

**REPORT OF THE**

**Virginia Freedom of  
Information Advisory Council**

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



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2015**





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ADVISORY COUNCIL**

**TO THE GOVERNOR AND  
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COMMONWEALTH OF VIRGINIA  
DECEMBER 2015

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OF THE  
VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

Delegate James M. LeMunyon, Chair  
Senator Richard H. Stuart, Vice-Chair  
Christopher Ashby  
Shawri King-Casey  
Kathleen Dooley  
Stephanie Hamlett  
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## TABLE OF CONTENTS

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<b>INTRODUCTION.....</b>	<b>1</b>
<b>EXECUTIVE SUMMARY.....</b>	<b>2</b>
<b>WORK OF THE COUNCIL .....</b>	<b>11</b>
<b>SERVICES RENDERED BY THE COUNCIL.....</b>	<b>31</b>
<b>CONCLUSION.....</b>	<b>35</b>

### **APPENDICES**

<b>A. Training and Education Presentations.....</b>	<b>A-1</b>
<b>B. Index of Written Advisory Opinions .....</b>	<b>B-1</b>
<b>C. Meetings of the Council .....</b>	<b>C-1</b>
<b>D. Recap of 2015 Session.....</b>	<b>D-1</b>
<b>FOIA and Related Access Legislation</b>	
<b>E. Breakdown of Inquiries to Council .....</b>	<b>E-1</b>
<b>F. Year-to-Year Comparison of Services by Council .....</b>	<b>F-1</b>
<b>G. Meetings and Records Subcommittees; synopsis of FOIA exemptions review completed pursuant to HJR 96 as of December 1, 2015.....</b>	<b>G-1</b>





# **REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

**To: The Honorable Terence R. McAuliffe, Governor of Virginia  
and The General Assembly of Virginia**

**Richmond, Virginia  
December 2015**

## **INTRODUCTION**

"A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and mocks their loyalty."

110 Congressional Record 17, 087 (1964) (Statement of Senator Long)

Established by the 2000 Session of the General Assembly<sup>1</sup>, the Virginia Freedom of Information Advisory Council (the "Council") was created as an advisory council in the legislative branch of state government to encourage and facilitate compliance with the 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.<sup>2</sup> The Council is also required to file an annual report on its activities and findings regarding FOIA, including recommendations for changes in the law, to the Governor and the General Assembly.

The Council is composed of 12 members, including one member of the House of Delegates; one member of the Senate of Virginia; the Attorney General or his designee; the Librarian

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

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

of Virginia; the director of the Division of Legislative Services; one representative of local government; two representatives of the news media; and four citizens.

The Council provides guidance to those seeking assistance in the understanding and application of FOIA; although the Council cannot compel the production of documents or issue orders. By rendering advisory opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide the future public access practices of state and local government agencies. Although the Council has no authority to mediate disputes, it may be called upon as a resource to assist in the resolution of FOIA disputes and to foster compliance as well as 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 an ombudsman role, the Council is a resource for the public, representatives of state and local government, and members of the media.

## EXECUTIVE SUMMARY

In its fifteenth year, the Council continued to fulfill its role as a clearinghouse for public access issues for the Virginia General Assembly. The Council has kept abreast of trends, developments in judicial decisions, and emerging issues related to the Virginia Freedom of Information Act (FOIA) and access generally. In its 15-year history, the Council has provided more than 22,400 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials and has conducted over 900 FOIA training programs. The Council is recognized as the forum for evaluating proposed FOIA and related public access legislation and 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, 2014, through November 30, 2015—the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. The seven bills referred to the Council by the General Assembly are:

- **HB 1646 (Pogge) - FOIA; proceeding for enforcement.** Provides that in an enforcement action, if the court finds the public body violated certain meeting notice requirements, the court may invalidate any action of the public body taken at such meeting.
- **HB 1722 (Ramadan)/ SB 893 (Petersen) - FOIA; working papers and correspondence exemptions for university presidents.** Eliminates the working paper and correspondence record exemption for the president or other chief executive officer of any public institution of higher education in Virginia.

- **HB 1776 (Albo)/SB 1032 (McDougle) - Alcoholic beverage control.** Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority, created by the bill. The bill has a delayed effective date of July 1, 2018, except that the provisions of the thirteenth and fourteenth enactments become effective July 1, 2015.  
**NOTE:** The thirteenth enactment clause to this bill states *that the Virginia Freedom of Information Advisory Council shall include in its study of the Virginia Freedom of Information Act in accordance with House Joint Resolution No. 96 of the Acts of Assembly of 2014 a review of the provisions of § 2.2-3705.7 of the Code of Virginia as amended by this act and make any recommendations it deems necessary and appropriate.*
- **HB 2223 (Morris) - FOIA; willful violations a misdemeanor; penalty.** Provides that in addition to the civil enforcement provisions of FOIA, any officer, employee, or member of a public body who, without legal excuse or justification, deliberately, willfully, and knowingly violates certain FOIA provisions is guilty of a Class 1 misdemeanor.
- **SB 1166 (Hanger) - Public service corporations; access to public records.** Makes a public service corporation subject to the public records provisions of the Virginia Freedom of Information Act with respect to any project or activity for which it may exercise the power of eminent domain and has filed or prefiled for a certificate or other permitting document.
- **SB 1402 (Cosgrove) - FOIA; open meeting exemption for gang-related activities.** Authorizes a public body to convene a closed meeting for consultation with or briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning criminal street gang-related activities.

**FOIA Council action on each of these:**

- **HB 1646 (Pogge) - FOIA; proceeding for enforcement.** Referred to Meetings Subcommittee for further study (incorporated into HJR No. 96 study).
- **HB 1722 (Ramadan)/ SB 893 (Petersen) - FOIA; working papers and correspondence exemptions for university presidents.** Referred to Records Subcommittee for further study. Records Subcommittee did not recommend the subject of these bills, but did recommend other amendments to the working papers and correspondence exemption.
- **HB 1776 (Albo)/SB 1032 (McDougle) - Alcoholic beverage control; referred to FOIA Council by enactment clause.** Referred to Records Subcommittee for further study. The Subcommittee recommended striking the new exemption.

- **HB 2223 (Morris) - FOIA; willful violations a misdemeanor; penalty.** The Council voted to recommend against the bill at its May 20, 2015 meeting. The Council provided Delegate Morris another opportunity to speak to his proposal during the Legislative Preview at the Council's November 18, 2015 meeting.
- **SB 1166 (Hanger) - Public service corporations; access to public records.** Referred to Records Subcommittee for further study. The Subcommittee recommended no action on the bill.
- **SB 1402 (Cosgrove) - FOIA; open meeting exemption for gang-related activities.** Referred to Meetings Subcommittee for further study (incorporated into HJR No. 96 study).

Additionally, the Council completed its second year of study of FOIA pursuant to House Joint Resolution No. 96 (HJR 96, 2014, LeMunyon), which directs the Council to (i) study all exemptions contained in FOIA and determine the continued applicability or appropriateness of such exemptions, (ii) determine whether FOIA should be amended to eliminate any exemption from FOIA that the Council determines is no longer applicable or appropriate, (iii) examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA, and (iv) report its findings and recommendations by December 1, 2016. At each of its meetings, the Council received progress reports from its two HJR 96 subcommittees and reviewed the draft legislation that has been recommended by each Subcommittee. The Records Subcommittee met four times in 2014 and six times in 2015. To date the Records Subcommittee has studied 76 records exemptions. An additional 27 exemptions for proprietary records and trade secrets were referred to the Proprietary Records Work Group which met four times in 2015. That Work Group will continue to meet in 2016. The Records Subcommittee also formed a DHRM Records Work Group which met one time to study an exemption particular to the Department of Human Resource Management. The Meetings Subcommittee met six times in 2015. The Meetings Subcommittee completed its review of the closed meeting exemptions in FOIA (approximately 45 exemptions in total) and began studying meetings procedure issues. The Council decided that rather than introduce individual legislative recommendations as separate bills while the study is ongoing, it will recommend for the 2017 Session an omnibus bill at the conclusion of the study. Summaries of the Records Subcommittee's and Meetings Subcommittee's work, including agendas, recommendations, and exemption worksheets, are available on the Council's website.

The Council continued to monitor Virginia court decisions relating to FOIA. In the fall of 2015 the Supreme Court of Virginia issued an opinion in case of *Virginia Department of Corrections v. Surovell*.<sup>3</sup> This case concerned a request for various documents related to executions, including execution manuals. The Department denied the request for execution

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<sup>3</sup> *Virginia Department of Corrections v. Surovell*, (Supreme Court of Virginia, Record No. 141780, decided Sept. 17, 2015)(available at <http://www.courts.state.va.us/opinions/opnscvwp/1141780.pdf>).

manuals pursuant to subdivision 6 of § 2.2-3705.2, a public safety exemption which allows a public body to withhold the following records:

Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.

The Supreme Court ruled in favor of VDOC that VDOC did not have to release the execution manuals. Surovell had argued that VDOC had used an incorrect standard for determining whether release of the records would "jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure." The Supreme Court rejected that argument, holding that "[t]o the extent that releasing documents would expose a governmental facility to danger, the standard is met. VDOC need not prove conclusively that, if it responded, some [facility's security] would in fact be compromised or jeopardized." [Internal quotations omitted.] The Supreme Court also opined on the weight to be given agency expertise:

We ... hold that the circuit court must make a de novo determination of the propriety of withholding the documents at issue, but in doing so, the circuit court must accord "substantial weight" to VDOC's determinations. ("[D]e novo review in the national security context can be summarized as follows: (1) The government has the burden of establishing an exemption. (2) The court must make a de novo determination. (3) In doing this, it must first 'accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'"). Once satisfied that proper procedures have been followed and that the information logically falls within the exemption clause, courts need go no further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

[Internal citations omitted.] Finally, the Supreme Court also addressed whether an agency would be required to redact a record when only part of the record is exempt, or whether the entire record may be withheld. The Court stated that "[t]he question before us is whether an agency is required to redact an exempt document that may contain non-exempt material. We agree with the Commonwealth that an agency is not required to redact under these circumstances." The Supreme Court qualified that holding based on the language of the exemption itself and whether the exemption uses the word "portions," as follows:

The wording of the statute applies the exclusion to the entire drawing, manual, minutes or record and makes it disclosable only at the discretion of the custodian. Nothing in this section speaks to redaction except for a general

reference to the option of disclosure at the discretion of the custodian. This language creates no requirement of partial disclosure or redaction.

\* \* \*

Where the General Assembly intends to require redaction and production of portions of records, it has specifically so provided....Had the General Assembly intended to require redaction of documents that fall under the security exemption of subsection (6) of the statute, it would have included the phrase "those portions" or "portions thereof."

Delegate Surovell spoke to the Council about the case as part of the Council's Legislative Preview on November 18, 2015. Delegates LeMunyon and Surovell both indicated they would likely introduce legislation during the 2016 Session of the General Assembly in response to the Supreme Court's decision.

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 2015, Council staff conducted 79 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. While FOIA training is the most critical mission of the Council, in 2015, the annual statewide FOIA Workshops conducted by Council staff were discontinued. The statewide workshops posed considerable administrative burdens in their planning and execution, especially in light of the small Council staff. The Council continues to provide FOIA training, however, but upon the request of any interested group, such as the staff of state and local agencies, members of local governing bodies, media organizations, citizen organizations, and any other group that wishes to learn more about FOIA. Under this new approach, Council staff travels to the location of the group requesting training and provides relevant training materials. The training is tailored to meet the needs of the particular group, ranges from 45 minutes to several hours, and presents a general overview of FOIA or focuses specifically on particular exemptions or portions of FOIA frequently used by that group or organization. Under the new training approach offered by the Council, organizations requesting training are strongly encouraged, but not required, to consolidate training by including other like organizations within a single or neighboring jurisdiction(s) wherever possible. All Council training programs are preapproved by the Virginia State Bar for continuing legal education credit for licensed attorneys. The training programs are also preapproved 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.

The Council develops and continually updates free educational materials to aid in the understanding and application of FOIA. This year, the Council added a Citizens' Guide to Making FOIA Requests, in addition to updating previous reference materials. The Council publishes these educational materials on its website.

For this reporting period, the Council, with a staff of two attorneys, responded to 1,424 inquiries. Of these inquiries, nine resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: three by a government official, three by media representatives, and three by citizens. The remaining requests were for informal opinions, given via telephone and email. Of these requests, 802 were made by government officials, 467 by citizens, and 146 by media. Starting in 2006, the Council has seen an increase in the number of informal opinion requests compared with requests for formal written opinions. For the past several years this trend has remained consistent. This continuing trend appears to stem from the Council's reputation for fairness and reliability in its informal opinions and as a credible source for FOIA guidance before disputes arise.

FOIA was again the subject of significant legislative activity in the 2015 Session. The General Assembly passed a total of 16 bills amending FOIA during the 2015 Session. At its last meeting of 2014, the FOIA Council voted favorably to recommend the subject matter of three bills that passed the General Assembly in 2015: HB 1633 and SB 968, identical bills that create an exemption for certain records of certain health care committees and entities to the extent that they reveal information that may be withheld from discovery as privileged communications, and HB 2104, which provides that the record and open meeting exemptions for VCU Medical Center shall also apply when the records are in the possession of VCU or the discussion of certain matters occurs at a meeting of the Virginia Commonwealth University Board of Visitors.

Four bills add two new records exemptions in FOIA as follows:

- Creates an exemption for certain records of certain health care committees and entities to the extent that they reveal information that may be withheld from discovery as privileged communications. HB 1633 and SB 968 amending §§ 2.2-3705.5;
- Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority, created by the bill. Adds an exemption for certain proprietary records, trade secrets, financial records, and cost estimates. The bill contains numerous technical amendments. The bill has a delayed effective date of July 1, 2018, except that the provisions of the thirteenth and fourteenth enactments become effective July 1, 2015. [NOTE: The act amends an existing records exemption in § 2.2-3705.3, adds a new records exemption in § 2.2-3705.7, and adds a new meetings exemption in § 2.2-3711, all subject to the delayed effective date of July 1, 2018. The thirteenth enactment, effective July 1, 2015, directs the FOIA Council to include a review of the amendments to § 2.2-3705.7 in the FOIA Council's three-year study directed by House Joint Resolution No. 96 (2014), effective July 1, 2015.] HB 1776 and SB 1032 amending §§ 2.2-3705.3, 2.2-3705.7, and 2.2-3711.

Four bills add two new meetings exemptions in FOIA as follows:

- Allows a closed meeting to be held for the discussion of certain exempt records related to Resource Management Plans. HB 1618 and SB 1126 amending § 2.2-3711;
- Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority, as summarized above. Allows a closed meeting to be held to discuss certain exempt records held by the Authority. HB 1776 and SB 1032 amending §§ 2.2-3705.3, 2.2-3705.7, and 2.2-3711.

Twelve bills amend existing provisions of FOIA as follows:

- Amends existing records and meetings exemptions to cover certain adult death investigations by adult fatality review teams. HB 1558 amending §§ 2.2-3705.5 and 2.2-3711;
- Amends the definition of public body to include private police departments, for purposes of access to public records. Enacted with an emergency clause, giving it an effective date of March 16, 2015. HB 1606 and SB 1217 amending § 2.2-3701;
- Abolishes the Capital Access Fund for Disadvantaged Businesses, and makes a corresponding amendment to an existing records exemption. HB 1757 and SB 854 amending § 2.2-3705.6;
- Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority, as summarized above. Makes a corresponding technical amendment to an existing records exemption for certain administrative investigations. HB 1776 and SB 1032 amending §§ 2.2-3705.3, 2.2-3705.7, and 2.2-3711;
- Amends an existing records exemption to provide that the identity of donors to the Veterans Services Foundation does not have to be disclosed under FOIA if the donor has requested anonymity in connection with or as a condition of making a pledge or donation. HB 1967 amending § 2.2-3705.7;
- Provides that the record and open meeting exemptions for VCU Medical Center shall also apply when the records are in the possession of VCU or the discussion of certain matters occurs at a meeting of the Virginia Commonwealth University Board of Visitors. HB 2104 amending §§ 2.2-3705.7 and 2.2-3711;
- Clarifies that the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public



- meeting, is not a meeting under FOIA. SB 969 amending §§ 2.2-3701 and 2.2-3707;
- Expands the open meeting exemption for the discussion of plans to protect public safety as it relates to terrorism and security of governmental facilities to include the discussion of specific cybersecurity threats or vulnerabilities, including the discussion of related records excluded from FOIA, where discussion in an open meeting would jeopardize the safety of any person or the security of any facility, building, structure, information technology system, or software program. Enacted with an emergency clause, giving it an effective date of March 16, 2015. SB 1109 amending § 2.2-3711;
  - Expands the current record exemption for plans and information to prevent or respond to terrorism to include information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities or security plans and measures of an entity, facility, building structure, information technology system, or software program. Enacted with an emergency clause, giving it an effective date of March 16, 2015. SB 1129 amending § 2.2-3705.2.

A more detailed report of the bills discussed above and other public access bills passed during the 2015 Session appears on the Council's website and is attached as Appendix D to the 2015 Annual Report of the FOIA Council.

Keeping abreast of the latest access trends, access to public records contained in databases owned and maintained by many governmental entities has become the subject of numerous inquiries to the Council. Several database examples were examined and Council discussions included how, under FOIA or other law, such databases were to be treated for public access purposes. The first example reviewed was for the Virginia Information Technologies Agency (VITA), which maintains IT architecture and equipment for executive branch agencies, and the Library of Virginia, which archives records from all over the Commonwealth for both state and local public bodies. Public access for both is addressed in subsection J of § 2.2-3704 in regard to transferring possession of records.<sup>4</sup> The Council also reviewed the status of records held by the Division of Legislative Automated Systems (DLAS), an IT agency for the legislative branch that maintains records of the General Assembly, the Clerks of the House and Senate, the Division of Legislative Services, and other legislative agencies. Subdivision 5 of § 30-34.14 provides that such records are not to

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<sup>4</sup> "In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester. Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia shall be the custodian of such permanently archived records and shall be responsible for responding to requests for such records made pursuant to this chapter."

be revealed by DLAS.<sup>5</sup> The next database example was the State Compensation Board and its Local Inmate Data System. Citizen requests for the database for a particular jail were denied due to the prohibition on the release of criminal history information and the FOIA exemption for "All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment." (§§ 19.2-389 and 2.2-3706(A)(2)(d).) However, individual records and statistical records are available online (vinelink.com and the State Compensation Board website, respectively). The Council next considered the database that exists at the Department of State Police for concealed handgun permits that are issued by the circuit court. Note that public access to records of persons having a concealed handgun permit has changed over time: these records were initially open, but subsequently the full State Police database was closed to public access, although individual circuit court records were open to the public. In 2015, however, all such records are closed except statistical and aggregate info.<sup>6</sup>

Another database example concerned the Department of Criminal Justice Services (DCJS) and the required training of law-enforcement officers. Currently DCJS oversees in-service training for qualification and certification of continuing education of law-enforcement officers as well as persons licensed as private security services businesses. As a result, DCJS maintains a database of all in-service training, which database also contains the names, positions, employee ID number, and employment history with law-enforcement agencies of each law-enforcement officer and similar data on private security individuals. The Council was told that there are 40,000 such individuals in the DCJS database. For law-enforcement officers, this information would be also maintained by the employing law-enforcement agency. Generally, except for name and position information, which is required to be released under FOIA, the remainder of the information is exempt from mandatory disclosure as a personnel record. The Council was informed that DCJS has no knowledge if a particular law-enforcement officer is an undercover officer (which information is also exempt from FOIA). It is a large database and very difficult for DCJS to follow-up whether certain fields are exempt and as a result the review of the database would be costly to the requester. If the requester requested records from the individual agencies, the FOIA request would be easier and hence less costly to produce. A reporter with the *Virginian-Pilot* newspaper requested some of the records from the DCJS database including names, job positions, and dates of hire for law enforcement employees. It appears that the reporter and DCJS reached an agreement on the production of these records, but subsequently DCJS denied the request. The requester filed a FOIA petition against DCJS in

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<sup>5</sup> "Every document or file maintained or stored on equipment of the Division shall be considered the property of the person for whom the document or file is maintained or stored. Neither the Director nor any employee of the Division shall reveal any of this property to any person outside of the Division, except with the consent of the owner of the property. "

<sup>6</sup> § 18.2-308.02 (D): " The clerk of court shall withhold from public disclosure the applicant's name and any other information contained in a permit application or any order issuing a concealed handgun permit, except that such information shall not be withheld from any law-enforcement officer acting in the performance of his official duties or from the applicant with respect to his own information. The prohibition on public disclosure of information under this subsection shall not apply to any reference to the issuance of a concealed handgun permit in any order book before July 1, 2008; however, any other concealed handgun records maintained by the clerk shall be withheld from public disclosure."

the Norfolk Circuit Court, and the Court ordered DCJS to produce the database under the terms the parties had previously agreed upon.<sup>7</sup>

Additionally, the Council discussed its recent advisory opinion (AO-03-15, issued on April 23, 2015) that addressed the question of whether the Office of the Executive Secretary of the Supreme Court of Virginia (OES) improperly withheld the electronic compilation of circuit court case status records in OES' case management system. The Council was informed that public access to the OES database varies; some circuit courts allow individual records to be accessed online, some allow their portion of the full database to be released, others do not participate in OES' case management system. OES has released those records in the past, but declined repeated requests for it recently, citing a change in policy last year. After lengthy analysis of pertinent provisions of law, AO-03-15 concluded that it appears that OES by statute operates and maintains a case management system, the operation and maintenance of the system is the transaction of OES' public business, and therefore OES' case management records are public records subject to FOIA.<sup>8</sup> By operation of law, the respective clerks also remain custodians of those records, and they bear responsibility for maintaining the integrity of those records. To the extent that OES owns or possesses such data, it is also a custodian of such records and likewise responsible to respond to a request for it under FOIA. Subsequent to the issuance of AO-03-15, it appears that the Newport News Daily Press has brought a FOIA petition against OES seeking release of the database, but that litigation has not been resolved. The Council will continue to monitor the case as it progresses.

In 2015, the Council welcomed Marisa Porto, vice-president of content for the Daily Press in Newport News, who was appointed to a four-year term by the Speaker of the House of Delegates as the media representative to the Council, and Shawri King-Casey, the Compliance and Transparency Counsel for the Office of the Attorney General, as the designee of the Attorney General to the Council.

## WORK OF THE COUNCIL

### May 20, 2015

The Council held its first meeting of 2015.<sup>9</sup> This meeting was held to hear bills referred by the 2015 Session of the General Assembly, to refer bills and other study issues to the

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<sup>7</sup> *Harki v. Dept. of Criminal Justice Services* (Circuit Court of the City of Norfolk, Civil Docket No. CL15-10637, letter opinion dated November 18, 2015); see also Jonathan Edwards, *Virginian-Pilot wins lawsuit to get police officers' info*, The Virginian-Pilot PilotOnline, November 18, 2015, available at [http://www.pilotonline.com/news/government/virginia/virginian-pilot-wins-lawsuit-to-get-police-officers-info/article\\_5415888b-71ec-56c9-90af-77f4c0326ada.html](http://www.pilotonline.com/news/government/virginia/virginian-pilot-wins-lawsuit-to-get-police-officers-info/article_5415888b-71ec-56c9-90af-77f4c0326ada.html) (last accessed December 1, 2015).

<sup>8</sup> Note that such records may still be subject to other exemptions depending on their contents, such as records concerning access control features of such a system (which may be exempt under subdivision 3 of § 2.2-3705.2) or the underlying software itself (which may be exempt under subdivisions 6 or 7 of § 2.2-3705.1).

<sup>9</sup> FOIA Council members Senator Stuart, Delegate LeMunyon, Ashby, Dooley, Treadway, Oksman, and Selph, were present; members Hamlett, Jones, Landon, Tavenner, and Whitehurst were absent.

Records Subcommittee and the Meetings Subcommittee which were created in 2014 as part of the study of FOIA in accordance with House Joint Resolution No. 96, and to present other issues of interest to the Council.

### **Recap of FOIA and Related Access Bills from 2015 Session of General Assembly**

Staff presented a recap of FOIA and related access bills from the 2015 Session of General Assembly and advised that the General Assembly passed a total of 16 bills amending FOIA during the 2015 Session. At its last meeting of 2014, the FOIA Council voted favorably to recommend the subject matter of three bills that passed the General Assembly in 2015: HB 1633 and SB 968, identical bills that create an exemption for certain records of certain health care committees and entities to the extent that they reveal information that may be withheld from discovery as privileged communications, and HB 2104, which provides that the record and open meeting exemptions for VCU Medical Center shall also apply when the records are in the possession of VCU or the discussion of certain matters occurs at a meeting of the Virginia Commonwealth University Board of Visitors.

In addition, HB 1776 and its Senate counterpart, SB 1032, in addition to eliminating the Alcoholic Beverage Control (ABC) Board and replacing it with the Virginia Alcoholic Beverage Control Authority, add a new FOIA exemption for certain proprietary records, trade secrets, financial records, and cost estimates held by the ABC Authority. The bill amends an existing records exemption in § 2.2-3705.3, adds a new records exemption in § 2.2-3705.7, and adds a new meetings exemption in § 2.2-3711, all subject to the delayed effective date of July 1, 2018. The thirteenth enactment, effective July 1, 2015, directs the FOIA Council to include a review of the amendments to § 2.2-3705.7 in the FOIA Council's three-year study directed by House Joint Resolution No. 96 (2014).

Four bills add two new meetings exemptions in FOIA as follows. HB 1618 and SB 1126, both amending § 2.2-3711, allow a closed meeting to be held for the discussion of certain exempt records related to Resource Management Plans. HB 1776 and SB 1032 amending §§ 2.2-3705.3, 2.2-3705.7, and 2.2-3711, as summarized above, allow a closed meeting to be held to discuss certain exempt records held by the ABC Authority.

Finally, twelve bills amend existing provisions of FOIA. Please see on the Council's website the full 2015 Legislative Update for further details.

### **Bills referred to Council by 2015 Session of General Assembly**

Staff advised the Council that the General Assembly had referred eight bills to the Council for study this year and provided an overview of each bill. The Council then discussed each bill in depth.

Delegate Pogge's HB 1646 provided that in an enforcement action, if the court finds the public body did not provide personal notice of a meeting as provided in subsection E of § 2.2-3707, the court may invalidate any action of the public body taken at such meeting. Mr. Oksman asked if there were standards for how serious a violation must be before an action

would be invalidated. Staff replied there were no such limits or thresholds in the bill. Mark Flynn of the Virginia Municipal League (VML) observed that an inadvertent mistake in sending individual notice could lead to invalidation. Staff confirmed for Delegate LeMunyon that the bill would only apply to individual notice sent under subsection E of § 2.2-3707, not other types of notice. Mr. Oksman and Mr. Flynn discussed what effect such invalidation might have on zoning actions and bond issues. The Council by unanimous vote then referred the bill to the Meetings Subcommittee for further study.

Identical bills HB 1722 (Ramadan) and SB 893 (Petersen) would have eliminated the working papers and correspondence record exemption for the president or other chief executive officer of any public institution of higher education in Virginia. Delegate Ramadan was present and advised the Council that no other heads of state agencies are able to use this exemption, and that its use by university presidents has caused negative press coverage and is bad for the reputation of the universities. Staff confirmed that community colleges are also considered public institutions of higher education in response to a question from Delegate LeMunyon. The Council by unanimous vote then referred the bills to the Records Subcommittee for further study.

HB 1776 (Albo)/SB 1032 (McDougle) were referred to FOIA Council by an enactment clause contained in both bills. The thirteenth enactment clauses in these bills requires the Council to include in its study of FOIA (in accordance with House Joint Resolution No. 96 of the Acts of Assembly of 2014) a review of the provisions of § 2.2-3705.7 that create a new exemption for the Alcoholic Beverage Control Authority for records that contain (i) information of a proprietary nature gathered by or in the possession of the Authority from a private entity pursuant to a promise of confidentiality; (ii) trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), of any private entity; (iii) financial records of a private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; (iv) contract cost estimates prepared for the (a) confidential use in awarding contracts for construction or (b) purchase of goods or services; or (v) the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority. The enactment clauses direct the Council to make any recommendations it deems necessary and appropriate to this new exemption. Staff noted that the bill was referred because there was some question as to the need for the new records exemption it creates. The Council by unanimous vote referred the bill to the Records Subcommittee for further study.

HB 2223 (Morris) provides that in addition to the civil enforcement provisions of FOIA, any officer, employee, or member of a public body who, without legal excuse or justification, deliberately, willfully, and knowingly violates certain FOIA provisions is guilty of a Class 1 misdemeanor. In response to questions from Senator Stuart, staff confirmed that if enacted, these would be the first criminal penalties for violations of FOIA in Virginia. Staff also confirmed that a public employee could face criminal prosecution over a failure to respond to a FOIA request. Delegate LeMunyon stated that after a conversation with a constituent regarding a request taking months, where the only recourse left is going to court, he thought that current law is insufficient. Staff noted that current law provides monetary penalties for

knowing and willful violations. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that a cursory review showed about twelve other states with fee penalties and several with criminal misdemeanor or other penalties, such as subjecting a public official to recall. She stated that she agreed with Delegate LeMunyon that citizens currently are at a loss for adequate remedies. Mr. Flynn expressed concern that a criminal penalty might be used or abused to get a warrant from a magistrate and generate newspaper headlines, and could be used as a political weapon. Senator Stuart stated that potential mischief is a big concern. Mr. Oksman asked if someone swears to a magistrate for a warrant, how would the magistrate know the official did not act with legal advice, or in bad faith, or otherwise? Mr. Flynn said the magistrate would not know. LaBravia Jenkins of the Petersburg Commonwealth's Attorney's Office and the Virginia Association of Commonwealth's Attorneys (VACA) stated that VACA opposes criminalizing FOIA. She observed that the criminal justice system is about crime and punishment whereas FOIA is about how public officials go about their work, and noted that a Class 1 misdemeanor is punishable by up to one year in jail and a \$2,500 fine. Delegate LeMunyon asked if criminalizing is not the right answer, then what are some other ideas? Ms. Jenkins stated that good public officials take FOIA seriously, and suggested increased fines or other alternatives would be better than criminalization. Senator Stuart asked if there was anywhere else in the Code with a criminal punishment for a civil, ministerial act; Ms. Jenkins replied that there was not. The Council then voted unanimously to recommend against HB 2223.

SB 1166 (Hanger) makes a public service corporation subject to the public records provisions of FOIA with respect to any project or activity for which it may exercise the power of eminent domain and has filed or prefiled for a certificate or other permitting document. Staff noted this bill does not amend FOIA, but rather concerns other access provisions outside of FOIA. David Ogburn, representing Verizon, stated that the genesis of the bill was a utility pipeline being built and an attempt to get routing information on the pipeline. He further stated that while he was not directly involved in the pipeline project, the broader concern is that the bill would extend FOIA to records held by private companies that are "authorized to use eminent domain." He said that such language would include all public service corporations, not just those that actually use eminent domain. Those private corporations do not want their competitors to know their costs, economic development prospects, and other information. Mr. Ogburn provided other examples besides the pipeline, such as a data center and building facilities. Ms. Rhyne stated that Mr. Ogburn was correct about the origin of the bill, but noted that a private entity can be subject to FOIA already if it is principally or wholly supported by public funds or performing a government service. She further stated that the power of eminent domain is granted by the legislature, and the legislature can place conditions on it. The Council then voted 6-to-1 in favor of referring the bill to the Records Subcommittee for further study; all members present voted "aye," except Senator Stuart voted "no."

SB 1402 (Cosgrove) authorizes a public body to convene a closed meeting for consultation with or briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning criminal street gang-related activities. Senator Stuart, Delegate LeMunyon and staff discussed how under current law the topic of gang-related activities

does not appear to be covered under any current exemptions. Staff related that the patron, Senator Cosgrove, had spoken with a City Attorney who indicated the topic was not covered by the current exemption for terrorist activity or other threats to public safety under subdivision A 19 of § 2.2-3711. The Council by unanimous vote then referred the bill to the Meetings Subcommittee for further study.

## Subcommittee Reports

**Records Subcommittee.** Council member and Subcommittee Vice-chair Chris Ashby advised the Council that the Records Subcommittee held its first meeting of the 2015 Interim on May 11, 2015 and was continuing its study of records exemptions as directed by HJR No. 96. Mr. Ashby provided the following recap of the Subcommittee's work to date:

2014 recap:

- Met four times in 2014 to begin studying record exemptions pursuant to House Joint Resolution No. 96 (2014).
- Addressed exemptions of general application (§§ 2.2-3705.1 and 2.2-3705.) and exemptions to records of specific public bodies (§ 2.2-3705.7).
- Specific recommendations to be included in omnibus legislation at the end of the three-year study.

2015 recap: First meeting, May 11, 2015 (Monday of last week):

Old Business:

- Carried over for further study two exemptions:  
(1) advice of legal counsel (§ 2.2-3705.1(2)) and  
(2) working papers and correspondence of certain officials (§ 2.2-3705.7(2)).
- Looked at an exemption for certain records maintained by the Department of the Treasury or participants in the Local Government Investment Pool (§ 2.2-3705.7(27)). Asked that a legislative proposal be drafted to eliminate this specific exemption, and instead expand a more general exemption for financial account and routing numbers to cover the data that needs protection (§ 2.2-3705.1(13)). To be considered at next meeting.

New Business:

- The Subcommittee began looking at exemptions for proprietary records and trade secrets (§ 2.2-3705.6).
- Suggested to consolidate the many specific individual exemptions into one or more broader exemptions in this area. The Subcommittee directed that staff and interested parties form a work group on this issue to develop draft language for the Subcommittee's consideration. The work group has not yet set its first meeting date.
- The next Subcommittee meeting has not yet been scheduled.

**Meetings Subcommittee.** Council member and Subcommittee Chair, Kathleen Dooley advised the Council that the Meetings Subcommittee held its first meeting of the 2015 Interim on May 12, 2015, to continue its study of meetings exemptions as directed by HJR No. 96. Ms. Dooley indicated that the Subcommittee had reviewed draft legislation that made several technical corrections to the meeting exemptions found in § 2.2-3711. She advised that there had been several discussions of the personnel meeting exemption, but that there was not yet resolution on that issue. The next meeting date for the Subcommittee is set for June 17, 2015.

### **Public comment**

The Council offered the opportunity for public comment. No public comment was offered.

### **Expiring FOIA Council Membership terms.**

Staff advised the Council that member George Whitehurst's second full 4-year term ends July 1, 2015 and he is ineligible for reappointment. In addition, Stephanie Hamlett's first 4-year term ends July 1, 2015, but she is eligible for reappointment. Kathleen Dooley's first 4-year term ends July 1, 2015 and Ms. Dooley was reappointed by Senate Rules to a second 4-year term ending July 1, 2019.

### **Other Business**

#### Databases and recent Council Advisory Opinion.

Staff discussed its recent advisory opinion (AO-03-15, issued on April 23, 2015) that addressed the question of whether the Office of the Executive Secretary of the Supreme Court of Virginia (OES) improperly withheld the electronic compilation of circuit court case status records in OES' case management system. OES has released those records in the past, but declined repeated requests for it recently, citing a change in policy last year. After lengthy analysis of pertinent provisions of law, AO-03-15 concluded that it appears that OES by statute operates and maintains a case management system, the operation and maintenance of the system is the transaction of OES' public business, and therefore OES' case management records are public records subject to FOIA.<sup>10</sup> By operation of law, the respective clerks also remain custodians of those records, and they bear responsibility for maintaining the integrity of those records. To the extent that OES owns or possesses such data, it is also a custodian of such records and likewise responsible to respond to a request for it under FOIA.

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<sup>10</sup> Note that such records may still be subject to other exemptions depending on their contents, such as records concerning access control features of such a system (which may be exempt under subdivision 3 of § 2.2-3705.2) or the underlying software itself (which may be exempt under subdivisions 6 or 7 of § 2.2-3705.1).



Further, staff informed the Council that access to public records contained in databases owned and maintained by many governmental entities has become the subject of numerous inquiries to the Council. Staff provided several database examples and indicated how, under FOIA or other law, such databases were to be treated for public access purposes.

1) VITA maintains IT architecture and equipment for executive branch agencies. The Library of Virginia archives records from all over the Commonwealth. Both are addressed in § 2.2-3704(J) re: transferring possession of records:

"In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester. Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ [42.1-76](#) et seq.). In accordance with § [42.1-79](#), the Library of Virginia shall be the custodian of such permanently archived records and shall be responsible for responding to requests for such records made pursuant to this chapter."

2) DLAS maintains legislative records for the General Assembly, Clerks of the House and Senate, DLS and other legislative agencies. Has provision for documents not to be revealed by DLAS in § 30-34.14(5):

"Every document or file maintained or stored on equipment of the Division shall be considered the property of the person for whom the document or file is maintained or stored. Neither the Director nor any employee of the Division shall reveal any of this property to any person outside of the Division, except with the consent of the owner of the property. "

3) OES maintains case management system for circuit courts. Recent advisory opinion (AO-03-15) with which OES disagrees re: release of full database. Some jurisdictions allow

individual records to be accessed online, some allow their portion of full database to be released, others do not participate in OES' case management system.

#### 4) State Compensation Board - Local Inmate Data System

Citizen requested database for a particular jail, denied due to criminal history and FOIA exemption for "All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment." (§§ 19.2-389 and 2.2-3706(A)(2)(d).) However, individual records and statistical records are available online (vinelink.com and SCB website, respectively).

5) Concealed handgun permits - changes over time through legislation (open, then full State Police database closed, but individual circuit court records open, now all closed except statistical and aggregate info).

§ 18.2-308.02 (D): " The clerk of court shall withhold from public disclosure the applicant's name and any other information contained in a permit application or any order issuing a concealed handgun permit, except that such information shall not be withheld from any law-enforcement officer acting in the performance of his official duties or from the applicant with respect to his own information. The prohibition on public disclosure of information under this subsection shall not apply to any reference to the issuance of a concealed handgun permit in any order book before July 1, 2008; however, any other concealed handgun records maintained by the clerk shall be withheld from public disclosure."

#### **FOIA Workshops**

Staff advised that, while well attended, the annual statewide FOIA Workshops posed considerable administrative burdens in their planning and execution. While staff views FOIA training as its most critical mission, it was considering changing the way FOIA training would be conducted statewide. Essentially, staff proposed that in fulfilling its statutory mission to conduct educational programs about FOIA, it would provide training upon request to interested groups, such as the staff of state and local agencies, members of local governing bodies, media organizations, citizen organizations, and any other group that wishes to learn more about FOIA. Council staff will travel to the location of the group requesting training. The training is and would be tailored 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 or organization. Organizations requesting training are strongly encouraged, but not required, to consolidate training by including other like organizations within a single or neighboring jurisdiction(s) wherever possible. This training is free of charge and is available generally from March through November. Because the FOIA Council is a legislative agency, training is generally not available while the General Assembly is in session. The Council deferred to staff the authority to fashion any alternative to the statewide FOIA workshops it deemed advisable.

### **Next Council Meeting**

The next Council meeting is set for Thursday, July 22, 2015 at 1:30 p.m. in the House Room D of the General Assembly Building in Richmond.

### **July 22, 2015**

The Council held its second meeting of the 2015 interim.<sup>11</sup> This meeting was held to receive progress reports from the Records Subcommittee and the Meetings Subcommittee which were created in 2014 as part of the study of FOIA in accordance with House Joint Resolution No. 96, and to discuss other issues of interest to the Council.

Delegate Jim LeMunyon, Vice-chair, called the meeting to order and welcomed the Council's newest member, Marisa Porto. Ms. Porto, vice president of content for the Daily Press in Newport News, was appointed to a four-year term by the Speaker of the House of Delegates as the media representative to the Council. Delegate LeMunyon also noted that Stephanie Hamlett has been reappointed to serve another four-year term on the Council.

### **Subcommittee Reports**

The Council next received progress reports from the Records Subcommittee and the Meetings Subcommittee. Alan Gernhardt, Council staff attorney advised the Council that the Records Subcommittee had met three times during the 2015 Interim ( May 11, 2015, June 18, 2015, and July 22, 2015) to continue its study of records exemptions as directed by HJR No. 96 and pursuant to the study plan adopted by the Council. Please see Appendix A to this meeting summary for information about what sections of FOIA were reviewed by the Records Subcommittee beginning in 2014 and the recommendations of the Records Subcommittee made as of July 22, 2015.<sup>12</sup>

Delegate LeMunyon called for public comment on the work of the Records Subcommittee. Dave Ress, a reporter with the Daily Press, opined that the working papers exemption in Virginia was overly broad and needs to be addressed. Mr. Ress also noted that the use of the personnel meeting exemption was too broadly applied and in contravention of a 1999 Attorney General opinion on the topic. David Ogburn, representing Verizon, advised that the term "telecommunication carriers" contained in the FOIA record exemptions was out-of-date. He suggested that staff contact the State Corporation Commission to ascertain the most current terminology. Craig Merritt, representing the Virginia Press Association, cautioned the Council that Subcommittee recommendations for "no change" were somewhat misleading. In some cases, this recommendation was as a result of heavily debated issues, but other times it came because no challenge was made of the exemption and hence no further discussion. Delegate LeMunyon asked if there were any "no change" recommendations that VPA would like to see changed. Mr. Merritt explained that the VPA has picked its battles, but their real concern was when no affected agency comes to a

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<sup>11</sup> All Council members were present, except Senator Stuart, Ms. Treadway, and Messrs. Ashby and Oksman.

<sup>12</sup> Appendix G to this Annual Report summarizes the reviews performed by both Subcommittees.

Subcommittee meeting, there is no opportunity to respond. Michael Bogacki and David M. Lindsey, both representing the Unalienable Rights Foundation, did not comment about the work of either Subcommittee, but instead provided general comments about the Virginia Public Records Act, previous FOIA cases decided by the Virginia Supreme Court, and specific advisory opinions of the Council. In addition, Mr. Bogacki served Council staff with a FOIA petition for alleged violations of FOIA and the Virginia Public Records Act committed on the day of this meeting.

Council member Kathleen Dooley, chair of the Meetings Subcommittee advised the Council that Meetings Subcommittee had met three times during the 2015 Interim ( May 12, 2015, June 17, 2015, and July 21, 2015) to continue its study of meeting exemptions as directed by HJR No. 96 and pursuant to the study plan adopted by the Council. Please see the Council's website for detailed information about what sections of FOIA were reviewed by the Meetings Subcommittee beginning in 2014 and the recommendations of the Meetings Subcommittee made as of July 22, 2015.

Delegate LeMunyon requested any comment from the Council regarding the work of the Subcommittees. Mr. Landon expressed concerns about the use of the personnel exemptions (for both records and meetings) and related issues concerning the working papers exemption and determining who is the custodian of records at any given agency. He observed that these issues may cause confusion for the public and raise questions of accountability.

The Council then heard public comment. Mr. Ress reiterated concerns about the use of the personnel exemption for closed meetings and how it may be used more broadly than intended. In response to a question from Delegate LeMunyon, Mr. Ress stated he felt the haphazard and overly broad way in which the exemption is applied suggests that tighter language would help officials and the public know what is covered.

Mr. Lindsey asserted that the Virginia Public Records Act clearly identifies who are the heads of agencies and the custodians of public records. He further asserted that FOIA exemptions violate provisions of the Virginia and United States Constitutions,<sup>13</sup> and expressed his disagreement with the conclusion of Freedom of Information Advisory Opinion 05 (2006). Noting that every advisory opinion begins with a statement that it is based on the facts presented by the person requesting the opinion, he stated that he felt FOIA Council staff was not getting complete information when writing advisory opinions.

Staff noted that the study plan for HJR No. 96 adopted last year was incorporated for reference. The next issue of business was the appointment of a Council member to the Meetings Subcommittee to fill the vacancy created by the expiration on July 1, 2015 of Mr. Whitehurst's term on the FOIA Council. Ms. Porto volunteered to serve on both the Meetings Subcommittee and the Records Subcommittee.

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<sup>13</sup> Specifically, Mr. Lindsey referred to Va. Const. art. I, §§ 2 and 12, and U.S. Const. amend. I and XIV.

The agenda item entitled "Exercise of FOIA Council's statutory duties" was deferred until the next Council meeting in September due to Mr. Oksman absence.

The Council then received additional public comment on FOIA generally or other access issues. Mr. Ress informed the Council that he had been a reporter in Virginia since 1990 and had also reported in New Jersey, Illinois, Quebec, London, and Africa, and that those experiences gave him perspective. He advised that the study of FOIA should be a fundamental look to ensure that the law delivers to Virginia citizens the information they have a right to know. He noted that Virginia exemptions for working papers, criminal investigative files, suicide reports, and public utilities are different from other states' approaches and in these areas Virginia FOIA is not good. Mr. Ress also believed that the cost of producing records under a FOIA request should be carefully examined. Mr. Ress stated that FOIA exemptions are discretionary but are treated as mandatory, and that enforcement of FOIA rights is costly and something many citizens cannot afford. Delegate LeMunyon inquired how best to put teeth in FOIA enforcement. Mr. Ress responded that the Council should enforce the law or alternatively, the Attorney General should bring cases on behalf of citizens. He also suggested examining the level of fines, looking at whether it should be a criminal misdemeanor or civil penalty, and making provisions to get at notes from closed meetings if it is determined that the meeting was closed improperly. Delegate LeMunyon asked about comparison studies with other states. Mr. Ress stated he had looked but did not find any good studies, and that comparing statutes directly was a chore.

Maria Everett, Executive Director, informed the Council that after announcing the discontinuation of the annual FOIA seminars in favor of more individualized training by arrangement, the response was overwhelmingly positive.

The next meeting of the Council is scheduled for Wednesday, September 30, 2015 at 10:00 a.m. in House Room D of the General Assembly Building in Richmond. There being no further business, the meeting was adjourned.

## **September 30, 2015**

The Council held its third meeting of the 2015 interim.<sup>14</sup> This meeting was held to receive progress reports from the Records Subcommittee and the Meetings Subcommittee which were created in 2014 as part of the study of FOIA in accordance with House Joint Resolution No. 96, to begin the annual Legislative Preview, and to discuss other issues of interest to the Council.

The meeting was called to order and members introduced themselves, including Shawri King-Casey, the new designee of the Attorney General. Ms. King-Casey is the first Compliance and Transparency Counsel for the Office of the Attorney General. Next the Council held elections for Chair and Vice Chair. Delegate LeMunyon was elected Chair and Senator Stuart was elected Vice-Chair, both by unanimous vote.

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<sup>14</sup> All Council members were present, except Ms. Hamlett and Mr. Ashby.

Delegate LeMunyon then noted that because Delegate Morris was unable to attend today's meeting, agenda item no. 4 concerning Delegate Morris' House Bill 2223 would be deferred until the Council's next meeting on November 18, 2015.

### **Subcommittee Reports**

Staff advised the Council that the Records Subcommittee had met four times during the 2015 Interim ( May 11, June 18, July 22, and August 18, 2015) to continue its study of records exemptions as directed by HJR No. 96 and pursuant to the study plan adopted by the Council. Please see the Council's website for detailed information about what sections of FOIA were reviewed by the Records Subcommittee beginning in 2014 and the recommendations of the Records Subcommittee made as of August 18, 2015.

Council member Kathleen Dooley, chair of the Meetings Subcommittee advised the Council that Meetings Subcommittee had met four times during the 2015 Interim ( May 12, June 17, July 21, and August 19, 2015) to continue its study of meeting exemptions as directed by HJR No. 96 and pursuant to the study plan adopted by the Council. Ms. Dooley announced that the Subcommittee had completed its initial review of the closed meeting exemptions and was moving on to consider procedural matters. Please see Appendix B to this agenda for information about what sections of FOIA were reviewed by the Meetings Subcommittee beginning in 2014 and the recommendations of the Meetings Subcommittee made as of July 22, 2015.<sup>15</sup> The Meetings Subcommittee is scheduled to meet again this afternoon at 1:00 PM, following the full Council meeting.

### **Review of Subcommittee-recommended legislative proposals**

Following the reports of the Subcommittees, Maria J.K. Everett, Executive Director of the Council, reviewed the draft legislation that has been recommended to date by both Subcommittees. As a reminder, the Council has previously indicated that rather than introduce individual legislative recommendations as separate bills while the HJR No. 96 study is ongoing, it prefers to introduce omnibus legislation at the conclusion of the study.

### **Legislative Preview**

Stephen L. DeVita, Esq., presented three proposals on behalf of the Loudoun County School Board. The full text of the proposals will be posted on the Council web site. A summary of the three proposals follows:

1. To amend the closed meeting exemption for discussion of the acquisition or disposition of real property, subdivision A 3 of § 2.2-3711, to clarify that a local governing body may convene in closed meeting when working collaboratively or consulting with a local school board regarding the acquisition of real property for

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<sup>15</sup> Appendix G to this Annual Report summarizes the reviews performed by both Subcommittees.

2. school sites, even though the local governing body is not contemplated to be a co-purchaser of the property with the school board. Mr. DeVita expressed a concern that under current law, the County Board of Supervisors may not be able to meet with the School Board to discuss the School Board's acquisition of real property when the Board of Supervisors is not a party to the contract, even though the Board of Supervisors provides the budget for the School Board.
3. To amend subsection C of § 2.2-3704 to clarify that a court of competent jurisdiction may exercise discretion in fashioning appropriate relief when a public body is at risk of being unable to meet the time deadlines in responding to a records request, even with the 7-day extension. Mr. DeVita stated that this clarification would allow a court to address mischievous behavior by fashioning a remedy appropriate to the circumstances. As an example, he suggested a court might limit the number of new FOIA requests a requester might make if the requester if the requester already had numerous requests outstanding.
4. To amend subsection C of § 2.2-3704 by incorporating it into § 2.2-3713 so that the proceedings by which the requester seeks enforcement and the proceedings by which the public body seeks relief are together in one section. The language should also state that the public body may file a counterclaim for relief in response to a requester's action for enforcement.

Next to speak was Victoria Nicholls, a citizen of Virginia who suggested changing the exemptions applicable to the Virginia Department of Health Professions (DHP) and the various boards relating to medical professions. She specifically suggested that copies of DHP reports and decisions to dismiss or proceed with a case against a health care professional be given to the complainant; that correspondence from the health care professional who is the subject of a complaint be given to the complainant; that records of state employees involved in investigations be available so that complainants can see outcomes for patients to compare as to whether state employees are doing their jobs; and that professional curricula vitae for appointed boards be removed from the Governor's exemption for working papers. Ms. Nichols stated that her experiences with such matters dated back to 2009 and that in practice, investigations of health care professionals may involve sharing the same information among multiple state agencies, but that there may be discrepancies in the facts, incomplete investigations, but that complainants cannot find out if the investigations performed are thorough, if board members may have conflicts, or other "back door" issues. She stated that taxpayers currently pay over \$12 million per year for DHP investigations, but under current law cannot even tell if investigations are actually performed. As a further example, Ms. Nicholls indicated that her own medical records had been given to the lawyer who represented the health care professional who was the subject of her complaint without any notification to Ms. Nicholls and without her permission. She stated that her goal is to ensure that state agencies do what taxpayers pay them to do and that there are no conflicts of interest.

## Public Comment

Delegate LeMunyon opened the floor to public comment and indicated he would particularly like to hear comments about the work of the Subcommittees on HJR No. 96.

Dave Ress, a reporter with the Daily Press, identified three issues of concern: 1) over use of the working papers exemption, 2) open meetings review, and 3) the recent decision of the Supreme Court of Virginia in *Department of Corrections v. Surovell* (Record No. 141780, decided September 17, 2015). Mr. Ress stated that the working papers exemption is possibly the biggest loophole that allows the affairs of government to be conducted in an atmosphere of secrecy, as cited as an example a report on government waste and duplication of effort by the Office of the State Inspector General that was withheld as a Governor's working paper, among other examples. Regarding closed meetings, he described one local governing body that had not had a meeting without a closed session in at least a year and a half, and another that spent six hours in and out of closed session. He posed the question of whether we really want to have that many closed meetings that last that long. Regarding the *Surovell* decision, he noted the preamble to FOIA states that exemptions are discretionary and narrowly targeted, which keeps the fundamental premise of the public right to know, but the Supreme Court decision focuses on the language of the exemptions rather than the basic procedure and five responses to records requests set out in § 2.2-3704.

Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), stated she had received a message from a man in southwest Virginia stating that his local governing body had held a closed meeting at every meeting for the past 20 years and described it as demoralizing to the public and making the citizens feel like trespassers in their own town. She noted that the last FOIA rewrite was in 1999, it involved hard compromises on controversial exemptions, and it created the Council. She stated that she felt the Council's stature as the authority on open government is waning, that one Governor proposed elimination of the Council and another completely misstated the law. She continued by saying it is a completely different world from 1999, that FOIA needs a radical revamp, that much of FOIA no longer serves the public, and Virginia can and must do better.

Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), commented on the work of the proprietary records study group and the *Surovell* case. He related that the Supreme Court of Virginia's opinion in the *American Tradition Institute* case last year invited the General Assembly to address proprietary records. He further stated that the rule of construction is that the General Assembly acquiesces in the Court's interpretation unless it changes the statutory language, and therefore we will have to follow the Court's interpretation of the word "proprietary" set out in the *American Tradition Institute* case in all of the other exemptions where the word appears. He expressed the VPA's opinion that it is not possible to fix everything involving proprietary records, but is possible to deal with situations where private entities submit trade secrets or confidential financial information to public bodies. Regarding the *Surovell* decision, Mr. Merritt noted two points: 1) FOIA states that the public body bears the burden to establish an exemption by a preponderance of



evidence, but the *Surovell* decision sets forth a standard of deference to the public body that may require redrafting, and 2) the *Surovell* decision states the rule that if a record includes material subject to an exclusion, the public body may withhold the entire record, which cuts against the accepted interpretation of FOIA for at least a couple of decades, and will need to be addressed in the Code.

Roger Wiley, an attorney representing local government and a former member of the Council, stated that based on his own experience, in spite of what some might suggest, the sky is not falling on open government in Virginia. He stated that the majority of those in local government comply with the law day in and day out. While acknowledging that violations do occur, he suggested that the answer is not always to rewrite the law, but to seek clarification. He stated that the examples Mr. Ress provided were problems with individual interpretations of the law, not the law itself. He expressed that the public does not appreciate how tedious and time consuming good government can be, in reference to the work of the Subcommittees reviewing every exemption in FOIA one by one. He concluded that through the study process generally there are good reasons for the way the law is now and sweeping revisions are not needed.

### **Other Business**

Delegate LeMunyon indicated he had received a letter from Delegate Surovell regarding the recent Supreme Court decision and that the matter would be taken up at the November 18, 2015 meeting of the Council. He stated the Council would also take stock of the progress of the three-year study under HJR No. 96. He continued by saying he had heard some say the Council is not shrinking exemptions enough, and he would encourage people to come forward to state which exemptions and why, to tell the Council specifically what needs to be changed. He asked that going forward, each Subcommittee have a specific reason for each recommendation stated in the meeting minutes, particularly as members of the General Assembly will want to know the reasons when considering any legislation produced by the study for the 2017 Session.

Marisa Porto stated that as a new Council member, she had gone back to the original study plan and would like further clarity on the philosophy of the Council, particularly in light of the *Surovell* decision. Delegate LeMunyon stated that he was still working through the *Surovell* decision, but generally his opinion was to ask if FOIA did not exist, what would we keep and why, and which exemptions are necessary?

There being no further public comment, the next order of business was the appointment of Ms. King-Casey as a member of both the Records and Meetings Subcommittee.

As a reminder, the next meeting of the Council is scheduled for Wednesday, November 18, 2015 at 10:00 a.m. in House Room C of the General Assembly Building in Richmond. There being no further business, the meeting was adjourned.

## **November 18, 2015**

The Virginia Freedom of Information Advisory Council (the Council) held its fourth meeting of the 2015 Interim on November 18, 2015.<sup>16</sup> This meeting was held to receive progress reports from the Records Subcommittee and the Meetings Subcommittee which were created in 2014 as part of the study of FOIA in accordance with House Joint Resolution No. 96, to continue the Legislative Preview, and to discuss other issues of interest to the Council.

### **Review of HB 2223 (2015, Delegate Morris)**

The meeting was called to order and Delegate LeMunyon asked Delegate Morris to speak to his House Bill 2223, which would have provided that in addition to the civil enforcement provisions of FOIA, any officer, employee, or member of a public body who, without legal excuse or justification, deliberately, willfully, and knowingly violates certain FOIA provisions would be guilty of a Class 1 misdemeanor. The Council had previously reviewed this bill at its May 20, 2015 meeting and voted not to recommend the bill, but Delegate Morris was given another opportunity to speak to the Council about his concerns. Delegate Morris informed the Council today that he intends to introduce three FOIA bills in the 2016 Session of the General Assembly. The first is a modified version of HB 2223. The new version includes the same criminal misdemeanor penalty, but does not allow a citizen to swear out a misdemeanor before a magistrate as can be done for other misdemeanors. Instead, one would have to go to a Commonwealth's Attorney or law enforcement agency before a warrant could be issued, which Delegate Morris indicated is the same level of scrutiny required for felony offenses. He stated that this change was to prevent any potential abuse of the criminal penalty. Delegate Morris' second proposal would require government employees, elected officials, and appointees to use only government-provided email accounts to conduct government business. Any such email that was inadvertently conducted on a non-government account would be required to be forwarded to a government account for record retention purposes. The third proposal would require that a credentialed member of the press be allowed to attend all closed meetings, but not to disclose the contents of the closed meeting unless it was conducted in violation of FOIA. Delegate Morris stated that the second and third proposals were to improve accountability to citizens and increase their confidence in government. In response to questions from the Council, Delegate Morris stated that 24 other states have misdemeanor penalties and one has felony penalties for FOIA violations and that his first bill was tailored to require the highest standards of willful and deliberate conduct before imposing criminal penalties. Regarding the second bill, he told the Council that while private email accounts may be subject to FOIA now if they are used in the transaction of public business, the problem is retention of private email, especially after the person leaves office or employment. The Council questioned what is a "credentialed" member of the press as the term is used in the third bill. Delegate Morris indicated he did not have a specific definition, but the intent was to improve oversight of closed meetings. The Council and Delegate Morris also discussed

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<sup>16</sup> All Council members were present, except Mr. Jones and Ms. King-Casey.

the process involved in implementing each of the three bills as practical matters, and how each might be enforced.

Delegate LeMunyon then opened the floor to public comment. Donna Sayegh, a citizen from Portsmouth, described a situation where two local city council members disagreed over what had happened in a closed meeting, and stated that it would have benefitted citizens if there had been a witness there (as suggested in Delegate Morris' third proposal).

Dave Ress, a reporter with the Daily Press, noted that Delegate Morris had referenced dozens of citizens' complaints, not complaints from the media, and stated that all of the proposals were interesting and presented complicated issues. He suggested that there may be other ways to monitor and verify closed meetings, noted that text messages present similar issues to email, and stated that in his experience with current law, a media entity like the Daily Press would go to court to enforce FOIA but ordinary citizens would not. Senator Stuart asked whether Mr. Ress would be willing to sit in a closed meeting as a member of the press under Delegate Morris' third proposal. Mr. Ress indicated that while he would obey the law if it happened, he had a problem with the idea of being sworn to secrecy beforehand.

La Bravia Jenkins, President of the Virginia Association of Commonwealth's Attorneys (VACA), stated that the proposed criminal penalty bill was problematic and that while she understood it was intended to improve accountability, it could lead to any amount of mischief. As an example, she posited that if a receptionist with many duties decides not to respond to a FOIA request in time, the receptionist would be guilty of a misdemeanor and subject to up to one year in jail and up to a \$2,500 fine. She further stated that she had not heard of any attempt to fix the civil penalty or suggest other ways to punish, and that she did not believe a criminal penalty will work because it would have many unintended consequences.

Roger Wiley, speaking on behalf of the Virginia Association of Counties (VACo) and the Virginia Municipal League (VML), informed the Council that both organizations had opposed the bill in the past for many of the same reasons Ms. Jenkins stated. He expressed concern that a criminal penalty might be used as a political weapon, and concern that citizens who volunteer to serve on public bodies would be exposed to criminal penalties, which would have a chilling effect on their willingness to serve. Mr. Wiley stated he felt the bill regarding email accounts was unnecessary and that in practical terms, most people have multiple accounts and often use them interchangeably. On the third bill, Mr. Wiley asserted that if a reporter was invited into a closed meeting, then it was not really closed. Additionally, he noted other potential issues such as credentialing reporters at the local level, and that it was unfair to subject reporters to possible criminal penalties for saying what happened in a closed meeting when members of the public body could speak out about it without penalty. He also noted that good reporters often find out what happened in closed meetings anyway.

Craig Merritt, speaking on behalf of the Virginia Press Association (VPA) regarding Delegate Morris' third proposal, stated that VPA would not want to institutionalize the role

of the press as an actor in government. He agreed with Mr. Wiley that reporters often get information from multiple sources, and expressed concern regarding misattribution of sources if reporters were present in closed meetings. He agreed with Delegate Morris' idea that there is a need for an ombudsman function and more ability to check what goes on in a closed meeting, but expressed that this proposal may not be the right way to do it.

Delegate Morris was given the opportunity to address these comments. Regarding his first proposal, he said that given the high standards involved he did not see how anyone would "stumble" in to a criminal violation. He observed that the General Assembly passes new criminal laws every session, and Commonwealth's Attorneys can adjust to them. Regarding the second, he observed that once an email message on a private account was deleted, there was no practical way to get it under FOIA since the public body would not have a copy. In that case, a subpoena to the email provider would be necessary. He also emphasized that the purpose of his proposals is to provide checks and balances to give citizens confidence that government is open and transparent. Ms. Porto thanked Delegate Morris, noting that the Daily Press has brought a FOIA petition against the Office of the Executive Secretary of the Supreme Court. She stated she was disheartened by hearing excuses from government and complaints from citizens, noting that on a practical level most citizens will not go to court, but FOIA is not about the media, it is about citizens' rights.

***Department of Corrections v. Surovell (Supreme Court of Virginia, decided Sept. 17, 2015)***

Delegate Surovell was present at the Council meeting to address this case. He stated that the substance of the case was that people interested in better understanding how executions are carried out in Virginia asked the Department of Corrections (DOC) for relevant records. He indicated that DOC denied the request because the majority of the records were exempt because their release would jeopardize public safety. Delegate Surovell was the named petitioner in a mandamus action filed against DOC in Fairfax County Circuit Court. He stated that the judge rejected much of DOC's argument and ordered DOC to turn over most of the requested records, and DOC appealed to the Supreme Court of Virginia. The Supreme Court issued its opinion in favor of DOC. Delegate Surovell identified two problems he found with the Supreme Court's decision. The first was that even though appellate review is conducted *de novo*, the Supreme Court directed the trial court to give agencies deference as to whether they meet the exemption. Delegate Surovell asserted that giving such deference means that the review is not truly *de novo*. The second problem he identified was regarding redaction: the Supreme Court held that redaction of public records is only required if the exemption at issue uses the word "portions." He suggested that the law should be clarified to state that if a document can be redacted and produced, it ought to be, with a provision for *in camera* review by a court. He observed that otherwise, following the Supreme Court's decision, the General Assembly would have to put the word "portions" in every exemption in FOIA.

Senator Stuart agreed with Delegate Surovell regarding the second point regarding redaction, but questioned whether deference to agency expertise might be appropriate. Delegate Surovell noted that in addition to expertise, agencies might have motive to

withhold records, and there might be broader problems if deference is given by the courts to public bodies generally.

Delegate LeMunyon then asked for public comment from those who agreed with Delegate Surovell. Mr. Ress expressed agreement and emphasized that § 2.2-3704 of FOIA sets forth the responses to a records request, one of which is to redact and has been understood that way. Mr. Merritt stated that VPA had provided a proposal to address the redaction issue, and observed conflict between a standard of deference to an agency versus the requirement in subsection E of § 2.2-3713 that "the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence." In response to a question from Delegate LeMunyon, Delegate Surovell indicated he would introduce legislation to address these issues at the next Session of the General Assembly, depending on what the FOIA Council does. Delegate LeMunyon stated that he had requested staff to prepare a draft and that the fix would not be trivial. Delegate Surovell indicated he liked the VPA proposal on the issue. Delegate LeMunyon directed staff to prepare a draft and circulate it before the 2016 Session, and if necessary, to hold a meeting to discuss it if problems were identified and possibly to have the Council recommend it.

### **Subcommittee Reports**

The Council next received progress reports from the Records Subcommittee and the Meetings Subcommittee.

Staff advised the Council that the Records Subcommittee had met five times during the 2015 Interim ( May 11, June 18, July 22, August 18, and October 7, 2015) and would meet a sixth time this afternoon to continue its study of records exemptions as directed by HJR No. 96 and pursuant to the study plan adopted by the Council. Please see Appendix A to this meeting summary for information about what sections of FOIA were reviewed by the Records Subcommittee beginning in 2014 and the recommendations of the Records Subcommittee made as of October 7, 2015. In response to Delegate LeMunyon's inquiry, staff went through the Subcommittee's October 7 recommendations one by one (also appearing in Appendix A).<sup>17</sup> Staff also informed the Council that the Proprietary Records Work Group planned to continue its work on exemptions for proprietary records and trade secrets following the 2016 Session of the General Assembly.

Council member Kathleen Dooley, chair of the Meetings Subcommittee advised the Council that Meetings Subcommittee had met six times during the 2015 Interim ( May 12, June 17, July 21, August 19, September 30, and November 4, 2015) to continue its study of meeting exemptions as directed by HJR No. 96 and pursuant to the study plan adopted by the Council. Ms. Dooley announced that the Subcommittee had completed its initial review of the closed meeting exemptions, although the "context draft" was still outstanding. She explained that the "context draft" was created to flesh out meetings exemptions that are mere cross-references to records exemptions by providing additional context without

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<sup>17</sup> Appendix G to this Annual Report summarizes the reviews performed by both Subcommittees.

changing the substance of the exemptions. Other than the context draft, the Subcommittee is moving on to consider procedural matters. Please see Appendix B to this summary for information about what sections of FOIA were reviewed by the Meetings Subcommittee beginning in 2014 and the recommendations of the Meetings Subcommittee made as of November 4, 2015.<sup>18</sup> Delegate LeMunyon observed that there were no recommendations made on November 4, 2015 according to the Appendix. Staff responded that that was because the Subcommittee had moved on to consider procedural matters but had not yet made any recommendations on them.

### **Review of Subcommittee-recommended legislative proposals**

Following the reports of the Subcommittees, Maria J.K. Everett, Executive Director of the Council, reviewed the draft legislation that has been recommended to date by both Subcommittees. As a reminder, the Council has previously indicated that rather than introduce individual legislative recommendations as separate bills while the HJR No. 96 study is ongoing, it prefers to introduce omnibus legislation at the conclusion of the study.

### **Legislative Preview, Public Comment, and Other Business**

Mr. Ress handed out a proposal he described as a new approach to FOIA that would utilize about a dozen general exemptions rather than the many specific exemptions in FOIA currently. He stated that his proposal would require a written explanation when a custodian exercises discretion to withhold records and that closed meetings would be limited and monitored. He asked that the Council consider it and perhaps after the 2016 Session consider it as an alternative approach or use it as a reminder of the issues.

Dena Rosenkrantz of the Virginia Education Association (VEA) stated that VEA was seeking legislation regarding access to records of teachers and school employees. Noting the existing provisions for confidentiality of teacher performance indicators outside of FOIA in Code § 22.1-295.1, she indicated things such as student test scores, growth profiles, and other value-added records should be confidential and are not reliable measures of teacher performance. She also expressed concern that employees are not notified when records are requested and disclosed, and that the personnel exemption in FOIA is not mandatory and employees do not know their information may be public. She also indicated concern over times schools will not share information with employees, such as not sharing disciplinary records when no action is taken.

Maria Montgomery, Managing Editor of the Winchester Star and a member of the VPA Board, provided her perspective based on working as a reporter in Connecticut. She informed the Council that Connecticut has a commission to investigate and enforce its version of FOIA. She said that the process is administrative and civil instead of criminal, and that appeals go to the courts. The commission is composed of members from media, citizens, and agencies, and it takes calls and complaints from the public. Ms. Montgomery

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<sup>18</sup> *Id.*

stated that in 30 years she had been a complainant and party in many cases, and almost all ruled in favor of release. She stated that Connecticut FOIA Commission lawyers would argue cases on appeal at no cost to the citizens or media. She also said that approximately three quarters of the cases were brought by citizens and the remaining quarter by media. By contrast, she said that the Winchester Star has never gone to court on a FOIA matter, and that she could provide many examples where the Winchester Star did not get records due to high costs or other reasons. She said it was frustrating working in Virginia after working in Connecticut and New York.

Delegate LeMunyon asked if there was any other business or public comment. There was none. As a reminder, the next meeting of the Council will be scheduled after the 2016 Session of the General Assembly. There being no further business, the meeting was adjourned.

## **SERVICES RENDERED BY THE COUNCIL**

As part of its statutory duties, the Council is charged with providing opinions about the application and interpretation of FOIA, conducting FOIA training seminars, and publishing educational materials. In addition, the Council maintains a website designed to provide on-line access to many of the Council's resources. The Council offers advice and guidance over the phone, via e-mail, and in formal written opinions to the public, representatives of state and local government, and members of the news media. The Council also offers training seminars on the application of FOIA. While FOIA training is the most critical mission of the Council, in 2015, the annual statewide FOIA Workshops conducted by Council staff were discontinued. The statewide workshops posed considerable administrative burdens in their planning and execution, especially in light of the small Council staff. Essentially, staff proposed that in fulfilling its statutory mission to conduct educational programs about FOIA, it would provide training upon request to interested groups, such as the staff of state and local agencies, members of local governing bodies, media organizations, citizen organizations, and any other group that wishes to learn more about FOIA. Council staff will travel to the location of the group requesting training. The training is and would be tailored 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 or organization. Organizations requesting training are strongly encouraged, but not required, to consolidate training by including other like organizations within a single or neighboring jurisdiction(s) wherever possible. 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 1,424 inquiries and conducted 79 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, 2014 to November 30, 2015, the Council, with a staff of two attorneys, fielded 1,424 inquiries. Of these inquiries, nine 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, 2014 through November 30, 2015:

Written Advisory Opinions: 9

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

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, 2014 and November 30, 2015:



Telephone and E-mail Responses: 1,415

Government	802
Citizens	467
News Media	146

Appendix E to this report sets out the number of inquiries received by the Council each month from December, 2014 through November, 2015, 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.gov/>. The Council's website provides access to a wide range of information concerning FOIA and the work of the Council, including (i) Council meeting schedules, including meeting summaries and agendas, (ii) the membership and staff lists of the Council, (iii) reference materials and sample forms and letters, (iv) the Council's annual reports, (v) information about Council subcommittees and legislative proposals, and (vi) links to other Virginia resources, including the Virginia Public Records Act. To facilitate compliance with FOIA, sample response letters for each of the five mandated responses to a FOIA request as well as a sample request letter are available on the website. Written advisory opinions have been available on the website since January 2001 and are searchable by any visitor to the website. The opinions are also listed in chronological order with a brief summary to assist website visitors.

### **FOIA Training**

In fulfilling its statutory mission to conduct FOIA educational programs, the Council has conducted a series of day-long workshops around the state to provide FOIA training to recently-appointed public officials and employees. From 2000 through 2005 the workshops were held every year in multiple locations in an effort to maximize the availability of training throughout the Commonwealth. From 2005 through 2012, the workshops were held every other year instead due to declining attendance as many interested persons had already attended a conference just the year before and as a sign that its basic training mission had been successfully accomplished. However, staff still receives requests for the workshops every year. Beginning in 2013, in an effort to satisfy the demand for annual programs without over-saturating any particular area, the Council resumed presenting the workshops annually, but at only a few locations per year (note that other individualized free training presentations will remain available by request, as always). While FOIA training is the most critical mission of the Council, in 2015, the annual statewide FOIA Workshops conducted by Council staff were discontinued. The statewide workshops posed considerable administrative burdens in their planning and execution, especially in light of the small Council staff. Essentially, staff proposed that in fulfilling its statutory mission to conduct educational programs about FOIA, it would provide training upon request to interested groups, such as the staff of state and local agencies, members of local governing bodies, media organizations, citizen organizations, and any other group that wishes to learn more about FOIA. Council staff will travel to the location of the group requesting training. The training is and would be tailored 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 or organization. Organizations requesting training are strongly encouraged, but not required, to consolidate training by including other like organizations within a single or neighboring jurisdiction(s) wherever possible. 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 also 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 1,424 inquiries and conducted 79 training seminars statewide. A list of these trainings appears as Appendix A to this report.

As is customary, the Council's training programs are approved by the State Bar of Virginia for continuing legal education credit (CLE) for attorneys, in-service credit for law-enforcement personnel by the Department of Criminal Justice Services, academy points for school board officials by the Virginia School Board Association, and continuing education credit for municipal clerks by the Virginia Municipal Clerks Association.

### **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
- Basic Meetings (PowerPoint presentation)
- Basic Records (PowerPoint presentation)
- E-Mail: Use, Access & Retention
- E-Mail & Meetings
- Taking the Shock Out of FOIA Charges
- FOIA & Access Bill Summaries
- FOIA Guide for Local Officials<sup>19</sup>
- Legislators Guide to FOIA
- FOIA Guide for Boards of Visitors
- FOIA Guide for Local Government Officials
- FOIA Guide for Members of Deliberative Bodies
- Law-Enforcement Records and FOIA

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<sup>19</sup> Developed in cooperation with VACo and VML.

- Law-Enforcement Guide for Handling 911 Requests
- Quick Reference Guide for Responding to FOIA Requests
- Guide to Geographic Information Systems Records
- Citizens' Guide to Making FOIA Requests

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 1,424 inquiries. It formed two subcommittees and two work groups 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 79 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,

Delegate James M. LeMunyon, Chair  
Senator Richard H. Stuart, Vice-Chair  
Christopher Ashby  
Shawri King-Casey  
Kathleen Dooley  
Stephanie Hamlett  
Edward Jones  
Forrest M. "Frosty" Landon  
Marisa Porto  
John G. Selph  
Robert L. Tavenner  
Sandra G. Treadway

## APPENDIX A

### TRAINING/EDUCATIONAL PRESENTATIONS

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

From December 1, 2014 through November 30, 2015, Council staff conducted 79 training seminars, which are listed below in chronological order identifying the group/agency requesting the training. Although exact attendance numbers from each event are unknown, staff estimates that at least 2,000 individuals attended the Council's training presentations this year.

December 2, 2014	Community Integration Advisory Commission Department for Aging and Rehabilitative Services Richmond, VA
December 10, 2014	State Compensation Board New Officer Training Richmond, VA
January 15, 2015	City of Falls Church Falls Church, VA
January 27, 2015	Virginia Government Communicators Winter Conference Richmond, VA
February 4, 2015	Virginia Commonwealth University Open World Program Delegation from Georgia Richmond, VA
February 9, 2015	Washington & Lee University School of Law Local Government Law Class Lexington, VA
February 11, 2015	Virginia Commonwealth University Communications Law & Ethics Class Richmond, VA
February 27, 2015	Crater Criminal Justice Academy Disputanta, VA
March 9, 2015	RegionTen Community Services Board Charlottesville, VA

March 19, 2015	Commonwealth Neurotrauma Initiative Trust Fund Henrico, VA  City of Suffolk Suffolk, VA
March 20, 2015	Roanoke/Salem Public Safety Center Salem, VA
March 24, 2015	City of Manassas Park Police Department Manassas Park, VA  Department of Housing and Community Development Permit Technician's Course Manassas, VA
April 16, 2015	City of Richmond Public Utilities Richmond, VA
April 24, 2015	Office of the Attorney General Richmond, VA
May 1, 2015	New associates at private law firm Washington, D.C.
May 7, 2015	Commonwealth Secure Panel Body Worn Cameras Richmond, VA
May 8, 2015	Towns of Irvington, Kilmarnock, and White Stone, and Lancaster County School Board Irvington, VA
May 13, 2015	City of Alexandria Sanitation Authority Alexandria, VA  Town of Crewe and surrounding localities Crewe, VA
May 14, 2015	Kenyan Parliament Delegation Richmond, VA
May 15, 2015	Floyd County Public Schools Floyd County, VA

May 18, 2015	Pittsylvania County Chatham, VA
May 19, 2015	City of Martinsville Martinsville, VA
	Department of Criminal Justice Services Professional Development Day Hanover, VA
May 21, 2015	Virginia Commonwealth University Communications Law & Ethics Class Richmond, VA
May 27, 2015	Bristol Virginia Police Department Bristol, VA
June 1, 2015	Central Shenandoah Criminal Justice Training Academy Weyers Cave, VA
June 2, 2015	Roanoke County Police Department Roanoke, VA
June 9, 2015	Fairfax County Sheriff's Office Fairfax, VA
June 10, 2015	Crater Criminal Justice Academy Disputanta, VA
June 20, 2015	Virginia Code Commission Richmond, VA
June 23, 2015	Hampton Roads Sanitation District Commission Virginia Beach, VA
July 10, 2015	Virginia Commonwealth University Public Administrators Richmond, VA
July 13, 2015	Department of Alcoholic Beverage Control Richmond, VA

July 15, 2015	Winchester Star Winchester, VA
	Department of Environmental Quality Piedmont Region Richmond, VA
July 17, 2015	Longwood University Farmville, VA
July 28, 2015	Department of Motor Vehicles Richmond, VA
	Department of Motor Vehicles Richmond, VA
August 5, 2015	Department of Planning and Budget Richmond, VA
August 11, 2015	Southwest VA Health Authority Abingdon, VA
August 12, 2015	Crater Criminal Justice Academy Disputanta, VA
	Department of Environmental Quality Roanoke, VA
September 1, 2015	Virginia Cave Board Richmond, VA
	Prince William County Fire Marshall Prince William County, VA
September 9, 2015	Hanover County Sheriff's Office Hanover, VA
September 10, 2015	City of Lexington Police Department Lexington, VA
September 17, 2015	Nelson County Nelson County, VA

September 28, 2015	Virginia Commonwealth University Communications Law & Ethics Class Richmond, VA
	Virginia Department of Transportation Salem, VA
September 29, 2015	Board of Accountancy Richmond, VA
	Virginia Municipal Clerks Association Annual Institutes and Academy Richmond, VA
October 4, 2015	Virginia Municipal League New Member Conference Richmond, VA
October 8, 2015	Department of Motor Vehicles Richmond, VA
	Department of Motor Vehicles Richmond, VA
October 14, 2015	Chesterfield County Public Schools Chesterfield, VA
October 15, 2015	James City County Police Department James City County, VA
October 16, 2015	Department of Health Professions Richmond, VA
October 21, 2015	State Council of Higher Education for Virginia 2015 Boards of Visitors Orientation Richmond, VA
	Office of the Attorney General Child Support Enforcement Conference Roanoke, VA
October 22, 2015	Virginia Lottery Richmond, VA
October 27, 2015	Roanoke Regional Airport Commission Roanoke, VA



October 28, 2015	Department of Agriculture and Consumer Services Richmond, VA
	Middle Peninsula Planning District Commission Saluda, VA
November 3, 2015	Department of Alcoholic Beverage Control Richmond, VA
November 4, 2015	Department of Housing and Community Development Permit Technician's Course
	Virginia Lottery Richmond, VA
November 5, 2015	Commonwealth Management Association Richmond, VA
November 9, 2015	Virginia Department of Transportation Richmond, VA
November 10, 2015	Rappahannock Regional Criminal Justice Academy Fredericksburg, VA
November 12, 2015	Virginia Coalition for Open Government Annual Conference Fredericksburg, VA
	Department of Environmental Quality Virginia Beach, VA
November 14, 2015	Virginia Taxpayer Alliance of Portsmouth Portsmouth, VA
November 18, 2015	Crater Criminal Justice Academy Disputanta, VA
November 19, 2015	VITA sponsored FOIA Conference Wise, VA
	Town of Glade Spring Glade Spring, VA
November 20, 2015	VITA sponsored FOIA Conference Wytheville, VA

**Index of Written Advisory Opinions  
December 1, 2014 through November 30, 2015**

**ADVISORY OPINIONS ISSUED**

<u>Opinion No.</u>	<u>Issue(s)</u>
<b>December</b>	
<a href="#"><u>AO-07-14</u></a>	As a general rule, an individual is not a public body for meetings purposes even if designated as a "board" by statute. Records prepared, owned, or possessed by that member in the transaction of public business are public records subject to FOIA.
<b>March</b>	
<a href="#"><u>AO-01-15</u></a>	A private entity that exercises no governmental authority and is not wholly or principally supported by government funds is not a public body subject to FOIA's records and meeting requirements. Money received by a private entity from government sources under a procurement contract should not be used to determine whether an entity is wholly or principally supported by public funds.
<a href="#"><u>AO-02-15</u></a>	Whether a record is exempt as a "working paper" depends on the purpose for which it was created, the person for whom it was created, and whether it has been disseminated beyond the personal or deliberative use of the official who holds the exemption.
<b>April</b>	
<a href="#"><u>AO-03-15</u></a>	There may be multiple custodians of public records, including databases, if multiple public bodies possess and use the records in the transaction of their respective public business.
<b>May</b>	

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[AO-04-15](#)

A public body does not have to create a new record that does not already exist, but may abstract or summarize information under such terms and conditions as agreed between the requester and the public body. Clear and concise communications are critical when making and responding to requests.

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June

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[AO-05-15](#)

Meeting minutes must include a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. A verbatim transcript is not required. A public body has the discretion to include specific comments made at the meeting or not so long as the minutes include the required summary and record of votes.

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August

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[AO-06-15](#)

A public body may not convene a closed meeting under the personnel exemption to discuss salary increases when the discussion does not concern specific individual public officers, appointees, or employees.

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September

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[AO-07-15](#)

Generally, FOIA does not prohibit the release of public records or the exercise of free speech. FOIA does not grant special rights to elected officials that differ from those of other Virginia citizens. Real estate appraisals may be withheld until the completion of a proposed purchase, sale, or lease.

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October

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[AO-08-15](#)

Body worn and dashboard video recordings made by law enforcement are public records subject to FOIA. The application of exemptions from mandatory disclosure depends on the contents of the video.

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## APPENDIX C

### 2015 Meetings of the Council

**Wednesday, May 20, 2015**

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

Recap of the 2015 legislative session, review of the bills referred to the Council by the 2015 Session of the General Assembly, discussion of FOIA study as per HJR 96 (2014), and Progress reports from the Council's two HJR 96 study subcommittees, the Meetings Subcommittee and the Records Subcommittee. Discussion of databases and recent Council Advisory Opinion re same.

**Wednesday, July 22, 2015**

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

Progress reports from the Council's two HJR 96 study subcommittees, the Meetings Subcommittee and the Records Subcommittee. Alternatives to annual statewide FOIA Workshops.

**Thursday, September 30, 2015**

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

Election of chair and vice-chair of the Council. Progress reports from the Council's two HJR 96 study subcommittees, the Meetings Subcommittee and the Records Subcommittee, and review of Subcommittee recommended draft legislation. Annual legislative preview, part I.

**Tuesday, November 18, 2015**

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

Progress reports from the Council's two HJR 96 study subcommittees, the Meetings Subcommittee and the Records Subcommittee, and review of Subcommittee recommended draft legislation. Annual legislative preview, part II.

**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, 2015.*

**I. Introduction**

The General Assembly passed a total of 16 bills amending the Virginia Freedom of Information Act (FOIA) during the 2015 Session. At its last meeting of 2014, the FOIA Council voted favorably to recommend the subject matter of three bills that passed the General Assembly in 2015: HB 1633 and SB 968, identical bills that create an exemption for certain records of certain health care committees and entities to the extent that they reveal information that may be withheld from discovery as privileged communications, and HB 2104, which provides that the record and open meeting exemptions for VCU Medical Center shall also apply when the records are in the possession of VCU or the discussion of certain matters occurs at a meeting of the Virginia Commonwealth University Board of Visitors.

Four bills add two new records exemptions in FOIA as follows:

- Creates an exemption for certain records of certain health care committees and entities to the extent that they reveal information that may be withheld from discovery as privileged communications. HB 1633 and SB 968 amending § § 2.2-3705.5;
- Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority, created by the bill. Adds an exemption for certain proprietary records, trade secrets, financial records, and cost estimates. The bill contains numerous technical amendments. The bill has a delayed effective date of July 1, 2018, except that the provisions of the thirteenth and fourteenth enactments become effective July 1, 2015. [NOTE: The act amends an existing records exemption in § 2.2-3705.3, adds a new records exemption in § 2.2-3705.7, and adds a new meetings exemption in § 2.2-3711, all subject to the delayed effective date of July 1, 2018. The thirteenth enactment, effective July 1, 2015, directs the FOIA Council to include a review of the amendments to § 2.2-3705.7 in the FOIA Council's three-year study directed by House Joint Resolution No. 96 (2014), effective July 1, 2015.] HB 1776 and SB 1032 amending §§ 2.2-3705.3, 2.2-3705.7, and 2.2-3711.

Four bills add two new meetings exemptions in FOIA as follows:

- Allows a closed meeting to be held for the discussion of certain exempt records related to Resource Management Plans. HB 1618 and SB 1126 amending § 2.2-3711;

- Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority, as summarized above. Allows a closed meeting to be held to discuss certain exempt records held by the Authority. HB 1776 and SB 1032 amending §§ 2.2-3705.3, 2.2-3705.7, and 2.2-3711.

Twelve bills amend existing provisions of FOIA as follows:

- Amends existing records and meetings exemptions to cover certain adult death investigations by adult fatality review teams. HB 1558 amending §§ 2.2-3705.5 and 2.2-3711;
- Amends the definition of public body to include private police departments, for purposes of access to public records. Enacted with an emergency clause, giving it an effective date of March 16, 2015. HB 1606 and SB 1217 amending § 2.2-3701;
- Abolishes the Capital Access Fund for Disadvantaged Businesses, and makes a corresponding amendment to an existing records exemption. HB 1757 and SB 854 amending § 2.2-3705.6;
- Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority, as summarized above. Makes a corresponding technical amendment to an existing records exemption for certain administrative investigations. HB 1776 and SB 1032 amending §§ 2.2-3705.3, 2.2-3705.7, and 2.2-3711;
- Amends an existing records exemption to provide that the identity of donors to the Veterans Services Foundation does not have to be disclosed under FOIA if the donor has requested anonymity in connection with or as a condition of making a pledge or donation. HB 1967 amending § 2.2-3705.7;
- Provides that the record and open meeting exemptions for VCU Medical Center shall also apply when the records are in the possession of VCU or the discussion of certain matters occurs at a meeting of the Virginia Commonwealth University Board of Visitors. HB 2104 amending §§ 2.2-3705.7 and 2.2-3711;
- Clarifies that the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting, is not a meeting under FOIA. SB 969

amending §§ 2.2-3701 and 2.2-3707;

- Expands the open meeting exemption for the discussion of plans to protect public safety as it relates to terrorism and security of governmental facilities to include the discussion of specific cybersecurity threats or vulnerabilities, including the discussion of related records excluded from FOIA, where discussion in an open meeting would jeopardize the safety of any person or the security of any facility, building, structure, information technology system, or software program. Enacted with an emergency clause, giving it an effective date of March 16, 2015. SB 1109 amending § 2.2-3711;
- Expands the current record exemption for plans and information to prevent or respond to terrorism to include information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities or security plans and measures of an entity, facility, building structure, information technology system, or software program. Enacted with an emergency clause, giving it an effective date of March 16, 2015. SB 1129 amending § 2.2-3705.2.

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 2015 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, 2015.

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

### **§ 2.2-3701 Definitions.**

**Private police departments.** Defines "private police department" as any police department that employs private police officers operated by an entity authorized by statute or an act of assembly to establish a private police department. The bill provides that the authority of a private police department is limited to real property owned, leased, or controlled by the entity and, if approved by the local chief of police or sheriff, any contiguous property. The bill also provides that private police departments and private police officers shall be subject to and comply with the relevant laws and regulations governing municipal police departments and shall meet the minimum compulsory training requirements for law-enforcement officers. The bill provides further that any private police department in existence on January 1, 2013, that was not otherwise established by statute or an act of assembly and whose status as a private police department was recognized by the Department of Criminal Justice Services at that time may continue to operate as a private police department, provided that it complies with the necessary requirements. The private police departments so recognized by the Department are the Aquia Harbor Police Department, the Babcock and Wilcox Police Department, the Bridgewater Airpark Police Department, the Carilion Police and Security Services Department, the Kings Dominion Park Police Department, the Kingsmill Police Department, the Lake Monticello Police Department, the Massanutten Police Department, and the Wintergreen Police Department. The bill contains an emergency

clause. [NOTE: The bill adds private police departments to the definition of public bodies subject to FOIA for purposes of access to public records; the act was approved on March 16, 2015.] HB 1606 (2015 Acts of Assembly, c. 195) and SB 1217 (2015 Acts of Assembly, c. 224).

**Virginia Freedom of Information Act (FOIA); exception to open meeting requirements.**

Clarifies that the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting, is not a meeting under FOIA. The bill contains a technical amendment. SB 969 (2015 Acts of Assembly, c. 131).

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

**Virginia Freedom of Information Act; record exemption for public safety; cybersecurity.**

Expands the current record exemption for plans and information to prevent or respond to terrorism to include information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities or security plans and measures of an entity, facility, building structure, information technology system, or software program. The bill contains an emergency clause and technical amendments. [NOTE: The act was approved on March 16, 2015.] SB 1129 (2015 Acts of Assembly, c. 183).

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

**Alcoholic beverage control.** Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority, created by the bill. The bill provides for the appointment of the Board of Directors of the Authority by the Governor, to be confirmed by the General Assembly, and the appointment by the Governor of a Chief Executive Officer of the Authority, also to be confirmed by the General Assembly. The bill sets the eligibility requirements for appointment of both the Board members and the Chief Executive Officer, including background checks. The bill provides for the salary of Board members and the Chief Executive Officer and specifies that Board members and the Chief Executive Officer may be only removed for cause by the Governor. Among other things, the bill also (i) provides for the transfer of current ABC employees to the Authority, (ii) continues such employees' participation in the state health plan and VRS, and (iii) sets out the powers and duties of the Authority and the Chief Executive Officer. The bill contains numerous technical amendments. The bill has a delayed effective date of July 1, 2018, except that the provisions of the thirteenth and fourteenth enactments become effective July 1, 2015. [NOTE: The act amends an existing records exemption in § 2.2-3705.3, adds a new records exemption in § 2.2-3705.7, and adds a new meetings exemption in § 2.2-3711, all subject to the delayed effective date of July 1, 2018. The



thirteenth enactment, effective July 1, 2015, directs the FOIA Council to include a review of the amendments to § 2.2-3705.7 in the FOIA Council's three-year study directed by House Joint Resolution No. 96 (2014).] HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

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

**Local and regional adult fatality review teams; penalty.** Allows for the creation of local or regional adult fatality review teams upon the initiative of any local or regional law-enforcement agency, department of social services, emergency medical services agency, attorney for the Commonwealth's office, or community services board. The bill provides that such teams may review the death of any person age 60 years or older, or any adult age 18 years or older who is incapacitated, who resides in the Commonwealth and who is in need of temporary or emergency protective services (i) who was the subject of an adult protective services or law-enforcement investigation; (ii) whose death was due to abuse, neglect, or exploitation or acts suggesting abuse, neglect, or exploitation; or (iii) whose death came under the jurisdiction of or was investigated by the Office of the Chief Medical Examiner as occurring in any suspicious, unusual, or unnatural manner. A violation of the confidentiality of the review process is punishable as a Class 3 misdemeanor. HB 1558 (2015 Acts of Assembly, c. 108).

**Virginia Freedom of Information Act; record exemption for certain health records.** Clarifies that records of certain health care committees and entities, to the extent that they reveal information that may be withheld from discovery as privileged communications, are exempt from disclosure under FOIA. HB 1633 (2015 Acts of Assembly, c. 127) and SB 968 (2015 Acts of Assembly, c. 22).

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

**Virginia Small Business Financing Authority; Small, Women-owned, and Minority-owned Business Loan Fund.** Abolishes the Capital Access Fund for Disadvantaged Businesses, which provides loan guarantees, loan loss reserves, and interest rate write downs for disadvantaged businesses, and replaces it with the Small, Women-owned, and Minority-owned Business Loan Fund. The new fund will provide direct loans to eligible small, women-owned, and minority-owned businesses. The bill requires the Small Business Financing Authority and the Department of Small Business and Supplier Diversity to transfer cash balances in the Capital Access Fund for Disadvantaged Businesses to the Small, Women-owned, and Minority-owned Business Loan Fund. The bill contains technical amendments. [NOTE: The bill contains a technical amendment to an existing records exemption.] HB1757 (2015 Acts of Assembly, c. 696) and SB 854 (2015 Acts of Assembly, c. 697).

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

**Virginia Freedom of Information Act records held by both Virginia Commonwealth University (VCU) and the VCU Medical Center; discussion of same.** Provides that the record and open meeting exemptions for VCU Medical Center shall also apply when the records are in the possession of VCU or the discussion of certain matters occurs at a meeting of the Virginia Commonwealth University Board of Visitors. HB 2104 (2015 Acts of Assembly, c. 549).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

**Veterans Services Foundation.** Provides that the Veterans Services Foundation may accept revenue from all sources, including private source fundraising, to support its mission. The bill also provides that the identity of donors to the Foundation does not have to be disclosed under FOIA if the donor has requested anonymity in connection with or as a condition of making a pledge or donation. HB 1967 (2015 Acts of Assembly, c. 137).

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

**Virginia Freedom of Information Act (FOIA); exception to open meeting requirements.** *See summary under § 2.2-3701, supra.* SB 969 (2015 Acts of Assembly, c. 131).

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

**Local and regional adult fatality review teams; penalty.** *See summary under § 2.2-3705.5, supra.* HB 1558 (2015 Acts of Assembly, c. 108).

**Resource management plans; consideration of certain records in closed meetings.** Creates an open meeting exemption for the discussion or consideration of certain records, currently excluded from FOIA, that relate to resource management plans. The bill provides that this exemption shall not apply, however, to the discussion or consideration of records that contain information that has been certified for release by the person who is the subject of the information or transformed into a statistical or aggregate form that does not allow identification of the person who supplied, or is the subject of, the information. HB 1618 (2015 Acts of Assembly, c. 169) and SB 1126 (2015 Acts of Assembly, c. 27).

**Virginia Freedom of Information Act records held by both Virginia Commonwealth University (VCU) and the VCU Medical Center; discussion of same.** *See summary under § 2.2-3705.7, supra.* HB 2104 (2015 Acts of Assembly, c. 549).

**Virginia Freedom of Information Act (FOIA); open meeting exemptions; discussions relating to cybersecurity.** Expands the open meeting exemption for the discussion of plans to protect public safety as it relates to terrorism and security of governmental facilities to include the discussion of specific cybersecurity threats or vulnerabilities, including the discussion of related records excluded from FOIA, where discussion in an open meeting would jeopardize the safety of any person or the security of any facility, building, structure, information technology system, or software program. The bill contains an emergency clause. [NOTE: The act was approved on March 16, 2015.] SB 1109 (2015 Acts of Assembly, c. 182).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

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

#### **Title 1 General Provisions.**

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

**Circuit court clerk responsibilities.** Revises certain circuit court clerk responsibilities, including (i) permitting the posting of notices on the circuit court clerk's website; (ii) clarifying that, if a name change is granted to a convicted sex offender, the clerk entering such order shall transmit a certified copy to any agency or department of the Commonwealth that has issued a license using such person's changed name, if known to the court and identified in the court order; (iii) clarifying that the clerk of court is not required to enter partial satisfactions of each installment payment of court costs; and (iv) allowing the clerk of court to compel production of a will or require security. HB 1780 (2015 Acts of Assembly, c. 631).

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

**Local and regional adult fatality review teams; penalty.** *See summary under § 2.2-3705.5, supra.* HB 1558 (2015 Acts of Assembly, c. 108).

**Virginia Small Business Financing Authority; Small, Women-owned, and Minority-owned Business Loan Fund.** *See summary under § 2.2-3705.6, supra.* HB1757 (2015 Acts of Assembly, c. 696) and SB 854 (2015 Acts of Assembly, c. 697).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

**Innovation and Entrepreneurship Investment Authority; powers.** Provides the Innovation and Entrepreneurship Investment Authority (commonly known as the CIT) with the power to exclusively, or with any other person, form and otherwise develop, own, operate, govern, and otherwise direct the disposition of assets of separate legal entities, provided that such entities are formed solely for the purpose of managing and administering any assets disposed of by the Authority. The bill provides that these legal entities may include limited liability companies, limited partnerships, charitable foundations, real estate holding companies, investment holding companies, nonstock corporations, and benefit corporations and provides that any such entities shall be operated under the governance of the Authority. The bill sets out other requirements for such entities, including that they shall not be deemed to be a state or governmental agency, advisory agency, or public body or instrumentality and that no director, officer, or employee of any such entity shall be deemed to be an officer or employee for purposes of the State and Local Government Conflict of Interests Act. The bill does provide, however, that the Auditor of Public

Accounts or his legally authorized representatives shall annually audit the financial accounts of the Authority and any such entity, provided that the working papers and records of the Auditor of Public Accounts relating to such audits shall not be subject to the provisions of FOIA. The bill also sets the quorum for the Authority's board of directors at nine and requires the reporting of certain additional information to the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance, the Secretary of Technology, and the Director of Planning and Budget. HB 1799 (2015 Acts of Assembly, c. 685).

**State and Local Government Conflict of Interests Act, General Assembly Conflicts of Interests Act, and Virginia Conflict of Interest and Ethics Advisory Council; certain gifts prohibited; approvals required for certain travel.** Removes the distinction between tangible and intangible gifts and prohibits any state or local officer or employee, member of the General Assembly, and certain candidates from soliciting, accepting, or receiving within any calendar year a single gift with a value exceeding \$100 or a combination of gifts with a value exceeding \$100 from certain persons; however, such prohibition does not apply to gifts from personal friends. The bill also prohibits the immediate family of such officers, employees, members, or candidates from soliciting, accepting, or receiving such gifts. The bill provides an exception for gifts received at widely attended events, which are those events at which at least 25 persons have been invited to attend or there is a reasonable expectation that at least 25 persons will attend the event. The bill requires disclosure of any single gift or entertainment, or any combination of gifts or entertainment, with a value exceeding \$50. The bill also requires persons subject to the Conflict of Interest Acts to request approval from the Virginia Conflict of Interest and Ethics Advisory Council (the Council) and receive the approval of the Council prior to accepting or receiving any travel-related transportation, lodging, meal, hospitality, or other thing of value provided by certain third parties that has a value exceeding \$100. The bill modifies the current composition of the Council, reducing the number of members from 15 to 9 and requires that there be bipartisan balance of the General Assembly members appointed to the Council. The bill requires electronic filing of disclosure forms with the Council and provides that local officers and employees will file disclosure forms locally instead of with the Council. The bill provides that the making of a knowing and intentional false statement on a disclosure form is punishable as a Class 5 felony. The bill also prohibits the Governor, his campaign committee, and any political action committee established on his behalf from knowingly soliciting or accepting a contribution, gift, or other item with a value greater than \$100 from persons and entities seeking loans or grants from the Commonwealth's Development Opportunity Fund (the Fund), restricts such gifts and contributions from persons and entities seeking loans or grants from the Fund, and provides that any violation shall result in a civil penalty of \$500 or up to two times the amount of the contribution or gift, whichever is greater. The bill has a delayed effective date of January 1, 2016, except the provisions of the bill related to the Council and its duties become effective July 1, 2015. HB 2070 (2015 Acts of Assembly, c. 763) and SB 1424 (2015 Acts of Assembly, c. 777).

**Community policy and management teams; information sharing.** Changes the term "community management and planning team" to the term "community policy and management team" (CPMT) in a section of the Code of Virginia relating to information sharing and confidentiality of information in cases being reviewed by a CPMT or family assessment and

planning team, to be consistent with terminology used throughout the Code. HB 2141 (2015 Acts of Assembly, c. 357).

**Innovation and Entrepreneurship Investment Authority; powers.** Provides the Innovation and Entrepreneurship Investment Authority (commonly known as the CIT) with the power to exclusively, or with any other person, form and otherwise develop, own, operate, govern, and otherwise direct the disposition of assets of separate legal entities, provided that such entities are formed solely for the purpose of managing and administering any assets disposed of by the Authority. The bill provides that these legal entities may include limited liability companies, limited partnerships, charitable foundations, real estate holding companies, investment holding companies, nonstock corporations, and benefit corporations and provides that any such entities shall be operated under the governance of the Authority. The bill sets out other requirements for such entities, including that they shall not be deemed to be a state or governmental agency, advisory agency, or public body or instrumentality and that no director, officer, or employee of any such entity shall be deemed to be an officer or employee for purposes of the State and Local Government Conflict of Interests Act. The bill requires, however, that the Auditor of Public Accounts or his legally authorized representatives shall annually audit the financial accounts of the Authority and any such entity, provided that the working papers and records of the Auditor of Public Accounts relating to such audits shall not be subject to the provisions of the Virginia Freedom of Information Act. The bill (i) adds two members to the board of directors appointed by the Speaker of the House and the Senate Committee on Rules and sets the quorum for the Authority's board of directors at nine; (ii) requires the reporting of certain additional information to the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance, the Secretary of Technology, and the Director of Planning and Budget; and (iii) clarifies the Authority's powers related the MACH37 Cyber Accelerator entity. SB 1385 (2015 Acts of Assembly, c. 687).

### **Title 3.2 Agriculture, Animal Care, and Food.**

**Industrial hemp production and manufacturing.** Allows the cultivation of industrial hemp by licensed growers as part of a university-managed research program. The bill defines industrial hemp as the plant *Cannabis sativa* with a concentration of THC no greater than that allowed by federal law, excludes industrial hemp from the definition of marijuana in the Drug Control Act, and bars the prosecution of a licensed grower under drug laws for the possession of industrial hemp as part of the research program. The bill directs the Commissioner of the Department of Agriculture and Consumer Services to adopt relevant regulations and establish an industrial hemp research program to be managed by public institutions of higher education. [NOTE: Contains an exemption from FOIA for "records, data, and information filed in support of a license application."] HB 1277 (2015 Acts of Assembly, c. 158) and SB 955 (2015 Acts of Assembly, c. 180).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

**Tobacco Indemnification and Community Revitalization Commission; financial viability and feasibility study prior to disbursement; Virginia Tobacco Region Revolving Fund.**

Renames the Tobacco Indemnification and Community Revitalization Commission as the Tobacco Region Revitalization Commission (the Commission) and requires it to contract with a manager to oversee Commission loans, grants, and other distributions of money. The bill requires the manager to provide a written report on the financial viability and feasibility of any such distribution and prohibits the Commission from making the distribution until its viability and feasibility have received recommendations from the manager. The bill eliminates future appointments of three nonlegislative citizen members and requires 13 of the remaining 28 Commission members to have experience in particular fields. The bill requires the Commission to (i) adopt policies governing the Tobacco Region Opportunity Fund; (ii) require a dollar-for-dollar match from entities receiving grants; (iii) make no distribution to a tobacco-dependent community solely based on the historical production of tobacco; (iv) require each project to have an accountability matrix, provide a set of quantified outcome expectations and other figures, and demonstrate how it will address low employment levels or other indicators; (v) develop a strategic plan every two years; and (vi) establish a public database of awards. The bill also establishes the Virginia Tobacco Region Revolving Fund (the Fund), the assets of which are to be used to make loans to local governments for the financing of any project. The bill empowers the Virginia Resources Authority (the Authority) to administer the Fund, pledge assets of the Fund as security for bonds issued to finance a project, sell or collect on loans made from the Fund, and, in accordance with a memorandum of agreement with the Commission, establish the rates and terms of loans. The bill directs the Commission, in conjunction with the Authority, to make an annual report to the General Assembly and the Governor on all loans made from the Fund. HB 2330 (2015 Acts of Assembly, c. 399) and SB 1440 (2015 Acts of Assembly, c. 433).

#### **Title 4.1 Alcoholic beverage control act.**

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

#### **Title 8.01 Civil remedies and procedure.**

**Circuit court clerk responsibilities.** *See summary under Title 1, supra.* HB 1780 (2015 Acts of Assembly, c. 631).

**Dissemination, etc., of criminal history record information; civil action.** Creates a civil action against any person who disseminates, publishes, or maintains or causes to be disseminated, published, or maintained the criminal history record information of an individual pertaining to that individual's charge or arrest for a criminal offense and solicits, requests, or accepts money or other thing of value for removing such information. Such person shall be liable to the individual who is the subject of the information for actual damages or \$500, whichever is greater, in addition to reasonable attorney fees and costs. SB 720 (2015 Acts of Assembly, c. 414).

**Circuit court clerks; electronic records, fees, etc.** Makes various changes to the operations of circuit court clerks, including (i) allowing any agency or instrumentality of the Commonwealth to submit records in electronic form; (ii) providing that the state highway plat book kept in the clerk's office may be produced in paper, microfilm, or electronic form; (iii) providing that the

clerk may set a convenience fee for electronic filing of civil or criminal proceedings that is lower than the convenience fee currently charged for payment by debit or credit card; and (iv) providing that all unpaid fines and costs be docketed as a judgment against the defendant in favor of the Commonwealth. SB 1316 (2015 Acts of Assembly, c. 641).

## **Title 9.1 Commonwealth Public Safety.**

**Private police departments.** *See summary under § 2.2--3701, supra.* HB 1606 (2015 Acts of Assembly, c. 195) and SB 1217 (2015 Acts of Assembly, c. 224).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

## **Title 15.2 Counties, Cities, and Towns.**

**Family day homes and child day centers; licensure; background checks; reporting; notice.** Requires fingerprint-based national criminal history records checks for licensed child day centers and family day homes and requires employees and volunteers of such child day centers and family day homes to notify the provider if they are convicted of a barrier crime or subject to a founded complaint of child abuse or neglect. The bill adds the offenses that require registration in the Sex Offender and Crimes Against Minors Registry to the list of barrier crimes specific to family day homes. The bill lowers from five to four the maximum number of children for whom a family day home may provide care without a license, exclusive of the provider's children and any children who reside in the home. The bill requires (i) local commissioners of the revenue or other local business license officials to report to the Department of Social Services (the Department) semiannually the contact information for any child day center or family day home to which a business license was issued; (ii) unlicensed and unregistered family day homes, other than those in which all of the children receiving care are related to the provider by blood or marriage, to provide written notice to parents stating that the family day home is not regulated by the Department and referring the parents to a website maintained by the Department for additional information; and (iii) child day centers and family day homes that contract with the Department to provide child care services that are funded by the Child Care and Development Block Grant to comply with all requirements established by federal law and regulation. The bill also requires the Department to (a) develop recommendations related to appropriate criminal and civil penalties for individuals who wrongfully operate a child day center or family day home without a license or provide care for more children than the maximum number permitted under their license; (b) report on the requirements established in the Child Care and Development Block Grant to the Senate Committee on Rehabilitation and Social Services and the House Committee on Health, Welfare and Institutions by December 1, 2015; (c) develop and make available to child day centers and family day homes training and technical information and assistance regarding compliance with new licensure requirements established in the bill; and (d) work with certain localities authorized to regulate and license family day homes to identify and address any differences between ordinances adopted by such localities and state regulations for the licensure of family day homes. The provisions of the bill that require licensure of family day homes providing care for five or more children have a delayed effective date of July 1, 2016. The provisions of the bill that require fingerprint-based national criminal history records checks have

a delayed effective date of July 1, 2017. HB 1570 (2015 Acts of Assembly, c. 758) and SB 1168 (2015 Acts of Assembly, c. 770).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

**Variiances.** Changes the standard by which a board of zoning appeals shall grant an application for a variance by eliminating or altering several of the requirements. [NOTE: Contains cross-references to FOIA regarding the provision of certain records.] HB 1849 (2015 Acts of Assembly, c. 597).

## **Title 17.1 Courts of Record.**

**Remote access to land records; fee; Department of Historic Resources.** Exempts the Department of Historic Resources from paying the fee for remote access to land records. HB 1875 (2015 Acts of Assembly, c. 65).

**Remote access to land records; indemnification.** Prohibits a circuit court clerk or an outside vendor contracted by the clerk, or both, from including their indemnification as a requirement in an agreement with a state agency or employee thereof acting in the employee's official capacity to provide subscribers remote access to land records. HB 1983 (2015 Acts of Assembly, c. 174).

**Circuit court clerks; electronic records, fees, etc.** *See summary under Title 8.01, supra.* SB 1316 (2015 Acts of Assembly, c. 641).

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

**Virginia Small Business Financing Authority; Small, Women-owned, and Minority-owned Business Loan Fund.** *See summary under § 2.2-3705.6, supra.* HB1757 (2015 Acts of Assembly, c. 696) and SB 854 (2015 Acts of Assembly, c. 697).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

## **Title 19.2 Criminal Procedure.**

**Right to privacy in electronic communications; confidential relationship; civil action.** Doubles the amount of liquidated damages that may be recovered against a person who intercepts, discloses, or uses wire, electronic, or oral communications in violation of Virginia's wiretapping law if such communications are between (i) a husband and wife; (ii) an attorney and client; (iii) a licensed practitioner of the healing arts and patient; (iv) a licensed professional counselor, licensed clinical social worker, licensed psychologist, or licensed marriage and family therapist and client; or (v) a clergy member and person seeking spiritual counsel or advice. The bill increases the allowable liquidated damages from \$400 a day for each day of violation or \$4,000, whichever is higher, to \$800 a day or \$8,000, whichever is higher. HB 1308 (2015 Acts of Assembly, c. 672).



**Warrant requirement for certain telecommunications records; prohibition on collection by law enforcement.** Provides that if an investigative or law-enforcement officer would be required to obtain a search warrant in order to obtain the contents of electronic communications or real-time location data from a provider of electronic communication service or remote computing service, the officer shall not use any device to intercept such communications or collect such real-time location data without first obtaining a search warrant authorizing the use of the device. HB 1408 (2015 Acts of Assembly, c. 43).

**Family day homes and child day centers; licensure; background checks; reporting; notice.** *See summary under Title 15.2, supra.* HB 1570 (2015 Acts of Assembly, c. 758) and SB 1168 (2015 Acts of Assembly, c. 770).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

## **Title 22.1 Education.**

**Public elementary and secondary schools; student identification numbers.** Prohibits the Department of Education (the Department) and each local school board from requiring any student enrolled in a public elementary or secondary school or receiving home instruction, or his parent, to provide the student's federal social security number. The bill requires the Department to instead develop a system of unique student identification numbers and requires each local school board to assign such a number to each student enrolled in a public elementary or secondary school. Under current law, every student is required to present a federal social security number within 90 days of his enrollment; if a student is ineligible to obtain a social security number or his parent is unwilling to present a social security number, the superintendent may assign another identifying number or waive the requirement. The bill has a delayed effective date of August 1, 2015. HB 1307 (2015 Acts of Assembly, c. 666) and SB 1293 (2015 Acts of Assembly, c. 372).

**Students' personally identifiable information.** Requires the Department of Education to develop and make publicly available on its website policies to ensure state and local compliance with the federal Family Educational Rights and Privacy Act (FERPA) and state law applicable to students' personally identifiable information, including policies for (i) access to students' personally identifiable information and (ii) the approval of requests for student data from public and private entities and individuals for the purpose of research. The bill requires the Department and each local school division to notify the parent of any student whose personally identifiable information contained in electronic records could reasonably be assumed to have been disclosed in violation of FERPA or state law applicable to such information, except as otherwise provided in certain other provisions of law. Such notification shall include the (a) date, estimated date, or date range of the disclosure; (b) type of information that was or is reasonably believed to have been disclosed; and (c) remedial measures taken or planned in response to the disclosure. HB 1334 (2015 Acts of Assembly, c. 139).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

**Uniformed services-connected students; identification.** Requires the Department of Education to establish a process for the identification by local school divisions of newly enrolled students who have a parent in the uniformed services. Local school divisions are required to identify such students in accordance with the process. Nonidentifiable, aggregate data collected from the identification of such students shall be made available to local, state, and federal entities for the purposes of becoming eligible for nongeneral fund sources and receiving services to meet the needs of uniformed services-connected students residing in the Commonwealth. [NOTE: Also provides that certain records are not public records subject to FOIA.] HB 2373 (2015 Acts of Assembly, c. 582) and SB 1354 (2015 Acts of Assembly, c. 583).

**Public schools; annual budget publication.** Requires each local school division to publish the annual school budget in line item form on its website. Current law requires publication of the budget but does not specify line item form. SB 1286 (2015 Acts of Assembly, c. 371).

**School board clerks; electronic maintenance of records.** Permits the clerk of each school board to keep volumes of meeting minutes and receipt and disbursement records, vouchers, contracts, and other official papers electronically. HB 2245 (2015 Acts of Assembly, c. 388) and SB 1339 (2015 Acts of Assembly, c. 330).

**Home instruction; religious exemption; information privacy.** Prohibits a division superintendent or local school board from disclosing to the Department of Education or any other person or entity outside of the local school division information provided by a student or parent for the purpose of (i) notifying the superintendent that the student will be receiving home instruction or (ii) claiming a religious exemption from school attendance. The bill contains a technical amendment. SB 1383 (2015 Acts of Assembly, c. 592).

## **Title 23 Educational Institutions.**

**Public institutions of higher education; students exhibiting suicidal tendencies or behavior; notification of student health or counseling center.** Requires each public institution of higher education's policies that advise students, faculty, and staff of the proper procedures for identifying and addressing the needs of students exhibiting suicidal tendencies or behavior to require procedures for notifying the institution's student health or counseling center when a student exhibits suicidal tendencies or behavior. HB 1715 (2015 Acts of Assembly, c. 663) and SB 1122 (2015 Acts of Assembly, c. 716).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

**Campus police departments; sexual assault reporting.** Requires that mutual aid agreements between a campus police force and a law-enforcement agency contain provisions requiring either the campus police force or the agency with which it has established a mutual aid agreement to notify the local attorney for the Commonwealth within 48 hours of beginning any investigation

involving felony criminal sexual assault occurring on campus property or other property related to the institution of higher education. The bill also requires institutions of higher education that have security departments instead of campus police forces to enter into a memorandum of understanding with a law-enforcement agency and such memorandum of understanding shall contain similar provisions requiring reports to the local attorney for the Commonwealth. HB 1785 (2015 Acts of Assembly, c. 707).

**Institutions of higher education; reporting acts of sexual violence.** Requires any responsible employee of a public or private nonprofit institution of higher education who in the course of his employment obtains information that an act of sexual violence has been committed against a student or on campus property or other property related to the institution to report such information to the Title IX coordinator for the institution as soon as practicable. The bill requires the Title IX coordinator to report such information to a review committee, which shall meet within 72 hours of the receipt of information of an alleged act of sexual violence and which shall include the Title IX coordinator, a representative of law enforcement, and a student affairs representative. If the review committee determines that disclosure of the information regarding the alleged act of sexual violence is necessary to protect the health and safety of the victim or other individuals, the representative of law enforcement on the review committee shall disclose the information, including personally identifiable information, to the law-enforcement agency responsible for investigating the alleged act. In cases involving a felony sexual assault, the representative of law enforcement on the review committee, or in certain situations, another committee member, shall consult with the local attorney for the Commonwealth or other prosecutor responsible for prosecuting the alleged act of sexual violence.

The bill requires the governing board of each public or private nonprofit institution of higher education to (i) establish a written memorandum of understanding with a local sexual assault crisis center or other victim support service and (ii) adopt policies to provide victims with information on contacting such center or service. The bill requires each public or private nonprofit institution of higher education to annually certify to the State Council of Higher Education for Virginia that it has reviewed its sexual violence policy. Finally, the bill requires the Department of Criminal Justice Services to monitor the impact the legislation will have on the workload of local victim witness programs and report its findings to the Chairmen of the House and Senate Committees for Courts of Justice by October 1, 2016. HB 1930 (2015 Acts of Assembly, c. 737) and SB 712 (2015 Acts of Assembly, c. 745).

**Public institutions of higher education; required reports on intellectual property and externally sponsored research.** Requires each public institution of higher education to include in its six-year plan the following for the most recently ended fiscal year: (i) the assignment during the year of any intellectual property interests to a person or nongovernmental entity by the institution or any related entity, (ii) the value of externally sponsored research funds received during the year from a person or nongovernmental entity by the institution or any related entity, and (iii) the number and types of patents awarded during the year to the institution or any related entity that were developed in whole or part from externally sponsored research provided by a person or nongovernmental entity. HB 1959 (2015 Acts of Assembly, c. 579) and SB 1206 (2015 Acts of Assembly, c. 580).

**Academic transcripts; suspension, permanent dismissal, or withdrawal from institution.** Requires the registrar of certain public and private institutions of higher education, or the other employee, office, or department of the institution that is responsible for maintaining student academic records, to include a prominent notation on the transcript of each student who has been suspended for, has been permanently dismissed for, or withdraws from the institution while under investigation for an offense involving sexual violence under the institution's code, rules, or set of standards governing student conduct. The bill defines sexual violence as physical sexual acts committed against a person's will or against a person incapable of giving consent. The bill provides that any notation due to a student's suspension shall be removed if the student completed the term of the suspension and any conditions thereof and has been determined by the institution to be in good standing. SB 1193 (2015 Acts of Assembly, c. 771).

## **Title 24.2 Elections.**

**Election administration; lists of registered voters and persons who voted in certain elections.** Requires the local electoral boards to provide to the Department of Elections within 14 days after the election the list of persons who voted, including those who voted provisionally and were determined to be entitled to vote, unless the local electoral board uses a nonelectronic pollbook, in which case the electoral board is required to submit such lists within seven days of the pollbook being released from the possession of the clerk of court. Current law requires that such lists be submitted to the Department of Elections within 60 days. The bill contains technical amendments to reflect the administrative reorganization of the Department of Elections that took effect July 1, 2014. HB 2056 (2015 Acts of Assembly, c. 712).

## **Title 30 General Assembly.**

**State and Local Government Conflict of Interests Act, General Assembly Conflicts of Interests Act, and Virginia Conflict of Interest and Ethics Advisory Council; certain gifts prohibited; approvals required for certain travel.** *See summary under Title 2.2, supra.* HB 2070 (2015 Acts of Assembly, c. 763) and SB 1424 (2015 Acts of Assembly, c. 777).

## **Title 32.1 Health.**

**Local and regional adult fatality review teams; penalty.** *See summary under § 2.2-3705.5, supra.* HB 1558 (2015 Acts of Assembly, c. 108).

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

## **Title 33.2 Highways and Other Surface Transportation Systems.**

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

## **Title 40.1 Labor and Employment.**

**Employers; disclosure of social media account information.** Prohibits an employer from requiring a current or prospective employee to disclose the username and password to his social media account. The measure also prohibits an employer from requiring an employee to add an employee, a supervisor, or an administrator to the list of contacts associated with the employee's social media account. HB 2081 (2015 Acts of Assembly, c. 576).

## **Title 46.2 Motor Vehicles.**

**Department of Motor Vehicles; emergency contact program.** Provides that DMV may establish an emergency contact program to allow customers to give DMV the name of an emergency contact person and related emergency contact information, which the customer may update or delete electronically at any time, to be kept in the customer's DMV record and made available to law-enforcement officers in emergency situations. The bill has a delayed effective date of January 1, 2016. [NOTE: The bill provides that such emergency contact information shall not be considered a public record subject to disclosure under FOIA.] HB 1392 (2015 Acts of Assembly, c. 162).

**Transportation network companies.** Establishes a process for the licensing of transportation network companies (TNCs) by the Department of Motor Vehicles (DMV), provided that TNCs comply with the requirements for licensure. The bill requires TNCs to screen drivers (TNC partners), ensure that all drivers are at least 21 years old and properly licensed to drive, and conduct background checks on all drivers including a national criminal background check, a driving history report, and status on the state and national sex offender registries. [NOTE: The bill also contains provisions regarding the disclosure of certain information, including that the information shall not be subject to FOIA.] HB 1662 (2015 Acts of Assembly, c. 2) and SB 1025 (2015 Acts of Assembly, c. 3).

## **Title 48 Nuisances.**

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

## **Title 51.1 Pensions, Benefits, and Retirement.**

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

## **Title 53.1 Prisons and Other Methods of Correction.**

**Notice required upon transfer of prisoner.** Requires the sheriff, superintendent, or Department of Corrections to give notice to any victim of the offense for which a prisoner was incarcerated as soon as practicable following the transfer of such prisoner. Under current law, such notice must be given at least 15 days prior to the transfer. SB 1311 (2015 Acts of Assembly, c. 101).

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

**Industrial hemp production and manufacturing.** *See summary under Title 3.2, supra.* HB 1277 (2015 Acts of Assembly, c. 158) and SB 955 (2015 Acts of Assembly, c. 180).

**Prescription Monitoring Program; subpoenas.** Provides that records in possession of the Prescription Monitoring Program shall not be available for civil subpoena, nor shall such records be disclosed, discoverable, or compelled to be produced in any civil proceeding, nor shall such records be deemed admissible as evidence in any civil proceeding for any reason. HB 1810 (2015 Acts of Assembly, c. 507).

**Prescription Monitoring Program; disclosure of information.** Requires the Director of the Department of Health Professions to disclose information from the Prescription Monitoring Program relevant to a specific investigation, supervision, or monitoring of a specific recipient for purposes of the administration of criminal justice to a probation or parole officer or local community-based probation officer who has completed the Virginia State Police Drug Diversion School designated by the Director of the Department of Corrections or his designee. SB 817 (2015 Acts of Assembly, c. 118).

## **Title 58.1 Taxation.**

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

**Disclosure of information.** Authorizes the Department of Taxation to disclose (i) whether a person, firm, or corporation is registered as a retail sales and use tax dealer and whether a certificate of registration number for such tax is valid, (ii) to the developer or the economic development authority of a tourism project tax information facilitating the repayment of gap financing, and (iii) tax information to a private entity with which the Department has contracted to assist in the administration of the refund process. The bill also allows the Attorney General and the Tax Commissioner to disclose tax information relating to sellers and purchasers of cigarettes or other tobacco products to a federal, state, or local agency. SB 1010 (2015 Acts of Assembly, c. 247).

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

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

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

**Tobacco Indemnification and Community Revitalization Commission; financial viability and feasibility study prior to disbursement; Virginia Tobacco Region Revolving Fund.** *See summary under Title 3.2, supra.* HB 2330 (2015 Acts of Assembly, c. 399) and SB 1440 (2015 Acts of Assembly, c. 433).

## **Title 63.2 Welfare (Social Services).**

**Local and regional adult fatality review teams; penalty.** *See summary under § 2.2-3705.5, supra.* HB 1558 (2015 Acts of Assembly, c. 108).

**Family day homes and child day centers; licensure; background checks; reporting; notice.** *See summary under Title 15.2, supra.* HB 1570 (2015 Acts of Assembly, c. 758) and SB 1168 (2015 Acts of Assembly, c. 770).

## **Title 64.2 Wills, Trusts, and Fiduciaries.**

**Circuit court clerk responsibilities.** *See summary under Title 1, supra.* HB 1780 (2015 Acts of Assembly, c. 631).

## **Title 65.2 Worker's Compensation.**

**Alcoholic beverage control.** *See summary under § 2.2-3705.3, supra.* HB 1776 (2015 Acts of Assembly, c. 730) and SB 1032 (2015 Acts of Assembly, c. 38).

## **Title 67 Virginia Energy Plan**

**Virginia Solar Energy Development Authority.** Creates the Virginia Solar Energy Development Authority to facilitate, coordinate, and support the development of the solar energy industry and solar-powered electric energy facilities in the Commonwealth. The Authority is directed to do so by developing programs to increase the availability of financing for solar energy projects, facilitate the increase of solar energy generation systems on public and private sector facilities in the Commonwealth, promote the growth of the Virginia solar industry, and provide a hub for collaboration between entities to partner on solar energy projects. The Authority will be composed of 11 members, of whom six will be appointed by the Governor, three will be appointed by the Speaker of the House, and two will be appointed by the Senate Committee on Rules. Members may be representatives of solar businesses, solar customers, renewable energy financiers, state and local government solar customers, and solar research academics. The Authority is charged with, among other tasks, (i) identifying existing state and regulatory or administrative barriers to the development of the solar energy industry; (ii) collaborating with entities such as higher education institutions to increase the training and development of the workforce needed by the solar industry in Virginia, including industry-recognized credentials and certifications; (iii) applying to the U.S. Department of Energy for loan guarantees for such projects; and (iv) performing any other activities as may seem appropriate to increase solar energy generation in Virginia and the associated jobs and economic development and competitiveness benefits, including assisting investor-owned utilities in the planned deployment of at least 400 megawatts of solar energy projects in the Commonwealth by 2020 through entering into agreements in its discretion in any manner provided by law for the purpose of planning and providing for the financing or assisting in the financing of the construction or purchase of solar energy projects that are authorized pursuant to a provision of Chapter 23 of Title 56. The Director of the Department of Mines, Minerals and Energy may

utilize non-state-funded support to carry out any duties assigned to the Director. Funding may be provided by any source, public or private, for the purposes for which the Authority is created. The bill has a sunset date of July 1, 2025. [NOTE: The act contains certain provisions regarding confidentiality of information.] HB 2267 (2015 Acts of Assembly, c. 398) and SB 1099 (2015 Acts of Assembly, c. 90).

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## APPENDIX E

### Breakdown of Inquiries to Council December 1, 2014 through November 30, 2015

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, 2014 through November 30, 2015

Total number of inquiries: 1,424

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	1	0	0	0	0	0	0	0	0	1	1	0	3
Citizens	0	0	0	1	0	1	1	0	0	0	0	0	3
News Media	0	0	0	1	1	0	0	0	1	0	0	0	3
<b>TOTAL</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>9</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	54	63	54	85	74	73	75	89	64	61	70	40	802
Citizens	31	41	29	39	40	38	40	51	52	29	34	43	467
News Media	13	13	8	16	8	9	12	14	16	15	13	9	146
<b>TOTAL</b>	<b>98</b>	<b>117</b>	<b>91</b>	<b>140</b>	<b>122</b>	<b>120</b>	<b>127</b>	<b>154</b>	<b>132</b>	<b>105</b>	<b>117</b>	<b>92</b>	<b>1415</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY MONTH:</b>													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	55	63	54	85	74	73	75	89	64	62	71	40	805
Citizens	31	41	29	40	40	39	41	51	52	29	34	43	470
News Media	13	13	8	17	9	9	12	14	17	15	13	9	149
<b>TOTAL</b>	<b>99</b>	<b>117</b>	<b>91</b>	<b>142</b>	<b>123</b>	<b>121</b>	<b>128</b>	<b>154</b>	<b>133</b>	<b>106</b>	<b>118</b>	<b>92</b>	<b>1424</b>

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	2	2	0
Citizens	1	1	1
News Media	2	1	0
<b>TOTAL</b>	<b>5</b>	<b>4</b>	<b>1</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	530	179	141
Citizens	289	47	201
News Media	75	40	47
<b>TOTAL</b>	<b>894</b>	<b>266</b>	<b>389</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	532	181	141
Citizens	290	48	202
News Media	77	41	47
<b>TOTAL</b>	<b>899</b>	<b>270</b>	<b>390</b>

## APPENDIX F

### OPINIONS ISSUED BY THE COUNCIL DECEMBER 2006 THROUGH NOVEMBER 2015

The purpose of this appendix is to show trends over time. In order to save space, we have chosen to present a ten-year time span rather than the full history of all opinions issued since the inception of the Council in July, 2000. For opinion count totals from prior years not shown in this appendix, please see previously issued Annual Reports.

#### Written Opinions:

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
<b>Government</b>	4	2	1	3	2	3	3	2	1	3
<b>Citizens</b>	6	8	8	10	3	4	2	5	2	3
<b>News Media</b>	0	3	2	0	1	0	0	3	3	3

#### Informal Opinions:

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
<b>Government</b>	845	854	827	910	899	820	846	872	873	802
<b>Public</b>	664	674	641	618	620	560	433	452	467	467
<b>News Media</b>	232	167	206	150	165	152	124	173	148	146

#### Total Number of Opinions:

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
<b>Government</b>	849	856	828	913	901	823	849	874	874	805
<b>Public</b>	670	682	649	628	623	564	435	457	469	470
<b>News Media</b>	232	170	208	150	166	152	124	176	151	149
<b>GRAND TOTAL</b>	1751	1708	1685	1691	1690	1539	1408	1507	1494	1424

## APPENDIX G

### Meetings and Records Subcommittees Synopsis of FOIA exemptions review pursuant to HJR 96 Completed as of December 1, 2015

#### **1. Meetings Subcommittee:**

The Meetings Subcommittee met six times during the 2015 Interim ( May 12, June 17, July 21, August 19, September 30, and November 4, 2015) to continue its study of meeting exemptions and other FOIA meeting provisions as directed by HJR No. 96 and pursuant to the study plan adopted by the Council. This appendix provides additional information about what sections of FOIA were reviewed by the Meetings Subcommittee beginning in 2014 and the recommendations of the Meetings Subcommittee made as of November 4, 2015, relating to open meeting exemptions. Beginning at the September 30, 2015 meeting, the Meetings Subcommittee began its consideration of § 2.2-3712; closed meeting procedures. Please see the Council's website (2015 Subcommittees) for detailed information about the work of the Meetings Subcommittee.

#### **Review of § 2.2-3711(open meeting exemptions) and recommendations made:**

A 2 (scholastic)
July 8, 2014
No changes
A 3 (real estate)
July 8, 2014
No changes
A 4 (personal matters)
July 8, 2014
No changes
A 5 (prospective business/no prior announcement)
July 8, 2014
No changes
A 6 (investment of public funds)
July 8, 2014
No changes
A 7 (specific legal matters or litigation)
July 8 and August 19, 2014
Amend to separate into two exemptions
A 8 (boards of visitors/gifts, grants, etc.)
August 19 and November 5, 2014

No changes
A 10 (honorary degrees or special awards)
August 19, 2014
No changes
A 11 (tests & exams)
August 19, 2014
No changes
A 12 (disciplinary action vs. member of General Assembly)
November 5, 2014
No changes
A 13 (hazardous waste siting)
August 19, 2014
No changes
A 14 (Governor and advisory board economic forecasts)
November 5, 2014
No changes
A 15 (medical & mental health records)
August 19, 2014
No changes
A 16 (Lottery Board)
November 5, 2014
No changes
A 17 (Local crime commissions)
November 5, 2014 and May 12, 2015
Amend to delete exemption (after research, there are no local crime commissions)
A 18 (Board of Corrections; inmate informants )
June 17, 2015
No changes, unless Board of Corrections says otherwise
A 19 (Public safety; terrorism; cybersecurity)
August 19, 2014 and August 19, 2015
No changes
A 20 (VRS, UVA, VCSP investments)
November 5, 2014 and June 17, 2015
Amend to include cross reference to § 15.2-1544 et seq., including local government entities that invest funds for post-retirement benefits other than pensions.
A 21 (Child and Adult fatality review teams)
November 5, 2014
No changes

A 22 (UVA Medical Ctr and EVMS)
November 5, 2014
No changes
A 23 (VCU Health System Authority)
November 5, 2014, June 17 and August 19, 2015
Amend to eliminate redundancies with other FOIA exemptions
A 24 (Health Practitioners Monitoring Program)
November 5, 2014
No changes
A 25 (VCSP)
November 5, 2014 and June 17, 2015
No changes
A 26 (Wireless Carrier E-911 Cost Recovery Subcommittee )
November 5, 2014 and July 21, 2015
No changes
A 27 (DPOR, DHP, and Bd of Accountancy; disciplinary proceedings)
November 5, 2014
No changes
A 28 (PPEA & PPTA records)
August 19, 2014, November 4, 2014
No changes; but subject to reconsideration if Records Subcommittee makes changes to the corollary records exemption.
A 29 (Public contracts; public procurement)
August 19, 2014 and August 19, 2015
No changes
A 30 (Commonwealth Health Research Board or Innovation and Entrepreneurship Investment Authority or the Research and Technology Investment Advisory Committee a; loan and grant applications.)
July 21, 2015
No changes
A 31 (Commitment Review of Committee; individuals subject to commitment as sexually violent predators)
July 21, 2015
No changes; flag b/c contains x-ref to subdivision 9 of § 2.2-3705.2
A 32 (Expired)
May 12, 2015
Amend to delete expired exemption
A 33(Telecom or cable TV)
August 19, 2014
No changes; but subject to reconsideration if Records Subcommittee makes changes to the corollary records exemption.

A 34 (Wireless Service Authorities)
August 19, 2014
No changes; but subject to reconsideration if Records Subcommittee makes changes to the corollary records exemption.
A 35 (SBE and local electoral boards)
June 17, 2015
No changes
A 36 (Forensic Science Board or the Scientific Advisory Committee; criminal investigative records)
June 17, 2015
No changes
A 37 (Brown v. Board of Education Scholarship Program Awards Committee; scholarship awards)
June 17, 2015
No changes
A 38 (VA Port Authority)
August 19, 2015
No changes
A 39 (VRS, local retirement systems, and VCSP)
November 14, 2014
No changes
A 40 (Economic development discussions; x-ref to subdivision 3 of § 2.2-3705.6)
August 19, 2014
No changes; but subject to reconsideration if Records Subcommittee makes changes to the corollary records exemption.
A 41 (VA Board of Education; teacher licensing)
July 21, 2015
No changes; flag for subcommittee; contains x-ref to subdivision 12 of § 2.2-3705.3
A 42 (VA Military Council and commissions created by executive order; BRAC)
June 17, 2015, July 21, 2015, and August 19, 2015
No changes
A 43 (Board of Trustees, Veterans Services Foundation)
November 5, 2014
No changes
A 44 (Tobacco Region Revitalization Commission)
July 21, 2015
No changes; flag for subcommittee; contains x-ref to subdivision 23 of § 2.2-3705.6
A 45 (Commercial Space Flight Authority; rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority)

July 21, 2015
No changes; flag for subcommittee; contains x-ref to subdivision 24 of § 2.2-3705.6

A 46 (DCR; Resource Management Plans)
August 19, 2015
No changes but subject to context draft review and final decision re: records x-ref to subdivision 25 of § 2.2-3705.6 or subsection E of § 10.1-104.7

A 47 (ABC Authority) NOTE: effective July 1, 2018
August 19, 2015
No changes; but subject to context draft review and final decision re: records x-ref to subdivision 1 of § 2.2-3705.3 and subdivision 34 of § 2.2-3705.7. And Record Subcommittee review of subdivision 34 of § 2.2-3705.7.

*\*The Subcommittee also considered whether the current meeting exemptions that reference existing FOIA record exemptions should be amended to contain more information, to include the identity of the public body(s) to which the exemption applies and a general description of the subject matter of the excluded records/topic for discussion in a closed meeting, in addition to the citation to the applicable records exemption. A "context draft" was prepared and the consensus of the Subcommittee was that while the approach is good, there may be unintended consequences stemming from the "context draft." As a result, the Subcommittee decided to wait and give this idea further consideration before making a recommendation.*

## **2. Records Subcommittee:**

The Records Subcommittee met six times during the 2015 Interim (May 11, June 18, July 22, August 18, October 7, and November 18, 2015) to continue its study of records exemptions as directed by HJR No. 96 and pursuant to the study plan adopted by the Council. This appendix provides additional information about what sections of FOIA were reviewed by the Records Subcommittee beginning in 2014 and the recommendations of the Records Subcommittee made as of November 18, 2015. Please see the Council's website (2015 Subcommittees) for detailed information about the work of the Records Subcommittee.

### **I. OLD BUSINESS - Exemptions carried over from 2014**

#### **§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies.**

<b>Code Subsection or Subdivision</b>	<b>Date(s) Reviewed</b>	<b>Recommended Action(s)</b>	<b>Need to consider further? (Yes/No)</b>
1 (personnel records)	July 8, and August 25, 2014; July 22, 2015	2014 recommended amending to include language from current § 2.2-3705.8 (A); add "name" as required disclosure; 2015 referral by Meetings Subcommittee re: opening records of dismissal of certain high-level appointees - no action	No



2 (advice of legal counsel & atty-client privilege)	July 8, August 25, and November 5, 2014; May 11 and June 18, 2015	No action	No
6 (vendor software)	July 8, 2014	Further consideration with other proprietary records when study § 2.2-3705.6	Yes - with other proprietary records

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

<b>Code Subsection or Subdivision</b>	<b>Date(s) Reviewed</b>	<b>Recommended Action(s)</b>	<b>Need to consider further? (Yes/No)</b>
2 (working papers & correspondence)	August 25, 2014; June 18, July 22, and August 18, 2015	Carry over for further consideration; HB 1722/SB 893 referred by 2015 Session of General Assembly re: college & university presidents - no action on HB 1722/SB 893; recommended moving the term "correspondence" into the definition of "working papers" for clarification of existing language	No
12 ((VRS, UVA, VCSP investments)	August 25, 2014 & July 22, 2015	2014 recommended no changes; Meetings Subcommittee recommended change to meetings exemption that would allow the exemption to be used in the case of local boards that invest funds for post-retirement benefits other than pensions; Records Subcommittee recommended corresponding change to records exemption	No
27 (Treasury, Local Gov't Investment Pool)	November 5, 2014; May 11, July 22, and August 18, 2015	Considered whether necessary after § 2.2-3705.1 (13) enacted; recommended no changes	No

**II. NEW BUSINESS - 2015**

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

<b>Code Subsection or Subdivision</b>	<b>Date(s) Reviewed</b>	<b>Recommended Action(s)</b>	<b>Need to consider further? (Yes/No)</b>
1 (rape crisis center or program for battered spouses)	July 22, 2015	No changes	No

2 (engineering & construction drawings & plans)	July 22, August 18, October 7, and November 18, 2015	Have staff prepare draft combining similar provisions from subdivisions 2, 4, 6, and 14 for further consideration	Yes
3 (security/access to data processing or telecommunications systems)	July 22, 2015	No changes	No
4 (terrorism & cybersecurity)	July 22, August 18, October 7, and November 18, 2015	Have staff prepare draft combining similar provisions from subdivisions 2, 4, 6, and 14 for further consideration	Yes
5 (railway system safety plans; ongoing accident investigations)	July 22, 2015	No changes	No
6 (safety & security of governmental facilities)	July 22, August 18, October 7, and November 18, 2015	Have staff prepare draft combining similar provisions from subdivisions 2, 4, 6, and 14 for further consideration	Yes
7 (school safety audits)	July 22, 2015	No changes	No
8 (Expired.)	July 22, 2015	No action needed	No
9 (mental health assessments of sexually violent predators)	July 22, 2015	No changes	No
10 (subscriber data not otherwise public, provided by a telecommunications carrier to a public body for 911)	July 22, August 18, and October 7, 2015	Recommend amending to use the term "communication services provider" as defined in Code § 58.1-647 instead of the term "telecommunications carrier"	Yes
11 (subscriber data not otherwise public, collected by a local governing body for 911)	July 22, August 18, and October 7, 2015	Recommend amending to use the term "communication services provider" as defined in Code § 58.1-647 instead of the term "telecommunications carrier"	Yes
12 (closure, realignment, or relocation of federal military or national security installations)	July 22 and August 18, 2015	No changes	No
13 (internal controls of the Commonwealth's financial processes and systems)	July 22 and August 18, 2015	No changes	No
14 (public safety)	July 22,	Have staff prepare draft combining	Yes

communications systems)	August 18, October 7, and November 18, 2015	similar provisions from subdivisions 2, 4, 6, and 14 for further consideration	
15 (Fire/EMS cell phones for official duties)	July 22, 2015	No changes	No
16 (hospital & nursing home disaster recovery & evacuation plans)	July 22, 2015	No changes	No

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

<b>Code Subsection or Subdivision</b>	<b>Date(s) Reviewed</b>	<b>Recommended Action(s)</b>	<b>Need to consider further? (Yes/No)</b>
1 (investigations of licenses & permits - ABC, Lottery, Racing Commission, VDACS, DCJS)	August 18, 2015	No changes	No
2 (active investigations by DHP or health regulatory boards)	August 18, 2015	No changes	No
3 (investigations of employment discrimination complaints to DHRM or local public bodies)	August 18, 2015	No changes	No
4 (active investigations by DMAS)	August 18, 2015	No changes	No
5 (investigations of unlawful discriminatory practices under the Virginia Human Rights Act or local ordinance)	August 18, 2015	No changes	No
6 (investigations of lottery agents, lottery crimes, etc.)	August 18, 2015	No changes	No
7 (various audits conducted by JLARC, APA, etc.)	October 7 and November 18, 2015	Deferred at request of affected parties	Yes
8 (DHRM employment dispute resolution investigations)	October 7 and November 18, 2015	Recommend elimination because subject already covered by general personnel records exemption	No

9 (complainant information re: zoning, Building Code, and Fire Code complaints)	October 7 and November 18, 2015	No changes	Yes
10 (active investigations by DCJS re: private security services, special conservators of the peace, bail bondsmen, and bail enforcement agents)	October 7, 2015	No changes	No
11 (Board of Education investigations of test security, alteration, and administration)	October 7 and November 18, 2015	Recommend amending the phrase "shall not prohibit the disclosure" to "shall not authorize the withholding"	No
12 (Board of Education active investigations re: teacher licenses)	October 7 and November 18, 2015	Recommend amending the phrase "shall not prohibit the disclosure" to "shall not authorize the withholding"	No
13 (investigation by the Attorney General regarding the Tobacco Master Settlement Agreement and related matters)	October 7, 2015	No changes	No

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

NOTE: The Subcommittee directed staff and interested parties to meet as a proprietary records work group to discuss consolidating the many specific exemptions for proprietary records and trade secrets into one or more exemptions of general application. The work group met on June 18, July 21, August 18, and November 10, 2015. The work group will continue in 2016.

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

Code Subsection or Subdivision	Date(s) Reviewed	Recommended Action(s)	Need to consider further? (Yes/No)
34 (ABC, delayed effective date 2018)	October 7 and November 18, 2015	Recommend eliminating as need for exemption is speculative	No

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