

REPORT OF THE

**Virginia Freedom of
Information Advisory Council**

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



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

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

COMMONWEALTH OF VIRGINIA
DECEMBER 2019

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

Senator Richard H. Stuart, Chair
Delegate Luke E. Torian, Vice-Chair
Senator Mamie E. Locke
Delegate Glenn R. Davis, Jr.
Shawri King-Casey
Sandra G. Treadway
Mark Vucci
Lee Bujakowski
William "Billy" Coleburn
Matthew Conrad
Bruce Potter
Sterling Rives
Cullen Seltzer
Michael Stern

Staff

Division of Legislative Services

Alan Gernhardt, *Executive Director*
Ashley Binns, *Attorney*
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REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

**To: The Honorable Ralph S. Northam, Governor of Virginia
and The General Assembly of Virginia**

**Richmond, Virginia
December 2019**

INTRODUCTION

Established by the 2000 Session of the General Assembly,¹ 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 public body, conducting training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of FOIA, and publishing educational materials on the provisions of FOIA.² The Council is also required to file an annual report on its activities and findings regarding FOIA, including recommendations for changes in the law, to the Governor and the General Assembly.

The Council is composed of 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.³

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

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

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

³ Until 2017, 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).

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 twentieth 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 20-year history, the Council has provided more than 29,600 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials and has conducted over 1,100 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, 2018, through November 30, 2019—the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. In 2019, the General Assembly referred three bills to the Council for further study.⁴ 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. The Council established three subcommittees in 2019, one to hear each bill:

- HB 2201 (Tyler) **State Forester; confidentiality of certain records.** Excludes from the mandatory disclosure provisions of the Virginia Freedom of Information Act certain records of the Department of Forestry (the Department). The records include trade secrets and financial information, reports of criminal violations made to the Department by persons outside the Department, and records of an active administrative investigation.
- HB 2386 (Bulova) **Public institutions of higher education; information relating to pledges and donations.** Requires public institutions of higher education, when accepting a donation, gift, or similar financial support that is conditioned upon the acceptance of certain terms and conditions by the public institution of higher education, to provide the donor with a written document acknowledging the public institution of higher education's acceptance of such terms and conditions. The bill requires the public institution of higher education to retain a copy of such document and provides that such document shall be subject to the provisions of the Virginia Freedom of Information Act (FOIA). The bill provides that no discretionary exclusion in FOIA shall apply to protect information relating to the amount, date, purpose, and terms of a pledge or donation made to a public institution of higher education. The bill provides that the identity of the donor shall be protected only

⁴ House Bills 2201 (Tyler) and 2386 (Bulova), and House Joint Resolution 628 (Heretick).

- if (a) the donor has requested anonymity in connection with or as a condition of making a pledge or donation and (b) the pledge or donation does not impose terms or conditions related to academic decision-making.
- HJ 628 (Heretick) **Study; Virginia Freedom of Information Advisory Council; threat of phishing attacks; report.** Directs the Virginia Freedom of Information Advisory Council (FOIA Council) to study the threat of phishing attacks on citizens and public employees whose contact and private information is legally obtained as a result of a Freedom of Information Act (FOIA) request. The study further directs the FOIA Council to examine the current FOIA provisions and make recommendations on ways to address the threat of phishing attacks on citizens and public employees of the Commonwealth.

The Forestry Records Subcommittee was established to study HB 2201. The Subcommittee met once to study the bill, but upon further consultation with the patron, the Office of the Attorney General and the Department of Forestry, the interested parties decided not to move forward with the study of HB 2201, as they determined that existing exemptions in FOIA would cover the types of records they sought to protect.

The Donor Records Subcommittee was established to study HB 2386. After meeting once, the Subcommittee recommended the amendments that the bill would make to the existing FOIA exemption for donor records, but the Subcommittee took no position on the portion of the bill that amends Title 23.1, as it felt that provision fell outside the purview of FOIA and the Council. The Council accepted the Subcommittee's recommendation at the Council's meeting on July 17, 2019, by vote of 7-0-1.⁵

The Phishing Study Subcommittee was established to study HJ 628 and related issues concerning phishing and cyberattacks referred to the Council by letter from M. Kirkland "Kirk" Cox, Speaker of the House. The Subcommittee met three times and heard testimony on phishing, spoofing, and other forms of cyberattacks from Delegate Stephen E. "Steve" Heretick, patron of HJ 628, and representatives from the City of Portsmouth, the Virginia Information Technologies Agency (VITA), the Virginia State Police, the Virginia Municipal League (VML), the Virginia Coalition for Open Government (VCOG), and the Virginia Press Association (VPA). The Subcommittee considered what is being done to prevent and respond to such attacks at the state and local levels currently, heard suggestions concerning possible changes to FOIA, and heard responses to those proposals. Following the Subcommittee's recommendation, the Council reported to the Speaker that due to the complexity, breadth, and importance of the issues that had been raised, it planned to continue the study next year. The Council also referred to the Subcommittee an issue initially raised by VCOG concerning tolling time when a requester asks for a cost estimate in advance. After hearing the Subcommittee's recommendation, the Council recommended to the 2020 Session of the General Assembly draft legislation that would provide that if a requester asks for a cost estimate in advance, the time to respond is tolled for the amount of time that elapses between notice of the cost estimate and the response from the requester, and that if the public body receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be withdrawn. The bill clarifies that if a cost estimate exceeds \$200 and the public body

⁵ Ms. Shawri King-Casey abstained as the Office of the Attorney General was involved in litigation before the Supreme Court of Virginia (*Transparent GMU v. George Mason University*), also relating to access to donor records.

requires an advance deposit, the public body may require the requester to pay the advance deposit before the public body is required to process the request.

The Council continued to monitor Virginia court decisions relating to FOIA. In 2019, the Virginia Supreme Court accepted the case of *Transparent GMU v. George Mason University*, which concerns whether a university foundation should be subject to FOIA, but the Court did not issue its decision on this case until after the Council concluded its work for the year.⁶

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 2019, Council staff conducted 56 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. In 2017, 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 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/>). In 2018, the Council began offering free training presentations on "Access to Public Records" in Richmond to anyone who wished to attend. In 2019, the Council continued these free presentations and expanded them to include the "Access to Public Meetings" and "FOIA and Law Enforcement Records" presentations, as well, holding a total of 15 such free presentations in Richmond.

For this reporting period, the Council responded to 1821 inquiries. Of these inquiries, nine resulted in formal, written opinions, four of which were requested by citizens, three by media representatives, and two by government representatives. The remaining requests were for informal opinions, given via telephone and email. Of these requests, 1112 were made by government officials, 604 by citizens, and 96 by media representatives. In March 2019, staff switched from using paper records to an electronic spreadsheet to track informal requests. Starting in 2006, the Council has seen an increase in the number of informal opinion requests compared with requests for formal written opinions. For more than a decade, this trend has remained consistent. This continuing trend appears to stem from the Council's reputation for fairness and reliability in its

⁶ The Council held its last meeting on December 4, 2019; the Court issued its decision in the *Transparent GMU* case on December 12, 2019. Note that the Court held that university foundations are not "public bodies" subject to FOIA.

informal opinions and as a creditable source for FOIA guidance before disputes arise. In 2018, 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, which continued through 2019. In addition, there have been many inquiries about training for local elected officials, which will be required beginning July 1, 2020, pursuant to new § 2.2-3704.3 (see Appendix D below for details). The Council will develop a new online training program to facilitate compliance with this new requirement and enable local elected officials to take the course at their convenience.

FOIA was again the subject of significant legislative activity in the 2019 session. The General Assembly passed a total of 19 bills amending FOIA during the 2019 Session. Six bills passed the General Assembly that were recommended by the FOIA Council: HB 1772, which allows any officer, employee, or member of a public body to introduce an advisory opinion issued by the Council as evidence against allegations of a willful and knowing violation of FOIA if the person acted in good faith reliance on such advisory opinion; HB 2494, which prohibits any state agency from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on their religious preferences or affiliations, unless specifically required by state or federal law; SB 1101, which allows the Office of the Attorney General to represent a member of the General Assembly in any civil matter alleging that such member in his official capacity violated FOIA; SB 1180, which defines the term "trade secret," for the purposes of FOIA, as meaning the same as that term is defined in the Uniform Trade Secrets Act; SB 1182, which clarifies that certain requirements of current law regarding participation in public meetings through electronic communication means do not apply to meetings held to address a state of emergency declared by the Governor; and SB 1184, which provides that FOIA shall not apply to sexual assault response teams, with the exception of records relating to protocols and policies of the sexual assault response team and guidelines for the community's response established by the sexual assault response team, which shall be public records and subject to the provisions of FOIA. A more detailed report of the bills discussed above and other public access bills passed during the 2019 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. In particular, the use of social media by public bodies and public officials has led to many questions regarding access and records retention. New developments in technology, such as documents that may be edited in real time by multiple remote users, have raised further questions on both the records and meetings sides of FOIA. In 2019, the Council published a new guide to FOIA and Social Media to address many of these concerns, which is available on the "Reference Materials" page of the Council's website.

In 2019, the Council welcomed new members Bruce Potter, who replaced Marisa Porto as a citizen member/media representative appointed by the Speaker of the House, Sterling E. Rives, III, who replaced Kathleen Dooley as a citizen member/local government representative appointed by the Senate Committee on Rules, and Matthew A. Conrad, who replaced Stephanie Hamlett as a citizen member/state employee appointed by the Governor. The Council thanks Ms. Porto, Ms. Dooley, and Ms. Hamlett for their service.

WORK OF THE COUNCIL

The majority of the Council's work in 2019 involved studying the three bills referred by the 2019 Session of the General Assembly. The Council initially scheduled three meetings for 2019 but added a fourth meeting in December in order to act on draft legislation recommended by the Phishing Study Subcommittee.

May 8, 2019

The Council met in Richmond with Delegate Luke E. Torian, vice-chair, presiding.⁷ The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting are accessible through the Council's website.

Presentation: Recap of FOIA and Related Access Bills from 2019 Session of General Assembly

Council Staff

Staff informed the Council that the 2019 Session of the General Assembly passed a total of 19 bills amending FOIA.

Nine bills clarify three existing records exemptions and add three new records exemptions in FOIA as follows:

HB 1650 and SB 1060, identical bills amending § 2.2-3705.7, clarify that information about an individual winner of the Virginia Lottery whose prize exceeds \$10 million is exempt from disclosure under FOIA unless the winner consents to such disclosure;

HB 2546, amending § 2.2-3705.5, clarifies that information and records obtained or created by the Maternal Death Review Team (the Team) during a review of any death conducted by the Team shall be confidential and exempt from disclosure under FOIA to the extent that such information is made confidential by § 32.1-283.8;

HB 2560 and SB 1224, identical bills amending § 2.2-3705.7, clarify that information reflecting the substance of meetings in which individual cases of abuse, neglect, or exploitation of adults as defined in § 63.2-1603 are discussed by multidisciplinary teams established pursuant to §§ 15.2-1627.5 and 63.2-1605 are exempt from mandatory disclosure under FOIA;

HB 2490 and SB 1617, identical bills amending § 2.2-3705.4, exclude from the mandatory disclosure provisions of FOIA pertaining to educational records and certain records of educational

⁷ **Members Present:** Delegate Luke E. Torian, Lee Bujakowski, Delegate Glenn R. Davis, Kathleen Dooley, Shawri King-Casey, Cullen Seltzer, Michael Stern, Sandra Treadway, and Mark Vucci

Members Absent: William Coleburn, Stephanie Hamlett, Senator Mamie E. Locke, and Senator Richard H. Stuart

institutions those records provided by a qualified institution to the Governor or designated reviewers related to a proposed memorandum of understanding, or proposed amendments to a memorandum of understanding, submitted pursuant to Chapter 12.1 (Tech Talent Investment Program) of Title 23.1;⁸

SB 1106, amending § 2.2-3705.7, excludes from the mandatory disclosure provisions of FOIA information discussed in a closed session of the Physical Therapy Compact Commission or the Executive Board or other committees of the Commission for purposes set forth in subsection E of § 54.1-3491; and

SB 1492, amending § 2.2-3705.6, excludes from the mandatory disclosure provisions of FOIA trade secrets, financial information, and research-related information supplied to the Department of Housing and Community Development (the Department) as part of any grant application submitted to the Department pursuant to certain requirements set out in the Code or pursuant to the Virginia Growth and Opportunity Board or the Virginia Telecommunication Initiative as authorized by the appropriation act, if such disclosure would be harmful to the competitive position of the applicant.

Seven bills clarify three existing meetings exemptions and add two new meetings exemptions in FOIA as follows:

- HB 2178, amending § 2.2-3711, clarifies that discussion or consideration by the State Board of Elections or local electoral boards of voting security matters made confidential pursuant to § 24.2-410.2 or 24.2-625.1 are exempt from the open meeting requirements of FOIA;
- HB 2546, amending § 2.2-3711, clarifies that portions of meetings in which maternal death cases are discussed by the Maternal Mortality Review Team pursuant to § 32.1-283.8 are exempt from the open meeting requirements of FOIA;
- HB 2560 and SB 1224, identical bills amending § 2.2-3711, clarify that discussion or consideration of individual cases involving abuse, neglect, or exploitation of adults as defined in § 63.2-1603 pursuant to §§ 15.2-1627.5 and 63.2-1605 are exempt from the open meeting requirements of FOIA;
- HB 1964 and SB 1090, identical bills amending § 2.2-3711, create an exemption from the open meeting requirements of FOIA for discussion or consideration by the Board of Trustees of the Fort Monroe Authority of matters relating to specific gifts, bequests, and grants from private sources; and

⁸ The new exemption provides that a memorandum of understanding entered into pursuant to such chapter shall be subject to public disclosure after it is agreed to and signed by the Governor.

- SB 1126, amending § 2.2-3711, creates an exemption from the open meeting requirements of FOIA for discussion, consideration, or review of matters by the Virginia Lottery Board related to investigations exempted from disclosure under subdivision 1 of § 2.2-3705.3.

Six other bills amend existing provisions or add new provisions to FOIA.

Additionally, two bills recommended by the FOIA Council but not amending FOIA passed the General Assembly:

HB 2494, prohibits any state agency from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on their religious preferences or affiliations, unless specifically required by state or federal law, and

SB 1101, allows the Office of the Attorney General to represent a member of the General Assembly in any civil matter alleging that such member in his official capacity violated FOIA.

Presentation: House Bill 2386 (Bulova)⁹

Delegate David L. Bulova

Delegate Bulova addressed a case currently pending on appeal before the Supreme Court of Virginia, *Transparent GMU v. George Mason University*. He stated that there is some overlap in subject matter between the case and HB 2386, because both stem from facts regarding certain gift agreements at George Mason University. However, the case focuses on whether a university foundation is a public body subject to FOIA, whereas HB 2386 would amend an existing records exemption concerning donor records and gift agreements. After further describing the intent and probable effects of the proposed legislation, Delegate Bulova noted that some have suggested to wait for the outcome of the case before proceeding to study HB 2386, but he urged the Council to proceed because the case and the bill address different issues.

Presentation: House Bill 2201 (Tyler)¹⁰

Rob Farrell, Virginia State Forester

Mr. Farrell stated that the Department of Forestry seeks the exemption presented in the bill to help protect information related to the investigation of forest fires, including arson, to protect trade

⁹ House Bill 2386 was introduced during the 2019 Session of the General Assembly, and was left in the House Committee on Education.

¹⁰ House Bill 2201 was introduced during the 2019 Session of the General Assembly, and was passed by indefinitely with a letter in the Senate Committee on Agriculture, Conservation and Natural Resources.

secrets received by the Department from private companies and information concerning water quality investigations related to timber harvesting.

Presentation: House Joint Resolution 628 (Heretick)¹¹

Council Staff

Staff summarized the letter received from Speaker of the House M. Kirkland "Kirk" Cox directing the Council to study current FOIA provisions and make recommendations on ways to address the threat of phishing attacks on citizens and public employees of the Commonwealth. Staff noted that the Council had studied access to personally identifiable information approximately a decade ago and suggested updating that work, as well as contacting relevant agencies such as the Department of Human Resource Management and the Virginia State Police for assistance with this study.

Assignment of Subcommittees

Delegate Luke E. Torian

At the conclusion of the presentations, members of the Council were assigned to specific subcommittees to study each of the bills presented. Delegate Torian followed staff recommendations by establishing three subcommittees to study the two bills and one resolution described above and appointed members to the three subcommittees.

The Donor Records Subcommittee, consisting of Council members William Coleburn, Stephanie Hamlett, Cullen Seltzer, Michael Stern, and Mark Vucci, will study HB 2386 (Bulova).

The Forestry Records Subcommittee, consisting of Council members Kathleen Dooley, Shawri King-Casey, Sandra G. Treadway, and Mark Vucci, will study HB 2201 (Tyler).

The Phishing Study Subcommittee, consisting of Council members Lee Bujakowski, Kathleen Dooley, Shawri King-Casey, Sandra G. Treadway, and Mark Vucci, will study HJ 628 (Heretick).

Public Comment and Next Meeting

During the period for public comment, the Council received one comment. An issue was raised regarding the time to respond to a FOIA request being tolled when a public body seeks an advance deposit from a requester, but there being no similar tolling provision when a requester asks for an

¹¹ House Joint Resolution 628 was introduced during the 2019 Session of the General Assembly, and was left in the House Committee on Rules.

estimate from a public body. The Council directed staff to look into the issue and present it at the next Council meeting.

The date and time of the next Council meeting will be posted to the Council website as soon as it is scheduled.¹²

July 17, 2019

The Council met in Richmond with Senator Richard H. Stuart, chair, presiding.¹³ The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting are accessible through the Council's website.

Presentation: Subcommittee Reports

Council Staff

Forestry Records Subcommittee

The Forestry Records Subcommittee met on June 17 to consider House Bill 2201 from the 2019 Session.¹⁴

- **HB 2201 (Tyler); State Forester; confidentiality of certain records.** Excludes from the mandatory disclosure provisions of the Virginia Freedom of Information Act certain records of the Department of Forestry (the Department). The records include trade secrets and financial information, reports of criminal violations made to the Department by persons outside the Department, and records of an active administrative investigation.

The Subcommittee heard from Delegate Roslyn Tyler; Brad Copenhaver, the Deputy Secretary of Agriculture and Forestry; and Ed Zimmer, the Deputy State Forester. The bill was introduced in an effort to protect certain information submitted to the Department, including trade secrets and financial information, and certain criminal or administrative investigations conducted by the Department. The bill passed in the House of Delegates, but was passed by indefinitely in the Senate Committee on Agriculture, Conservation and Natural Resources.

Some of the major concerns regarding the bill held by members of the Subcommittee included the breadth of the bill's language, the scope of the criminal exemption, and the fact that existing FOIA exemptions may already cover the same records as the bill seeks to cover. The Subcommittee noted that they would like to hear directly from the representative of the Attorney General that advised

¹² Please note that subsequent to the May 8, 2019, FOIA Council meeting, the next Council meeting dates were set for July 17, 2019, and September 18, 2019, both meetings to begin at 1:00 pm.

¹³ **Members Present:** Senator Mamie E. Locke, Senator Richard H. Stuart (chair), Delegate Luke E. Torian, Shawri King-Casey, William Coleburn, Sterling Rives, Cullen Seltzer, Sandra Treadway

Members Absent: Delegate Glenn R. Davis, Lee Bujakowski, Stephanie Hamlett, Michael Stern

¹⁴ Members of the Forestry Subcommittee include Kathleen Dooley, Shawri King-Casey, Dr. Sandra Treadway, and Mark Vucci. At the meeting, Mr. Vucci was elected chair and Dr. Treadway was elected vice-chair.

the Department that the bill was necessary and recommended that a draft of more specific language be reviewed at the next Subcommittee meeting that was to be held on July 15.

However, after the first Subcommittee meeting, the Department, along with the representative of the Attorney General and the patron, decided not to move forward with the study of HB 2201, as they determined that existing exemptions in FOIA would cover the types of records they were seeking to protect. As a result, the second scheduled Subcommittee meeting that was to be held on July 15 was cancelled.

Donor Records Subcommittee

The Donor Records Subcommittee met on June 18 to consider House Bill 2386.¹⁵

- **HB 2386 (Bulova); Public institutions of higher education; information relating to pledges and donations.** Requires public institutions of higher education, when accepting a donation, gift, or similar financial support that is conditioned upon the acceptance of certain terms and conditions by the public institution of higher education, to provide the donor with a written document acknowledging the public institution of higher education's acceptance of such terms and conditions. The bill requires the public institution of higher education to retain a copy of such document and provides that such document shall be subject to the provisions of the Virginia Freedom of Information Act (FOIA). The bill provides that no discretionary exclusion in FOIA shall apply to protect information relating to the amount, date, purpose, and terms of a pledge or donation made to a public institution of higher education. The bill provides that the identity of the donor shall be protected only if (a) the donor has requested anonymity in connection with or as a condition of making a pledge or donation and (b) the pledge or donation does not impose terms or conditions related to academic decision-making.

The Subcommittee heard testimony regarding the bill from its patron, Delegate David L. Bulova. There is current litigation pending before the Virginia Supreme Court (*Transparent GMU v. GMU*) that shares background facts with HB 2386, but presents different legal issues regarding whether university foundations are subject to FOIA. This bill came about after requests were made for donor agreements held by George Mason University (GMU). GMU's response to the requester was that the agreements they sought were not held by the university, but by its foundation, which is a private entity and not subject to FOIA. The bill seeks to address a major concern that anonymous donors might have undue influence over the academic decision-making process of the institution.

Public comment was received from Brian Turner of the American Association of University Professors and Megan Rhyne of the Virginia Coalition for Open Government, who were both in

¹⁵ Members of the Donor Records Subcommittee include William Coleburn, Stephanie Hamlett, Cullen Seltzer, Michael Stern, and Mark Vucci. At the meeting, Mr. Vucci was elected chair.

support of the bill. Robert Tyler, Counsel to the University of Virginia, supported the bill in concept.

Some of the major concerns over the bill held by the Subcommittee included the difficulties of clarifying when FOIA does and does not apply, maintaining donor anonymity, and ensuring that terms and conditions are part of a written record and subject to FOIA. The Subcommittee voted unanimously to recommend the amendments to the FOIA portion of the bill (lines 74-84), while giving no recommendation for or against the other portion of the bill that would amend Title 23.1 (lines 101-109), as it is outside of the purview of FOIA.

Staff spoke with Delegate Bulova and he accepts the Subcommittee's recommendation regarding the FOIA portion of the bill and noted that he will work with the affected institutions of higher education regarding the portion of the bill that amends Title 23.1. The second Subcommittee meeting scheduled for July 3 was cancelled.

With a vote of 7-0-1 (Ms. King-Casey abstaining), the Council voted to accept the Subcommittee's recommendation.

Phishing Study Subcommittee

The Phishing Study Subcommittee met on July 15 to consider House Joint Resolution 628.¹⁶

- **HJ 628 (Heretick); Study; Virginia Freedom of Information Advisory Council; threat of phishing attacks; report.** Directs the Virginia Freedom of Information Advisory Council (FOIA Council) to study the threat of phishing attacks on citizens and public employees whose contact and private information is legally obtained as a result of a Freedom of Information Act (FOIA) request. The study further directs the FOIA Council to examine the current FOIA provisions and make recommendations on ways to address the threat of phishing attacks on citizens and public employees of the Commonwealth.

Staff presented background information on current exemptions under FOIA that are related to the subject matter of the resolution. The resolution's patron, Delegate Stephen E. Heretick, along with Solomon Ashby, Portsmouth City Attorney; Daniel Jones, Portsmouth Chief Information Officer; and Sherry Neil, Portsmouth Government Affairs Manager, gave testimony regarding the background facts surrounding the resolution and asked for the Council to study the issue. They expressed a concern that information currently available under FOIA along with just one additional data point is enough to steal someone's identity. They also noted that when a spoofed email from a high-ranking staff member is sent out with nefarious links, even with proper training it is inevitable that some employees will click such links because it appears to be coming from a trusted

¹⁶ Members of the Phishing Study Subcommittee include Lee Bujakowski, Shawri King-Casey, Sterling Rives, Sandra Treadway, and Mark Vucci. At the meeting, Dr. Treadway was elected chair.

source. Delegate Heretick presented suggestions for legislative changes on behalf of the City of Portsmouth. Those suggestions are posted on the Council's website.

Public comment was received from Amy Judd of the Virginia Information Technologies Agency and Megan Rhyne of the Virginia Coalition for Open Government.

The Subcommittee agreed that the issue addressed by the resolution is a legitimate concern and that attention by the Council is warranted. The Subcommittee will continue its discussion of HJ 628 at its next meeting scheduled for August 21, 2019, at 10:00 am.

Presentation: FOIA Training and Reporting Requirements

Council Staff

SB 1431 – § 2.2-3704.3

Staff informed the Council that they have already received multiple inquiries about the FOIA training for local elected officials that will be required beginning July 1, 2020, pursuant to § 2.2-3704.3, which was created by Chapter 531 of the Acts of Assembly of 2019. Two issues have been raised: (1) the current language as enacted requires "online training sessions" under subsection A, but some local government attorneys wish to provide live, in-person training, just as they can for FOIA officers under current law and (2) whether the new training requirement includes constitutional officers as "local elected officials." Staff noted that the requirements for FOIA officers under current law explicitly include constitutional officers and treat them the same as local public bodies (subsection D of § 2.2-3704.2). The Council directed staff to prepare a draft for consideration at the next Council meeting that will amend § 2.2-3704.3 to allow for live, in-person training as well as online training, and to include constitutional officers explicitly in the training requirements.

Legislative Changes to § 2.2-3704.2

Staff presented the current state of the law with regard to FOIA officer training. Currently, § 2.2-3704.2 requires FOIA officers to be trained annually and to report to the FOIA Council annually that they are the FOIA officer for a particular state or local public body. Staff presented a bill that changes the frequency for required FOIA officer training from annually to once every two years and changes the reporting requirement from once every year to by July 1 of the year an officer is initially trained and thereafter only if the reported information changes. This bill would make § 2.2-3704.2 consistent with the language in § 2.2-3704.3 in terms of the training requirement, which would serve to avoid confusion and make for a more efficient process. The Council voted unanimously to recommend this draft language.

Staff also recommended to the Council that regional public bodies be included explicitly in §2.2-3704.2 alongside state and local public bodies. The Council agreed with the recommendation and

voted to adopt the bill presented with amendments that would explicitly add regional public bodies to the language in § 2.2-3704.2.

Other Business & Updates

Council Staff

Electronic Communications and Social Media Guide

Staff presented a new guidance document on FOIA and social media that addresses questions regarding social media as a public record and the use of social media to hold a meeting, offers tips for best practices when using social media, and covers other related issues. The guide is available on the "Reference Materials" page of the Council's website.

Current FOIA Training

Staff provided an update on the free FOIA training sessions being held in Richmond. Last year, staff conducted six such sessions on the topic of public records, which were attended by 374 participants. This year, staff is providing sessions addressing public records, public meetings, and law-enforcement records. So far this year, 96 people have attended five free training sessions held in Richmond from May through July, and 76 people are registered for 10 additional sessions scheduled to be held from July through November, with more expected to register as the dates approach.

Tolling Provision

Staff reminded Council that at its May meeting an issue was brought to the Council's attention regarding the lack of a tolling provision when a requester asks a public body for a cost estimate. As a result, confusion and disputes over charges have occurred at times when a public body has provided an estimate, then sent records along with a bill for charges within the five working day response deadline, even though the requester did not agree to those charges. Staff noted that the intent would be to protect both requesters and public bodies by giving them a chance to agree on charges before providing records, but concerns have been raised in years past that there could be inadvertent consequences causing additional delay in providing records. The Council directed the Phishing Study Subcommittee to consider this issue and staff to prepare sample amendments for the Subcommittee's consideration at its next meeting.

Public Comment and Next Meeting

There were no public comments. The next Council meeting is scheduled for Wednesday, September 18, 2019, at 1:00 pm in Senate Room A on the Ground Floor of the Pocahontas Building.

September 18, 2019

The Council met in Richmond with Senator Richard H. Stuart, chair, presiding.¹⁷ The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting are accessible through the Council's website.

Presentation: Subcommittee Reports

Council Staff

Forestry Records Subcommittee

- **HB 2201 (Tyler); State Forester; confidentiality of certain records.** Excludes from the mandatory disclosure provisions of the Virginia Freedom of Information Act certain records of the Department of Forestry (the Department). The records include trade secrets and financial information, reports of criminal violations made to the Department by persons outside the Department, and records of an active administrative investigation.

To recap the Council's work to date, staff reminded the Council that the Forestry Records Subcommittee had met once to consider HB 2201 (Tyler). The Department of Forestry, its Attorney General representative, and the patron had further discussions about the legislation after the first Subcommittee meeting and decided not to move forward with the study of HB 2201, as they believe existing exemptions in FOIA would cover the types of records they were seeking to protect. As a result, the second scheduled Subcommittee meeting was canceled.

Donor Records Subcommittee

- **HB 2386 (Bulova); Public institutions of higher education; information relating to pledges and donations.** Requires public institutions of higher education, when accepting a donation, gift, or similar financial support that is conditioned upon the acceptance of certain terms and conditions by the public institution of higher education, to provide the donor with a written document acknowledging the public institution of higher education's acceptance of such terms and conditions. The bill requires the public institution of higher education to retain a copy of such document and provides that such document shall be subject to the provisions of the Virginia Freedom of Information Act (FOIA). The bill provides that no discretionary exclusion in FOIA shall apply to protect information relating to the amount, date, purpose, and terms of a pledge or donation made to a public institution of higher education. The bill provides that the identity of the donor shall be

¹⁷ **Members Present:** Senator Richard H. Stuart (chair), Senator Mamie E. Locke, Lee Bujakowski, William Coleburn, Bruce Potter, Cullen Seltzer, Michael Stern, Sandra Treadway, Mark Vucci

Members Absent: Delegate Luke E. Torian (vice chair), Matthew A. Conrad, Delegate Glenn R. Davis, Shawri King-Casey, Sterling Rives (Note: This meeting was noticed as an electronic meeting as it was expected that Mr. Conrad would call in, but he was unable to do so; no members participated by electronic communication means.)

- protected only if (a) the donor has requested anonymity in connection with or as a condition of making a pledge or donation and (b) the pledge or donation does not impose terms or conditions related to academic decision-making.

Continuing the recap, staff reminded the Council that the Donor Records Subcommittee met once to consider HB 2386; that the Virginia Supreme Court had recently heard argument in the case *Transparent GMU v. GMU*, a case that shares background facts with HB 2386 but presents different legal issues (whether university foundations are subject to FOIA); and that the bill seeks to address the concern that anonymous donors might have undue influence over the academic decision making process of the institution. At its last meeting, the Council voted to accept the Subcommittee's recommendation that the Council recommend the amendments to the FOIA portion of the bill (lines 74-84), but that the Council give no recommendation for or against the other portion of the bill that would amend Title 23.1 (lines 101-109) because it is outside of the purview of FOIA.

Phishing Study Subcommittee

- **HJ 628 (Heretick); Study; Virginia Freedom of Information Advisory Council; threat of phishing attacks; report.** Directs the Virginia Freedom of Information Advisory Council (FOIA Council) to study the threat of phishing attacks on citizens and public employees whose contact and private information is legally obtained as a result of a Freedom of Information Act (FOIA) request. The study further directs the FOIA Council to examine the current FOIA provisions and make recommendations on ways to address the threat of phishing attacks on citizens and public employees of the Commonwealth.

Staff reported that the Phishing Study Subcommittee has met twice to consider HJ 628, is scheduled to meet again on October 8, 2019, and wishes to continue its study through next year in order to give full consideration to the issues presented. At the first Subcommittee meeting, staff presented background information on current exemptions under FOIA that are related to the subject matter of the resolution, and the Subcommittee heard from Delegate Stephen E. Heretick, along with representatives from the City of Portsmouth, including the City Attorney, Chief Information Officer, and Government Affairs Manager. They expressed concerns about the availability of information through FOIA that could be used to commit identity theft against public employees and the use of spoofed email from a high ranking staff member. They also presented suggestions for legislative changes for consideration and discussion. At its second meeting the Subcommittee heard additional information about phishing, identity theft, cyberattacks, and what state government is doing in response from representatives of the Virginia State Police and the Virginia Information Technologies Agency. The Subcommittee also received comments in opposition to the suggested legislative proposals from the Virginia Coalition for Open Government and the Virginia Press Association. Staff further noted that the Speaker of the House had directed the Council to study this issue and report back by November 1, 2019. Delegate Heretick and Sherri Neil, the Portsmouth Government Affairs Manager, further discussed the factual background for the study with the Council and expressed their support for continuing the study next year. The

Council then voted unanimously to report the work to date to the Speaker of the House and express its desire to continue the study next year.

Additionally, the Council directed the Subcommittee to consider adding a tolling provision to the records production procedure to toll the time from when a public body provides an estimate of costs until the requester agrees to pay. Because there is no such provision in current law, confusion and disputes over charges have occurred at times when a public body has provided an estimate, then sent records along with a bill for charges within the five working day response deadline without the requester having agreed to those charges. Staff reported that the Subcommittee had received two alternative drafts as possible mechanisms for such a tolling provision and directed staff to further amend one of them for consideration at the Subcommittee's meeting on October 8, 2019.

Annual Legislative Preview

Roger Wiley, Hefty, Wiley, and Gore, P.C., and Leo Rogers, Loudoun County Attorney

Mr. Wiley, on behalf of Loudoun County, stated that the county intends to include as part of its 2020 legislative package an amendment to the existing exemption for certain library records in subdivision 3 of § 2.2-3705.7 that would expand the exemption to cover materials accessed on a library computer in addition to materials borrowed by a patron. Mr. Rogers stated that the county would also seek a new exemption to protect certain information submitted by loan applicants during the loan application process that the applicants would not want competitors to get until after the application process was complete. He explained that the loan applicants were developers and the financial process involved the county, as well as state and federal agencies, but that ultimately the records would be available to the public. Sample language for both exemptions was presented for consideration and discussed by the Council. In response to inquiry from the Council, Mr. Rogers stated that the presentation was informational and that they would appreciate comments and feedback on the proposals but were not seeking action from the Council. There were no other legislative proposals presented.

Presentation: FOIA Training and Reporting Requirements

Council Staff

Legislative Changes to § 2.2-3704.3

At its last meeting, the Council directed staff to prepare a draft for consideration that will amend § 2.2-3704.3 to allow for live, in-person FOIA training, as well as online training, and to include constitutional officers explicitly in the training requirements. Staff presented this draft (LD 20100371D) and the Council voted 8-0-1 (Senator Stuart abstained) to recommend it to the 2020 Session of the General Assembly.

Legislative Changes to § 2.2-3704.2

At its last meeting, the Council voted unanimously to recommend a bill that changes the frequency for required FOIA officer training from annually to once every two years and changes the reporting requirement from once every year to by July 1 of the year an officer is initially trained and then only if the information changes. At that meeting the Council directed staff to amend that bill to explicitly add regional public bodies to the language in § 2.2-3704.2. Staff presented this amended draft (LD 20100195D) and the Council voted unanimously to recommend it to the 2020 Session of the General Assembly.

Other Business and Updates

Council Staff

Current FOIA Training

Staff provided an update on the free FOIA training sessions being held in Richmond. This year to date, staff has held nine such free training sessions with 142 attendees, and 87 persons are registered for six additional sessions to be held through November, with more expected to register as the dates approach. Staff has also held 31 presentations at other locations to date, with nine more scheduled through November. Staff further reported that a new online FOIA training program is being developed in-house that will be available by July 1, 2020. It is expected that the new program will cover both access to public records and access to public meetings. Due to technical difficulties that have been experienced with the current online training, the new training will be hosted by the Division of Legislative Automated Systems instead of on the Commonwealth of Virginia Learning Center.

FOIA Inquiries

Staff reported that, to date, it has received a total of 1,453 informal inquiries by telephone and email. Of those, 393 have come from citizens, 881 from government, and 76 from media representatives, and two were of uncertain sources. Staff has also received eight requests for formal advisory opinions to be published on the FOIA Council website. Staff informed the Council that it had switched earlier this year from a paper filing system to an online system, which may change the format of reporting in this year's Annual Report.

Public Comment and Next Meeting

There were no public comments. Senator Stuart announced that this would be the last meeting of the Council for 2019 unless the Phishing Study Subcommittee completes its work and needs the Council to meet to vote to recommend additional legislation to the 2020 Session of the General Assembly.

December 4, 2018

The Council met in Richmond with Delegate Luke E. Torian, vice-chair, presiding.¹⁸ The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting are accessible through the Council's website.

Presentation: Subcommittee Reports

Council Staff

Phishing Study Subcommittee

In addition to studying HJ 628 regarding phishing attacks, the Council had directed the Subcommittee to consider adding a tolling provision to the records production procedure to toll the time from when a public body provides an estimate of costs until the requester agrees to pay. Because there is no such provision in current law, confusion and disputes over charges have occurred at times when a public body has provided an estimate, then sent records along with a bill for charges within the five working day response deadline, but the requester did not agree with those charges. Staff reported that at the Subcommittee's meeting on October 8, 2019, it had considered multiple drafts and recommend one (LD 20100558D) that would toll the time from when notice of an estimate was sent to a request until payment was received, would provide that if there was no response within 30 days the request would be deemed to be withdrawn, and would clarify that actual payment is required in situations where the estimate exceeds \$200 and the public body requires an advance deposit. The Virginia Press Association (VPA) submitted written comments in opposition to this draft, which are posted on the Council's website. Betsy Edwards, Executive Director of the VPA, testified to the Council that the VPA opposed the draft because by requiring advance payment even for requests under the \$200 threshold in current law, the draft would introduce new burdens on requesters and could act as a deterrent, especially if costs were overestimated. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government, noted that a requirement to prepay went beyond the original issue she had raised concerning the response timing when a requester asks for an estimate in advance, and therefore, she also urged the Council to reject the recommended draft. In response to inquiry from the Council, staff noted that at least one circuit court has held that the current language in subsection H of § 2.2-3704 "means a public body may require actual payment of a deposit prior to processing a FOIA request."¹⁹ After further discussion of the drafts that had been presented to the Subcommittee, the Council voted 6-2 to recommend to the 2020 Session of the General Assembly a new draft that

¹⁸ **Members Present:** Delegate Luke E. Torian (vice chair), Senator Mamie E. Locke, William Coleburn, Bruce Potter, Sterling Rives, Cullen Seltzer, Michael Stern, Sandra Treadway, Mark Vucci

Members Absent: Senator Richard H. Stuart (chair), Delegate Glenn R. Davis, Lee Bujakowski, Matthew A. Conrad, Shawri King-Casey

¹⁹ *Fairfax County School Board v. Judicial Watch*, 91 Va. Cir. 443, 448 (Circuit Court of Fairfax County, 2016).

used some language from two of the prior drafts (LD 20100544D, lines 56–59, and LD 20100558D, line 79). The new draft would toll the time from when notice of an estimate was sent until a response was received (but would not require payment in advance if the estimate is less than \$200), would provide that if there was no response within 30 days the request would be deemed to be withdrawn, and would clarify that actual payment is required in situations where the estimate exceeds \$200 and the public body requires an advance deposit.

Annual Legislative Preview

Council Staff

Staff shared an email message and attached letter received from Elizabeth Bennett-Parker, Vice Mayor of the City of Alexandria, concerning issues the City may choose to include in a future legislative package. The email addresses concerns over access to constituents' contact information; the letter suggests allowing expanded participation in meetings conducted using electronic communications. Both the email and the letter are posted on the Council's website.

Public Comment and Next Meeting

There were no public comments. The meeting schedule for 2020 will be determined after the 2020 Session of the General Assembly has 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 (<http://foiacouncil.dls.virginia.gov>) 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. The Council has 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 1821 inquiries, conducted 56 live training seminars, and continued to provide free online training through the Commonwealth of Virginia Learning Center. A listing of the live training seminars appears as Appendix A to this report.

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 phone 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 they are 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, 2018, to November 30, 2019, Council staff fielded 1821 inquiries. Of these inquiries, nine resulted in formal, written opinions. By issuing written opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide future practices. In addition to sending a signed copy of the letter opinion to the requester, 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, 2018, through November 30, 2019:

Written Advisory Opinions: 9

State and Local Government	2
Citizens of the Commonwealth	4
Members of the News Media	3

Typically, the Council provides advice over phone and 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, 2018, and November 30, 2019:

Telephone and Email Responses: 1812

Government	1112
Citizens	604
News Media	96

Appendix F to this report sets out the number of inquiries received by the Council each month from December 2018, through November 2019, 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).

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 traveled 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 it 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 focused 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. In 2018, the Council began offering free records training in Richmond for anyone who was interested. The Council initially offered four dates with up to 50 registrants per date; registration was full in less than two weeks. Two additional dates were added, and in total there were approximately 350 registrants for the six dates of free training. Due to this success, the Council in 2019 offered 15 additional free training presentations in Richmond and expanded the programs to offer its training on meetings and training for law enforcement, as well as training on records. During this reporting period, the Council staff responded to 1821 inquiries and conducted a total of 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, the Council continued to offer 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. In 2019, the Council added a guide on FOIA & Social Media and new PowerPoint presentations on Access to Public Records, Access to Public Meetings, and Criminal and Other Law Enforcement Records. These materials are available on the Council's website. Specifically, the Council offers the following educational materials:

- Access to Public Records Powerpoint Presentation
- Access to Public Meetings Powerpoint Presentation
- Access to Public Records
- Access to Public Meetings
- Electronic Meetings Guide
- E-Mail: Use, Access & Retention
- EMail & Meetings
- Law-Enforcement Records

- Criminal and Other Law Enforcement Records Powerpoint Presentation
- Handling FOIA Requests for Records of 911 Calls
- FOIA & Social Media
- 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
- Guide to Geographic Information Systems Records
- List of other access laws
- Citizens' Guide to Making FOIA Requests
- SCHEV FOIA video for governing boards

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 link to a FOIA petition developed by the courts 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 1821 inquiries and conducting 56 training sessions throughout the Commonwealth over the course of the year. The Council also formed three subcommittees in 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,

Senator Richard H. Stuart, Chair

Delegate Luke E. Torian, Vice-Chair

Senator Mamie E. Locke

Delegate Glenn R. Davis, Jr.

Shawri King-Casey

Sandra G. Treadway

Mark Vucci

Lee Bujakowski

William "Billy" Coleburn

Matthew A. Conrad

Bruce Potter

Sterling E. Rives, III

Cullen D. Seltzer

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, 2018 through November 30, 2019, Council staff conducted a total of 56 training seminars, which are listed below in chronological order. In 2019, the Council conducted 41 presentations, as requested by other groups, agencies and localities, and conducted 15 free courses based in Richmond open to all interested parties. The Access to Public Records and Access to Public Meetings courses are each preapproved for 1.5 hours of continuing legal education (CLE) credit through the Virginia State Bar. The Law Enforcement Records program is preapproved for 2.0 hours in-service credit through the Department of Criminal Justice Services, as well as 2.0 hours of CLE. Additionally, the Council continued to offer online FOIA training through the Commonwealth of Virginia Learning Center administered by the Department of Human Resource Management (<https://covlc.virginia.gov/>).

December 5, 2018	Senate Legislative Aides Richmond, VA
December 12, 2018	State Compensation Board New Officer Training Glen Allen, VA
December 19, 2018	Henrietta Lacks Commission South Boston, VA
December 19, 2018	City of Danville Danville, VA
January 8, 2019	Virginia Municipal League Newly Elected Officials Conference Richmond, VA
February 25, 2019	Department of Criminal Justice Services Chesterfield, VA
February 28, 2019	Town of Leesburg, Loudoun County, and surrounding localities Leesburg, VA
March 15, 2019	Fairfax County & surrounding localities Fairfax, VA

March 18, 2019	Virginia Commonwealth University Communications Law & Ethics Class Richmond, VA
March 19, 2019	Division of Child Support Enforcement Statewide Conference Staunton, VA
April 2, 2019	Stafford County Sheriff's Office Stafford, VA
April 2, 2019	Department of Housing and Community Development Virginia Building Code Academy Permit Technician Course Fredericksburg, VA
April 11, 2019	Public Schools Records Consortium 2019 PSRC Workshop Richmond, VA
April 18, 2019	York-Poquoson Sheriff's Office, Newport News Sheriff's Office, and other law enforcement agencies Yorktown, VA
April 25, 2019	Virginia Port Authority Norfolk, VA
April 30, 2019	Commonwealth Regional Council Farmville, VA
May 14, 2019	Access to Public Records Richmond, VA
May 20, 2019	Department of Housing & Community Development Richmond, VA
May 21, 2019	Board of Accountancy Glen Allen, VA
May 24, 2019	Tidewater District Commissioners of the Revenue Association Milford, VA
May 30, 2019	Law Enforcement Records Richmond, VA
June 11, 2019	Access to Public Records Richmond, VA

June 12, 2019	Division of Legislative Services Richmond, VA
June 14, 2019	Treasurer's Association of Virginia 89th Annual Conference Arlington, VA
June 20, 2019	Southwest District Commissioners of the Revenue Association Roanoke, VA
June 21, 2019	Town and County of Floyd Floyd, VA
June 25, 2019	Access to Public Meetings Richmond, VA
July 9, 2019	Access to Public Records Richmond, VA
July 18, 2019	Pittsylvania County Chatham, VA
July 23, 2019	Law Enforcement Records Richmond, VA
July 29, 2019	Rappahannock County Washington, VA
July 29, 2019	Town of Middleburg Middleburg, VA
August 7, 2019	Richmond County Public Schools Via teleconference
August 13, 2019	Access to Public Records Richmond, VA
August 19, 2019	Virginia Alcohol Safety Action Program 2019 Training Conference Hampton, VA
August 27, 2019	Access to Public Meetings Richmond, VA

September 5, 2019	Department of Housing and Community Development Virginia Building Code Academy Permit Technician Course Henrico, VA
September 10, 2019	Access to Public Records Richmond, VA
September 11, 2019	Commissioners of the Revenue Association Central District Meeting Powhatan, VA
September 16, 2019	Virginia Commonwealth University Communications Law & Ethics Class Richmond, VA
September 24, 2019	Law Enforcement Records Richmond, VA
October 3, 2019	Department of Professional and Occupational Regulation Glen Allen, VA
October 7, 2019	Department of Health Professions Board Member Training Henrico, VA
October 8, 2019	Employment Services Organization Steering Committee Department for Aging and Rehabilitative Services Henrico, VA
October 9, 2019	42nd Annual Virginia Municipal Clerks Association Institutes and Academy Virginia Beach, VA
October 15, 2019	Access to Public Records Richmond, VA
October 17, 2019	Virginia Beach Police Department Virginia Beach, VA
October 17, 2019	American Water Works Association Virginia Beach, VA
October 22, 2019	State Council of Higher Education for Virginia Board of Visitors Orientation Richmond, VA

October 23, 2019	Department of Aging and Rehabilitative Services DARS Advisory Board Staff Meeting Henrico, VA
October 24, 2019	Virginia Association of Zoning Officials Region 8 via teleconference
October 29, 2019	Access to Public Meetings Richmond, VA
November 14, 2019	Law Enforcement Records Richmond, VA
November 19, 2019	Access to Public Meetings Access to Public Records Richmond, VA
November 21, 2019	Virginia School Boards Association Annual School Board Clerks Conference Williamsburg, VA

Index of Written Advisory Opinions
December 1, 2018, through November 30, 2019

ADVISORY OPINIONS ISSUED

Opinion No.

Issue(s)

March

AO-01-19

Access to health records is addressed by FOIA and other specific laws outside of FOIA. Where the laws differ, the more specific provisions are controlling.

AO-02-19

A public body engaged in dispute resolution proceedings may hold closed meetings under the exemptions for discussion of actual or probable litigation and consultation with legal counsel on specific legal matters. However, it does not appear that FOIA or the various laws concerning dispute resolution have considered or addressed situations where two or more public bodies wish to hold a joint meeting for the purpose of dispute resolution. There are also applicable records exemptions for certain records of dispute resolution proceedings both within FOIA and outside of FOIA in statutes that specifically address such dispute resolution proceedings.

April

AO-03-19

Records concerning identifiable individual students, including individual students' test scores, are scholastic records that are exempt from mandatory disclosure under FOIA. The redaction of a student's name and other personal information does not necessarily make a scholastic record a nonexempt record that must be disclosed under FOIA as the record may still contain information about the specific individual, whether identified by name or not.

AO-04-19

Section 54.1-108 provides that certain license applications and scoring records, among other records, are not subject to disclosure under the Virginia Freedom of Information Act. This opinion considers a dispute regarding the redaction of applicant names from records related to the application and scoring process.

July

AO-05-19

Charges for public records are limited to reasonable charges not to exceed the public body's actual costs, but the question of whether a particular charge is reasonable may be decided only by a court.

August

AO-06-19 Failure to provide notice and take minutes of public meetings as required by FOIA are violations of FOIA. Only a court may rule on whether any particular notice is reasonable under the circumstance for a special, emergency, or continued meeting. Once posted, notices should not be removed before the meeting occurs.

AO-07-19 The exemption in subdivision 32 of § 2.2-3705.6 of FOIA applies to "information related to a grant application, or accompanying a grant application" that is submitted to the Department of Housing and Community Development as described in the exemption. Challenges to applications submitted as part of the Virginia Telecommunications Initiative program are not exempt from disclosure under this exemption as they are not submitted by the applicant.

AO-08-19 The exemption in subdivision 13 of § 2.2-3705.1 applies to certain account numbers and routing information, but does not address the names of credit card holders. The expedited hearing provisions in § 2.2-3713 apply regardless of whether a petition is filed in general district court or circuit court. Only a court may rule on evidentiary matters.

November

AO-09-19 The fundraising exemption, subdivision A 7 of § 2.2-3705.4, allows a public body to withhold certain information maintained in connection with fundraising activities by or for a public institution of higher education. The identity of a donor may only be withheld under the fundraising exemption if the donor has requested anonymity in connection with or as a condition of making a pledge or donation. Only a court has the authority to review records *in camera* and render a legally binding decision on whether redactions were properly made.

2019 Meetings of the Council

Wednesday, May 8, 2019

Senate Room A, Pocahontas Building, Richmond

Recap of the 2019 legislative session; review of the bills referred to the Council by the 2019 Session of the General Assembly and appointment of subcommittees to the study the bills.; updates regarding guide to social media and FOIA, FOIA officer training, and FOIA training for local elected officials.

Wednesday, July 17, 2019

Senate Room A, Pocahontas Building, Richmond

Progress reports and review of recommended drafts from the Council's subcommittees (Forestry Records Subcommittee study ended without recommendation by concurrence of patron, agency, and Office of the Attorney General; Donor Records Subcommittee recommends bill in part; Phishing Study Subcommittee continues study); guide to social media and FOIA presented by staff; updates regarding FOIA officer training, FOIA training for local elected officials, and current training presentations; issue raised regarding tolling time when a requester asks for an estimate in advance.

Wednesday, September 18, 2019

Senate Room A, Pocahontas Building, Richmond

Progress report from the Council's subcommittees (Forestry and Donor Records Subcommittees work completed, Phishing Study will continue into next year); Annual Legislative Preview (legislative proposals presented on behalf of Loudoun County); updates and draft recommendations regarding training for FOIA officers and local elected officials; updates on current training and FOIA inquiries.

Wednesday, December 4, 2018

Senate Room A, Pocahontas Building, Richmond

Report from Phishing Study Committee and recommendation on draft legislation to toll time when a requester asks for an estimate in advance; Annual Legislative Preview (possible legislative proposals from City of Alexandria).

2018 FOIA LEGISLATIVE UPDATE**I. Introduction**

The General Assembly passed a total of 19 bills amending the Virginia Freedom of Information Act (FOIA) during the 2019 Session. Six bills passed the General Assembly that were recommended by the FOIA Council: HB 1772, which allows any officer, employee, or member of a public body to introduce an advisory opinion issued by the Virginia Freedom of Information Advisory Council as evidence against allegations of a willful and knowing violation of FOIA if they acted in good faith reliance on such advisory opinion; HB 2494, which prohibits any state agency from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on their religious preferences or affiliations, unless specifically required by state or federal law; SB 1101, which allows the Office of the Attorney General to represent a member of the General Assembly in any civil matter alleging that such member in his official capacity violated FOIA; SB 1180, which defines the term "trade secret," for the purposes of FOIA, as meaning the same as that term is defined in the Uniform Trade Secrets Act; SB 1182, which clarifies that certain requirements of current law regarding participation in public meetings through electronic communication means do not apply to meetings held to address a state of emergency declared by the Governor; and SB 1184, which provides that FOIA shall not apply to sexual assault response teams, with the exception of records relating to protocols and policies of the sexual assault response team and guidelines for the community's response established by the sexual assault response team, which shall be public records and subject to the provisions of FOIA.

Nine bills clarify three existing records exemptions and add three new records exemptions in FOIA as follows:

- HB 1650 and SB 1060 clarify that information about an individual winner of the Virginia Lottery whose prize exceeds \$10 million is exempt from disclosure under FOIA unless the winner consents to such disclosure. (§ 2.2-3705.7)
- HB 2546 clarifies that information and records obtained or created by the Maternal Death Review Team (the Team) during a review of any death conducted by the Team shall be confidential and exempt from disclosure under FOIA to the extent that such information is made confidential by § 32.1-283.8. (§ 2.2-3705.5)
- HB 2560 and SB 1224 clarify that information reflecting the substance of meetings in which individual cases of abuse, neglect, or exploitation of adults as defined in § 63.2-1603 are discussed by multidisciplinary teams established pursuant to §§ 15.2-1627.5 and 63.2-1605 are exempt from mandatory disclosure under FOIA. (§ 2.2-3705.7)
- HB 2490 and SB 1617 exclude from the mandatory disclosure provisions of FOIA pertaining to educational records and certain records of educational institutions records provided to the Governor or the designated reviewers by a qualified institution related to a

proposed memorandum of understanding, or proposed amendments to a memorandum of understanding, submitted pursuant to Chapter 12.1 (Tech Talent Investment Program) of Title 23.1. The new exemption provides that a memorandum of understanding entered into pursuant to such chapter shall be subject to public disclosure after it is agreed to and signed by the Governor. Adding an exemption in § 2.2-3705.4.

- SB 1106 excludes from the mandatory disclosure provisions of FOIA information discussed in a closed session of the Physical Therapy Compact Commission or the Executive Board or other committees of the Commission for purposes set forth in subsection E of § 54.1-3491. Adding an exemption in § 2.2-3705.7.
- SB 1492 excludes from the mandatory disclosure provisions of FOIA trade secrets, financial information, and research-related information supplied to the Department of Housing and Community Development (the Department) as part of any grant application submitted to the Department pursuant to certain requirements set out in the Code or pursuant to the Virginia Growth and Opportunity Board or the Virginia Telecommunication Initiative as authorized by the appropriation act, if such disclosure would be harmful to the competitive position of the applicant. Adding an exemption in § 2.2-3705.6.

Seven bills clarify three existing meetings exemptions and add two new meetings exemptions in FOIA as follows:

- HB 2178 clarifies that discussion or consideration by the State Board of Elections or local electoral boards of voting security matters made confidential pursuant to § 24.2-410.2 or 24.2-625.1 are exempt from the open meeting requirements of FOIA. (§ 2.2-3711)
- HB 2546 clarifies that portions of meetings in which maternal death cases are discussed by the Maternal Mortality Review Team pursuant to § 32.1-283.8 are exempt from the open meeting requirements of FOIA. (§ 2.2-3711)
- HB 2560 and SB 1224 clarify that discussion or consideration of individual cases involving abuse, neglect, or exploitation of adults as defined in § 63.2-1603 pursuant to §§ 15.2-1627.5 and 63.2-1605 are exempt from the open meeting requirements of FOIA. (§ 2.2-3711)
- HB 1964 and SB 1090 create an exemption from the open meeting requirements of FOIA for discussion or consideration by the Board of Trustees of the Fort Monroe Authority of matters relating to specific gifts, bequests, and grants from private sources. (§ 2.2-3711)
- SB 1126 creates an exemption from the open meeting requirements of FOIA for discussion, consideration, or review of matters by the Virginia Lottery Board related to investigations exempted from disclosure under subdivision 1 of § 2.2-3705.3. (§ 2.2-3711)

Six bills amend existing provisions or add new provisions to FOIA as follows:

- HB 1772 provides that any officer, employee, or member of a public body alleged to have willfully and knowingly violated FOIA who acted in good faith reliance upon an advisory opinion issued by the Virginia Freedom of Information Advisory Council may introduce such advisory opinion as evidence that the alleged violation was not made willfully and knowingly. Adding § 2.2-3715.
- SB 1180 defines the term "trade secret," for the purposes of FOIA, as meaning the same as that term is defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.). Amending §§ 2.2-3701, 2.2-3705.2, 2.2-3705.6, 2.2-3705.7, and 2.3-3711.
- SB 1182 clarifies that certain requirements of current law regarding participation in public meetings through electronic communication means do not apply to meetings held to address a state of emergency declared by the Governor, specifically the requirements that public bodies (i) adopt a written policy regarding participation by electronic communication, (ii) have a quorum of a public body physically assembled at a primary or central location, and (iii) make arrangements for the voice of any member participating from a remote location to be heard by all persons at the primary or central location. Amending § 2.2-3708.2.
- SB 1184 provides that FOIA shall not apply to sexual assault response teams, 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 and subject to the provisions of FOIA. The bill also provides that FOIA shall not apply to multidisciplinary child sexual abuse response teams. Amending §§ 2.2-3703, 2.2-3705.7, and 2.2-3711.
- SB 1431 requires the Virginia Freedom of Information Advisory Council or the local government attorney to provide, and local elected officials to complete, an online training session on the provisions of FOIA at least once every two years. The legislation also eliminates the three-day notice requirement for an expedited hearing on a petition for mandamus or injunction where violations relating to the open meeting requirements of FOIA are alleged. Adding § 2.2-3704.3 and amending § 2.2-3713.
- SB 1554 provides that in addition to any penalties imposed under FOIA (i) if a court finds that any officer, employee, or member of a public body failed to provide public records to a requester in accordance with the provisions of FOIA because such officer, employee, or member of a public body altered or destroyed the requested public records with the intention of avoiding the provisions of FOIA prior to the expiration of the applicable record retention period set pursuant to the Virginia Public Records Act, the court may impose upon such officer, employee, or member in his individual capacity a civil penalty of up to \$100 per record altered or destroyed and (ii) if a court finds that a member of a public body voted to certify a closed meeting and at the time of such certification an attorney representing the body was present and such certification was not in accordance with the requirements of FOIA, the court may impose on the public body a civil penalty of up to \$1,000. Amending § 2.2-3714.

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 2019 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, 2019.

II. Amendments to the Virginia Freedom of Information Act

§ 2.2-3701 Definitions.

SB 1180 Virginia Freedom of Information Act; definition of trade secret. Defines the term "trade secret," for the purposes of the Virginia Freedom of Information Act, as meaning the same as that term is defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.). This bill is a recommendation of the Virginia Freedom of Information Advisory Council. (2019 Acts of Assembly, c. 358).

§ 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.

SB 1184 Virginia Freedom of Information Act; applicability; sexual assault response teams and multidisciplinary child sexual abuse response teams. Provides that the Virginia Freedom of Information Act (FOIA) shall not apply to sexual assault response teams, 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 and subject to the provisions of FOIA. The bill also provides that FOIA shall not apply to multidisciplinary child sexual abuse response teams. This bill is a recommendation of the Freedom of Information Advisory Council. (2019 Acts of Assembly, c. 729).

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

SB 1180 Virginia Freedom of Information Act; definition of trade secret. *See summary under § 2.2-3701, supra.* (2019 Acts of Assembly, c. 358).

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

HB 2490 and SB 1617 Tech Talent Investment Program. Creates a grant program to assist qualified public institutions of higher education, defined in the bill, in reaching, by 2039, a goal of increasing by at least 25,000 degrees the number of bachelor's and master's degrees awarded in computer science, computer engineering, and closely related fields, or that otherwise align with traded-sector, technology-focused growth opportunities identified by the Virginia Economic Development Partnership Authority. To be eligible for an annual grant, a qualified institution is required to enter into a memorandum of understanding setting forth specific criteria for eligible

degrees, eligible expenses, degree production goals, and graduation rates. Failure to meet criteria would result in the adjustment of future awards. The bill requires qualified institutions that are grant recipients to report annually on progress towards meeting such goals and that grants issued pursuant to the program are subject to appropriation, and for the Secretary of Finance to report annually regarding the progress of each qualified institution in meeting its goals and the amount of grants awarded to such institution. (2019 Acts of Assembly, cc. 638 and 639).

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

HB 2546 Maternal Death Review Team established. Establishes the Maternal Death Review Team (the Team) to develop and implement procedures to ensure that maternal deaths occurring in the Commonwealth are analyzed in a systematic way. The bill requires the Team to (i) develop and revise as necessary operating procedures for maternal death reviews, including identification of cases to be reviewed and procedures for coordinating among the agencies and professionals involved; (ii) improve the identification of, and data collection and record keeping related to, causes of maternal deaths; (iii) recommend components of programs to increase awareness and prevention of, and education about, maternal deaths; and (iv) recommend training to improve the review of maternal deaths. The bill also requires the Team to compile triennial statistical data regarding maternal deaths and to make such data available to the Governor and the General Assembly. The bill provides that information and records obtained or created by the Team and portions of meetings of the Team at which individual maternal deaths are discussed shall be confidential. (2019 Acts of Assembly, c. 834).

§ 2.2-3705.6 Exclusions to application of chapter; records of specific public bodies and certain other limited exclusions.

SB 1180 Virginia Freedom of Information Act; definition of trade secret. *See summary under § 2.2-3701, supra.* (2019 Acts of Assembly, c. 358).

SB 1492 FOIA; exclusions; proprietary records and trade secrets; Virginia Telecommunication Initiative. Excludes trade secrets, financial information, and research-related information supplied to the Department of Housing and Community Development (the Department) as part of any grant application submitted to the Department pursuant to certain requirements set out in the Code or pursuant to the Virginia Growth and Opportunity Board or the Virginia Telecommunication Initiative as authorized by the appropriation act from the mandatory disclosure provisions of FOIA, if such disclosure would be harmful to the competitive position of the applicant. The bill provides that in order for such trade secrets, financial information, and research-related information to be excluded, the applicant shall (i) invoke this exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify with specificity the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary. The Department is directed to determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or confidential proprietary information of the applicant. (2019 Acts of Assembly, c. 629).

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

HB 1650 and SB 1060 (which incorporates SB 1082) Virginia Lottery Law; disclosure of a lottery winner's identity. Prohibits the Virginia Lottery from disclosing information about individual winners whose prize exceeds \$10 million, and exempts such information from disclosure under the Freedom of Information Act (FOIA), unless the winner consents to disclosure. Under FOIA, disclosure of the winner's name, hometown, and amount won is currently mandatory. (2019 Acts of Assembly, cc. 247 and 163).

HB 2560 and SB 1224 Protective services; adult abuse, neglect, and exploitation; multidisciplinary teams. Authorizes local departments of social services to foster, when practicable, the creation, maintenance, and coordination of hospital and community-based multidisciplinary teams focused on the abuse, neglect, and exploitation of adults 60 years of age or older or 18 years of age or older who are physically or mentally incapacitated. The bill provides that such teams may: (i) assist the local department of social services in identifying abused, neglected, and exploited adults; (ii) coordinate medical, social, and legal services for abused, neglected, and exploited adults and their families; (iii) develop innovative programs for detection and prevention of the abuse, neglect, and exploitation of adults; (iv) promote community awareness and action to address adult abuse, neglect, and exploitation; and (v) disseminate information to the general public regarding the problem of adult abuse, neglect, and exploitation, strategies and methods for preventing such abuse, neglect, and exploitation, and treatment options for abused, neglected, and exploited adults. The bill also allows the attorney for the Commonwealth in each jurisdiction to establish a multidisciplinary adult abuse, neglect, and exploitation response team to review cases of abuse, neglect, and exploitation of adults. Such multidisciplinary team may be established separately or in conjunction with any already existing multidisciplinary team. (2019 Acts of Assembly, cc. 170 and 775).

SB 1180 Virginia Freedom of Information Act; definition of trade secret. *See summary under § 2.2-3701, supra.* (2019 Acts of Assembly, c. 358).

SB 1106 Licensure of physical therapists and physical therapist assistants; Physical Therapy Licensure Compact. Authorizes Virginia to become a signatory to the Physical Therapy Licensure Compact. The Compact permits eligible licensed physical therapists and physical therapist assistants to practice in Compact member states, provided they are licensed in at least one member state. In addition, the bill requires each applicant for licensure in the Commonwealth as a physical therapist or physical therapist assistant to submit fingerprints and provide personal descriptive information in order for the Board to receive a state and federal criminal history record report for each applicant. The bill has a delayed effective date of January 1, 2020, and directs the Board of Physical Therapy to adopt emergency regulations to implement the provisions of the bill. (2019 Acts of Assembly, c. 300).

SB 1184 Virginia Freedom of Information Act; applicability; sexual assault response teams and multidisciplinary child sexual abuse response teams. *See summary under § 2.2-3703, supra.* (2019 Acts of Assembly, c. 729).

§ 2.2-3708.2 Meetings held through electronic communication means.

SB 1182 Virginia Freedom of Information Act; meetings held through electronic communication means. Clarifies that certain requirements of current law regarding participation

in public meetings through electronic communication means do not apply to meetings held to address a state of emergency declared by the Governor, specifically the requirements that public bodies (i) adopt a written policy regarding participation by electronic communication, (ii) have a quorum of a public body physically assembled at a primary or central location, and (iii) make arrangements for the voice of any member participating from a remote location to be heard by all persons at the primary or central location. This bill is a recommendation of the Virginia Freedom of Information Advisory Council. (2019 Acts of Assembly, c. 359).

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

HB 1964 and SB 1090 Virginia Freedom of Information Act; meeting exemption for the Fort Monroe Authority. Creates an exemption from the open meeting requirements of the Virginia Freedom of Information Act for discussion or consideration by the Board of Trustees of the Fort Monroe Authority of matters relating to specific gifts, bequests, and grants from private sources. (2019 Acts of Assembly, cc. 4 and 500).

HB 2178 Virginia voter registration system; security plans and procedures; remedying security risks. Directs the State Board of Elections to promulgate regulations and standards necessary to ensure the security and integrity of the Virginia voter registration system and the supporting technologies utilized by the counties and cities to maintain and record registrant information. The local electoral boards are also required to develop and update annually written plans and procedures to ensure the security and integrity of the supporting technologies. The local electoral boards are further required to report annually to the Department of Elections on their security plans and procedures. The bill authorizes the Department of Elections to limit a locality's access to the Virginia voter registration system if it is determined that the county or city has failed to develop security plans and procedures or to comply with the security standards established by the State Board; such access would be limited as necessary to address and resolve any security risks or to enforce compliance. Records describing protocols for maintaining the security of the Virginia voter registration system and the supporting technologies utilized to maintain and record registrant information are exempted from the Freedom of Information Act and meetings to discuss such protocols are permitted to be closed pursuant to the provisions of the Freedom of Information Act. The bill requires the State Board of Elections to convene a work group prior to adopting security standards and to establish a standing advisory group of local government IT professionals and general registrars to assist and consult on updates to security standards. (2019 Acts of Assembly, c. 426).

HB 2546 Maternal Death Review Team established. *See summary under § 2.2-3705.5, supra.* (2019 Acts of Assembly, c. 834).

HB 2560 and SB 1224 Protective services; adult abuse, neglect, and exploitation; multidisciplinary teams. *See summary under § 2.2-3705.7, supra.* (2019 Acts of Assembly, cc. 170 and 775).

SB 1126 Lottery Board; regulation of casino gaming; penalties. Authorizes casino gaming in the Commonwealth to be regulated by the Virginia Lottery Board (the Board). Casino gaming shall be limited to certain cities that meet the criteria that is outlined in the bill, and a referendum must be passed in the city on the question of allowing casino gaming in the city. The bill requires the

Joint Legislative Audit and Review Commission (JLARC) to conduct a review of casino gaming laws in other states and report its findings to the Chairmen of the Senate Committee on General Laws and Technology and the House Committee on General Laws on or before December 1, 2019. The bill contains enactment clauses that prohibit (i) any referendum from being held prior to the publication of the JLARC findings and recommendations regarding casino gaming or after January 1, 2021, and (ii) the Board from issuing a license to operate a gaming operation before July 1, 2020. The bill also provides that amendments to the Code of Virginia that are made in the bill will not become effective unless reenacted by the 2020 Session of the General Assembly. (2019 Acts of Assembly, c. 789).

SB 1180 Virginia Freedom of Information Act; definition of trade secret. *See summary under § 2.2-3701, supra.* (2019 Acts of Assembly, c. 358).

SB 1184 Virginia Freedom of Information Act; applicability; sexual assault response teams and multidisciplinary child sexual abuse response teams. *See summary under § 2.2-3703, supra.* (2019 Acts of Assembly, c. 729).

§ 2.2-3713 Proceedings for enforcement of chapter.

SB 1431 Virginia Freedom of Information Act; training requirements; proceedings for enforcement. Requires the Virginia Freedom of Information Advisory Council or the local government attorney to provide, and local elected officials to complete, an online training session on the provisions of the Virginia Freedom of Information Act. The bill requires local elected officials to complete such training at least once every two years while they are in office. The bill also eliminates the three-day notice requirement for an expedited hearing on a petition for mandamus or injunction where violations relating to the open meeting requirements of the Act are alleged. The requirement of the bill for online training for local officials has a delayed effective date of July 1, 2020. (2019 Acts of Assembly, c. 531).

§ 2.2-3714 Violations and penalties.

SB 1554 Virginia Freedom of Information Act (FOIA); civil penalties. Provides that in addition to any penalties imposed under FOIA, (i) if a court finds that any officer, employee, or member of a public body failed to provide public records to a requester in accordance with the provisions of FOIA because such officer, employee, or member of a public body altered or destroyed the requested public records with the intention of avoiding the provisions of FOIA prior to the expiration of the applicable record retention period set pursuant to the Virginia Public Records Act, the court may impose upon such officer, employee, or member in his individual capacity a civil penalty of up to \$100 per record altered or destroyed and (ii) if a court finds that a member of a public body voted to certify a closed meeting and at the time of such certification an attorney representing the body was present and such certification was not in accordance with the requirements of FOIA, the court may impose on the public body a civil penalty of up to \$1,000. (2019 Acts of Assembly, c. 843).

§ 2.2-3715 Effect of advisory opinions from the Freedom of Information Advisory Council on liability for willful and knowing violations.

HB 1772 Virginia Freedom of Information Advisory Council; advisory opinions; evidence in civil proceeding. Provides that any officer, employee, or member of a public body alleged to have willfully and knowingly violated the Virginia Freedom of Information Act who acted in good faith reliance upon an advisory opinion issued by the Virginia Freedom of Information Advisory Council may introduce such advisory opinion as evidence that the alleged violation was not made willfully and knowingly. The bill contains technical amendments. This bill is a recommendation of the Virginia Freedom of Information Advisory Council. (2019 Acts of Assembly, c. 354).

III. Other Access-Related Legislation

Title 2.2 Administration of Government

HB 1740 Government Data Collection and Dissemination Practices Act; exemptions. Modifies current law to provide that personal information systems related to adult services and adult protective services that are maintained by the Department for Aging and Rehabilitative Services (DARS), rather than the Department of Social Services, are exempt from the Government Data Collection and Dissemination Practices Act. The bill also adds to such exemption DARS personal information systems related to auxiliary grants. (2019 Acts of Assembly, c. 277).

HB 2494 Government Data Collection and Dissemination Practices Act; dissemination of information concerning religious preferences and affiliations. Prohibits any state agency maintaining an information system that includes personal information from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity, unless specifically required by state or federal law. This prohibition applies even if consent is given to disseminate such information to public institutions of higher education, state facilities under Title 37.2 (Behavioral Health and Developmental Services), and juvenile correctional facilities established pursuant to Title 66 (Juvenile Justice) or Chapter 11 (§ 16.1-226 et seq.) of Title 16.1 (Juvenile and Domestic Relations District Courts). As introduced, this bill is a recommendation of the Virginia Freedom of Information Advisory Council. (2019 Acts of Assembly, c. 774).

SB 1101 Office of the Attorney General; representation of members of the General Assembly for violations of the Virginia Freedom of Information Act. Allows the Office of the Attorney General to represent a member of the General Assembly in any civil matter alleging that such member in his official capacity violated the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). This bill is a recommendation of the Virginia Freedom of Information Advisory Council. (2019 Acts of Assembly, c., 357).

Title 17.1 Courts of Record

HB 2058 Remote access to land records; fee; exemption for certain state agencies. Exempts the Department of General Services, the Department of Conservation and Recreation, the Department of Forestry, and the Virginia Alcoholic Beverage Control Authority from paying any fee for remote access to land records. The bill also provides that if a clerk of the circuit court who provides secure remote access to land records contracts with an outside vendor to provide such remote access to subscribers, such contract shall contain a provision exempting the Department of

General Services, the Department of Conservation and Recreation, the Department of Forestry, and the Virginia Alcoholic Beverage Control Authority from paying any access or subscription fee. The bill further provides that when an agreement for such remote access is made between a state agency and the clerk or an outside vendor, the agreement shall provide that the state agency is required to monitor its employees' activity under such agreement to ensure compliance with its terms. (2019 Acts of Assembly, c. 611).

Title 19.2 Criminal Procedure

HB 2746 Central Criminal Records Exchange; background checks through Live Scan device. Requires the Department of State Police (the Department) to accept requests for background checks through the use of a Live Scan device certified by the Federal Bureau of Investigation by any agency or organization located within the Commonwealth that (i) is a business or organization that provides care to children or the elderly or disabled and is authorized to receive criminal history record information and (ii) utilizes a fingerprint background check as a condition of licensure, certification, employment, or volunteer service. The bill states that any such agency or organization transmitting requests for background checks to the Department shall be responsible for all costs associated with capturing, formatting, encrypting, and transmitting all required information in a manner prescribed by the Department. The bill provides that the Department shall only provide the criminal history record information to the extent authorized by state or federal law, rules, and regulations and that the Department may deny any such agency or organization access to criminal history record information if the Department finds that such agency or organization has failed to comply with state or federal law, rules, or regulations. (2019 Acts of Assembly, c. 620).

HB 2080 Physical evidence recovery kit tracking system. Provides that the Department of Forensic Science (Department) shall maintain a statewide electronic tracking system for physical evidence recovery kits where such kits will be assigned a unique identification number to track each kit from its distribution as an uncollected kit to the health care provider through to its destruction. The bill provides that the Department shall provide access to the tracking system to health care providers, law-enforcement agencies, the Division of Consolidated Laboratory Services, and the Office of the Chief Medical Examiner. The bill also provides that a health care provider shall inform the victim of sexual assault of the unique identification number assigned to the physical evidence recovery kit utilized by the health care provider during the forensic medical examination and provide the victim with information regarding the physical evidence recovery kit tracking system. The bill provides that records entered into the physical evidence recovery kit tracking system are confidential and are not subject to disclosure under the Freedom of Information Act. The bill has a delayed effective date of July 1, 2020. (2019 Acts of Assembly, c. 473).

Title 22.1 Education

HB 2449 Scholastic records; disclosure of directory information. Provides that a school or institution of higher education may disclose certain directory information of a student to certain internal persons for educational purposes or internal business if the student has not opted out of such disclosure. Under current law, such disclosures require written consent. The bill also provides an exception for state and federal law requirements from the prohibition of such disclosures. (2019 Acts of Assembly, c. 229).

Title 30 General Assembly

SB 1556 Auditor of Public Accounts; Commonwealth Data Point; employee compensation information. Requires that the searchable database containing certain state expenditure information that is maintained by the Auditor of Public Accounts include the number of full-time state employees for whom the annual rate of pay is more than \$10,000, an identifier associated with each such employee, and the salary, bonuses, and total compensation paid during the fiscal year for the employee associated with each identifier. Current law requires that compensation data be connected to an employee's job position. (2019 Acts of Assembly, c. 731).

Title 53.1 Prisons and Other Methods of Correction

HB 2213 Exchange of medical and mental health information and records of person committed to jail; local probation officers. Adds local probation officers to the list of persons among whom the medical and mental health information and records of any person committed to jail, and transferred to another correctional facility, may be exchanged. (2019 Acts of Assembly, c. 702).

APPENDIX E

Bills Referred to the FOIA Council by the 2019 Session of the General Assembly:

- **HB 2201 (Tyler); State Forester; confidentiality of certain records.** Excludes from the mandatory disclosure provisions of the Virginia Freedom of Information Act certain records of the Department of Forestry (the Department). The records include trade secrets and financial information, reports of criminal violations made to the Department by persons outside the Department, and records of an active administrative investigation.
- **HB 2386 (Bulova); Public institutions of higher education; information relating to pledges and donations.** Requires public institutions of higher education, when accepting a donation, gift, or similar financial support that is conditioned upon the acceptance of certain terms and conditions by the public institution of higher education, to provide the donor with a written document acknowledging the public institution of higher education's acceptance of such terms and conditions. The bill requires the public institution of higher education to retain a copy of such document and provides that such document shall be subject to the provisions of the Virginia Freedom of Information Act (FOIA). The bill provides that no discretionary exclusion in FOIA shall apply to protect information relating to the amount, date, purpose, and terms of a pledge or donation made to a public institution of higher education. The bill provides that the identity of the donor shall be protected only if (a) the donor has requested anonymity in connection with or as a condition of making a pledge or donation and (b) the pledge or donation does not impose terms or conditions related to academic decision-making.
- **HJ 628 (Heretick); Study; Virginia Freedom of Information Advisory Council; threat of phishing attacks; report.** Directs the Virginia Freedom of Information Advisory Council (FOIA Council) to study the threat of phishing attacks on citizens and public employees whose contact and private information is legally obtained as a result of a Freedom of Information Act (FOIA) request. The study further directs the FOIA Council to examine the current FOIA provisions and make recommendations on ways to address the threat of phishing attacks on citizens and public employees of the Commonwealth.

FOIA Council Action on Each Bill:

- **HB 2201 (Tyler); State Forester; confidentiality of certain records.** Subcommittee met once, but after that meeting the patron, affected agency, and Office of the Attorney General decided not to proceed with the study, as they determined that existing exemptions would provide the needed protections.
- **HB 2386 (Bulova); Public institutions of higher education; information relating to pledges and donations.** Subcommittee met once and recommended the portion of the bill that amends the current exemption for donor records but took no position on the portion of the bill outside of FOIA. The full Council concurred with the Subcommittee's recommendation.

- **HJ 628 (Heretick); Study; Virginia Freedom of Information Advisory Council; threat of phishing attacks; report.** Subcommittee met three times and heard testimony from the patron, the City of Portsmouth, the Virginia State Police, and the Virginia Information Technologies Agency. Due to the breadth and importance of the issues presented, the Subcommittee and Council will continue this study next year.

APPENDIX F

Breakdown of Inquiries to Council December 1, 2018, through November 30, 2019

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 phone 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, 2018, through November 30, 2019

Total number of inquiries: 1821

A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY MONTH:													
	Dec	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Total
Government	0	0	0	1	1	0	0	0	0	0	0	0	2
Citizens	0	0	0	0	1	0	0	1	2	0	0	0	4
News Media	0	0	0	1	0	0	0	0	1	0	0	1	3
TOTAL	0	0	0	2	2	0	0	1	3	0	0	1	9
B. TELEPHONE & EMAIL INQUIRIES:													
	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Government	61	79	89	100	108	101	85	95	89	116	114	75	1112
Citizens	35	61	58	49	63	63	45	56	39	44	55	36	604
News Media	4	7	13	15	11	8	8	6	3	6	13	2	96
TOTAL	100	147	160	164	182	172	138	157	131	166	182	113	1812
C. TOTAL NUMBER OF ALL INQUIRIES:													
	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct	Nov	TOTAL
Government	61	79	89	101	109	101	85	95	89	116	114	75	1114
Citizens	35	61	58	49	64	63	45	57	41	44	55	36	608
News Media	4	7	13	16	11	8	8	6	4	6	13	3	99
TOTAL	100	147	160	166	184	172	138	158	134	166	182	114	1821

A. REQUESTS FOR WRITTEN ADVISORY OPINIONS, BY CATEGORY:			
	Records	Meetings	Other
Government	1	1	0
Citizens	4	0	1
News Media	1	1	0
TOTAL	6	2	1
B. TELEPHONE & EMAIL INQUIRIES:			
	Records	Meetings	Other
Government	679	221	306
Citizens	442	40	178
News Media	76	10	20
TOTAL	1197	271	504
C. TOTAL NUMBER OF ALL INQUIRIES:			
	Records	Meetings	Other
Government	680	222	306
Citizens	446	40	179
News Media	77	11	20
TOTAL	1203	273	505

APPENDIX G

OPINIONS ISSUED BY THE COUNCIL DECEMBER 2009 THROUGH NOVEMBER 2018

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:

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Government	2	3	3	2	1	3	0	5	0	2
Citizens	3	4	2	5	2	3	2	3	9	4
News Media	1	0	0	3	3	3	1	0	0	3

Informal Opinions:

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Government	899	820	846	872	873	802	1,058	1,134	1,168	1,112
Public	620	560	433	452	467	467	561	588	596	604
News Media	165	152	124	173	148	146	108	112	116	96

Total Number of Opinions:

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Government	901	823	849	874	874	805	1,058	1,139	1,168	1,114
Public	623	564	435	457	469	470	563	591	605	608
News Media	166	152	124	176	151	149	109	112	116	99
GRAND TOTAL	1,690	1,539	1,408	1,507	1,494	1,424	1,730	1,842	1,889	1,821

