

**REPORT OF THE**

**Virginia Freedom of  
Information Advisory Council**

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



**HOUSE DOCUMENT NO. 20**

**COMMONWEALTH OF VIRGINIA  
RICHMOND  
2017**





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

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

COMMONWEALTH OF VIRGINIA  
DECEMBER 2017

---

---



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

Delegate James M. LeMunyon, Chair  
Senator Richard H. Stuart, Vice-Chair  
Senator Mamie E. Locke  
Delegate Luke E. Torian  
Shawri King-Casey  
Sandra G. Treadway  
Mark Vucci  
William "Billy" Coleburn  
Kathleen Dooley  
Stephanie Hamlett  
Edward Jones  
Marisa Porto  
Cullen Seltzer  
Michael Stern

\*\*\*\*\*

Staff

*Division of Legislative Services*

Alan Gernhardt, *Executive Director and Senior Attorney*  
Jessica L. Budd, *Attorney*  
Darlene Jordan, *Sr. Operations Staff Assistant*



---

## TABLE OF CONTENTS

---

<b>INTRODUCTION .....</b>	<b>1</b>
<b>EXECUTIVE SUMMARY .....</b>	<b>2</b>
<b>WORK OF THE COUNCIL .....</b>	<b>7</b>
<b>SERVICES RENDERED BY THE COUNCIL .....</b>	<b>33</b>
<b>CONCLUSION .....</b>	<b>36</b>

### **APPENDICES**

<b>A. Training and Educational Presentations .....</b>	<b>A-1</b>
<b>B. Index of Written Advisory Opinions Issued .....</b>	<b>B-1</b>
<b>C. 2017 Meetings of the Council .....</b>	<b>C-1</b>
<b>D. Status of Freedom of Information and Other Related Access Bills .....</b>	<b>D-1</b>
<b>E. Bills Referred to the FOIA Council by the 2017 Session of the General Assembly .....</b>	<b>E-1</b>
<b>F. Breakdown of Inquiries to Council .....</b>	<b>F-1</b>
<b>G. Opinions Issued by the Council December 2008 through November 2017 .....</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 2017**

## **INTRODUCTION**

"Liberty cannot be preserved without a general knowledge among the people, who have a right ... and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers."

- **John Adams**, *A Dissertation on the Canon and Feudal Law* (1765)

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 14 members, including two members of the House of Delegates, two members of the Senate of Virginia, the Attorney General or his designee, the Librarian of Virginia, the director of the Division of Legislative Services, one representative of local government, two representatives of the news media, and four citizens.<sup>3</sup>

---

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

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

<sup>3</sup> Until this year the Council was composed of 12 members; one additional member from the House of Delegates and one additional member from the Senate of Virginia were added effective July 1, 2017, pursuant to House Bill 2144 (LeMunyon) (2017 Acts of Assembly, c. 644).

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 seventeenth 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 FOIA and public access generally. In its 17-year history, the Council has provided more than 25,900 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials and has conducted over 1,000 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, 2016, through November 30, 2017—the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. This year the General Assembly referred three bills to the Council for further study:

- **HB 2223 (Kory) FOIA; right to speak at open meetings.** Requires that every public body afford an opportunity for public comment during any open meeting and requires that the public comment periods be noticed on the public body's agenda. The bill permits the public body to have discretion in where it places the public comment period on its agenda and permits the public body to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill requires that for meetings of all public bodies, not just those state public bodies on which there is at least one member appointed by the Governor as in current law, the notice provided for any such meeting include a statement as to approximately at what point during the meeting public comment will be received.
- **HB 2316 (Marshall, D.W.) Tobacco Region Revitalization Commission; meetings by teleconference.** Provides that the remote locations from which additional members of the Commission participate in a Commission meeting that is conducted through electronic communication means shall not be required to be open to the public.
- **SB 972 (DeSteph) Requests for information by members of the General Assembly; responses not subject to redaction.** Requires all departments, agencies, and institutions of the Commonwealth and staff and employees thereof to respond to a request

for information made by a member of the General Assembly. The bill further provides that notwithstanding the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), a response to a request for information made by a member of the General Assembly shall not be subject to redaction.

Each of these bills referred was scheduled for review, and all of the patrons were invited to Council meetings to provide the background for their respective bills. Delegate Kory was unable to present HB 2223 to the Council this year, so the Council took no action on HB 2223. Senator DeSteph presented SB 972 to the Council, but after considering the bill, the Council decided to take no action on it. Representatives of the Tobacco Region Revitalization Commission appeared on behalf of Delegate Marshall to present HB 2316 to the Council. The Council considered the bill and formed an Electronic Meetings Subcommittee that met twice to study HB 2316 and related issues. After hearing back from the subcommittee, the Council recommended three drafts regarding electronic meetings:

- (1) An amended draft based on HB 2316 that would remove the requirement that the remote locations from which members of a public body participate in meetings through electronic communication means be open to the public. Instead, the amended draft provides that members of the public must be provided an electronic communication means substantially equivalent to that provided to members of the public body through which the public may witness the meeting. The bill provides that public access to remote locations from which members of the public body participate through electronic communication means shall be encouraged, but not required; however, if three or more members are gathered at the same remote location, such remote location must be open to the public. The bill also amends the annual reporting requirements for public bodies that meet by electronic communication means;
- (2) A draft that would combine current Code §§ 2.2-3708 and 2.2-3708.1 into a single section addressing all types of meetings utilizing electronic communication means; and
- (3) A draft that would clarify the definition of "electronic communication" by amending it to mean the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities to transmit or receive information.

The Council also studied the subject matter of HB 1971 (Massie),<sup>4</sup> which excluded the records of a multidisciplinary team as they relate to individual child abuse or neglect cases or sex offenses involving a child from mandatory disclosure under FOIA and provided an exemption from open meeting requirements to such teams and sexual assault response teams. The issue presented was whether these teams should be exempt from all provisions of FOIA, much like family assessment and planning teams established pursuant to § 2.2-5207. After considering the issue and hearing from Commonwealth's Attorney Michael Doucette and Deputy Commonwealth's Attorney Nancy Oglesby about how these terms work in practice, the Council recommended a bill that provides that FOIA shall not apply to sexual assault response teams established pursuant to § 15.2-1627.4, with the exception of records relating to (i) protocols and policies of the sexual assault response team and (ii) guidelines for the community's response established by the sexual assault response team, which the bill provides shall be public records subject to the provisions of FOIA. The bill

---

<sup>4</sup> Note that HB 1971 was enacted into law effective July 1, 2017 (2017 Acts of Assembly, c. 587).

also provides that FOIA shall not apply to multidisciplinary child sexual abuse response teams established pursuant to § 15.2-1627.5.

Additionally, the Council decided to continue its study of the exemptions for trade secrets and proprietary records. The Council studied these exemptions over the course of its three-year study under House Joint Resolution No. 96 (2014). When that study was completed last year, the Council decided not to act on the issue, but to continue its study in 2017. This year the Council formed a Proprietary Records and Trade Secrets Subcommittee that met four times and had a work group that met once. As a result of this year's work, the Council recommended three bills:

(1) A bill that would (i) create a general record exclusion for trade secrets submitted to a public body, (ii) permit a requester filing a FOIA petition challenging a record's designation as an excluded trade secret to name the submitting entity or its successor in interest, in addition to the public body, as a defendant, and (iii) permit the public body to request that the court add the submitting entity as an additional defendant in the action;

(2) A bill that would (i) permit a requester filing a FOIA petition challenging a record's designation as an excluded trade secret to name the submitting entity or its successor in interest, in addition to the public body, as a defendant, (ii) permit the public body to request that the court add the submitting entity as an additional defendant in the action, and (iii) provide that if, as a result of the action, the court requires the public body to produce the requested information because it was unreasonably withheld as a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), any award of reasonable costs and attorney fees to the requester shall be paid by the submitting entity or the public body, or both, in the proportion deemed appropriate by the court; and

(3) A bill based on current procurement policy language that would amend the Virginia Public Procurement Act (§ 2.2-4300 et seq.) to provide that a bidder, offeror, or contractor shall not improperly designate as trade secrets or proprietary information (i) an entire bid, proposal, or prequalification application; (ii) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (iii) line item prices or total bid, proposal, or prequalification application prices.

The Council also recommended a draft to change certain provisions of § 2.2-3706 concerning law-enforcement and criminal records. Experience has shown that certain amendments made to this section since 2013 may have had unintended consequences, in that they have been interpreted by some to limit the provisions of subsection A (concerning mandatory disclosures, discretionary exemptions, and one prohibition regarding the identity of criminal informants) only to law-enforcement agencies, and to allow any public body to apply subsection B (which allows the redaction of personal, medical, and financial information from noncriminal incident records). However, certain provisions of subsection A necessarily apply to public bodies that are not engaged in criminal law-enforcement activities, and the provisions of subsection B regarding noncriminal records were not intended to apply as general exemptions for all public bodies. The Council directed staff to prepare an amended draft to correct these unintended results by clarifying the application of these subsections and subdivisions. All of the legislative drafts recommended by the Council are available on the Council's website and are attached as Appendix E to this report.

The Council continued to monitor Virginia court decisions relating to FOIA. The Supreme Court of Virginia issued its decision in the case of *Daily Press v. Office of the Executive Secretary of the*

*Supreme Court*, a case that the Council has been monitoring since last year.<sup>5</sup> That case concerned access to the case management system comprised of records from 118 of the 120 Virginia circuit courts and maintained by the Office of the Executive Secretary of the Supreme Court of Virginia (the Court). The Court held that the *Daily Press* must seek these records from each clerk of circuit court, as Code § 17.1-242 expressly designates the circuit court clerks as the custodians of such records. In other litigation, the Henrico County Circuit Court in June issued a letter opinion in the case of *Davison v. Dunnavant*,<sup>6</sup> in which Mr. Davison, a citizen, sought access to certain posts on Senator Dunnavant's Facebook page. The circuit court held that a sitting member of the General Assembly is a public official but is not a public body subject to FOIA. The circuit court issued a second letter opinion and a final order in August after a rehearing. In the second opinion, the circuit court reversed its June holding and held that a member of the General Assembly is subject to FOIA, but it found that no violation of FOIA had occurred in the case. In another case, the Accomack County General District Court issued an opinion in *Turner v. Office of the Executive Secretary*,<sup>7</sup> also in August. Dr. Turner, a citizen, sought access to certain records regarding annual budget allotments provided to circuit court judges. The general district court concluded that "judges are not public bodies, and they are not officers or employees of a public body" and therefore "individual judges are excluded from the requirements of FOIA." It is the Council's understanding that this decision is being appealed to the circuit court.

The Council continued its commitment to providing FOIA training. The Council views its training duty as its most important mission and welcomes opportunities to provide FOIA training programs. During 2017, Council staff conducted 56 live, in-person 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. In 2015, the annual statewide FOIA Workshops conducted by Council staff were discontinued in favor of providing training upon the request of any interested group. Under this approach, Council staff travels to the location of the group requesting training, provides relevant training materials, and presents training tailored to meet the needs of the particular group. All such 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. In addition, the Virginia Municipal Clerks Association, the Virginia School Board Association, and other organizations give credit for attendance at these FOIA presentations. This year the Council also implemented a free online training program available through the Commonwealth of Virginia Learning Center administered by the Department of Human Resource Management (<https://covlc.virginia.gov/>). This format allows FOIA officers to be trained at a time when it is convenient for them, to generate records of who has completed training, and for issuance of a certificate of completion contemporaneously with successful course completion. Both the live, in-person presentations and the online training program satisfy the statutory requirement for FOIA officers to receive annual training. Additionally, pursuant to HB 2143 (LeMunyon, 2017), the Council has created forms for

---

<sup>5</sup> *The Daily Press, LLC v. Office of the Exec. Sec'y of the Sup. Ct. of Va.*, 293 Va. 551, 800 S.E.2d 822 (2017).

<sup>6</sup> *Davison v. Dunnavant*, (Circuit Court of Henrico County, letter opinions dated June 14, 2017, and August 10, 2017, final order dated August 25, 2017, case no. CL17-737).

<sup>7</sup> *Turner v. Office of the Attorney General* (case no. GV17-0673) and *Turner v. Office of the Executive Secretary* (case no. GV17-0637) (Accomack County General District Court, letter opinion dated August 3, 2017, addressing both cases).

FOIA officers to report their contact information, and it has also created a searchable list of FOIA officers, both available on the Council's website (<http://foiacouncil.dls.virginia.gov/>).

For this reporting period, the Council responded to 1,842 inquiries. Of these inquiries, eight resulted in formal, written opinions. The breakdown of requests for written opinions is as follows: five by government officials, none by media representatives, and three by citizens. The remaining requests were for informal opinions, given via telephone and email. Of these requests, 1,134 were made by government officials, 588 by citizens, and 112 by media representatives. Starting in 2006, the Council has seen an increase in the number of informal opinion requests as compared with requests for formal written opinions. For the past decade, 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 creditable source for FOIA guidance before disputes arise. This year there also was a noticeable increase in the number of inquiries concerning the requirements for FOIA officers, especially in regard to the availability of online training, the reporting requirements, and the list of FOIA officers.

FOIA was again the subject of significant legislative activity in the 2017 session. The General Assembly passed a total of 22 bills amending FOIA during the 2017 session. The Council in 2016 completed the third year of the three-year study of FOIA directed by House Joint Resolution No. 96 (2014), and as a result of that study, the Council recommended two pieces of omnibus legislation to the 2017 Session of the General Assembly incorporating all of its recommended changes. Both omnibus bills, HB 1539 (the records omnibus bill) and HB 1540 (the meetings omnibus bill), passed the General Assembly. Two additional bills passed the General Assembly that were recommended by the FOIA Council: HB 1734, which requires guidance documents of the Virginia Parole Board to be available as public records under FOIA, and HB 1876, which excludes from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years. A more detailed report of the bills discussed above and other public access bills passed during the 2017 session appears on the Council's website and is attached as Appendix D to this report.

In keeping abreast of the latest access trends, the Council has continued to encounter questions regarding the use of technology both in regard to public records and public meetings. On the records side, the Council has observed that databases are often shared among users and may be maintained by service providers that may be public bodies or independent contractors, rather than by the public body that created the records, which has raised the issue of who is the custodian of such databases. Additionally, the use of social media by public bodies and public officials has led to many questions regarding access and records retention. On the meetings side, as stated above, the Council once again formed an Electronic Meetings Subcommittee to address issues that have arisen as electronic communications technology is more readily available and widely used.

Effective July 1, 2017, the membership of the Council has been increased from 12 members to 14 members by adding one additional member from the House of Delegates and one additional member from the Senate. The Council welcomed new legislative members Senator Mamie E. Locke and Delegate Luke E. Torian. The Council also welcomed Chad Ayers, Esq., who recently joined the Division of Legislative Services to work with Jessica Budd, Esq., as staff to the House General Laws Committee. Starting next year, Mr. Ayers will also help staff the Council.

The Council also said farewell to Maria J.K. Everett, who has been Executive Director of the Council since its inception in July 2000 and retired in August 2017. During her 17-year tenure as

Executive Director, the FOIA Council rendered approximately 26,000 informal and formal opinions on the application/interpretation of FOIA and conducted nearly 1,000 training sessions on FOIA. Ms. Everett was also a senior attorney with the Division of Legislative Services and had staffed the House General Laws Committee since 1990. In that capacity, Ms. Everett was lead staff on the study of FOIA in 1998–1999 under House Joint Resolution 187 (1998), which led to the creation of the Council. The Council praised Ms. Everett's legal expertise, her skills at providing FOIA training that is both educational and entertaining, and her ability to provide practical advice to help citizens, the media, and government officials handle FOIA matters effectively. The Council thanked Ms. Everett for her exceptional service to the Council and the Commonwealth.

## **WORK OF THE COUNCIL**

The majority of the Council's work this year was related to matters carried over from the House Joint Resolution No. 96 (2014) study, which concluded last year, and bills referred by the 2017 Session of the General Assembly. Particular emphasis was placed on studying the treatment of trade secrets and proprietary records and the conduct of electronic meetings.

### **March 7, 2017**

The Council held its first meeting of the 2017 interim on March 7, 2017.<sup>8</sup> The meeting was held to hear an update on legislation passed by the 2017 Session of the General Assembly, to consider bills referred by the 2017 Session of the General Assembly to the Council for further study, to review issues carried over from 2016 for further study this year and develop a study plan for the study of those issues, and to discuss other issues of interest to the Council. After the meeting was called to order and the members present were introduced, the Council welcomed its newest member, Cullen Seltzer, Esq., appointed by the Governor for a term of four years.

### **Recap of FOIA and Related Access Bills from 2017 Session of General Assembly**

Staff informed the Council that the 2017 Session of the General Assembly passed a total of 21 bills amending FOIA. The Council in 2016 completed the third year of the three-year study of FOIA directed by House Joint Resolution No. 96 (2014) (HJR No. 96 study), and as a result of that study, the Council recommended two pieces of omnibus legislation to the 2017 Session of the General Assembly incorporating all of its recommended changes. Both omnibus bills, HB 1539, the records omnibus bill, and HB 1540, the meetings omnibus bill, passed the General Assembly. Two additional bills passed the General Assembly that were recommended by the Council: HB 1734, which requires guidance documents of the Virginia Parole Board to be available as public records under FOIA, and HB 1876, which excludes from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years.

Five bills add three new records exemptions in FOIA as follows: SB 1226, amending § 2.2-3705.6, adds a new records exemption for certain proprietary information included in solar services agreements between a private business and a public body; SB 1561 and HB 2209, identical bills amending § 2.2-3705.5, add a new records exemption for records of and information held by the

---

<sup>8</sup> Council members Coleburn, Hamlett, King-Casey, Porto, Seltzer, Stern, and Vucci were present; member Dooley participated by telephone; members Delegate LeMunyon (Chair), Senator Stuart (Vice-Chair), Jones, and Treadway were absent.

Emergency Department Care Coordination Program<sup>9</sup>; and SB 1006 and HB 1551, identical bills amending § 2.2-3705.5, add a new records exemption for data and information provided by the Office of the Executive Secretary of the Supreme Court of Virginia to the Department of Behavioral Health and Developmental Services pursuant to § 37.2-308.1 pertaining to commitment hearings for juveniles and adults.

Two bills add two new meetings exemptions in FOIA as follows: SB 1574, amending § 2.2-3711, adds a new meetings exemption for meetings of a subcommittee of the Board of the Virginia Economic Development Partnership Authority created to consider information provided by the Virginia Employment Commission in order to verify employment and wage claims of businesses that have received incentive awards, and HB 1971, amending §§ 2.2-3705.7 and 2.2-3711, adds a new meetings exemption for discussion or consideration of (i) individual sexual assault cases by a sexual assault response team established pursuant to § 15.2-1627.4 and (ii) individual child abuse or neglect cases or sex offenses involving a child by a multidisciplinary child abuse team established pursuant to § 15.2-1627.5, and also excludes records of such multidisciplinary child abuse teams from mandatory disclosure.

The remaining 14 bills amend existing provisions of FOIA. Of note, HB 2144, among other provisions, increases the Council from 12 members to 14 members by adding one additional member from the House of Delegates and one additional member from the Senate.

Staff noted that while the Legislative Update document is complete, it is not finalized because the Governor has not yet taken action on some of the bills and has until March 27, 2017, to do so. The General Assembly will meet on April 5, 2017, for the Reconvened Session to act on any amendments or vetoes by the Governor. The final version of the 2017 Legislative Update will be posted on the Council's website after final action has been taken on all of the bills.

### **Bills Referred to Council for Study by 2017 Session of General Assembly**

Staff advised the Council that the General Assembly had referred three bills to the Council for study this year and provided an overview of each bill.

HB 2316 (Marshall, D.) pertains to meetings of the Tobacco Region Revitalization Commission and seeks to provide that the remote locations from which additional members of the Commission participate in a Commission meeting that is conducted through electronic communication means shall not be required to be open to the public.

SB 972 (DeSteph) would require all departments, agencies, and institutions of the Commonwealth and staff and employees thereof to respond to a request for information made by a member of the General Assembly. The bill further provides that notwithstanding the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), a response to a request for information made by a member of the General Assembly shall not be subject to redaction.

HB 2223 (Kory) would require every public body to afford an opportunity for public comment during any open meeting and would require that the public comment periods be noticed on the public body's agenda. The bill permits the public body to have discretion in where it places the public comment period on its agenda and permits the public body to adopt reasonable rules

---

<sup>9</sup> SB 1561 and HB 2209, creating the Emergency Department Care Coordination Program, do not become effective unless and until the Commonwealth receives federal Health Information Technology for Economic and Clinical Health (HITECH) Act funds to implement its provisions.



governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill requires that for meetings of all public bodies, not just those state public bodies on which there is at least one member appointed by the Governor as in current law, the notice provided for any such meeting include a statement as to approximately at what point during the meeting public comment will be received.

### **Issues Continued from 2016 for Further Study**

Staff next provided an overview of each of the five issues carried over from 2016 for further study in 2017.

- Proprietary Records and Trade Secrets

In 2014, the Virginia Press Association submitted a white paper suggesting the creation of one or more general exemptions for proprietary records and trade secrets, as opposed to the many specific exemptions in current law that are limited to particular agencies and particular types of records. This proposal, along with a review of current exemptions addressing proprietary records and trade secrets, was studied in depth by the Council, the Records Subcommittee, and the Proprietary Records Work Group over the course of the three-year study. Various issues were identified, including the lack of a statutory definition of "proprietary," various usages of the same terms in different exemptions that may be subject to differing interpretations, the proliferation of new exemptions using very similar language adding to the length and complexity of FOIA, concerns over the process of designating what records are proprietary or trade secrets, different types of records that might be exempted, and concerns over liability if a public body had to defend a designation made by a private entity. Draft proposals were presented at every level of review, and agency representatives testified regarding current exemptions, but no consensus was reached on a recommendation moving forward.

- Personnel Records

Personnel records were studied by the Records Subcommittee, the Personnel Records Work Group, the DHRM Records Work Group, and the full Council from 2014 through 2016. Amendments to clarify the existing personnel records exemption and to eliminate a redundant exemption passed the 2017 Session of the General Assembly as part of the omnibus legislation recommended by the Council (HB 1539). Additional issues were identified but not resolved concerning differing treatment of letters of recommendation in different contexts, the lack of a definition of "personnel records," and the interaction of provisions concerning personnel records with administrative investigations.

- Law-Enforcement Records

The next issue that was carried over for further study was that of access to law-enforcement records, particularly criminal investigative records. Staff provided a brief overview highlighting the prior instances in which the Council has studied the issue. Staff noted that the Council formed a Criminal Investigative Records subcommittee in 2010 to study SB 711 (2010), which sought to require law-enforcement agencies to disclose criminal investigative records once a criminal investigation or prosecution was final or was otherwise terminated, with certain limited exceptions. The subcommittee met three times over the 2010 interim but, ultimately, after considering arguments both in favor of and in opposition to the bill, could not find common ground for substantive change on the issue. The subcommittee did, however, recommend a draft that sought

to rewrite Va. Code § 2.2-3706, the statute governing access to criminal investigative records, in an effort to make the section easier to read and understand without introducing any substantive changes. The Council voted to recommend the draft, but for several reasons it was decided that introduction of the draft be delayed until the 2012 Session of the General Assembly.

Staff explained that the Criminal Investigative Records subcommittee was continued in 2011 to study HB 1467 and a separate proposal offered by the Virginia Press Association concerning access to criminal and other law-enforcement records. HB 1467 was substantially the same as SB 711 (the bill that was studied the prior year), and after considerable discussion, which substantially echoed those comments offered both in support of and in opposition to SB 711 the prior year, the subcommittee recommended that no further action be taken on HB 1467. The subcommittee also recommended, however, that the issue of access to criminal investigative files and other law-enforcement records be continued for further study due to the significant amount of interest expressed by stakeholders. The subcommittee directed staff to meet with the interested parties to see if consensus could be reached about making any changes to the existing law. Staff met with interested stakeholders, including the Virginia Press Association, law-enforcement representatives, and other interested parties, three times over the remainder of the 2011 interim. The work group was not able to reach agreement on a legislative proposal, but it intended to continue its work during the 2012 interim.

Staff noted that the subcommittee met three times during the 2012 interim and that it used a position paper drafted by the Virginia Press Association outlining its concerns with the then-existing version of Va. Code § 2.2-3706 to frame its discussions. At its last meeting, the subcommittee voted to recommend a draft that was intended to simply reorganize and clarify the existing law. The Council voted to recommend the draft to the 2013 Session of the General Assembly. That draft, in the form of SB 1264, passed and amended § 2.2-3706 into essentially the version of the statute that is current today.

The issue of access to law-enforcement records was raised again in 2016 but studied only in cursory fashion due to time constraints. As a result, the issue was carried over for continued study this year. Staff told the Council that the above information was provided by way of background and was in no way an attempt to restrict further examination of § 2.2-3706.

- Technology Issues

During the course of the three-year study, several issues were raised, but not resolved, concerning the effects of technology regarding access to both records and meetings:

- FOIA policy statement. At the beginning of the HJR No. 96 study, staff suggested that FOIA be amended to include a policy statement to the effect that "Any public body procuring any computer system, equipment or software, shall ensure that the proposed system, equipment or software is capable of producing public records in accordance with this chapter." (Language derived from § 2.2-1111, applicable to the Department of General Services.)
- "Vendor proprietary software" (§ 2.2-3705.1(6)) and "Computer software developed by or for [a public body]" (2.2-3705.1(7)).
- Website posting of notice and minutes (§§ 2.2-3707 and 2.2-3707.1).
- Texting among members during public meetings.

- Technical terminology and definitions
- Access to databases; the Supreme Court of Virginia is scheduled to hear a case concerning access to and custody of databases this year, so the Council decided to wait until the Court has rendered its decision before studying this issue further.
- Reorganization of FOIA

The HJR No. 96 study had directed the Council to examine the organizational structure of FOIA and make recommendations to improve readability and clarity. A draft was presented for consideration that would organize FOIA into articles for further clarity, but no consensus was reached.

### **Future Meetings**

The Council set the following meeting dates for 2017:

Monday, May 15, 2017, at 1:30 p.m. in House Room 1 in the Capitol, Richmond, Virginia;  
 Monday, August 14, 2017, at 1:30 p.m. in House Room 1 in the Capitol, Richmond, Virginia; and  
 Monday, November 20, 2017, at 1:30 p.m. in House Room 1 in the Capitol, Richmond, Virginia.

There being no further business, the meeting was adjourned.

### **May 15, 2017**

The Council held its second meeting of the 2017 interim on May 15, 2017.<sup>10</sup> The meeting was held to consider bills referred by the 2017 Session of the General Assembly to the Council for further study, to receive a progress report from the Proprietary Records and Trade Secrets Subcommittee, to review draft legislation recommended by the subcommittee, and to discuss other issues of interest to the Council.

### **Review of Bills Referred by the 2017 Session of the General Assembly**

Senator Bill DeSteph, patron of SB 972,<sup>11</sup> appeared before the Council to discuss his bill and the reason for its introduction. He explained that he introduced the bill because he had made several FOIA requests to public bodies for certain records and that when he received the records they had been redacted. He stated that after receiving the redacted records, he and his staff went online and were able to find the records online in unredacted form. He explained that the bill seeks to prevent public bodies from making "baseless" redactions in responses to FOIA requests made by members of the General Assembly, who need the information they have requested in order to fulfill their legislative duties.

---

<sup>10</sup> Council members Coleburn, Dooley, Hamlett, King-Casey, LeMunyon (Chair), Porto, Seltzer, Treadway, and Vucci were present; members Senator Stuart (Vice-Chair), Jones, and Stern were absent.

<sup>11</sup> **SB 972** DeSteph - Bill Summary: Requires all departments, agencies, and institutions of the Commonwealth and staff and employees thereof to respond to a request for information made by a member of the General Assembly. The bill further provides that notwithstanding the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), a response to a request for information made by a member of the General Assembly shall not be subject to redaction.

Staff then explained the bill line by line. Staff stated that the bill requires state agencies to provide unredacted records, notwithstanding the provisions of FOIA, in response to a request for information made by a member of the General Assembly acting in the performance of such member's official legislative duties. Staff stated that the bill provides exceptions that allow the state agency to redact (i) records or portions of records the disclosure of which is prohibited by law and (ii) records that are excluded under § 2.2-3705.2 (public safety), subdivision 2 of § 2.2-3705.7 (working papers), and § 2.2-3706 (certain criminal/law-enforcement records). Staff also explained that the bill prohibits, with certain limited exceptions, the member of the General Assembly from further disclosing such information. Staff emphasized that the right of access granted to members of the General Assembly by this bill is outside of and separate from the provisions of FOIA and that General Assembly members have no special status under FOIA.

Mr. Coleburn expressed concern that the bill gives elected officials a greater right of access to information than the citizens of Virginia. Ms. Dooley commented that the bill limits the application of the law to "a member of the General Assembly acting in the performance of such member's official legislative duties" and questioned how that is to be interpreted. Senator DeSteph deferred to staff, who responded that the term "official legislative duty" is not defined but that the intent in including that qualification was to limit the application of the law to legislators acting in their official capacity as opposed to their role as a citizen. Ms. Treadway then asked if a legislator would have to explain why he or she needs the requested information as part of his or her official duties. Senator DeSteph responded affirmatively and stated that legislators know their role as a legislator versus their role as a citizen. Ms. King-Casey asked Senator DeSteph whether the FOIA redaction law was in effect at the time the examples he cited occurred, in which he received records from a public body in response to a FOIA request that were redacted and in which he subsequently went online and found unredacted versions of the records. Such law would have required the public body to cite the specific Code section that permits the redaction. Ms. King-Casey commented that she was just trying to see if this was a bigger issue relating to noncompliance with FOIA. Senator DeSteph responded that the issue is that the public body redacted the records when they provided them to him but that they had clearly been released publicly in unredacted form. He stated that he did not know whether this was due to educational issues, arrogance, or perhaps whether he had phrased the question improperly.

The Council then heard public comment on the bill. Megan Rhyne, the Executive Director of the Virginia Coalition for Open Government (VCOG) commented that she understands why members of the General Assembly want this information but that she is very troubled that the bill grants a general right to information for members of the General Assembly that is not granted to citizens or local officials. She stated that there are noble reasons why citizens want this information also. She emphasized that FOIA provides the remedy for all persons, and such remedy is to file suit to obtain the information.

After asking the other members of the Council for their thoughts on the bill, Chairman LeMunyon told Senator DeSteph that the Council did not appear ready to make a decision on the bill at the current time and that the Council would like some additional time to think about it.

The Council then moved on to consider HB 2316,<sup>12</sup> another bill referred to the Council by the 2017 Session of the General Assembly. Evan Feinman, Executive Director of the Tobacco Region Revitalization Commission (the Commission), appeared on behalf of Delegate Marshall to discuss the bill with the Council. Mr. Feinman stated that many public bodies are not served as well as they could be by FOIA because technology has advanced faster than the law. He stated that the Commission's membership is spread broadly across the state and that the bill seeks to eliminate the requirement that when a member of the Commission participates in a meeting of the Commission through electronic communication means, the remote location must be open to the public. Mr. Feinman stated that both he and Delegate Marshall feel as though § 2.2-3708 in FOIA should be amended to remove that requirement for all public bodies instead of simply amending the Commission's statute to remove the requirement just for members of the Commission, as the bill currently does. Mr. Coleburn expressed concern that the bill as written is picking and choosing a specific public body to release from the requirement that the remote location be open to the public. He also stated that he feels as though having the requirement that the remote location be open to the public incentivizes members of the public body to go to the physical meeting location of the full public body.

Megan Rhyne, the Executive Director of VCOG, stated that if the Council is going to look into this issue, her suggestion is that all public bodies be released from the requirement. She suggested further study of the issue because of uncertainty as to whether technology has improved enough to dispose of the requirement that the remote location be open to the public.

Chairman LeMunyon directed staff to create a draft bill amending § 2.2-3708 that would remove the requirement that the remote location be open to the public for all public bodies. He also asked staff to provide, at the next meeting of the Council, some background information as to what the Code currently requires.

### **Proprietary Records and Trade Secrets Subcommittee Report**

Staff reported that the Proprietary Records and Trade Secrets Subcommittee met twice, on April 4, 2017, and May 1, 2017, and that a work group of the subcommittee met on April 25, 2017.

Staff stated that at the April 4, 2017, meeting of the subcommittee, staff reviewed work to-date on the topic of proprietary records and trade secrets under HJR No. 96 (2014–2016). During the review, staff emphasized that there had been 23 meetings on the topic at the Council, subcommittee, and work group levels, with no resolution of the issues. Staff presented two drafts to the subcommittee for its consideration on the topic of trade secrets—one based upon a proposal previously put forth in a white paper by the Virginia Press Association and one prepared by staff. After considering the drafts and receiving public comment, the subcommittee directed staff to create a new draft and to meet with interested parties as a work group to consider the new draft. Staff reported that the subcommittee raised the issue of the definition of the word "proprietary" and that a draft on the topic had been prepared on the topic by staff for the subcommittee's consideration, but that there had been no discussion of or action taken on the draft and the issue had been deferred to the next subcommittee meeting.

---

<sup>12</sup> **HB 2316** Marshall, D.W. - Bill Summary: Provides that the remote locations from which additional members of the Commission participate in a Commission meeting that is conducted through electronic communication means shall not be required to be open to the public.

Staff reported that the subcommittee work group met on April 25, 2017, and considered a new draft of legislation that would create a general exclusion for trade secrets submitted to a public body. Staff related that no members were appointed to the work group, but that all interested parties had been invited to join the discussion. Staff explained that after public comment on the draft, staff went through the draft line by line with the interested parties to identify areas of consensus. Staff related that at the conclusion of the work group meeting and after considerable discussion, the interested parties recommended amendments to the draft to be incorporated into a new draft for presentation to the Proprietary Records and Trade Secrets Subcommittee at its meeting on May 1, 2017. At its second meeting on May 1, 2017, staff reported that the Proprietary Records and Trade Secrets Subcommittee considered the trade secrets draft that was recommended to it by the work group. After discussion and hearing public comment on the draft, the subcommittee recommended the draft with amendments to the Council; however, the subcommittee decided to leave the issue of payment of costs and attorney fees on the table for further discussion at the next Council meeting.

Staff also reported that the subcommittee considered the issue of proprietary records and reviewed a draft that had been prepared by staff defining proprietary records and creating a general exclusion from mandatory disclosure for proprietary records. Staff explained that after reviewing the draft and listening to public comment, the subcommittee rejected the definition of "proprietary" set forth in the staff draft and instead directed staff to create a new draft using and defining the words "confidential information." Staff noted that the subcommittee asked staff to model the definition on the applicable language in the exclusion set forth in subdivision 11 of Va. Code § 2.2-3705.6.<sup>13</sup> Staff reported that the subcommittee also asked staff to include in the new draft language stating that the public body may determine whether the requested exclusion from disclosure is necessary to protect the confidential information of the submitting entity, as well as the apportionment language from the trade secrets draft. Staff reported that they had this new draft available for the Council to review during the current meeting.

### **Review of Trade Secrets Draft Recommended by the Proprietary Records and Trade Secrets Subcommittee**

Staff then presented the newest version of the trade secrets draft (Trade Secrets Draft #5) (LD#18100022D), which included the amendments requested by the Proprietary Records and Trade Secrets Subcommittee at its meeting on May 1, 2017.<sup>14</sup> Staff emphasized that Trade Secrets Draft #5 made the following changes to Trade Secrets Draft #4:

1. On line 13, changed the word "chapter" to "subdivision" (thereby avoiding making trade secrets exclusions that are outside of Va. Code § 2.2-3705.6, such as those of the Virginia Retirement System and the Virginia College Savings Plan, subject to the provisions of the general trade secrets exclusion created in Draft #4);
2. On line 20, changed the word "shall" to "may" (thereby making the joinder provision optional as opposed to mandatory);

---

<sup>13</sup> Subdivision 11 provides protection for (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial information of the private entity, including balance sheets and financial statements, that is not generally available to the public through regulatory disclosure or otherwise; and (iii) other information submitted by the private entity where if such information was made public, the financial interest or bargaining position of the public or private entity would be adversely affected.

<sup>14</sup> The full text of Trade Secrets Draft #5 is available on the Council's website at <http://foiacouncil.dls.virginia.gov/>.

3. On line 22, changed the language "improperly designated as a trade secret" to "improperly withheld pursuant to this subdivision as a trade secret"; and
4. Added a cross-reference in subdivision D of § 2.2-3713 stating that "The court may apportion any [such] award of reasonable costs and attorney fees in accordance with the provisions of subdivision 1 of § 2.2-3705.6."

Staff noted that the subcommittee recommended the draft with amendments to the full Council; however, the subcommittee had decided to leave the issue of payment of costs and attorney fees on the table for further discussion at the next Council meeting.

Mr. Vucci, referencing lines 18–19 of the draft, which state that "The public body may determine whether the requested exclusion from disclosure is necessary to protect the trade secrets of the submitting entity under [the general trade secrets exclusion]," drew the Council's attention to the fact that the threshold question should simply be whether or not the submitted information qualifies as a trade secret of the submitting entity as defined in the Uniform Trade Secrets Act, and therefore there need not be any further discretion on the part of the public body as to whether the submitted information should receive protection under the general trade secrets exclusion. Mr. Seltzer stated that he agrees and that he wishes to see lines 18–19 deleted from the draft.

### **Public Comment**

The Council then heard public comment on Trade Secrets Draft #5. Phil Abraham with the Vectre Corporation, who represents a number of construction clients, stated that he is comfortable with the bulk of the draft but that he has some concerns about the provisions relating to apportionment of attorney fees. He stated that the language in the bill relating to apportionment of attorney fees represents a major change and stressed that this is the first instance in which a private entity can be held liable with regards to a public body's decision to withhold records. He drew the Council's attention to the fact that it could very easily be a competitor of the submitting entity that is suing to obtain the submitting entity's trade secrets. He stated that at the last meeting of the Proprietary Records and Trade Secrets Subcommittee, a compromise was suggested that would have given the court the authority to require the requestor to pay reasonable costs and attorney fees in the event that the requestor did not prevail in court, thereby making the responsibility for payment of reasonable costs and attorney fees a two-way street; however, he noted that that compromise idea was strongly rejected. As a result, he requested that the Council maintain the status quo with regard to payment of reasonable costs and attorney fees (which would require the Council to remove the language in the draft permitting the court to require the submitting entity to pay the requestor's reasonable costs and attorney fees). He reminded the Council that, in the end, the public body is not required to withhold the records and can at any point decide to release the requested records and avoid being sued. Ryan Fierst with the Virginia Chamber of Commerce echoed Mr. Abraham's comments and stated that she wants to see the law on attorney fees remain the same.

Roger Wiley, representing the Virginia Association of Counties (and filling in for Phyllis Errico), commented that he wanted to explain the other side's (the public body's) perspective in wanting the submitting entity to be held responsible for paying the requester's reasonable costs and attorney fees. He stated that public bodies often receive boilerplate form contracts from entities with which they are contracting and that those contracts frequently state that everything that the entity submits to the public body is a confidential trade secret and that if the public body reveals any of that information the contract will be voided. Mr. Wiley stated that often it is a competitor of the

submitting entity's that is requesting the information. He stated that the public body must make a decision as to whether it wants to defend the submitting entity's trade secrets and run the risk of paying the requestor's attorney fees if the requester prevails in court or whether it wants to release the information and therefore allow the submitting entity to void the contract. Mr. Wiley suggested that the court should be able to look at the equities and decide who (whether the public body or the submitting entity) should be responsible for paying the requestor's attorney fees. He stated that to require the public body to bear all of the risk in that situation does not make sense and that he would like for there to be some way for the responsibility for the decisions to be shared by the public body and the submitting entity.

Rob Bohannon, representing the Northern Virginia Technology Council, echoed Mr. Abraham's comments and pointed out that the earmarking provisions in lines 12–17 of the draft do not permit the submitting entity to make a blanket statement that all of the information that they have submitted to the public body is a trade secret and should therefore be withheld from public disclosure. The earmarking provisions require the submitting entity to identify with specificity the trade secret information for which protection is sought.

The Council then proceeded to discuss the draft. Mr. Seltzer stated that on the issue of attorney fees, his inclination is to ensure that the submitting entity that seeks the exclusion bear the cost of defending the exclusion. He requested that the Council add language requiring the submitting entity to submit to service in a court of competent jurisdiction in the event of a FOIA challenge. He stressed that it is easy for the submitting entity to say that everything is a trade secret until the submitting entity knows that it will have to defend such designation in court. He stated that with that amendment, he supports the draft. In response, Chairman LeMunyon asked if submitting entities could be deterred from bidding for government contracts if there is a possibility that they may be faced with having to pay a requestor's attorney fees in the event that a requester challenges a denial of a FOIA request for the submitting entity's trade secret information in court. Mr. Seltzer answered that this may indeed be a deterrent, but it is a hazard of doing business.

Ms. Dooley stated that she supports the proposal to strike lines 18–19 of the draft. She stated that in her experience, public bodies are not skilled at deciding what is a trade secret and that they normally are not experts in proprietary information. Referring to line 21 of the draft, she made the observation that the draft gives the *requester* the authority to name the submitting entity or its successor in interest as an additional defendant in the action; however, the draft does not give the *public body* the same authority to name the submitting entity or its successor in interest as an additional defendant. She stressed that if the public body is sued for the submitting entity's trade secret information and the public body has to defend the withholding of the information, the public body has no idea how to defend the information. She stated that it seems as though the submitting entity is a necessary party, as it is the submitting entity's rights that the public body is seeking to protect. Moving on to the issue of attorney fees, Ms. Dooley stated that she feels that requiring the public body to pay the requester's attorney fees in this circumstance would be unjust. She stated that she does, however, like the idea of giving the court the authority to apportion any award of attorney fees to the requester between the public body and the submitting entity as the court sees appropriate.

After further discussion, the Council agreed to move lines 20–26 of the draft to Va. Code § 2.2-3713, the remedies section of FOIA. Ms. Dooley stressed that the provisions in those lines are really something special about the enforcement of the general trade secrets exclusion and that the Council should keep the remedies with the remedies section of FOIA, rather than in the exclusion.



Lastly, staff drew the Council's attention to lines 23–24, which state: "If, as a result of the action, the court requires the public body to produce such information because it was *improperly withheld* pursuant to this subdivision as a trade secret ..." (emphasis added). Staff noted that the threshold question that the judge is deciding is whether the information was improperly withheld because it is not a trade secret as defined in the Uniform Trade Secrets Act, not whether the information was improperly withheld under the general trade secrets exclusion. Staff requested to make this technical amendment, and the Council agreed.

Chairman LeMunyon directed staff to create a new draft incorporating the amendments agreed upon by the Council and to have it available for presentation and discussion at the next Council meeting.

### **Review of Proprietary Records Draft**

Staff explained that at the last meeting of the Proprietary Records and Trade Secrets Subcommittee, the subcommittee directed staff to create a definition, but to define the term "confidential information" instead of "proprietary." Staff then briefly went through the draft line by line with the Council, though in the interests of time and efficiency, staff recommended that the Council send the draft back to the subcommittee for further refinement. Staff explained that lines 9–13 of the draft define "confidential information" to mean financial information, including balance sheets and financial statements, or other information of a submitting entity that is not (i) generally available to the public through regulatory disclosure or otherwise or (ii) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), where if such information were to be made public, the financial interest or competitive position of the submitting entity would be adversely affected. Staff then explained that lines 68–74 create an exclusion from the mandatory disclosure provisions of FOIA for "confidential information" and provide an earmarking process for invoking the exclusion. Lastly, staff explained that lines 75–81 contain the same permissive joinder and apportionment of attorney fees provisions as were included in Trade Secrets Draft #5. Staff reminded the Council that there is a two-part process involved in attempting to resolve the issue of proprietary records—the first step being to decide upon a definition (either "proprietary," "confidential," or something else) and the second step being to conform each of the individual exclusions in Va. Code § 2.2-3705.6 to the terminology and definition adopted by the subcommittee. As such, staff explained that this draft focuses solely on the definitional issue and does not attempt to strike or amend any of the existing exclusions in Va. Code § 2.2-3705.6.

### **Public Comment**

The Council then heard public comment on the definition created in the draft. Megan Rhyne, the Executive Director of VCOG, expressed concern with the phrase "financial information, including," stating that she feels as though it implies that more financial information could be withheld than simply that information enumerated in the definition. She requested that information related to the financing of projects remain open, as sources of money for public projects would not be something that we would want to hide from the public. Such information could reveal relationships with banks, conflicts with members of boards, etc. She requested that the Council tighten up the definition to avoid making it overly broad.

Kay Heidbreder, representing Virginia Tech, Karah Gunther, representing Virginia Commonwealth University and the Virginia Commonwealth University Health System Authority,

and Kara Hart, representing the Virginia Economic Development Partnership Authority, each asked for more time to review the draft and look for areas of concern.

Chairman LeMunyon then asked the Council for any thoughts they may have on the draft. Mr. Seltzer commented that he looked at the specific exclusions in Va. Code § 2.2-3705.6 and, in his opinion, the words "confidential" and "proprietary" do not really have any meaning in the context of the specific exclusions. He stated that, in most cases, the specific exclusions either cross-reference another statute or they limit their own scope through additional words contained in the exclusion. As such, because the words "confidential" and "proprietary" do not add anything to the statute and simply serve to confuse, Mr. Seltzer recommended deleting them from the statute.

Chairman LeMunyon recommended sending the draft back to the subcommittee for further consideration. He directed staff to poll for dates on which to schedule the next subcommittee meeting.

### **Other Business**

The Council then revisited Delegate Massie's HB 1971,<sup>15</sup> which it had previously considered at its March 7, 2017, meeting. Staff explained that the bill does two things. First, it creates a records exclusion for information reflecting the substance of meetings in which individual child abuse or neglect cases or sex offenses involving a child are discussed by multidisciplinary child abuse teams (MDTs) (established pursuant to § 15.2-1627.5). Second, it creates two meetings exclusions for discussion or consideration of (i) individual sexual assault cases by sexual assault response teams (SARTs) (established pursuant to § 15.2-1627.4) [a records exclusion previously existed for SARTs, so the meetings exclusion was added by the bill] and (ii) individual child abuse or neglect cases or sex offenses involving a child discussed by a multidisciplinary child abuse team (established pursuant to § 15.2-1627.5).

Staff explained that Delegate Massie's bill passed the General Assembly this year; however, a question arose during committee proceedings as to whether SARTs and MDTs are more akin to Family Assessment and Planning Teams (FAPTs), which are exempt from all provisions of FOIA. Staff stated that as they currently stand, even though SARTs and MDTs now have meetings exclusions that cover the vast majority of what is discussed during their meetings, they still must comply with all of the meetings requirements of FOIA, including giving notice of their meetings and first convening an open meeting and then immediately certifying and entering into closed session. Staff emphasized that, therefore, the question before the Council is whether SARTs and MDTs should be categorized like FAPTs for the purposes of FOIA and exempted from all provisions of FOIA.

Staff reminded the Council that at its March 7, 2017, meeting, Mike Doucette, the Commonwealth's Attorney for the City of Lynchburg, spoke with the Council about this issue. Staff introduced Nancy Oglesby, the Deputy Commonwealth's Attorney for Fluvanna County, who was present at the current meeting on behalf of Delegate Massie to speak with the Council about the bill. Staff explained that Ms. Oglesby is an expert on these issues and can provide the Council with insight into the issues.

---

<sup>15</sup> **HB 1971** Massie - Bill Summary: Excludes the records of a multidisciplinary team as they relate to individual child abuse or neglect cases or sex offenses involving a child from mandatory disclosure under the **Virginia Freedom of Information Act**. The bill also provides an exemption from open meeting requirements to such teams and sexual assault response teams.

Ms. Oglesby told the Council that she has been a prosecutor in Virginia for 20 years. She stated that SARTs and MDTs are similar but that they are different in subject matter. She explained that both types of meetings are convened by the local Commonwealth's Attorney and that during both types of meetings most of the meeting time is spent discussing specific cases. She stated that MDTs focus on child abuse cases and SARTs focus on sexual assault cases. She stated that many of the players on both types of teams are the same. She stated that MDT meetings are oftentimes driven by child advocacy centers and that one of the goals of the meeting is to ensure that the players are not duplicating the services provided to the child victim (i.e., not conducting multiple interviews, etc.). She stated that the cases discussed by MDTs often originate from Child Protective Services. She further explained that one of the goals of SART meetings is to ensure that victims are receiving comprehensive services on a systemic level. She stated that the cases that are discussed during SART meetings generally originate from criminal investigations and hospitals.

Mr. Seltzer commented that in his opinion, anything referring to a specific case, such as records or discussion concerning a specific complaint, investigation, prosecution, victim, etc., should clearly be excluded from the mandatory disclosure provisions of FOIA. However, he stated that he was curious about any systemic policy questions that may be addressed in the meetings and thought that the public might be interested in those discussions. Ms. Oglesby responded that there is a difference in the nature of the two types of meetings. She stated that during MDT meetings, systemic policy issues are never discussed and that such meetings are entirely case-driven, whereas during SART meetings, there are two levels of discussion, one systemic and one case-driven. Ms. Oglesby further explained that the systemic discussion is driven entirely by discussion of individual cases.

Staff summarized that the issue is whether SARTs and MDTs should be subject to FOIA at all, given that most of what they discuss is already excluded from FOIA. However, staff noted that there is a clear concern that perhaps the public should be privy to any systemic policy discussions that occur during the meetings. Ms. Oglesby stated that the concern of Commonwealth's Attorneys is that they must give notice of the meeting and publicize that it is going to occur, but once the meeting begins they then immediately go into closed session, shutting out the public.

Ms. Dooley expressed a concern that FOIA may unfairly limit the discussion of the team due to the requirement that at the conclusion of the closed meeting the public body holding the meeting must immediately reconvene in an open meeting and certify that it only discussed matters exempted from the open meeting requirements. She stressed that it is most likely very hard for the members of the team to stay on topic and to discuss individual cases without diverging into discussing changes to policy. She stated that in her opinion it might be better to exempt these teams from FOIA altogether.

Ms. Porto commented that she understands and agrees with providing exemptions for discussions of individual cases but that she is concerned about discussions regarding systemic policy and procedure, and that she thinks the public should be allowed to hear those discussions.

Ms. Oglesby further clarified that any decision to change policy or procedure would not be made at a SART meeting. She explained that each agency that is involved in the meeting is independent and that the team does not have the power or authority to make a *joint* change for any of the agencies. She reiterated that any discussion of systemic policy issues that takes place is very specific to the intricacies of the individual cases being discussed at the meeting. She stated that

each of the agencies would have to later make the decision on its own whether to implement any of the suggestions for changes to policy or procedure that were discussed at the meeting.

Mr. Coleburn commented that he thinks it is always good policy to err on the side of requiring notice of meetings, even if almost the entirety of the meeting will take place in closed session.

Staff suggested drafting a compromise bill that would exempt MDTs and SARTs from FOIA but would still require SARTs to release any information related to policy discussions. The Council asked staff to prepare such a draft and have it available for consideration at the next FOIA Council meeting.

Staff then briefly discussed with the Council the implementation of HB 2143, Chairman LeMunyon's bill that passed the 2017 Session of the General Assembly that provides, among other things, that training through an online course offered by the Council shall satisfy the annual training requirement for FOIA officers. Staff reminded the Council that a free online training program for FOIA officers has been made available through the Commonwealth of Virginia Learning Center website maintained by the Department of Human Resource Management. However, staff shared with the Council that the process of making the online training operational has been problematic and frustrating for both users and staff.

Staff next asked the Council for guidance in issuing formal advisory opinions in circumstances in which the Council has been contacted by two parties asking for an opinion on the same issue, but wherein each party has provided different, conflicting facts. The Council advised staff that since the Council is not a fact-finder and has no subpoena power or other investigative tools, in such situations staff should issue one advisory opinion that outlines the law on point and then gives two different conclusions based upon the two different sets of facts that were presented.

Finally, in anticipation of Maria J. K. Everett's upcoming retirement as the Council's Executive Director, a post she has held since the Council's inception in 2000, the Council commended and thanked Ms. Everett for her dedicated service to the Council.

### **August 14, 2017**

The Council held its third meeting of the 2017 interim on August 14, 2017.<sup>16</sup> The meeting was held to welcome new members to the Council,<sup>17</sup> to consider bills referred by the 2017 Session of the General Assembly to the Council for further study, to receive a progress report from the Proprietary Records and Trade Secrets Subcommittee, to review draft legislation recommended by the subcommittee, and to discuss other issues of interest to the Council. Delegate LeMunyon began the meeting by welcoming new members Senator Locke and Delegate Torian, although Delegate Torian was not in attendance today. Senator Locke is the chair of the FOIA Subcommittee of the Senate Committee on General Laws and Technology.

### **Review of Bills Referred by the 2017 Session of the General Assembly**

---

<sup>16</sup> Council members Delegate LeMunyon (Chair), Senator Locke, Dooley, Hamlett, Porto, Seltzer, Stern, Treadway, and Vucci were present; members Senator Stuart (Vice-Chair), Delegate Torian, Coleburn, Jones, and King-Casey were absent.

<sup>17</sup> **HB 2144** LeMunyon increased the membership of the Council from 12 members to 14 members by adding one additional member from the House of Delegates and one additional member from the Senate. (2017 Acts of Assembly, c. 644.)

Delegate Kory was scheduled to present HB 2223,<sup>18</sup> concerning public comment periods, but was not able to attend today. Senator Bill DeSteph was scheduled to participate by teleconference to present SB 972,<sup>19</sup> concerning requests for information made by members of the General Assembly, but was unable to do so due to technical difficulties.<sup>20</sup> Because neither Delegate Kory nor Senator DeSteph was able to appear today, both bills will be on the agenda for the Council's next meeting.

### **Proprietary Records and Trade Secrets Subcommittee Report**

Staff reported that the Proprietary Records and Trade Secrets Subcommittee met four times this year, on April 4, May 1, July 11, and August 1, and that a work group of the subcommittee met on April 25, 2017. During these meetings, the subcommittee reviewed work to date on the topic of proprietary records and trade secrets under HJR No. 96 (2014–2016) and considered a new draft of legislation that would create a general exclusion for trade secrets submitted to a public body. The trade secrets draft presented to the Council today (LD 18100101D) is the sixth version considered this year, and it incorporates amendments recommended by the Council at its last meeting. Staff reminded the Council that one of the outstanding issues to be considered is the proposed liability shifting provision, which would permit a judge to apportion liability for costs and fees between a public body and the entity designating records as trade secrets, if such designation were challenged and the court determined that the records should not have been withheld as trade secrets. One suggestion was to separate the liability shifting provision into a separate bill. In addition to trade secrets, the subcommittee had considered the concern about the definition of "proprietary" as used in FOIA raised by Justice Mims in the case *American Tradition Institute v. Rector and Bd. of Visitors of the University of Virginia* (2014). Justice Mims noted in his concurrence that FOIA does not define the term "proprietary" but uses it in many different exemptions that all have different language, making it susceptible to multiple interpretations and increasing confusion. The subcommittee considered various approaches to this issue, including adopting a statutory definition or using different terminology, but it rejected these approaches. Instead, the subcommittee reported to the Council without recommendation a second version of its "deletion draft," which would eliminate most appearances of the terms "proprietary" and "confidential" from § 2.2-3705.6. The subcommittee also considered language taken from procurement manuals used by the Department of General Services (DGS) that would amend the provision of the Virginia Public Procurement Act (§ 2.2-4300 et seq.) that addresses trade secrets, § 2.2-4342. Staff presented a draft based on this language (LD 18100175D) to the Council but noted that the subcommittee had not considered or made a recommendation on the draft. Regarding

---

<sup>18</sup> **HB 2223** Kory - Bill Summary: Requires that every public body afford an opportunity for public comment during any open meeting and requires that the public comment periods be noticed on the public body's agenda. The bill permits the public body to have discretion in where it places the public comment period on its agenda and permits the public body to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill requires that for meetings of all public bodies, not just those state public bodies on which there is at least one member appointed by the Governor as in current law, the notice provided for any such meeting include a statement as to approximately at what point during the meeting public comment will be received.

<sup>19</sup> **SB 972** DeSteph - Bill Summary: Requires all departments, agencies, and institutions of the Commonwealth and staff and employees thereof to respond to a request for information made by a member of the General Assembly. The bill further provides that notwithstanding the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), a response to a request for information made by a member of the General Assembly shall not be subject to redaction.

<sup>20</sup> The nature of the problem was not known at the time of the meeting, but afterward it was discovered that the phone service provider had been having technical difficulties throughout the area.

all of the drafts, staff noted that while these drafts would address certain concerns in § 2.2-3705.6 and in the Virginia Public Procurement Act, they would not address the use of the terms "trade secrets," "proprietary," or "confidential" elsewhere in FOIA or in other laws. Staff further noted that several exemptions within FOIA cross-reference laws outside of FOIA that use these terms and that these draft proposals would not change those laws.

### **Review of Trade Secrets Drafts Recommended by the Proprietary Records and Trade Secrets Subcommittee (LD 18100101D)**

Staff then presented the newest version of the trade secrets draft (Trade Secrets Draft #6). Lines 12–20 of the draft create a new, general exemption for "trade secrets" and cross-reference the definition of "trade secrets" in the Uniform Trade Secrets Act (§ 59.1-336 et seq.). Lines 601–609 of the draft address the "liability shifting" issue of payment of costs and attorney fees, which the Council had flagged for further discussion. The draft also strikes references to "trade secrets" in other, existing exemptions in § 2.2-3705.6 and makes other technical changes. Delegate LeMunyon presented the policy question of whether an entity doing business with a public body should be made party to a suit if the entity designates too much information as trade secrets. He related that the DGS language allowed the agency to "push back" by disqualifying a bid or proposal in a procurement transaction if the agency and the submitting entity could not agree on what was to be protected as trade secrets. Mr. Seltzer stated that in representing local government bodies, the difficulty is assessing whether an item is a trade secret, and that because designation of trade secrets protects the private entity's interests, it should be the private entity's burden to defend the designation. He indicated support for the Trade Secrets Draft #6 and stated that he was not opposed to the draft based on DGS' policy language but that he felt it was insufficient because it still placed the burden on government to make an assessment of what is a trade secret. Mr. Stern asked whether notice must be given to the private entity beforehand. Ms. Hamlett stated that in her experience it is often part of the deal to notify a company if the public body plans to release any items designated as trade secrets. Ms. Porto suggested considering both the Trade Secrets Draft #6 and the draft based on DGS' policy language.

Public comment was invited. Phil Abraham of the Vectre Corporation indicated he had no problems with Trade Secrets Draft #6 except for the language concerning fees and costs at lines 605–609. He indicated a concern that competitors might try to use these provisions against each other by requesting protected documents, then challenging their designation as trade secrets, in order to require their competitors to incur costs defending their designations. He also noted that because the exemption is discretionary, the public body could always choose to release records. He stated that he felt that the draft based on DGS' policy language needs additional work and that the liability shifting provisions in Trade Secrets Draft #6 should be removed and put into a separate bill. Craig Merritt, Esq., representing the Virginia Press Association (VPA), agreed with Ms. Porto that both drafts should be considered. He stated that the draft based on DGS' policy language did not attempt to deal with what is a trade secret or proprietary language in FOIA but would be freestanding legislation that would do no harm and probably would add clarity. He also stated that the point about giving notice to the company that designated trade secrets was well taken and that the liability shifting issue in Trade Secrets Draft #6 presents the policy question of whether someone who designates trade secrets should be able to be brought before a court and, as a corollary, whether one trusts our judges.

After further discussion of the bills, the Council voted unanimously to recommend Trade Secret Draft #6 after amending it to remove the liability shifting provision (lines 605–609). The Council then discussed whether to recommend the liability shifting provision as a separate bill. The Council voted to amend the language to include that an award would lie if the court determined that the designation of a trade secret was unreasonable. The Council then voted 8–1 (all in favor except for Delegate LeMunyon, who voted against) to recommended the language as amended, with directions to staff to draft it as a stand-alone bill. Further considering the draft based on DGS' policy language, the Council amended the draft by deleting the last two sentences on lines 33–36, then voted unanimously to recommend the draft as amended.

The Council next opened the floor to public comment on the deletion draft. Mr. Merritt expressed the difficulty in addressing confidential business information as a result of the way this section of law has developed. He noted that his comments would also apply to the other trade secrets drafts and the combination draft. Mr. Merritt stated that this section mostly addresses information provided to public bodies by private businesses but also processes that public bodies administer by statute and instances when commercial information is developed by public bodies themselves. He provided multiple examples of possible consequences of removing the term "proprietary" where he felt it acts as a limitation, and he expressed concern over possible unintended consequences of removing the term. Mr. Merritt suggested that it would be necessary to go through each exemption one by one to examine the possible consequences of removing the term. Mr. Seltzer stated that the subcommittee had gone through each exemption to consider the consequences of deleting the terms "proprietary" and "confidential" and, to his surprise, had found that the terms really did not act as limiting language. After further discussion by the Council, no motion was made on these bills.

### **Review of Drafts Amended at the May 15, 2017, FOIA Council Meeting**

#### SARTs-MDTs Exclusion from FOIA Draft (LD18100108)

Staff reminded the Council that Delegate Massie's HB 1971 had been enacted this year and that it created meetings exclusions for sexual assault response teams (SARTs) and multidisciplinary child sexual abuse response teams (MDTs) and added MDTs to an existing records exemption applicable to SARTs. The subject matter was referred to the Council for further study, and the question posed was whether SARTs and MDTs should be subject to FOIA at all. The Council had previously heard from Michael Doucette, Commonwealth's Attorney for the City of Lynchburg, and Nancy Oglesby, Deputy Commonwealth's Attorney for Fluvanna County, both of whom expressed that the work done by SARTs and MDTs was almost entirely exempt under current law because the vast majority of the work concerned individual sexual assault and child abuse cases. However, it appears that SARTs do some policy work at a systemic level that may not be entirely related to individual cases. At its last meeting, the Council directed staff to draft a bill that would exempt MDTs and SARTs from FOIA but would still require SARTs to release any information related to policy discussions. Staff presented that bill today, noting that it would add SARTs and MDTs to the list of entities not subject to FOIA in Code § 2.2-3703, except that SARTs records relating to (i) protocols and policies of the SART and (ii) guidelines for the community's response would remain subject to FOIA. The bill would retain the current records exempt as applicable to SARTs but would strike the portion of the current exemption for MDTs because MDTs would no longer be subject to FOIA. Similarly, the bill would strike the meetings exemption for both SARTs and MDTs.

Delegate LeMunyon invited comment from the Council; there was none. Turning to public comment, Mr. Doucette stated that the draft would accomplish what was intended by HB 1971 in a more straightforward way. He also expressed concern over the term "sexual" in "multidisciplinary child sexual abuse response teams," as MDTs address child abuse other than sexual abuse. However, Mr. Doucette also recognized that "multidisciplinary child sexual abuse response teams" is the phrasing used currently in § 15.2-1627.5, to which this draft refers. Mr. Merritt posed several questions about what would happen if the draft were to become law, such as whether the public would be able to determine resources allocated to the teams in terms of money and personnel; whether aggregate and statistical information would be public; whether the public would find out what the results of the program and its efficacy were; and whether the public would know who participated. Mr. Vucci noted he was unsure that such information was available currently, as it was unclear whether different jurisdictions collect such information now. Senator Locke moved to amend the draft to strike the word "sexual" on line 31. After the Council debated the merits of the amendment, the motion to amend failed by vote of 7 to 2 (Senator Locke and Mr. Stern voted in favor; all others present voted against). The Council then voted to recommend the draft without amendment. The motion carried by vote of 7 to 2 (Ms. Dooley and Ms. Porto voted against; all others present voted in favor).

#### Electronic Meetings Draft (LD 1810095D)

Staff reminded the Council that the General Assembly had referred HB 2316 (Marshall, D.W.), which would have allowed the Virginia Tobacco Region Revitalization Commission (the Tobacco Commission) to hold meetings by electronic communication means without having the remote locations open to the public. After discussing the bill at its last meeting, the Council had directed staff to prepare for the Council's consideration a draft that would make this change generally for all public bodies. After staff presented the draft, Delegate LeMunyon invited comment on it. Megan Rhyne, the Executive Director of VCOG, stated that this draft appears to provide another way to take advantage of using electronic communications when a personal matter prevents attending a meeting in person and that it renders that section<sup>21</sup> redundant. She also stated that when the provisions for personal matters were added, it was a balance between the convenience of members and adding public participation, but this draft tips the balance to convenience. Betsy Edwards, Executive Director of the VPA, agreed with Ms. Rhyne and added that allowing such meetings for convenience goes against public access, as it is not the same as an in-person meeting and not easy or convenient for the public. Evan Feinman, Executive Director of the Tobacco Commission, disagreed because meetings would still require a central, public location where a quorum of the public body must be present. After further discussion of the issues involved, the Council decided to form an Electronic Meetings Subcommittee to study the issues in greater detail, with Ms. Dooley serving as chair of the subcommittee. Staff was directed to poll the members to determine who else would like to serve on the subcommittee and for meeting dates.

#### **FOIA Litigation Update**

Staff informed the Council that it was aware of three recent FOIA cases. First, the Henrico County Circuit Court, by decision issued June 14, 2017, held that individual members of the General Assembly are not "public bodies" and therefore are not required to respond to FOIA requests. The plaintiff in the case filed a motion for reconsideration, and it has been reported that the judge

---

<sup>21</sup> Subdivision A 1 of § 2.2-3708.1.



reversed his decision after a hearing on August 2, 2017, but found no violation of FOIA. However, the circuit court still lists this case as "Active," and a written decision does not appear to have been issued yet. Pursuant to the Council's litigation policy, the Council cannot comment on the case while it is pending before a court. Second, the Accomack County General District Court, by decision issued August 3, 2017, held that judges are neither "public bodies" nor "officers or employees of public bodies" and therefore judges are excluded from the requirements of FOIA. Under the rules of court, this decision is not yet final and may be appealed, and therefore the Council's litigation policy prevents further comment at this time. Finally, the Virginia Supreme Court (the Court) issued its decision in the case of *Daily Press v. Office of the Executive Secretary of the Supreme Court of Virginia* on June 29, 2017. The Court affirmed the judgment below, holding that under FOIA, a party requesting copies of court records must ask each jurisdiction's clerk of court for certain court records rather than seek to obtain a copy of a database in the Office of the Executive Secretary of the Supreme Court of Virginia. The Court's decision was guided by Code § 17.1-242, which provides that the clerks of court are the designated custodians of court records.

## **Other Business**

### FOIA Council policy on individual participation by electronic means

Staff reminded the Council that as required by subdivision B 1 of § 2.2-3708.1, at its meeting on November 18, 2014, the Council adopted a policy on individual members' participation in Council meetings by electronic means. Staff recommended that the Council adopt a revised version of the policy to reflect amendments to the law that became effective July 1, 2017. The Council directed that this matter be carried over to its next meeting on November 20, 2017.

### Public comment forms

As required by House Bill 2146 (LeMunyon, 2017), the Council has published a public comment form on the "Forms and Sample Letters" page of the Council's website so that requesters may comment on the quality of assistance they received in response to a request. However, the law does not specify where a requester is to send the form or what the Council should do with any such comment forms it receives. The Council directed that copies of such public comment forms be presented at Council meetings, and it decided that if the volume of forms received increases, the Council may decide to handle them in a different way.

### Proposal to add declaratory judgment to the remedies section of FOIA

Andrew Bodoh, Esq., presented the idea of adding declaratory judgment to the existing remedies under FOIA. He stated that the current remedies of mandamus and injunction equate to a court's saying "thou shalt" do something, or "thou shalt not" do something. By contrast, he stated, a declaratory judgment would allow a court to state "this is the way it is." As an example, he stated that if one public body said a record did not exist, yet another public body provided that same record, a court could declare that the first public body had violated FOIA. As another example, Mr. Bodoh related a situation where a public body charged 50 cents per page for standard black and white copies, but after questioning this policy, it reduced the charges to 21 cents per page, then four cents per page, then finally to two cents per page, which was determined to be the actual cost. He stated that declaratory judgment would be appropriate in such a situation where there was a disagreement over charges. He also noted that the proposal would differ from current law on

declaratory judgment in three ways: (1) currently, only circuit courts may issue declaratory judgments, but the proposal would allow general district courts to do so as well; (2) the proposal would allow for attorney fees and costs just as a FOIA petition does, whereas currently declaratory judgments allow only for an award of costs; and (3) the proposal would allow for an expedited hearing, again the same as is provided for a FOIA petition now. After brief discussion, the Council directed staff to prepare a draft that would implement this proposal to be considered at the next Council meeting.

#### Criminal and law-enforcement records under § 2.2-3706

Staff noted that various issues concerning criminal and law-enforcement records in § 2.2-3706 had been carried over for further study from last year. Staff noted in particular that since the section was last amended, questions had arisen regarding the interpretation of subsections A and B regarding their application to different types of public bodies. Specifically, it was noted that subsection A refers to "all public bodies engaged in criminal law-enforcement activities" but many of its provisions in practice apply to other public bodies. Conversely, due to amendments to subsection B, applicable to noncriminal incident records, it has come to staff's attention that public bodies not involved in law-enforcement have used this subsection as a general exemption for personal records. The Council directed staff to prepare a draft to address these issues for the Council's consideration at its next meeting.

#### **Public Comment**

Delegate LeMunyon invited any additional public comment. Ms. Rhyne noted that 2018 would mark the 50th anniversary of the passage of FOIA in Virginia and that March 11 through 17, 2018, would be celebrated as Sunshine Week. She encouraged the Council to hold an event commemorating the occasion. After reminding those present that the next Council meeting is scheduled to be held at 1:30 p.m. on November 20, 2017, in House Room 1 of the Capitol Building, Delegate LeMunyon adjourned the meeting.

#### **November 20, 2017**

The Council held its fourth meeting of the 2017 interim on November 20, 2017.<sup>22</sup> The meeting was held to consider bills referred by the 2017 Session of the General Assembly to the Council for further study, to receive a progress report from the Electronic Meetings Subcommittee, to review draft legislation recommended by the Electronic Meetings Subcommittee and the Proprietary Records and Trade Secrets Subcommittee, to hear any proposals for legislation as part of its Annual Legislative Preview, and to discuss other issues of interest to the Council.

#### **Review of Bills Referred by the 2017 Session of the General Assembly**

---

<sup>22</sup> Council members Delegate LeMunyon (Chair), Senator Stuart (Vice-Chair), Delegate Torian, Hamlett, Jones, King-Casey, Porto, Seltzer, Stern, Treadway, and Vucci were present; members Senator Locke, Coleburn, and Dooley were absent.

Delegate Kory was scheduled to present HB 2223,<sup>23</sup> concerning public comment periods, but she was not able to attend today. Senator Bill DeSteph presented SB 972,<sup>24</sup> concerning requests for information made by members of the General Assembly. He stated that the bill would require state agencies to provide records to members of the General Assembly acting in their legislative capacity without redaction, except for records that are prohibited from release and records covered under the exemptions for public safety, law-enforcement, and working papers.<sup>25</sup> Senator Stuart questioned whether this was setting up a special right for legislators. Senator DeSteph indicated the bill was introduced in response to situations where legislators either did not receive records that had been requested or received the records but not in a timely manner. He described an incident in which a citizen received the same records that Senator DeSteph did but the citizen received them a month and a half earlier. He further described another situation where a delegate received only two or three redacted pages of information whereas a citizen who made the same request received about 150 pages.

After brief discussion by the Council, the floor was opened to public comment. Megan Rhyne, the Executive Director of VCOG, expressed that she shared Senator Stuart's concern about the bill's creating a special carve-out for General Assembly members. Sandy McNinch, representing the Virginia Economic Development Partnership (VEDP), expressed concern because VEDP holds confidential information about hundreds of companies and would not want to have to give access to 140 more people. Alyssa Padden of the Office of the Executive Secretary of the Supreme Court of Virginia (OES), stated that while amendments to the original bill did address some concerns, there were still concerns about the treatment of court records, such as work product and privileged communications between judges and justices. She also questioned whether the bill would open confidential judicial records. First Sergeant David Ostwinkle of the Virginia State Police (VSP) stated that VSP uses the same tests for recruitment over and over again, and withholds them from the public under current law,<sup>26</sup> but he questions how this bill would affect access to those tests. Mr. Jones asked Senator DeSteph to consider keeping the bill with its current timeline for a reply but eliminating the language requiring records to be produced without redaction. Senator DeSteph responded that part of the reason for the bill was that members of the General Assembly had received redacted records that they felt should not have been redacted. He also stated that judge-to-judge communications and police exams could be added to the exceptions from required disclosure, and he asked that the Council recommend the bill to the 2018 Session of the General Assembly. After further discussion, the Council took no action on the bill.

---

<sup>23</sup> **HB 2223** Kory - Bill Summary: Requires that every public body afford an opportunity for public comment during any open meeting and requires that the public comment periods be noticed on the public body's agenda. The bill permits the public body to have discretion in where it places the public comment period on its agenda and permits the public body to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill requires that for meetings of all public bodies, not just those state public bodies on which there is at least one member appointed by the Governor as in current law, the notice provided for any such meeting include a statement as to approximately at what point during the meeting public comment will be received.

<sup>24</sup> **SB 972** DeSteph - Bill Summary: Requires all departments, agencies, and institutions of the Commonwealth and staff and employees thereof to respond to a request for information made by a member of the General Assembly. The bill further provides that notwithstanding the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), a response to a request for information made by a member of the General Assembly shall not be subject to redaction.

<sup>25</sup> Code §§ 2.2-3705.2, 2.2-3706, and 2.2-3705.7(2), respectively.

<sup>26</sup> Subdivision 4 of § 2.2-3705.1.

## **Electronic Meetings Subcommittee Report**

Staff reported that the Electronic Meetings Subcommittee met twice, on October 4 and November 1, 2017. As a reminder, the 2017 Session of the General Assembly referred HB 2316 (Marshall, D.W.) to the Council for study. HB 2316 would provide that the remote locations from which additional members of the Tobacco Region Revitalization Commission participate in a Commission meeting that is conducted through electronic communication means shall not be required to be open to the public. After considering HB 2316 at its May meeting, the Council directed staff to prepare a draft that would make this change generally for all public bodies. After considering the draft at its August meeting, the Council directed the subcommittee to further study this proposal, as well as other issues concerning electronic meetings carried over from last year after the conclusion of the three-year study under House Joint Resolution No. 96 (2014). Staff reported that the subcommittee considered and recommended three drafts to the Council for its consideration: (1) a "remote locations draft" based on HB 2316; (2) a draft that would combine the two current sections addressing electronic meetings, §§ 2.2-3708 and 2.2-3708.1, into one section without making substantive changes; and (3) a draft that would amend the definition of "electronic communication." Staff presented and the Council discussed each draft in turn as described below.

### **Review of Drafts Recommended by the Electronic Meetings Subcommittee**

#### Remote Locations Draft (18100760D)

The first draft considered by the Council was the one based on HB 2316 (Marshall, D.W.), which would have allowed the Virginia Tobacco Region Revitalization Commission (the Tobacco Commission) to hold meetings by electronic communication means without having the remote locations open to the public. Staff presented the draft in detail, noting that the draft would no longer require that remote locations be open to the public unless three or more members of a public body are participating from the same remote location and that the bill would (i) require that equivalent access be provided to the public to witness any meeting conducted by electronic communication means, (ii) amend the annual reporting requirements for electronic meetings, and (iii) make additional necessary corresponding changes.

#### Draft Combining §§ 2.2-3708 and 2.2-3708.1 (18100758D)

Staff presented the draft, noting that it combined the existing provisions for different types of electronic meetings into one section organized as follows: subsection A sets out provisions applicable to all public bodies that allow for individuals to call in to a meeting due to medical reasons or personal matters, or for public bodies to meet electronically in order to respond to a state of emergency as declared by the Governor; subsection B sets out the provision for members of regional public bodies to participate electronically if they live 60 miles or more from the central meeting location; subsection C sets out the procedural requirements applicable to subsections A and B concerning having a participation policy, having a physically assembled quorum, and ensuring that the voice of any member participating electronically be heard by all present at the main meeting location; and subsection D sets forth the provisions applicable only to state public bodies. Staff noted that the draft was not intended to make any substantive changes to current law but only to consolidate it all into one section in order to make it easier to understand.

#### Definition of "Electronic Communication" Draft (18100757D)

Staff explained that the subcommittee took up this issue because under current law, the term "electronic communication" is defined in § 2.2-3701 to mean "any audio or combined audio and visual communication method." This definition omits purely visual electronic communications such as electronic mail and text messages. Additionally, the current definition does not specify what is "electronic" as opposed to other communication means. After discussing alternatives, the subcommittee recommended this draft, which combines a definition of "electronic" found elsewhere in current law with a dictionary definition of "communication."

#### Public Comment and Discussion

Delegate LeMunyon invited comment on all three drafts. Chris Piper, representing the Tobacco Commission, expressed support for all three drafts. Andrew Bodoh, Esq., suggested the Council consider how these drafts might affect voting and whether changes should be made in § 2.2-3710 to clarify what type of voting would be allowed. Mr. Seltzer noted that the point was fairly taken but that the problem is in § 2.2-3710 rather than in the definition. Delegate LeMunyon suggested taking up the issue at another time. The Council then voted unanimously to recommend all three drafts to the 2018 Session of the General Assembly.

#### **Review of Proprietary Records and Trade Secrets Drafts Recommended by the Council**

Staff reminded the Council that at its last meeting the Council recommended three drafts brought to it by the Proprietary Records and Trade Secrets Subcommittee, with amendments to each draft. Staff today presented those drafts as amended, as described below.

#### Trade Secrets Exemption Draft (18100192D)

Staff explained that this draft would create a general record exclusion for trade secrets submitted to a public body and would allow permissive joinder of the entity that submitted the trade secrets to the public body (the submitting entity) in an action challenging the designation of a trade secret but would not allow for a court to apportion fees and costs between a public body and the submitting entity. The draft provides that a record is eligible for exclusion as a trade secret if the submitted information qualifies as a trade secret of the submitting entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) and requires the submitting entity to make a written request to the public body (i) invoking such exclusion upon submission of the trade secret information for which protection from disclosure is sought, (ii) identifying with specificity the trade secret information for which protection is sought, and (iii) stating the reasons why protection is necessary. The draft permits a requester filing a FOIA petition challenging a record's designation as an excluded trade secret to name the submitting entity or its successor in interest, in addition to the public body, as a defendant. The draft also permits the public body to request that the court add the submitting entity as an additional defendant in the action. The draft provides that the general exclusion for trade secrets shall not be construed to authorize the withholding of such information that no longer meets the definition of a trade secret under the Uniform Trade Secrets Act.

#### Trade Secrets Remedies Draft (18100193D)

Staff reminded the Council that at its last meeting the Council directed that the fee-shifting provision for fees and costs be separated from the draft creating the general exemption for trade secrets (described above). Specifically, this draft would permit a requester filing a FOIA petition

challenging a record's designation as an excluded trade secret to name the submitting entity or its successor in interest, in addition to the public body, as a defendant. The draft also permits the public body to request that the court add the submitting entity as an additional defendant in the action. The draft states that if, as a result of the action, the court requires the public body to produce the requested information because it was unreasonably withheld as a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), any award of reasonable costs and attorney fees to the requester shall be paid by the submitting entity or the public body, or both, in the proportion deemed appropriate by the court.

#### Public Procurement Act Draft (18100197D)

Staff reminded the Council that this draft amends the Virginia Public Procurement Act (§ 2.2-4300 et seq.) rather than FOIA, and is based on policy language from the Department of General Services. Specifically, the draft would provide that a bidder, offeror, or contractor shall not improperly designate as trade secrets or proprietary information (i) an entire bid, proposal, or prequalification application; (ii) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (iii) line item prices or total bid, proposal, or prequalification application prices.

#### Public Comment and Discussion

Phil Abraham of the Vectre Corporation reiterated his opposition on behalf of his clients to the fee-shifting provisions in the trade secrets remedies draft, as he had expressed at prior Council and subcommittee meetings. He stated he had no problem with the permissive joinder provisions but that the fee-shifting aspect would discourage competition, could be subject to abuse, and could be addressed by indemnification clauses in contracts rather than by statute. Mr. Abraham and the Council discussed various examples of how a business might misuse such fee-shifting provisions against a competitor, whether it would create an uneven playing field, and whether it is right that under current law only public bodies are liable for fees and costs, even though third parties are the ones to designate trade secrets and proprietary information. After further discussion, Mr. Seltzer moved to recommend all three drafts. Senator Stuart made a substitute motion to recommend the trade secrets exemption draft and the Public Procurement Act draft that was seconded by Mr. Stern, then approved by unanimous vote. Mr. Seltzer then moved to recommend the trade secrets remedies draft, which was seconded by Ms. Hamlett, then approved by vote of 7-4 (Seltzer, Treadway, Jones, Hamlett, Stern, King-Casey, and Porto voted in favor; Senator Stuart, Delegate LeMunyon, Delegate Torian, and Mr. Vucci voted against).

#### **Declaratory Judgment Draft**

At the Council's last meeting, Mr. Bodoh presented the idea of adding declaratory judgment to the existing remedies under FOIA. The Council directed staff to prepare a draft that would implement this proposal to be considered at the next Council meeting. Staff presented that draft today, but noted that because declaratory judgment is a declaration of right rather than a remedy for a violation, it was drafted as a new, separate section rather than incorporated into the provisions for a petition for mandamus or injunction under § 2.2-3713 (which are to remedy denials of the rights and privileges granted under FOIA). As directed by the Council at its last meeting, the draft includes provisions for an expedited hearing, jurisdiction and venue in general district court as well as circuit court, and the recovery of attorney fees and costs, all corresponding to the similar provisions for FOIA petitions for mandamus or injunction in current law. Staff informed the

Council that research revealed only two cases on point: (1) a Virginia Supreme Court case mentioned a FOIA declaratory judgment action having been brought by a sheriff,<sup>27</sup> and (2) a FOIA declaratory judgment action in circuit court was brought by a town.<sup>28</sup> Senator Stuart questioned whether there was a need for a special declaratory judgment remedy in FOIA rather than the more general declaratory judgment provisions in Article 16 (§ 8.01-184 et seq.) of Chapter 3 of Title 8.01. He also expressed concerns for the provisions giving docket precedence, due process issues, and whether declaratory judgments should be heard in general district court. Mr. Seltzer questioned whether a declaratory judgment action could be brought for FOIA matters now, and he expressed his thought that only a public body would bring such an action anyway. He stated that adding this provision would be confusing and unnecessary. Mr. Bodoh responded by stating that there are three situations where declaratory judgment would be helpful: (1) to declare whether costs are reasonable; (2) to declare the effects of an action taken by a public body without a proper vote; and (3) where there are questions regarding both a public body's policy and its action(s) under that policy. Senator Stuart again questioned whether a person may already bring a declaratory judgment action. Mr. Bodoh stated that a person can bring a declaratory judgment action already but that he would not get attorney fees, there are no expedited proceedings, and the matter could be heard only in circuit court. Mr. Bodoh also suggested that not all of the language from the Declaratory Judgment Act would be needed and that it could be incorporated into § 2.2-3713. Delegate LeMunyon invited further comment from the Council and the public; there was none. The Council took no action on this proposal.

### **Criminal and Law-Enforcement Records Draft**

At the Council's meeting in August, staff noted that various issues concerning criminal and law-enforcement records in § 2.2-3706 had been carried over for further study from last year. Staff noted in particular that questions of the interpretation of subsections A and B regarding how the provisions of each subsection apply to different public bodies had arisen since the section was last amended. Specifically, it was noted that subsection A refers to "all public bodies engaged in criminal law-enforcement activities" but that many of its provisions in practice apply to other public bodies. Conversely, due to amendments to subsection B, applicable to noncriminal incident records, it has come to staff's attention that public bodies not involved in law-enforcement had used this subsection as a general exemption for personal records. The Council then directed staff to prepare a draft to address these issues for the Council's consideration. Staff presented the draft, noting that one further amendment would be necessary to allow first responders (such as fire departments and emergency medical services) and 911 call centers, as well as law-enforcement bodies, to use the non-criminal incidents exemption in subsection B. There was no additional discussion or public comment. The Council voted unanimously to recommend the draft with an amendment to include first responders and 911 call centers in subsection B.

### **FOIA Litigation Update**

Staff informed the Council that the Henrico County Circuit Court had issued a second letter opinion and a final order in the case of *Davison v. Dunnivant*. By decision issued June 14, 2017, the court had held that individual members of the General Assembly are not "public bodies" and

---

<sup>27</sup> *Tull v. Brown*, 255 Va. 177, 494 S.E.2d 855 (1998) (the procedural history states that the circuit court below granted declaratory judgment for Sheriff Brown).

<sup>28</sup> *Town of Saltville v. Surber*, 84 Va. Cir. 11 (Circuit Court of Smyth County, 2011) (the town brought a declaratory judgment action to determine whether certain documents should be disclosed).

therefore are not required to respond to FOIA requests. The plaintiff in the case filed a motion for reconsideration, and the court held a second hearing on August 2, 2017. The court on August 10, 2017, issued a second letter opinion reversing the holding of the June 14 letter opinion and finding that there had been no violation of FOIA, which the court confirmed by its final order on August 25, 2017. The Council directed that staff post these opinions on the Council website.

## **Other Business**

### FOIA Council Policy on Individual Participation by Electronic Means

Staff reminded the Council that as required by subdivision B 1 of § 2.2-3708.1, at its meeting on November 18, 2014, the Council adopted a policy on individual members' participation in Council meetings by electronic means. Staff recommended that the Council adopt a revised version of the policy to reflect amendments to the law that became effective July 1, 2017. The Council voted unanimously to approve the revised policy (the full policy is available on the Council's website at <http://foiacouncil.dls.virginia.gov/policies.htm>).

### Public Comment Forms

As required by House Bill 2146 (LeMunyon, 2017), the Council has published a public comment form on the "Forms and Sample Letters" page of the Council's website so that requesters may comment on the quality of assistance they received in response to a request. The Council directed that such copies of such public comment forms be presented at Council meetings and decided that if the volume of forms received increases, then they might be handled another way. Staff reported that no new public comment forms had been received since the Council's last meeting.

### FOIA Training

Staff informed the Council that due to budget considerations, next year staff intends to hold more free seminar-style trainings in Richmond where participants may sign up in advance to attend, and to explore additional technological means to deliver training presentations. The goal is to reduce expenses while still reaching as many people as possible. Training continues to be preapproved for continuing legal education credit from the Virginia State Bar and in-service credit from the Department of Criminal Justice Services. Credit for attendance is also given by the Virginia School Boards Association, the Virginia Municipal Clerks Association, and other organizations.

## **Public Comment**

Ms. Rhyne informed the Council that VCOG continues to provide FOIA training. She also stated that in consideration of Delegate Kory's proposed HB 2223, Ms. Rhyne had an intern perform a 50-state survey on laws addressing public comment at meetings that she would be happy to share with anyone interested. Ms. Rhyne also noted that HB 1 was filed today for the 2018 Session of the General Assembly, regarding access to certain scholastic records.

The Council will poll for its next meeting date after the 2018 session adjourns. Delegate LeMunyon noted that as his legislative term is ending, today's meeting was his last as chair of the Council. He related the story of Benjamin Franklin's being asked after the Constitutional Convention in 1787, "What have we got—a republic or a monarchy?", to which Franklin replied, "A republic—if you can keep it." Delegate LeMunyon then paraphrased the quote to state that "Virginia has a FOIA, if we can keep it." The meeting was then 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 online access to many of the Council's resources. The Council offers advice and guidance over the phone, via email, and in formal written opinions to the public, representatives of state and local government, and members of the news media. The Council also offers training seminars on the application of FOIA. In 2015, the annual statewide FOIA Workshops conducted by Council staff were discontinued in favor of providing training upon the request of any interested group. Under this approach, Council staff travels to the location of the group requesting training, provides relevant training materials, and presents training tailored to meet the needs of the particular group. All such 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. In addition, the Virginia Municipal Clerks Association, the Virginia School Board Association, and other organizations give credit for attendance at these FOIA presentations. This year the Council also implemented a free online training program available through the Commonwealth of Virginia Learning Center administered by the Department of Human Resource Management (<https://covlc.virginia.gov/>). This format allows for FOIA officers to be trained at a time when it is convenient for them, for records to be generated of who has completed training, and for issuance of a certificate of completion contemporaneously with successful course completion. Both the live, in-person presentations and the online training program satisfy the statutory requirement for FOIA officers to receive annual training. Additionally, the Council develops and continually updates free educational materials to aid in the understanding and application of FOIA. During this reporting period, the Council responded to 1,842 inquiries, conducted 56 training seminars statewide, and had over 200 people sign up for the online training. 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 email. 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, 2016, to November 30, 2017, Council staff fielded 1,842 inquiries. Of these inquiries, eight 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, staff posts written opinions 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 to six 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 to this report. The table below profiles who requested written advisory opinions for the period December 1, 2016, through November 30, 2017:

Written Advisory Opinions: 8

State and Local Government	5
Citizens of the Commonwealth	3
Members of the News Media	0

Typically, the Council provides advice over the phone and via email. The bulk of the inquiries that the Council receives are handled in this manner. The questions and responses 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, 2016, and November 30, 2017:

Telephone and Email Responses: 1,834

Government	1134
Citizens	588
News Media	112

Appendix F to this report sets out the number of inquiries received by the Council each month from December, 2015, through November, 2016, and separately sets forth the number of different types of inquiries received by category (Records, Meetings, Other). Appendix G to this report shows the number of opinions over a 10-year timespan.

### **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 (§ 42.1-76 et seq.). 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, a sign that its basic training mission had been successfully accomplished, as many interested persons had already attended a conference just the year before. However, staff still receives requests for the workshops every year. Beginning in 2013, in an effort to satisfy the demand for annual programs without oversaturating 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 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 throughout Virginia, such as the staff of state and local agencies, members of local governing bodies, media organizations, citizen organizations, and any other group wishing to learn more about FOIA. Council staff has travelled to the location of the group requesting training. The training has been provided free of charge and tailored to meet the needs of the particular group, and has ranged from brief overviews of FOIA taking as little as 15 minutes to longer in-depth presentations lasting several hours. Often the training has been 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. 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 staff responded to 1,842 inquiries and conducted 56 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. Additionally, in 2017 the Council implemented a free, online training program for FOIA officers available through the Commonwealth of Virginia Learning Center administered by the Department of Human Resource Management.

## **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

Council's website and are frequently distributed at the training seminars described above. Specifically, the Council offers the following educational materials:

- Access to Public Records
- Access to Public Meetings
- Guide to State Electronic Meetings
- Guide to Local Electronic Meetings
- Basic Meetings (PowerPoint presentation)
- Basic Records (PowerPoint presentation)
- E-Mail: Use, Access & Retention
- EMail & Meetings
- Law-Enforcement Records
- Handling FOIA Requests for Records of 911 Calls
- Taking the Shock Out of FOIA Charges
- Legislative Issue Briefs
- FOIA Guide for Boards of Visitors
- FOIA Guide for Local Government Officials
- Access to Records - Quick Reference
- FOIA Guide for Members of Deliberative Bodies
- Legislators' Guide to FOIA
- Guide to Geographic Information Systems Records
- List of other access laws
- 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 a total of 1,842 inquiries and conducting 56 specialized training sessions throughout the Commonwealth over the course of the year. The Council also formed two subcommittees and one work group over the past year to examine FOIA and related access issues, and it encouraged

the participation of many individuals and groups in Council studies. Through its website, the Council continues to provide increased public awareness of and participation in its work and to publish a variety of educational materials on the application of FOIA. 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

Senator Mamie E. Locke

Delegate Luke E. Torian

Shawri King-Casey

Kathleen Dooley

Stephanie Hamlett

Edward Jones

Mark Vucci

Marisa Porto

Sandra G. Treadway

William "Billy" Coleburn

Michael Stern

**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, 2016 through November 30, 2017, Council staff conducted 56 training seminars, which are listed below in chronological order identifying the group/agency requesting the training. Additionally, the Council this year implemented online FOIA training through the Commonwealth of Virginia Learning Center administered by the Department of Human Resource Management (<https://covlc.virginia.gov/>).

December 6, 2016	Virginia Association of Soil & Water Conservation Districts Annual Meeting Roanoke, VA
December 7, 2016	State Compensation Board New Officer Training Richmond, VA
December 13, 2016	Virginia Department of Motor Vehicles Richmond, VA
January 20, 2017	Washington and Lee University School of Law Local Government Law Practicum Lexington, VA
February 1, 2017	Virginia Commonwealth University Communications Law & Ethics Class Richmond, VA
February 22, 2017	Virginia Department of Conservation and Recreation Richmond, VA
February 25, 2017	Virginia Cave Board Cumberland, VA
March 4, 2017	Virginia Municipal League Institute for Local Officials Richmond, VA
March 15, 2017	Virginia Department of Housing and Community Development Richmond, VA

March 15, 2017	Rockingham County Sheriff's Office Harrisonburg, VA
March 20, 2017	Department of Housing and Community Development Richmond, VA
March 21, 2017	Town of Leesburg Leesburg, VA
March 22, 2017	Chesterfield County Police Department and Sheriff's Office Chesterfield, VA
March 23, 2017	City of Suffolk Suffolk, VA
March 23, 2017	Hampton Sheriff's Office (and other law-enforcement personnel) Hampton, VA
March 28, 2017	Public Schools Records Management Workshop Portsmouth, VA
March 28, 2017	Warrenton Town Council, Planning Commission, and Architectural Review Board Warrenton, VA
April 4, 2017	City of Winchester Winchester, VA
April 6, 2017	Fluvanna County Palmyra, VA
April 11, 2017	Department of Housing and Community Development Permit Technician's Course Fredericksburg, VA
April 12, 2017	Amelia, Buckingham, Charlotte, Lunenburg, and Prince Edward Counties Farmville, VA
April 13, 2017	Floyd County Floyd, VA
April 20, 2017	Virginia Initiative for Growth and Opportunity in Each Region (GO Virginia) State Board & Regional Councils Chesterfield, VA

April 20, 2017	Town of Bluefield Bluefield, VA
April 21, 2017	Annual Bench-Bar Conference Abingdon, VA
April 26, 2017	Middle District Planning District Commission Tappahannock, VA
April 29, 2017	Group of citizen attorneys Herndon, VA
May 10, 2017	Rappahannock County Washington, VA
May 12, 2017	City of Richmond Public Schools Richmond, VA
May 16, 2017	Bath County Circuit Court Bath, VA
May 19, 2017	Virginia Association of Law Libraries 2017 Spring Meeting Williamsburg, VA
June 16, 2017	City of Richmond Department of Public Utilities Richmond, VA
June 19, 2017	GO Virginia Region 4 Council Chesterfield, VA
June 28, 2017	Lynchburg City Council Lynchburg, VA
June 30, 2017	Department of Social Services Richmond, VA
August 2, 2017	Community Integration Advisory Commission Richmond, VA
August 16, 2017	Division of Legislative Services Richmond, VA
August 17, 2017	Clarke County Administration & Social Services Berryville, VA



August 17, 2017	Clarke County Sheriff's Office & Berryville Police Department Berryville, VA
August 17, 2017	Middleburg Town Council Middleburg, VA
August 24, 2017	Peninsula Airport Commission Newport News, VA
August 24, 2017	Town of Chincoteague & surrounding localities Chincoteague, VA
September 14, 2017	Central District Commissioner of the Revenue Association Maidens, VA
September 20, 2017	Virginia Commonwealth University Communications Law & Ethics Class Richmond, VA
September 22, 2017	Rappahannock Community College Regional Educational Consortium Warsaw, VA
September 25, 2017	Wise County and surrounding localities hosted by Wise County E-911 Services Wise, VA
October 6, 2017	Local Government Paralegals Association Annual Conference Virginia Beach, VA
October 11, 2017	Virginia Municipal Clerks Association Annual Institutes and Academy Virginia Beach, VA
October 13, 2017	York-Poquoson Sheriff's Office and Poquoson Police Yorktown, VA
October 19, 2017	Manassas Park Department of Social Services Manassas Park, VA
October 19, 2017	Manassas Police Department Manassas, VA

October 25, 2017	State Council of Higher Education for Virginia Boards of Visitors Orientation Richmond, VA
October 27, 2017	Department of Criminal Justice Services Richmond, VA
November 2, 2017	Department of Agriculture and Consumer Services Richmond, VA
November 8, 2017	Towns of Wakefield, Waverly, Claremont, Newsoms, Courtland, Boykins, and Windsor Wakefield, VA
November 16, 2017	Virginia School Boards Association - Clerk's Workshop Williamsburg, VA

Index of Written Advisory Opinions  
December 1, 2016, through November 30, 2017

**ADVISORY OPINIONS ISSUED**

<u>Opinion No.</u>	<u>Issue(s)</u>
<b>December</b>	
AO-04-16	Under FOIA, a teacher has a right of access to the teacher's own personnel records, but not necessarily to scholastic records of a student. Generally, if a teacher requests a record that is both a personnel record and a scholastic record, the response should provide those portions which are the teacher's own personnel records but may redact those portions which are exempt as scholastic records. Other laws outside FOIA may also affect access to scholastic records, but this office's statutory authority is limited to providing guidance on FOIA.
<b>January</b>	
AO-01-17	Summarizes the requirements for responding to a request. A failure to respond to a request for public records is deemed a denial and a violation of FOIA. The statutory remedy for a violation is to file a petition for mandamus or injunction in general district or circuit court.
<b>February</b>	
AO-02-17	FOIA prohibits voting at public meetings by secret or written ballot as well as voting by telephone or other electronic communication means. However, FOIA does not address the use of electronic voting systems that use computer software to cast, record, and publicly display the votes at a public meeting. Whether such a system comports with FOIA depends on whether it publicly displays the individual vote of each member of the public body, or merely the final vote tally.

---

**March**

---

AO-03-17

---

A motion to convene a closed meeting must identify the subject of the meeting, the purpose of the meeting, and the exemption(s) which allow the meeting to be closed. A motion that fails to identify the subject, or lacks any other element, is insufficient.

---

---

**May**

---

AO-04-17

---

An organization, corporation, or agency in the Commonwealth that receives two-thirds (66.6%) or greater support from public funds is considered to be "supported ... principally by public funds" and therefore is a "public body" subject to FOIA. In some instances, an entity receiving less than two-thirds support from public sources might be considered a "public body" depending on the exact facts of each case. In this opinion, an entity receiving 68% of its support from public funds is considered a public body subject to FOIA.

---

---

**June**

---

AO-05-17

---

An organization, corporation, or agency in the Commonwealth that receives two-thirds (66.6%) or greater support from public funds is considered to be "supported ... principally by public funds" and therefore is a "public body" subject to FOIA. Prior opinions advised measuring an entity's level of funding at the time a request is made, but did not specify a time period to use as a measure. FOIA itself is silent on this point. We recommend using a fiscal year as the basis for determination to provide a balance between predictability in knowing whether an entity is subject to FOIA, and flexibility in recognizing changing factual circumstances.

---

---

**August**

---

AO-06-17

---

Meeting notices must contain the date, time, and location of the meeting. Notice of regular meetings must be posted at least three working days prior to the meeting. The day of the meeting is not counted as one of the three working days. Working days generally do not include legal holidays, weekends, or other days when the offices of the public body are closed.

---

---

**October**

---

AO-07-17

---

Following the policy and procedures of FOIA, all public records, including procurement records, must be disclosed upon request unless an exemption or other specific provision of law allows the records to be withheld.

## 2017 Meetings of the Council

**Tuesday, March 7, 2017**

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

Recap of the 2017 legislative session; review of the bills referred to the Council by the 2017 Session of the General Assembly; discussion of issues carried over from the FOIA study under HJR 96 (2014) completed last year; welcome to new Council member Cullen Seltzer, Esq.

**Monday, May 15, 2017**

**House Room 1, Capitol Building, Richmond**

Review of bills referred to the Council by the 2017 Session of the General Assembly; progress report and review of recommended drafts from the Council's Proprietary Records and Trade Secrets Subcommittee; HB 1971 (Massie, 2017) discussion regarding multidisciplinary teams responding to sexual assault and child abuse; online FOIA training; litigation update; recognition of the upcoming retirement of Maria J.K. Everett, Executive Director.

**Monday, August 14, 2017**

**House Room 1, Capitol Building, Richmond**

Welcome to new Council members Senator Mamie E. Locke and Delegate Luke E. Torian; review of bills referred to the Council by the 2017 Session of the General Assembly; progress report and review of recommended drafts from the Council's Proprietary Records and Trade Secrets Subcommittee; formation of Electronic Meetings Subcommittee; litigation update; public comment forms; consideration of proposal to add declaratory judgment remedy; discussion of amendments to clarify application of law-enforcement records provisions (§ 2.2-3706).

**Monday, November 20, 2017**

**House Room 1, Capitol Building, Richmond**

Review of bills referred to the Council by the 2017 Session of the General Assembly; progress report and review of recommended drafts from the Council's Proprietary Records and Trade Secrets and Electronic Meetings Subcommittees, draft adding declaratory judgment as a FOIA remedy, and law-enforcement records draft; litigation update; Council policy on individual participation by electronic means; public comment forms; update on FOIA training.

STATUS OF FREEDOM OF INFORMATION  
AND OTHER RELATED ACCESS BILLS

2017 FOIA LEGISLATIVE UPDATE

I. Introduction

The General Assembly passed a total of twenty-two bills amending the Virginia Freedom of Information Act (FOIA) during the 2017 Session. The Council in 2016 completed the third year of the three-year study of FOIA directed by House Joint Resolution No. 96 (2014), and as a result of that study the Council recommend two pieces of omnibus legislation to the 2017 Session of the General Assembly incorporating all of its recommend changes. Both omnibus bills, HB 1539, the records omnibus bill, and HB 1540, the meetings omnibus bill, passed the General Assembly. Two additional bills passed the General Assembly that were recommended by the FOIA Council: HB 1734, which requires guidance documents of the Virginia Parole Board to be available as public records under FOIA, and HB 1876, which excludes from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years.

Five bills add three new records exemptions in FOIA as follows:

- Excludes from the mandatory disclosure provisions of FOIA proprietary information, voluntarily provided by a private business under a promise of confidentiality from a public body, used by the public body for a solar services agreement. The bill requires the private business to specify the records for which protection is sought before submitting them to the public body and to state the reasons why protection is necessary. The bill also (i) allows a solar services agreement contractor or provider to designate specific provisions in a solar services agreement as proprietary information not subject to disclosure and (ii) authorizes a city to withhold from disclosure such information provided by a private entity in connection with a franchise, lease, or use under a solar services agreement. SB 1226 adding a new exemption in § 2.2-3705.6.
- Establishes the Emergency Department Care Coordination Program in the Department of Health to provide a single, statewide technology solution that connects all hospital emergency departments in the Commonwealth to facilitate real-time communication and collaboration between physicians, other health care providers, and other clinical and care management personnel for patients receiving services in hospital emergency departments, for the purpose of improving the quality of patient care services. The bill creates a FOIA records exclusion for records of and information held by the Emergency Department Care Coordination Program required to be kept confidential pursuant to § 32.1-372. SB 1561 and HB 2209 adding a new exemption in § 2.2-3705.5. [NOTE: *The bill does not become effective unless and until the Commonwealth receives federal Health Information Technology for Economic and Clinical Health (HITECH) Act funds to implement its provisions.*]
- Requires the Office of the Executive Secretary of the Supreme Court to provide electronic data, including individually identifiable information, on proceedings pursuant to Article 16 of Chapter 11 of Title 16.1 and Chapter 8 of Title 37.2 to the Department of Behavioral

Health and Developmental Services upon request and provides that the Department may use such data for the purpose of developing and maintaining statistical archives, conducting research on the outcome of such proceedings, and preparing analyses and reports for use by the Department. The bill requires the Department to take all necessary steps to protect the security and privacy of the records and information provided pursuant to the provisions of the bill in accordance with the requirements of state and federal law and regulations governing health privacy. The bill creates a corresponding records exemption for such electronic data. SB 1006 and HB 1551 adding a new exemption in § 2.2-3705.5.

Three bills add three new meetings exemptions in FOIA as follows:

- Restructures the membership of the board of directors (the Board) of the Virginia Economic Development Partnership Authority (the Authority), designates the Board as a supervisory board within the statutory definition of "supervisory," sets out the minimum qualifications for appointments to the Board, and sets out additional powers and duties required of the Board, including development of a strategic plan for economic development, a marketing plan, and an operational plan. The bill also establishes a Division of Incentives within the Authority to track, manage, and coordinate economic development incentives. Among other provisions, the bill requires the Virginia Employment Commission to provide certain employment information to the Authority as may be necessary to facilitate the administration and enforcement by the Authority of performance agreements with businesses that have received incentive awards. The bill creates a record exemption for portions of the strategic, marketing, or operational plan that would adversely affect the financial interests of the Commonwealth, as well as a corresponding meetings exemption for discussion of such information. The bill also establishes a subcommittee of the Board to receive and review such information in order to assist the Division of Incentives with the verification of employment and wage claims of those businesses that have received incentive awards, and creates a corresponding meetings exemption for meetings of the subcommittee. SB 1574 and HB 2471 adding a new exemption in § 2.2-3711.
- Excludes the records of a multidisciplinary team as they relate to individual child abuse or neglect cases or sex offenses involving a child from mandatory disclosure under the Virginia Freedom of Information Act. The bill also provides an exemption from open meeting requirements to such teams and sexual assault response teams. HB 1971 amending § 2.2-3705.7 and adding a new exemption in § 2.2-3711.

Fourteen bills amend existing provisions of FOIA as follows:

- Provides that personal contact information provided to a public body for the purpose of receiving electronic mail from the public body is excluded from the mandatory disclosure provisions of FOIA, provided that the electronic mail recipient has requested that the public body not disclose such information. The bill defines "personal contact information" as the home or business (i) address, (ii) email address, or (iii) telephone number or comparable number assigned to any other electronic communication device. Current law excludes "personal information," which is defined as including a broader range of information than the limited definition of personal contact information in the bill. SB 1040 amending § 2.2-3705.1.



- Requires that records of completed unattended death investigations be released to the parent or spouse of the decedent or, if there is no living parent or spouse, to the most immediate family member of the decedent, provided the person is not a person of interest or a suspect. The bill also defines "unattended death" and "immediate family member." SB 1102 amending § 2.2-3706.
- Among other provisions, clarifies that the exemption from mandatory disclosure of records under the Freedom of Information Act by applicants for grants and loans from the Virginia Research Investment Committee applies to certain financial records, trade secrets, and research-related information. The bill requires an applicant seeking to invoke the protections of the exemption to submit a written request to the Committee identifying the records or data for which protection is sought and stating the reason why protection is necessary. The exemption would also apply to documents prepared exclusively for the application review by the Committee, its staff, or a reviewing entity conducting a scientific review at the request of the Committee. The bill also amends the closed meeting exemption to include interviews of applicants by the Committee or a reviewing entity conducting a scientific review. SB 1371 and HB 2245 amending §§ 2.2-3705 and 2.2-3711.
- Clarifies the definition of public record. The bill also (i) defines "personal contact information" that is excluded from FOIA's mandatory disclosure provisions in certain cases; (ii) clarifies that a requester has the right to inspect records or receive copies at his option; (iii) clarifies language in certain record exclusions under FOIA that certain records may be disclosed at the discretion of the custodian; (iv) consolidates the personnel record exclusion with the limitation on the application of that exclusion, and specifically clarifies that the name, in addition to position, job classification, and salary, of a public employee is public information as per opinions of the Attorney General and the FOIA Council; (v) eliminates, effective July 1, 2018, the exclusion for the Alcoholic Beverage Control Authority relating to operating and marketing strategies; (vi) eliminates the exclusion for correspondence of local officials as unnecessary; (vii) consolidates various public safety exclusions relating to building plans and drawings and critical infrastructure into a single exclusion; (viii) eliminates the exclusion for administrative investigations of the Department of Human Resource Management, as the exclusion is already covered under the personnel records exclusion; (ix) expands the exclusion for personal information provided to the Virginia College Savings Plan to cover qualified beneficiaries, designated survivors, and authorized individuals, which terms are defined in the bill; (x) consolidates the various record exclusions for the Department of Health Professions and the Department of Health into single exclusions for each Department; (xi) clarifies certain Department of Social Services exclusions; (xii) provides an exclusion for local finance boards that provide postemployment benefits other than pensions; and (xiii) eliminates the record exclusion for *Virginia Wildlife Magazine*. The bill also limits the application of the working papers exemption by stating that information publicly available or not otherwise subject to an exclusion under FOIA or other provision of law that has been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed working papers. The bill contains numerous technical amendments. This bill is a recommendation of the Freedom of Information Advisory Council pursuant to the HJR 96 FOIA study (2014–2016). HB 1539 amending §§ 2.2-3701, 2.2-3704, 2.2-3704.1, 2.2-3704.2, 2.2-3705.1 through 2.2-3705.8, 2.2-3711, 2.2-3714, 2.2-3806, 22.1-253.13:3, 22.1-279.8, 23.1-

2425, 32.1-48.08, 32.1-48.011, 32.1-48.015, 32.1-283.1, 32.1-283.2, 32.1-283.3, 32.1-283.5, 32.1-283.6, 44-146.18, 44-146.22, 54.1-2517, and 54.1-2523.

- Revises FOIA's various open meeting exemptions relating to legal matters, litigation, certain museums, and the Virginia Commonwealth University Health System Authority. The bill also (i) clarifies where meeting notices and minutes are to be posted, (ii) requires copies of proposed agendas to be made available, (iii) eliminates reporting to the Joint Commission on Science and Technology when a state public body convenes an electronic communication meeting, and (iv) makes technical corrections to several open meeting exemptions to provide context for those meeting exemptions that currently only cross-reference corollary records exemptions. The bill also clarifies closed meeting procedures. The bill contains numerous technical corrections. This bill is a recommendation of the Freedom of Information Advisory Council pursuant to the HJR 96 FOIA study (2014–2016). HB 1540 amending §§ 2.2-3701, 2.2-3707, 2.2-3707.1, 2.2-3708, 2.2-3708.1, 2.2-3711, 2.2-3712, 10.1-104.7, 15.2-1416, 23.1-1303, and 54.1-2400.2.
- Requires guidance documents of the Virginia Parole Board to be available as public records under FOIA. HB 1734 amending § 2.2-3703.
- Excludes from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years. The bill provides that access shall not be denied to the parent, including a noncustodial parent, or guardian of such library patron. HB 1876 amending § 2.2-3705.7.
- Clarifies that at the end of the appointed term of a nonlegislative citizen member of the FOIA Advisory Council, the nonlegislative citizen member shall continue to serve until a successor is appointed. This bill is a recommendation of the Virginia Freedom of Information Advisory Council. HB 1932 amending § 30-178.
- Requires the Freedom of Information Advisory Council to maintain on its website a listing of all FOIA officers, including name, contact information, and the name of the public body such FOIA officers serve. The bill requires the name and contact information of FOIA officers trained by legal counsel of a public body to be submitted to the Council by July 1 of each year on a form developed by the Council for that purpose and to be updated in a timely manner in the event of any changes to such information. The bill also provides that training through an online course offered by the Council shall satisfy the annual training requirement for FOIA officers. HB 2143 amending § 2.2-3704.2.
- Increases the Virginia Freedom of Information Advisory Council from 12 members to 14 members by adding one additional member from the House of Delegates and one additional member from the Senate. The bill also provides that if any nonlegislative citizen member of the Council fails to attend a majority of meetings of the Council in a calendar year, the Council shall notify the member's appointing authority, who may, upon receipt of such notification, remove the member and appoint a successor as soon as practicable. HB 2144 amending § 30-178.
- Requires the Freedom of Information Advisory Council to develop an online public comment form to be posted on its official public government website to enable any requester to comment on the quality of assistance provided to the requester by a public body. The bill also requires all state public bodies subject to the provisions of FOIA and

any county or city, and any town with a population of more than 250, to post a link on its official public government website to the online public comment form. HB 2146 amending §§ 2.2-3704.1 and 30-179.

- Expands the existing FOIA record exclusion for information of a proprietary nature furnished by a supplier of charitable gaming supplies to the Virginia Department of Agriculture and Consumer Services to include such information submitted by manufacturers of charitable gaming supplies. The bill also expands the exclusion to include information submitted by suppliers and manufacturers of charitable gaming supplies pursuant to regulations promulgated by the Charitable Gaming Board related to approval of electronic and mechanical equipment. HB 2178 amending § 2.2-3705.6.

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 2017 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, 2017.

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

### **§ 2.2-3701 Definitions.**

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies.** Clarifies the definition of public record. The bill also (i) defines "personal contact information" that is excluded from FOIA's mandatory disclosure provisions in certain cases; (ii) clarifies that a requester has the right to inspect records or receive copies at his option; (iii) clarifies language in certain record exclusions under FOIA that certain records may be disclosed at the discretion of the custodian; (iv) consolidates the personnel record exclusion with the limitation on the application of that exclusion, and specifically clarifies that the name, in addition to position, job classification, and salary, of a public employee is public information as per opinions of the Attorney General and the FOIA Council; (v) eliminates, effective July 1, 2018, the exclusion for the Alcoholic Beverage Control Authority relating to operating and marketing strategies; (vi) eliminates the exclusion for correspondence of local officials as unnecessary; (vii) consolidates various public safety exclusions relating to building plans and drawings and critical infrastructure into a single exclusion; (viii) eliminates the exclusion for administrative investigations of the Department of Human Resource Management, as the exclusion is already covered under the personnel records exclusion; (ix) expands the exclusion for personal information provided to the Virginia College Savings Plan to cover qualified beneficiaries, designated survivors, and authorized individuals, which terms are defined in the bill; (x) consolidates the various record exclusions for the Department of Health Professions and the Department of Health into single exclusions for each Department; (xi) clarifies certain Department of Social Services exclusions; (xii) provides an exclusion for local finance boards that provide postemployment benefits other than pensions; and (xiii) eliminates the record exclusion for *Virginia Wildlife Magazine*. The bill also limits the application of the working papers exemption by stating that information publicly available or not otherwise subject to an exclusion under FOIA or other provision of law that has been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed working papers. The bill contains numerous technical amendments. This bill is a recommendation

of the Freedom of Information Advisory Council pursuant to the HJR 96 FOIA study (2014–2016). HB 1539 (2017 Acts of Assembly, c. 778).

**Virginia Freedom of Information Act (FOIA); public access to meetings of public bodies.** Revises FOIA's various open meeting exemptions relating to legal matters, litigation, certain museums, and the Virginia Commonwealth University Health System Authority. The bill also (i) clarifies where meeting notices and minutes are to be posted, (ii) requires copies of proposed agendas to be made available, (iii) eliminates reporting to the Joint Commission on Science and Technology when a state public body convenes an electronic communication meeting, and (iv) makes technical corrections to several open meeting exemptions to provide context for those meeting exemptions that currently only cross-reference corollary records exemptions. The bill also clarifies closed meeting procedures. The bill contains numerous technical corrections. This bill is a recommendation of the Freedom of Information Advisory Council pursuant to the HJR 96 FOIA study (2014–2016). HB 1540 (2017 Acts of Assembly, c. 616).

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

**Virginia Parole Board; exceptions to the Virginia Freedom of Information Act (FOIA).** Requires guidance documents of the Virginia Parole Board to be available as public records under FOIA. HB 1734 (2017 Acts of Assembly, c. 620).

**§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc.**

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

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

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

**Virginia Freedom of Information Act (FOIA); Freedom of Information Advisory Council; online public comment form.** Requires the Freedom of Information Advisory Council to develop an online public comment form to be posted on its official public government website to enable any requester to comment on the quality of assistance provided to the requester by a public body. The bill also requires all state public bodies subject to the provisions of FOIA and any county or city, and any town with a population of more than 250, to post a link on its official public government website to the online public comment form. HB 2146 (2017 Acts of Assembly, c. 645).

**§ 2.2-3704.2. Public bodies to designate FOIA officer.**

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

**Virginia Freedom of Information Act (FOIA); training provided by the Virginia Freedom of Information Advisory Council.** Requires the Freedom of Information Advisory Council to maintain on its website a listing of all FOIA officers, including name, contact information, and the name of the public body such FOIA officers serve. The bill requires the name and contact information of FOIA officers trained by legal counsel of a public body to be submitted to the Council by July 1 of each year on a form developed by the Council for that purpose and to be updated in a timely manner in the event of any changes to such information. The bill also provides that training through an online course offered by the Council shall satisfy the annual training requirement for FOIA officers. HB 2143 (2017 Acts of Assembly, c. 290).

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

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

**Virginia Freedom of Information Act (FOIA); record exclusion for personal contact information; limitation.** Provides that personal contact information provided to a public body for the purpose of receiving electronic mail from the public body is excluded from the mandatory disclosure provisions of FOIA, provided that the electronic mail recipient has requested that the public body not disclose such information. The bill defines "personal contact information" as the home or business (i) address, (ii) email address, or (iii) telephone number or comparable number assigned to any other electronic communication device. Current law excludes "personal information," which is defined as including a broader range of information than the limited definition of personal contact information in the bill. SB 1040 (2017 Acts of Assembly, c. 140).

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

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

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

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

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

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

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

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

**Emergency Department Care Coordination Program established.** Establishes the Emergency Department Care Coordination Program in the Department of Health to provide a single, statewide technology solution that connects all hospital emergency departments in the Commonwealth to facilitate real-time communication and collaboration between physicians, other health care providers, and other clinical and care management personnel for patients receiving services in hospital emergency departments, for the purpose of improving the quality of patient care services. The bill creates a FOIA records exclusion for records of and information held by the Emergency Department Care Coordination Program required to be kept confidential pursuant to § 32.1-372. SB 1561 (2017 Acts of Assembly, c. 475) and HB 2209 (2017 Acts of Assembly, c. 600). [**NOTE:** *The bill does not become effective unless and until the Commonwealth receives federal Health Information Technology for Economic and Clinical Health (HITECH) Act funds to implement its provisions.*]

**Commitment hearings; sharing of records and information.** Requires the Office of the Executive Secretary of the Supreme Court to provide electronic data, including individually identifiable information, on proceedings pursuant to Article 16 of Chapter 11 of Title 16.1 and Chapter 8 of Title 37.2 to the Department of Behavioral Health and Developmental Services upon request and provides that the Department may use such data for the purpose of developing and maintaining statistical archives, conducting research on the outcome of such proceedings, and preparing analyses and reports for use by the Department. The bill requires the Department to take all necessary steps to protect the security and privacy of the records and information provided pursuant to the provisions of the bill in accordance with the requirements of state and federal law and regulations governing health privacy. The bill creates a corresponding records exemption for such electronic data. SB 1006 (2017 Acts of Assembly, c. 719) and HB 1551 (2017 Acts of Assembly, c. 188).

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

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

**Virginia Freedom of Information Act; record exclusion for proprietary records and trade secrets; solar energy agreements.** Excludes from the mandatory disclosure provisions of FOIA proprietary information, voluntarily provided by a private business under a promise of confidentiality from a public body, used by the public body for a solar services agreement. The bill requires the private business to specify the records for which protection is sought before submitting them to the public body and to state the reasons why protection is necessary. The bill also (i) allows a solar services agreement contractor or provider to designate specific provisions in a solar services agreement as proprietary information not subject to disclosure and (ii) authorizes a city to withhold from disclosure such information provided by a private entity in connection with a franchise, lease, or use under a solar services agreement. SB 1226 (2017 Acts of Assembly, c. 737).

**Virginia Research Investment Committee.** Among other provisions, clarifies that the exemption from mandatory disclosure of records under the Freedom of Information Act by applicants for grants and loans from the Virginia Research Investment Committee applies to certain financial records, trade secrets, and research-related information. The bill requires an applicant seeking to invoke the protections of the exemption to submit a written request to the Committee identifying the records or data for which protection is sought and stating the reason why protection is necessary. The exemption would also apply to documents prepared exclusively for the application review by the Committee, its staff, or a reviewing entity conducting a scientific review at the request of the Committee. The bill also amends the closed meeting exemption to include interviews of applicants by the Committee or a reviewing entity conducting a scientific review. SB 1371 (2017 Acts of Assembly, c. 816) and HB 2245 (2017 Acts of Assembly, c. 796).

**Virginia Freedom of Information Act (FOIA); proprietary records and trade secrets; charitable gaming supplies.** Expands the existing FOIA record exclusion for information of a proprietary nature furnished by a supplier of charitable gaming supplies to the Virginia Department of Agriculture and Consumer Services to include such information submitted by manufacturers of charitable gaming supplies. The bill also expands the exclusion to include information submitted by suppliers and manufacturers of charitable gaming supplies pursuant to regulations promulgated by the Charitable Gaming Board related to approval of electronic and mechanical equipment. HB 2178 (2017 Acts of Assembly, c. 662).

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

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

**Virginia Freedom of Information Act; record and meeting exclusions for multidisciplinary child abuse teams.** Excludes the records of a multidisciplinary team as they relate to individual child abuse or neglect cases or sex offenses involving a child from mandatory disclosure under the Virginia Freedom of Information Act. The bill also provides an exemption from open meeting requirements to such teams and sexual assault response teams. HB 1971 (2017 Acts of Assembly, c. 587).

**Virginia Freedom of Information Act; public access to library records of minors.** Excludes from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years. The bill provides that access shall not be denied to the parent, including a noncustodial parent, or guardian of such library patron. HB 1876 (2017 Acts of Assembly, c. 642).

**§ 2.2-3705.8. Limitation on record exclusions.**

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

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

**Virginia Freedom of Information Act; completed unattended death investigations; mandatory disclosure.** Requires that records of completed unattended death investigations be

released to the parent or spouse of the decedent or, if there is no living parent or spouse, to the most immediate family member of the decedent, provided the person is not a person of interest or a suspect. The bill also defines "unattended death" and "immediate family member." SB 1102 (2017 Acts of Assembly, c. 828).

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

**Virginia Freedom of Information Act (FOIA); public access to meetings of public bodies.** *See summary under § 2.2-3701, supra.* HB 1540 (2017 Acts of Assembly, c. 616).

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

**Virginia Freedom of Information Act (FOIA); public access to meetings of public bodies.** *See summary under § 2.2-3701, supra.* HB 1540 (2017 Acts of Assembly, c. 616).

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

**Virginia Freedom of Information Act (FOIA); public access to meetings of public bodies.** *See summary under § 2.2-3701, supra.* HB 1540 (2017 Acts of Assembly, c. 616).

**§ 2.2-3708.1. Participation in meetings in event of emergency or personal matter; certain disabilities; distance from meeting location for certain public bodies.**

**Virginia Freedom of Information Act (FOIA); public access to meetings of public bodies.** *See summary under § 2.2-3701, supra.* HB 1540 (2017 Acts of Assembly, c. 616).

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

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

**Virginia Freedom of Information Act (FOIA); public access to meetings of public bodies.** *See summary under § 2.2-3701, supra.* HB 1540 (2017 Acts of Assembly, c. 616).

**Virginia Economic Development Partnership Authority; membership; powers and duties.**

Restructures the membership of the board of directors (the Board) of the Virginia Economic Development Partnership Authority (the Authority), designates the Board as a supervisory board within the statutory definition of "supervisory," sets out the minimum qualifications for appointments to the Board, and sets out additional powers and duties required of the Board, including development of a strategic plan for economic development, a marketing plan, and an operational plan. The bill also establishes a Division of Incentives within the Authority to track, manage, and coordinate economic development incentives. Under the bill, the Division is required to obtain certification from the Attorney General prior to certifying that an approved project has met the investment and job creation requirements and the review of the Attorney General prior to seeking the repayment of any public funds from an approved project due to a failure of the project to meet the investment and job creation requirements set forth in the contract or memorandum of understanding. The bill establishes a position of internal auditor and two advisory committees and requires (i) each commissioner of the revenue to provide certain tax information and (ii) the Virginia Employment Commission to provide certain employment information to the Authority as



may be necessary to facilitate the administration and enforcement by the Authority of performance agreements with businesses that have received incentive awards. The bill creates a record exemption for portions of the strategic, marketing, or operational plan that would adversely affect the financial interests of the Commonwealth, as well as a corresponding meetings exemption for discussion of such information. The bill also creates a meeting exemption for those portions of meetings of the subcommittee of the Board of the Authority established pursuant to subsection F of § 2.2-2237.3 to review and discuss information received from the Virginia Employment Commission pursuant to subdivision C 2 of § 60.2-114. The bill contains an emergency clause. SB 1574 (2017 Acts of Assembly, c. 824) and HB 2471 (2017 Acts of Assembly, c. 804).

**Virginia Freedom of Information Act; record and meeting exclusions for multidisciplinary child abuse teams.** *See summary under § 2.2-3705.7, supra.* HB 1971 (2017 Acts of Assembly, c. 587).

**Virginia Research Investment Committee.** *See summary under § 2.2-3705.6, supra.* SB 1371 (2017 Acts of Assembly, c. 816) and HB 2245 (2017 Acts of Assembly, c. 796).

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

**Virginia Freedom of Information Act (FOIA); public access to meetings of public bodies.** *See summary under § 2.2-3701, supra.* HB 1540 (2017 Acts of Assembly, c. 616).

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

**Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record.** *See summary under § 2.2-3701, supra.* HB 1539 (2017 Acts of Assembly, c. 778).

#### **§ 30-178. Virginia Freedom of Information Advisory Council; membership; terms; quorum; expenses.**

**Virginia Freedom of Information (FOIA) Advisory Council; terms of nonlegislative citizen members.** Clarifies that at the end of the appointed term of a nonlegislative citizen member of the FOIA Advisory Council, the nonlegislative citizen member shall continue to serve until a successor is appointed. This bill is a recommendation of the Virginia Freedom of Information Advisory Council. HB 1932 (2017 Acts of Assembly, c. 141).

**Virginia Freedom of Information Advisory Council; membership; effect of missing meetings.** Increases the Virginia Freedom of Information Advisory Council from 12 members to 14 members by adding one additional member from the House of Delegates and one additional member from the Senate. The bill also provides that if any nonlegislative citizen member of the Council fails to attend a majority of meetings of the Council in a calendar year, the Council shall notify the member's appointing authority, who may, upon receipt of such notification, remove the member and appoint a successor as soon as practicable. HB 2144 (2017 Acts of Assembly, c. 644).

#### **§ 30-179. Powers and duties of the Council.**

**Virginia Freedom of Information Act (FOIA); Freedom of Information Advisory Council; online public comment form.** *See summary under § 2.2-3704.1, supra.* HB 2146 (2017 Acts of Assembly, c. 645).

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

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

**Digital certification of government records.** Provides for the Secretary of the Commonwealth, in cooperation with the Virginia Information Technologies Agency, to develop standards for the use of digital signatures by government agencies on electronic records generated by such agencies. The bill further provides that such agencies may provide copies of digital records, via a website or upon request, and may charge a fee of \$5 for each digitally certified copy of an electronic record. Any digitally certified record submitted to a court in the Commonwealth shall be deemed to be authenticated by the custodian of the record. The bill defines "agency" to include all state agencies and local government entities, including constitutional officers, except circuit court clerks. SB 1341 (2017 Acts of Assembly, c. 738).

**Secure Commonwealth Panel; membership and duties.** Revises the membership of the Secure Commonwealth Panel, renamed the Secure and Resilient Commonwealth Panel, and requires the Panel to create an Emergency Management Awareness Group consisting of the Secretary of Public Safety and Homeland Security, the Lieutenant Governor, the Attorney General, the Executive Secretary of the Supreme Court of Virginia, and the Chairmen of the House Committee on Militia, Police and Public Safety and the Senate Committee on General Laws and Technology. The bill requires the Group to meet during a state of emergency to review critical information concerning such situation to facilitate communication between the executive, legislative, and judicial branches of state government. The bill dissolves the Virginia Emergency Response Council and transfers its duties to the Panel. The bill also requires the Panel, on or before October 1st of each year, to report to the Governor, the Senate Committee on Finance, the Senate Committee on General Laws and Technology, the House Committee on Appropriations, and the House Committee on Militia, Police and Public Safety concerning the state of the Commonwealth's emergency prevention, protection, mitigation, response, and recovery efforts and the resources necessary to implement them. The bill provides that such report may, with the concurrence of the Governor, include sensitive information, which information shall be excluded from disclosure in accordance with subdivisions 2, 3, 4, and 6 of § 2.2-3705.2 and which, if revealed publicly, would jeopardize or compromise security plans and procedures in the Commonwealth designed to protect (i) the public or (ii) public or private critical infrastructure. The bill further provides that sensitive information presented to any committee of the General Assembly shall be discussed in a closed meeting as provided in subdivision 19 of § 2.2-3711. The bill contains technical amendments. HB 1998 (2017 Acts of Assembly, c. 512).

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

**Line of Duty Act.** Clarifies provisions of the Line of Duty Act, including clarifying that suspension or reinstatement of health insurance benefits begins and ends at the beginning of a health insurance plan year rather than in the middle of a plan year and recognizing current practice that the Line of Duty Act administrator provides materials for training. The bill codifies certain provisions of the Line of Duty Act that currently are in the appropriation act. The bill modifies the provision that would have disqualified, effective July 1, 2017, the surviving spouse of a deceased member who remarried from receiving health insurance benefits, by restricting the disqualification to surviving spouses who remarry on or after July 1, 2017. The bill provides that evidence and documents obtained by or created by, and the report of investigation prepared by the Virginia

Retirement System, or the Department of Human Resource Management, in addition to the Virginia State Police, shall (i) be deemed confidential, (ii) be exempt from disclosure under the Freedom of Information Act (§ 2.2-3700 et seq.), and (iii) not be released in whole or in part by any person to any person except as provided in the Line of Duty Act. The bill provides that notwithstanding the prohibition, VRS may release to necessary parties such information, documents, and reports for purposes of administering appeals under the Line of Duty Act. The bill also provides that notwithstanding the prohibition, the Department of State Police and the Department of Accounts shall, upon request, share with the Virginia Retirement System and the Department of Human Resource Management any information, evidence, documents, and reports of investigation related to existing and past claims for benefits provided under the Line of Duty Act. The bill provides that such information, evidence, documents, and reports of investigation shall be exempt from disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). The bill contains an emergency clause. HB 2243 (2017 Acts of Assembly, c. 439).

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

**Virginia Wireless Services Authority Act; rates and charges.** Provides that a wireless services authority may fix rates, fees, and charges for services provided, or facilities owned, operated, or maintained by the authority, for which the authority has received loan funding. Currently, an authority may do so only if it has issued revenue bonds. A similar change authorizes rates to be set at levels to provide for payment of loans. The measure also requires each authority to maintain records demonstrating compliance with certain provisions and to make the records available for inspection and copying by the public pursuant to the Virginia Freedom of Information Act. HB 2108 (2017 Acts of Assembly, c. 389).

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

**Online access to nonconfidential court records; date of birth verification.** Provides that the Supreme Court and any other court clerk may provide online access to subscribers who have entered into an agreement with the clerk to have secure remote access to court records of nonconfidential criminal case information to confirm the complete date of birth of a defendant. SB 1044 (2017 Acts of Assembly, c. 92) and HB 1713 (2017 Acts of Assembly, c. 78).

### **Title 19.2 Criminal Procedure.**

**Juror information; confidentiality.** Limits to name and home address the personal information of a juror impaneled in a criminal case that the court may only regulate the disclosure of upon a showing of good cause, which includes a likelihood of bribery, tampering, or physical injury to or harassment of a juror. The bill limits the release of any additional personal information, defined in the bill as any information other than a name and home address, of a juror impaneled in a criminal case to the counsel of record in the case or a pro se defendant. The bill also provides that the court may, upon the motion of either party or its own motion, and for good cause shown, authorize the disclosure of such personal information to any other person, subject to any restrictions imposed by the court on further dissemination of such personal information. HB 1546 (2017 Acts of Assembly, c. 753).

### **Title 30 General Assembly.**

**Legislative drafting requests.** Provides that legislative drafting files related to laws enacted beginning with the 1989 Session of the General Assembly are the property of the requester. This is consistent with the treatment of laws enacted prior to 1989 and consistent with legislative privilege accorded to members of the General Assembly. The Division of Legislative Services would release legislative drafting files upon obtaining consent of the requester. SB 969 (2017 Acts of Assembly, c. 489).

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

**Washington Metrorail Safety Commission Interstate Compact.** Authorizes Virginia to become a signatory to the Washington Metrorail Safety Commission Interstate Compact. The compact establishes a state safety oversight authority for the Washington Metropolitan Area Transit Authority (WMATA) Rail System, pursuant to the mandate of federal law, to review, approve, oversee, and enforce the safety of the WMATA Rail System. The bill requires the Secretary of Transportation to negotiate, on the Commonwealth's behalf, the terms for revision of the WMATA Compact with the other signatories to the WMATA Compact. The bill requires the Commission to adopt the Federal Freedom of Information Act, 5 U.S.C. § 552(a)-(d) and (g), and Government in the Sunshine Act, codified at 5 U.S.C. 552b, as both may be amended from time to time, as its freedom of information policy and open meeting policy, respectively, and provides that the Commission shall not be subject to the comparable laws or policies of any Signatory. The bill contains an emergency clause. SB 1251 (2017 Acts of Assembly, c. 705) and HB 2136 (2017 Acts of Assembly, c. 696).

### **Title 46.2 Motor Vehicles.**

**State Police motor vehicle safety inspection data.** Authorizes the Superintendent of State Police to provide, upon request, verification of the inspection status of a vehicle and to charge a reasonable fee for providing such information. Fees shall not be charged to government or other public entities. The bill also provides that vehicle information, including all descriptive vehicle data, submitted to or received from the Department of State Police related to such a request shall not be considered a public record for the purposes of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). SB 1250 (2017 Acts of Assembly, c. ) and HB 2269 (2017 Acts of Assembly, c. 322).

**Transportation network company partner vehicle registration repeal.** Removes the requirement that a transportation network company (TNC) partner register his personal vehicle for use as a TNC partner vehicle with the Department of Motor Vehicles (DMV). The bill allows the Department of State Police to recognize another state's annual motor vehicle safety inspection in lieu of a Virginia inspection and clarifies that a TNC partner can keep proof of inspection in or on the vehicle. The bill also removes an exemption from the Virginia Freedom of Information Act for certain records submitted by a TNC partner to DMV. The bill contains an emergency clause. SB 1366 (2017 Acts of Assembly, c. 708) and HB 2019 (2017 Acts of Assembly, c. 694).

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

**Cannabidiol oil and THC-A oil; permitting of pharmaceutical processors to manufacture and provide.** Authorizes a pharmaceutical processor, after obtaining a permit from the Board of Pharmacy (the Board) and under the supervision of a licensed pharmacist, to manufacture and provide cannabidiol oil and THC-A oil to be used for the treatment of intractable epilepsy. The

bill sets limits on the number of permits that the Board may issue and requires that the Board adopt regulations establishing health, safety, and security requirements for permitted processors. The bill provides that only a licensed practitioner of medicine or osteopathy who is a neurologist or who specializes in the treatment of epilepsy may issue a written certification to a patient for the use of cannabidiol oil or THC-A oil. The bill also requires that a practitioner who issues a written certification for cannabidiol oil or THC-A oil, the patient issued such certification, and, if the patient is a minor or incapacitated, the patient's parent or legal guardian register with the Board. The bill requires further that a pharmaceutical processor shall not provide cannabidiol oil or THC-A oil to a patient or a patient's parent or legal guardian without first verifying that the patient, the patient's parent or legal guardian if the patient is a minor or incapacitated, and the practitioner who issued the written certification have registered with the Board. Finally, the bill provides an affirmative defense for agents and employees of pharmaceutical processors in a prosecution for the manufacture, possession, or distribution of marijuana. The bill provides that information obtained under the registration process shall be confidential and shall not be subject to the disclosure provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). The bill further provides, however, that reasonable access to registry information shall be provided to (i) the Chairmen of the House and Senate Committees for Courts of Justice, (ii) state and federal agencies or local law enforcement for the purpose of investigating or prosecuting a specific individual for a specific violation of law, (iii) licensed physicians or pharmacists for the purpose of providing patient care and drug therapy management and monitoring of drugs obtained by a registered patient, (iv) a pharmaceutical processor involved in the treatment of a registered patient, or (v) a registered patient or, if such patient is a minor or an incapacitated adult as defined in § 18.2-369, the patient's parent or legal guardian, but only with respect to information related to such registered patient. The bill contains an emergency clause. SB 1027 (2017 Acts of Assembly, c. 613).

#### **Title 55 Property and Conveyances.**

**Landlord and tenant law; residential tenancies; landlord and tenant obligations and remedies.** Provides that the Virginia Residential Landlord and Tenant Act (§ 55-248.2 et seq.) (the Act) shall apply to all residential tenancies; however, a landlord who is a natural person, an estate, or a legal entity that owns no more than two single-family residential dwelling units in its own name subject to a rental agreement may opt out of the Act by stating so in the rental agreement. The bill conforms general landlord and tenant law relating to residential tenancies to the Act, including the security deposits, lease terms, notice, and disclosure provisions. The bill also allows the landlord, for unclaimed security deposits, to submit such funds to the State Treasurer rather than the Virginia Housing Trust Fund and changes the requirement that a landlord make reasonable efforts to advise the tenant of the right to be present at the landlord's inspection to a requirement that written notice of the right be provided. The bill provides for a landlord to provide a tenant with a written statement of charges and payments over the previous 12 months rather than an accounting as required under current law. In addition, the bill includes any activity that involves or constitutes a criminal or willful act that also poses a threat to health and safety by the tenant or authorized occupants, guests, or invitees as an immediate nonremediable violation for which the landlord may terminate the tenancy. The bill also authorizes a landlord to dispose of the property of a deceased tenant if a personal representative has not been appointed by the circuit court. The landlord may proceed with the disposal after providing 10 days' notice. The bill (i) provides that authorized occupants, guests, or invitees must vacate the dwelling unit after the death of a sole

tenant; (ii) allows a landlord to request during the pendency of an unlawful detainer action an order requiring the tenant to provide the landlord with access to the dwelling unit; (iii) adds oil to the utilities that may be included in ratio utility billing; (iv) requires the landlord to provide a written security deposit disposition statement following a move-out inspection and provides for the landlord to seek recovery for additional damages discovered after the security deposit disposition has been made, provided, however, that the tenant may present evidence of the move-out report to support the tenant's position that such additional damages did not exist at the time of the move-out inspection; and (v) authorizes a landlord to retain an attorney to prepare or provide any required written notice and permits the use of an electronic signature or an electronic notarization. The bill also provides that no landlord or managing agent shall release information about a tenant or prospective tenant in the possession of the landlord to a third party unless, among other things, the information is a matter of public record as defined in § 2.2-3701. HB 2033 (2017 Acts of Assembly, c. 730).

### **Title 58.1 Taxation.**

**Purchase of cigarettes for resale; penalties.** Creates a new requirement that purchasers of cigarettes for resale must apply for a special cigarette exemption certificate from the Department of Taxation in order to not be liable for the payment of sales tax at the time of purchase. The bill sets forth numerous requirements that a taxpayer must meet in order to qualify for a cigarette exemption certificate and establishes processes and procedures for the application, renewal, denial, and revocation of the certificates. The bill creates new recordkeeping requirements for the sale or distribution of any quantity of cigarettes in excess of 50 cartons, or with a value greater than \$10,000 in any single sale. The bill provides that such records shall be exempt from disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) The bill also contains technical amendments. The provisions of the bill requiring the use of a cigarette exemption certificate have a delayed effective date of January 1, 2018. SB 1390 (2017 Acts of Assembly, c. 453) and HB 1913 (2017 Acts of Assembly, c. 112).

## APPENDIX E

### Bills Referred to the FOIA Council by the 2017 Session of the General Assembly:

- **HB 2223, Kory; FOIA - right to speak at open meetings.** Requires that every public body afford an opportunity for public comment during any open meeting and requires that the public comment periods be noticed on the public body's agenda. The bill permits the public body to have discretion in where it places the public comment period on its agenda and permits the public body to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill requires that for meetings of all public bodies, not just those state public bodies on which there is at least one member appointed by the Governor as in current law, the notice provided for any such meeting include a statement as to approximately at what point during the meeting public comment will be received.
- **HB 2316, Marshall, D.W.; Tobacco Region Revitalization Commission; meetings by teleconference.** Provides that the remote locations from which additional members of the Commission participate in a Commission meeting that is conducted through electronic communication means shall not be required to be open to the public.
- **SB 972, DeSteph; Requests for information by members of the General Assembly; responses not subject to redaction.** Requires all departments, agencies, and institutions of the Commonwealth and staff and employees thereof to respond to a request for information made by a member of the General Assembly. The bill further provides that notwithstanding the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), a response to a request for information made by a member of the General Assembly shall not be subject to redaction.

### FOIA Council Action on Each Bill:

- **HB 2223, Kory; FOIA - right to speak at open meetings.** Delegate Kory was unable to present the bill to the Council, so the Council took no action on the bill.
- **HB 2316, Marshall, D.W.; Tobacco Region Revitalization Commission; meetings by teleconference.** Representatives of the Tobacco Region Revitalization Commission spoke to the bill on behalf of Delegate Marshall at the Council's meetings on May 15, 2017, August 14, 2017, and November 20, 2017. The Council formed an Electronic Meetings Subcommittee (Subcommittee) to study the bill and other related issues. The Subcommittee met on October 4, 2017, and November 1, 2017. The Subcommittee recommended an amended version of the bill to the Council, which the Council voted to recommend to the 2018 Session of the General Assembly at the Council's meeting on November 20, 2017. The amended draft would apply to all public bodies, would no longer require that remote locations be open to the public unless three or more members of a public body were participating from the same remote location, would require that equivalent access be provided to the public to witness any meeting conducted by electronic communication means, would amend the annual reporting requirements for electronic meetings, and would make additional necessary corresponding changes.

- **SB 972, DeSteph; Requests for information by members of the General Assembly; responses not subject to redaction.** Senator DeSteph presented the bill at the Council's meetings on May 15, 2017, and November 20, 2017. After discussing the bill and hearing from the patron and interested parties, the Council took no action on the bill.



## APPENDIX F

### Breakdown of Inquiries to Council December 1, 2016, through November 30, 2017

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 email. 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, 2016, through November 30, 2017

Total number of inquiries: 1,842

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY MONTH:</b>													
	<b>Dec</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>June</b>	<b>July</b>	<b>Aug</b>	<b>Sept</b>	<b>Oct</b>	<b>Nov</b>	<b>Total</b>
Government	0	0	1	0	0	1	1	0	1	0	1	0	<b>5</b>
Citizens	1	1	0	1	0	0	0	0	0	0	0	0	<b>3</b>
News Media	0	0	0	0	0	0	0	0	0	0	0	0	<b>0</b>
<b>TOTAL</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>8</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY MONTH:</b>													
	<b>Dec</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>June</b>	<b>July</b>	<b>Aug</b>	<b>Sept</b>	<b>Oct</b>	<b>Nov</b>	<b>Total</b>
Government	74	69	70	119	71	104	78	110	155	99	102	83	<b>1,134</b>
Citizens	52	52	51	59	45	47	43	41	45	56	50	47	<b>588</b>
News Media	8	9	13	6	13	7	15	7	10	8	11	5	<b>112</b>
<b>TOTAL</b>	<b>134</b>	<b>130</b>	<b>134</b>	<b>184</b>	<b>129</b>	<b>158</b>	<b>136</b>	<b>158</b>	<b>210</b>	<b>163</b>	<b>163</b>	<b>135</b>	<b>1,834</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY MONTH:</b>													
	<b>Dec</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>June</b>	<b>July</b>	<b>Aug</b>	<b>Sept</b>	<b>Oct</b>	<b>Nov</b>	<b>Total</b>
Government	74	69	71	119	71	105	79	110	156	99	103	83	1,139
Citizens	53	53	51	60	45	47	43	41	45	56	50	47	591
News Media	8	9	13	6	13	7	15	7	10	8	11	5	112
<b>TOTAL</b>	<b>135</b>	<b>131</b>	<b>135</b>	<b>185</b>	<b>129</b>	<b>159</b>	<b>137</b>	<b>158</b>	<b>211</b>	<b>163</b>	<b>164</b>	<b>135</b>	<b>1,842</b>

<b>A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	1	2	2
Citizens	2	1	1
News Media	0	0	0
<b>TOTAL</b>	<b>3</b>	<b>3</b>	<b>3</b>
<b>B. TELEPHONE &amp; EMAIL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	663	210	337
Citizens	376	55	223
News Media	71	17	31
<b>TOTAL</b>	<b>1,110</b>	<b>282</b>	<b>591</b>
<b>C. TOTAL NUMBER OF ALL INQUIRIES, BY CATEGORY:</b>			
	<b>Records</b>	<b>Meetings</b>	<b>Other</b>
Government	664	212	339
Citizens	378	56	224
News Media	71	17	31
<b>TOTAL</b>	<b>1,113</b>	<b>285</b>	<b>594</b>

## APPENDIX G

### OPINIONS ISSUED BY THE COUNCIL DECEMBER 2008 THROUGH NOVEMBER 2017

The purpose of this appendix is to show trends over time. In order to save space, we have chosen to present a 10-year timespan 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:

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<b>Government</b>	1	3	2	3	3	2	1	3	0	5
<b>Citizens</b>	8	10	3	4	2	5	2	3	2	3
<b>News Media</b>	2	0	1	0	0	3	3	3	1	0

#### Informal Opinions:

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<b>Government</b>	827	910	899	820	846	872	873	802	1,058	1,134
<b>Public</b>	641	618	620	560	433	452	467	467	561	588
<b>News Media</b>	206	150	165	152	124	173	148	146	108	112

#### Total Number of Opinions:

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<b>Government</b>	828	913	901	823	849	874	874	805	1,058	1,139
<b>Public</b>	649	628	623	564	435	457	469	470	563	591
<b>News Media</b>	208	150	166	152	124	176	151	149	109	112
<b>GRAND TOTAL</b>	1,685	1,691	1,690	1,539	1,408	1,507	1,494	1,424	1,730	1,842

