpayers Act (VFATA) and the laws governing the Attorney General's duties with regard to the regulation of medical assistance, including (i) exempting certain information furnished to the Attorney General from disclosure under the Virginia Freedom of Information Act, (ii) imposing a three-year statute of limitations on claims for employer retaliation under the VFATA, (iii) permitting the Attorney General to share information obtained as part of a VFATA investigation with other state and federal governmental entities, (iv) allowing the Attorney General to propound interrogatories as part of an investigation of services furnished under medical assistance, and (v) requiring health care entities to disclose records to the Attorney General in connection with such investigations. SB 451 (2012 Acts of Assembly, c. 479).

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

Virginia All-Payer Claims Database; creation. Establishes the Virginia All-Payer Claims Database system, in order to facilitate data-driven, evidence-based improvements in access, quality, and cost of health care and to improve the public health through understanding of health care expenditure patterns and operation and performance of the health care system. Entities that choose to submit claims data to the database shall do so pursuant to data use and submission agreements executed with the nonprofit organization that contracts with the Commissioner of Health for public health data needs. The bill also directs the Commissioner to develop a work group to study continuing health information needs in the Commonwealth. HB 343 (2012 Acts of Assembly, c. 693) and SB 135 (2012 Acts of Assembly, c. 709).

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

Freedom of Information Act; personal information in constituent correspondence. Provides an exemption from the mandatory disclosure provisions of the Freedom of Information Act (FOIA) for the names, physical addresses, telephone numbers, and email addresses contained in correspondence between an individual and a member of the governing body, school board, or other public body of the locality in which the individual is a resident, unless the correspondence relates to the transaction of public business. The bill provides that no record that is otherwise open to inspection under FOIA shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any such correspondence. HB 141 (2012 Acts of Assembly, c. 726).

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

Mental health and developmental services; terminology. *See summary under § 2.2-3705.3, supra.* HB 552 (2012 Acts of Assembly, c. 507) and SB 387 (2012 Acts of Assembly, c. 476).

Governor's reorganization of executive branch of state government. *See summary under § 2.2-3705.2, supra.* HB 1291 (2012 Acts of Assembly, c. 803) and SB 678 (2012 Acts of Assembly, c. 835).

§ 2.2-3712. Closed meetings procedures; certification of proceedings.

Virginia Freedom of Information Act (FOIA); attendance by certain members in a closed meeting. Provides that a member of a public body shall be permitted to attend a closed meeting held by any of its committees or subcommittees, provided such member does not participate in any discussions held by the committee or subcommittee conducting the closed meeting. The bill requires that the minutes of the committee or subcommittee include the identity of such member who attended the closed meeting.

HB 480 (2012 Acts of Assembly, c. 428).

III. Other Access-Related Legislation

Uncodified Acts.

Budget Bill. Provides an exemption for certain records of the Virginia Information Technologies Agency pertaining to its contracts with a private entity regarding the operation of the Commonwealth's information technology infrastructure. HB 1301, Item 31, ¶ E 4. (2012 Acts of Assembly, c. 3.)

Budget Bill. Provides for access to certain records of the Department of Forensic Science related to the Post Conviction DNA Testing Program. HB 1301, Item 405, ¶¶ B 1 and B 2. (2012 Acts of Assembly, c. 3.)

Budget Bill. Provides an exemption for certain records of the Geographic Information Network Division of the Virginia Information Technologies Agency. HB 1301, Item 424, ¶ B. (2012 Acts of Assembly, c. 3.)

Title 2.2 Administration of Government.

Government Data Collection and Dissemination Practices Act; not applicable to certain records of the Department of Social Services. Provides that the provisions of the Government Data Collection and Dissemination Practices Act do not apply to personal information systems maintained by the Department of Social Services related to child welfare, adult services or adult protective services, or public assistance programs when requests for personal information are made

to the Department of Social Services. Such personal information requests are required to be made to the appropriate local department of social services. HB 217 (2012 Acts of Assembly, c. 229).

Government Data Collection and Dissemination Practices Act; exemptions. Exempts personal information systems maintained by auditors appointed by the local governing body of any county, city, or town or a school board that deals with local investigations. HB 329 (2012 Acts of Assembly, c. 268).

Secretary of the Commonwealth; organizational chart of state government. Requires the Secretary of the Commonwealth to include in the Secretary's annual report an organizational chart of state government. The bill specifies what information is to be contained in the organizational chart and that it is to be posted on the Commonwealth's website. HB 465 (2012 Acts of Assembly, c. 271).

State and Local Government Conflict of Interests Act; disclosure forms. Removes the signature notarization requirement from the Statement of Economic Interests disclosure form filed by certain state and local officers and employees. In addition, the bill clarifies that no person shall be mandated to file any disclosure under the State and Local Government Conflict of Interests Act unless specifically required by the Act. The bill also makes technical changes. HB 481 (2012 Acts of Assembly, c. 429).

Title 8.01 Civil Remedies and Procedure.

School records; self-authentication. Provides that school records shall be admissible in any matter where such records are material and otherwise admissible, provided that they are authenticated as true and accurate copies by the custodian of the records or by the person to whom the custodian reports, if they are different. Currently, such authenticated school records are only admissible in cases involving custody of the student or termination of parental rights. HB 424 (2012 Acts of Assembly, c. 499).

Clerks of court; certain duties of the circuit court clerk. Clarifies when the clerk of the court may destroy case file papers, and also clarifies that a person seeking authorization to perform marriages must file a petition with the clerk and pay any applicable fees. The bill allows the clerk to require the filing of a separate instrument acknowledging a confessed judgment and relieves the clerk of the requirements to (i) obtain or update a list of volunteer firefighters and (ii) provide marriage license applicants with health information. HB 1284 (2012 Acts of Assembly, c. 802).

Title 10.1 Conservation.

Nutrient management. Provides that the Department of Conservation and Recreation operate a voluntary nutrient management program to assist owners and operators of agricultural land and turf to effectively manage and apply nutrients to their land. In developing the program, the Department is to begin testing the software for assisting owners and operators of agricultural lands and turf by July 1, 2013, and begin full implementation by July 1, 2014. The development of the software may be deferred until funds become available. [Note: The bill contains a FOIA exemption for certain personal and proprietary information.] HB 932 (2012 Acts of Assembly, c. 781).

Title 15.2 Counties, Cities, and Towns.

Clerks of court; certain duties of the circuit court clerk. *See summary under Title 8.01, supra.*
HB 1284 (2012 Acts of Assembly, c. 802).

Title 16.1 Courts Not of Record.

Adoption procedures. Makes various changes to adoption procedures, including establishing a procedure for review of petitions filed for the purpose of obtaining a juvenile and domestic relations district court's assistance with the execution of consent to an adoption when the consent is executed pursuant to the laws of another state; expanding the venue for consent hearings in parental placement adoptions to include any city or county in the Commonwealth, provided that diligent efforts are made to conduct the hearing where the child was born, where the birth parents reside, or where the adoptive parents reside; eliminating the need for parental consent for an adoption in cases in which a birth parent has, without just cause, neither visited nor contacted the child for a period of six months immediately prior to the filing of a petition for adoption or a petition to accept consent to an adoption; adding language setting forth requirements for establishment of a date of birth for a child adopted from a foreign country; and clarifying the requirements for stepparent adoptions. The bill also makes changes to the process of registering with the Putative Father Registry. HB 445 (2012 Acts of Assembly, c. 424).

Title 17.1 Courts of Record.

Court records; secure remote access; interfacing computer systems. Provides that the operational expenses associated with providing secure remote access to land records includes locating technology in an offsite facility for purposes of improving public access or for the implementation of a disaster recovery plan. The bill extends the prohibition on selling or posting data accessed by secure remote access to include land records. The bill further requires the Executive Secretary of the Supreme Court to establish security and data standards for interfacing between a circuit court's case management or financial management system and the systems of the Supreme Court. HB 484 (2012 Acts of Assembly, c. 234).

Circuit court clerks; remote access to land records; fees collected by clerks; debit cards. Provides for the acceptance of debit cards in addition to credit cards and allows the clerk to outsource the processing of credit and debit card transactions. The bill also provides that the clerk may charge a convenience fee for processing credit or debit cards of up to \$2 per transaction or four percent of the amount paid. Currently, such fee may not exceed four percent of the amount paid. The bill also provides that certain court fees collected by the clerk shall be deposited into a special fund held by the clerk. The bill also makes permanent a Prince William program authorizing the clerk to charge a convenience fee of up to \$2 per transaction and a separate per image download fee for access to land records. HB 926 (2012 Acts of Assembly, c. 780).

Clerks of court; certain duties of the circuit court clerk. *See summary under Title 8.01, supra.*
HB 1284 (2012 Acts of Assembly, c. 802).

Title 18.2 Crimes and Offenses Generally.

Internet publication of personal information of certain public officials prohibited. Adds various public officials to the current provision prohibiting a state or local agency from publicly posting or displaying on the Internet the home address or personal telephone numbers of a law-enforcement officer if the officer has made a written demand and obtains a court order. The bill also deletes the requirement for a hearing and adds personal email addresses to the personal information subject to protection. HB 556 (2012 Acts of Assembly, c. 143).

Methamphetamine precursors; sale and tracking; penalties. Requires the Department of State Police to enter into a memorandum of understanding to establish the Commonwealth's participation in a real-time electronic recordkeeping and monitoring system for the nonprescription sale of ephedrine or related compounds. Most pharmacies and retail distributors will be required to enter nonprescription sales of ephedrine or related compounds into the electronic system. The bill retains the existing sales limit of no more than 3.6 grams of ephedrine or related compounds per day per individual retail customer and no more than nine grams per 30-day period. The bill is effective January 1, 2013. HB 1161 (2012 Acts of Assembly, c. 252) and SB 294 (2012 Acts of Assembly, c. 160).

Title 19.2 Criminal Procedure.

Critical incident stress management teams; privileged information. Provides that information communicated to critical incident stress management team members by public safety personnel who are the subjects of peer support services shall not be disclosed. The bill allows the public safety personnel to waive the privilege. HB 856 (2012 Acts of Assembly, c. 148) and SB 362 (2012 Acts of Assembly, c. 320).

Criminal procedure; GPS tracking device. Provides the authority and the protocol for a law-enforcement officer to apply for a search warrant to permit the use of a GPS tracking device. This bill contains an emergency clause and is effective from the date of its passage. HB 1298 (2012 Acts of Assembly, c. 636) and SB 685 (2012 Acts of Assembly, c. 679).

Title 20 Domestic Relations.

Clerks of court; certain duties of the circuit court clerk. *See summary under Title 8.01, supra.* HB 1284 (2012 Acts of Assembly, c. 802).

Title 23 Educational Institutions.

Higher education; publication of graduate employment rates. Requires public and private nonprofit institutions of higher education to publish data on the proportion of graduates with employment at 18 months and five years after the date of graduation. The data shall include the major and degree program, percentage of employment in the Commonwealth, average salary, and average higher education-related debt of graduates. The provisions of this bill will expire on June 30, 2017. HB 639 (2012 Acts of Assembly, c. 694).

Title 24.2 Elections.

Voter registration applications; protection of residence address information. Adds active and retired federal and Virginia justices and judges and attorneys employed by the United States Attorney General or Virginia Attorney General to the list of persons whose residence addresses may be replaced by a post office box address on publicly available registration and elections documents. HB 56 (2012 Acts of Assembly, c. 491).

Elections; provisional ballots; electoral board meetings. Provides that the meeting of the electoral board on the day or days following an election is open only to authorized party and candidate representatives, the persons who cast the provisional ballots with their representatives or legal counsel, and the staff and legal counsel for the electoral board. The bill also specifies that the party and candidate representatives attend as observers and not as participants. HB 63 (2012 Acts of Assembly, c. 592).

Campaign Finance Disclosure Act; general provisions applicable to penalties. Provides that the Act's requirements for filing timely and complete statements and reports remain in full force and effect notwithstanding any pending investigation into activities of any candidate campaign committee, political committee, or participant in the committee. HB 332 (2012 Acts of Assembly, c. 298).

Elections, administrative matters, and duties of the electoral board and general registrar. Provides for certain administrative efficiencies: permits general registrar to administer oath to voting equipment custodians; clarifies method to give notice of change in location of general registrar's office; modernizes procedures to give public notice of registration times and primaries; and permits absentee ballot envelopes to be opened before election day so long as the ballots are placed in a secure ballot container and no count is initiated. HB 623 (2012 Acts of Assembly, c. 328) and SB 566 (2012 Acts of Assembly, c. 486).

Elections; persons eligible to obtain lists of persons voting at primaries and elections. Allows access to the lists for all political purposes by members of the public and nonprofit organizations as well as by candidates, elected officials, and political party chairmen. HB 1118 (2012 Acts of Assembly, c. 664).

Title 27 Fire Protection.

Clerks of court; certain duties of the circuit court clerk. *See summary under Title 8.01, supra.* HB 1284 (2012 Acts of Assembly, c. 802).

Title 30 General Assembly.

Virginia College Savings Plan Oversight Act. Directs the Joint Legislative Audit and Review Commission (JLARC) to oversee and evaluate the Virginia College Savings Plan on a continuing basis. The bill requires JLARC and the Virginia College Savings Plan to make certain reports to

the General Assembly. HB 739 (2012 Acts of Assembly, c. 659) and SB 599 (2012 Acts of Assembly, c. 591).

Title 32.1 Health.

Death, marriage, or divorce records; when public. Reduces the time period after which death, marriage, divorce, or annulment records become public from 50 years to 25 years. HB 272 (2012 Acts of Assembly, c. 16).

Storage of health records. Replaces obsolete terminology and cross-references related to storage of health records, currently referred to as medical records or patient records. HB 1212 (2012 Acts of Assembly, c. 336).

Clerks of court; certain duties of the circuit court clerk. *See summary under Title 8.01, supra.* HB 1284 (2012 Acts of Assembly, c. 802).

Vital records; records becoming public. Provides that when 100 years have elapsed from the date of birth or 25 years from the date of death, marriage, divorce, or annulment, the records of such events shall, unless precluded from release by statute or court order, or at law-enforcement's request, become public information and be made available to the public. The bill also requires the State Registrar to make original records that become public information available to the Library of Virginia for safekeeping and for public access consistent with other state archival records, directs the State Registrar and the Library of Virginia to enter into a memorandum of understanding to arrange for continued prompt access to such records by the State Registrar for amendments or other working purposes, and directs the State Registrar to enter into a long-term contract with a private company experienced in maintaining genealogical research databases to create, maintain, and update online indexes of records made available to the public. HB 660 (2012 Acts of Assembly, c. 356).

Title 54.1 Professions and Occupations.

Virginia Board of Accountancy; confidentiality of certain information. Provides that tax returns, financial statements, and other financial information that is not generally available to the public through regulatory disclosure or otherwise, subdivision 3 of § 54.1-108 notwithstanding, provided to the Board by a complainant or as a result of an investigation of a licensee by the Board in response to a complaint shall be exempt from the provisions of the Virginia Freedom of Information Act. HB 275 (2012 Acts of Assembly, c. 375).

Prescription Monitoring Program; disclosures. Modifies the Prescription Monitoring Program to (i) require dispensers of covered substances to report the method of payment for the prescription, (ii) require the Director of the Department of Health Professions to report information relevant to an investigation of a prescription recipient, in addition to a prescriber or dispenser, to any federal law-enforcement agency with authority to conduct drug diversion investigations, (iii) allow the Director to disclose information indicating potential misuse of a prescription by a recipient to the State Police for the purpose of investigation into possible drug diversion, and (iv) allow prescribers to delegate authority to access the Program to an unlimited number, rather than the current limit

of two, of regulated health care professionals under their direct supervision. HB 347 (2012 Acts of Assembly, c. 21) and SB 321 (2012 Acts of Assembly, c. 71).

Veterans; disposition of cremains. Provides for a funeral director to provide the names and any other identifying information on unclaimed cremains to the Department of Veterans Services in order for the Department to determine if the unclaimed cremains are those of a veteran. Under the bill, commencing July 1, 2014, the Department shall notify the funeral director within 30 days of receipt of the information if the cremains are those of a veteran and whether such veteran is eligible for burial in a veterans cemetery. In addition, the bill provides that the names and any personal identifying information submitted by a funeral director to the Department are exempt from disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). HB 439 (2012 Acts of Assembly, c. 24).

Storage of health records. *See summary under Title 32.1, supra.* HB 1212 (2012 Acts of Assembly, c. 336).

Determination of status of unclaimed cremains belonging to veterans. Provides for a funeral director to provide the names and any other identifying information on unclaimed cremains to the Department of Veterans Services in order for the Department to determine if the unclaimed cremains are those of a veteran. Under the bill, commencing July 1, 2014, the Department shall notify the funeral director within 30 days of receipt of the information if the cremains are those of a veteran and whether such veteran is eligible for burial in a veterans cemetery. In addition, the bill provides that the names and any personal identifying information submitted by a funeral director to the Department are exempt from disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). SB 433 (2012 Acts of Assembly, c. 120).

Title 55 Property and Conveyances.

Time-Share Act; advertising foreclosed time-share properties. Provides the option of a more streamlined advertisement of the time-shares being foreclosed by requiring publication of the time, place, and date of sale; identification of the time-share being sold; contact information for obtaining further information about the sale; and a website address where more complete information and documentation can be obtained. HB 234 (2012 Acts of Assembly, c. 406).

Title 58.1 Taxation.

Warrants maintained by treasurers. Specifies that the information regarding warrants that shall not be disclosed includes any invoice that has been presented to a locality for payment, which the locality has attempted to pay, but the payment has not been completed because electronic payment has failed or a check was mailed but not cashed. HB 255 (2012 Acts of Assembly, c. 88).

Title 63.2 Welfare (Social Services).

Adoption procedures. *See summary under Title 16.1, supra.* HB 445 (2012 Acts of Assembly, c. 424).

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APPENDIX E

Breakdown of Inquiries to Council December 1, 2011 through November 30, 2012

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, 2011 through November 30, 2012

Total number of inquiries: 1,408

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	1	0	0	0	0	0	0	2	0	3
Citizens	0	0	0	1	1	0	0	0	0	0	0	0	2
News Media	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	0	0	2	1	0	0	0	0	0	2	0	5
B. TELEPHONE & EMAIL INQUIRIES, BY MONTH:													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	69	83	83	82	65	70	74	84	90	59	55	32	846
Citizens	28	49	37	35	32	40	36	35	40	33	39	29	433
News Media	11	7	11	18	11	10	6	13	12	9	7	9	124
TOTAL	108	139	131	135	108	120	116	132	142	101	101	70	1403
C. TOTAL NUMBER OF ALL INQUIRIES, BY MONTH:													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	69	83	83	83	65	70	74	84	90	59	57	32	849
Citizens	28	49	37	36	33	40	36	35	40	33	39	29	435
News Media	11	7	11	18	11	10	6	13	12	9	7	9	124
TOTAL	108	139	131	137	109	120	116	132	142	101	103	70	1408

A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:			
	Records	Meetings	Other
Government	3	1	0
Citizens	2	0	0
News Media	0	0	0
TOTAL	5	1	0
B. TELEPHONE & EMAIL INQUIRIES, BY CATEGORY:			
	Records	Meetings	Other
Government	550	193	137
Citizens	266	46	175
News Media	71	29	31
TOTAL	887	268	343
C. TOTAL NUMBER OF ALL INQUIRIES, BY CATEGORY:			
	Records	Meetings	Other
Government	553	194	137
Citizens	268	46	175
News Media	71	29	31
TOTAL	892	269	343

APPENDIX F

OPINIONS ISSUED BY THE COUNCIL JULY 2000 THROUGH NOVEMBER 2012

Written Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Government	4	20	6	8	8	4	4	2	1	3	2	3	3
Citizens	3	41	11	13	15	11	6	8	8	10	3	4	2
News Media	1	10	2	3	3	1	0	3	2	0	1	0	0

Informal Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Government	45	275	465	472	616	756	845	854	827	910	899	820	846
Public	43	324	360	331	429	687	664	674	641	618	620	560	433
News Media	21	169	165	198	145	209	232	167	206	150	165	152	124

Total Number of Opinions:

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Government	49	295	471	480	624	760	849	856	828	913	901	823	849
Public	47	365	371	344	444	698	670	682	649	628	623	564	435
News Media	22	179	167	201	148	210	232	170	208	150	166	152	124
GRAND TOTAL	118	539	1009	1025	1216	1668	1751	1708	1685	1691	1690	1539	1408

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