

**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 2020

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

Senator Mamie E. Locke, Chair  
Delegate Marcus B. Simon, Vice-Chair  
Senator Richard H. Stuart  
Delegate William C. Wampler, III  
Shawri King-Casey  
Sandra G. Treadway  
Mark Vucci  
Lee Bujakowski  
William "Billy" Coleburn  
Matthew Conrad  
Chidi I. James  
Bruce Potter  
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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 2020**

## **INTRODUCTION**

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

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

The Council provides guidance to those seeking assistance in the understanding and application of FOIA, although the Council cannot compel the production of documents or issue orders. By rendering advisory opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide the future public access practices of state and local government agencies. Although the Council has no authority to mediate disputes, it may be called upon as a resource to assist in the resolution of FOIA disputes and to foster compliance, as well as a better understanding of FOIA. In fulfilling its statutory charge, the Council strives to keep abreast of trends,

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

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

<sup>3</sup> Until 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).

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 twenty-first 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 21-year history, the Council has provided more than 31,600 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials and has conducted over 1,135 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, 2019, through November 30, 2020—the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. In 2020, the General Assembly referred two bills to the Council for further study and the Council continued a study from the 2019 Session.<sup>4</sup> Each of the 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 two new subcommittees in 2020 and continued one from 2019, such that each subcommittee would hear one bill or resolution being studied by the Council:

- **HB 321 (Levine, 2020) Virginia Freedom of Information Act; electronic meetings; serious medical condition of immediate family member.** Allows a public body to conduct a meeting through electronic communication means if, on or before the day of a meeting, a member of the public body holding the meeting notifies the chair of the public body that he is unable to attend due to a serious medical condition of an immediate family member that prevents the member's physical attendance. The bill also limits such participation in an electronic meeting due to a personal matter to either two meetings per calendar year or 10 percent of the meetings held that calendar year, rounded up to the nearest whole number, whichever is greater.
- **HB 5090 (Hurst, 2020 Special Session I) Virginia Freedom of Information Act; law-enforcement criminal incident information; criminal investigative files.** Adds criminal investigative files, defined in the bill, to the types of law-enforcement and criminal records required to be released in accordance with the provisions of the Virginia Freedom of Information Act. Under current law, the release of criminal investigative files is discretionary. The bill also allows a law-enforcement agency or attorney for the Commonwealth to petition a court of record for permission not to release criminal incident information that would otherwise be subject to release, if the release of such information is likely to jeopardize an ongoing investigation or cause certain other harms.

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<sup>4</sup> House Bills 321 (Levine, 2020) and 5090 (Hurst, 2020 Special Session I), and House Joint Resolution 628 (Heretick, 2019 Session).

- HJ 628 (Heretick, 2019) **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 Electronic Meetings Subcommittee was established to study HB 321. The Subcommittee met twice to study the bill and recommended to the Council an amended version that expands the existing provisions concerning electronic participation due to a medical condition to include caring for a sick family member and to increase the limitation on such participation due to personal matters to twice per year or 25 percent of the meetings held that calendar year, whichever is greater.

Due to the COVID-19 pandemic, the Electronic Meetings Subcommittee also studied the conduct of electronic meetings during states of emergency. The existing provision within FOIA for conducting electronic meetings during a state of emergency declared by the Governor limited the purpose of any such meeting to addressing the emergency itself.<sup>5</sup> In the past, this provision has been sufficient because the types of emergencies at issue were generally weather-related emergencies of short duration. However, because of the duration and nature of the COVID-19 pandemic, public bodies needed to meet to address other business while still remaining physically separate to help prevent the spread of COVID-19. For that reason, language was added to the State Budget that allowed a broader scope of topics to be discussed at electronic meetings held during a state of emergency.<sup>6</sup> A coalition of interested parties suggested to the Subcommittee a separate draft to address electronic meetings during states of emergency that expands the scope of the existing FOIA provision for such meetings in order to account for emergencies of greater duration such as the COVID-19 pandemic. The Subcommittee recommended an amended version of this draft to the Council. After considering both recommended drafts, the Council recommended amended versions of each to the 2021 Session of the General Assembly.

The Criminal Incident Information Subcommittee was established to study HB 5090. The Subcommittee met twice to study the bill and recommended an amended version of the bill to the Council, which the Council then recommended to the 2021 Session of the General Assembly. Currently, criminal investigative files may be withheld in the discretion of the custodian without any specific point at which release is required. The bill as recommended still allows criminal investigative files to be withheld in ongoing cases, but otherwise requires that they be released with certain limited exceptions.

The Phishing Study Subcommittee was established in 2019 to study House Joint Resolution 628 and related issues concerning phishing and cyberattacks as referred to the Council by letter from M. Kirkland "Kirk" Cox, Speaker of the House. The Subcommittee met three times in 2019 and once in 2020. In addition to phishing and cyber security issues, in 2019 the Subcommittee recommended to the Council a draft concerning tolling time when a requester asks for a cost estimate in advance, which the Council recommended to the 2020 Session of the General Assembly. The General Assembly passed an amended version of this legislation in 2020.<sup>7</sup>

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<sup>5</sup> Subdivision A 3 of § 2.2-3708.2 of the Code of Virginia.

<sup>6</sup> 2020 Acts of Assembly, c. 1289, Item § 4-0.01 (g).

<sup>7</sup> 2020 Acts of Assembly, c. 1142.

The Phishing Study Subcommittee met once in 2020 to continue the study of phishing and cyberattacks, and also considered a proposal to amend and expand an existing exemption designed to protect personal contact information when a person signs up to receive email from a public body. Regarding phishing attacks and related issues, the Subcommittee concluded that such issues are best addressed through training and cybersecurity measures, rather than through FOIA.

Regarding the proposals to amend the current exemption for personal contact information provided to a public body in order to receive email from the public body,<sup>8</sup> the Phishing Study Subcommittee presented two drafts without recommendation to the full Council for its consideration. The first draft exempts personal contact information provided to a public body or any of its members or employees during general correspondence; the full Council did not recommend this proposal. The second draft provides that personal contact information provided to a public body or any of its members for the purpose of receiving electronic communications is excluded from the mandatory disclosure provisions of FOIA unless the recipient of such electronic communications indicates his approval for the public body to disclose such information; the full Council recommended this draft to the 2021 Session of the General Assembly.

The Council continued to monitor Virginia court decisions relating to FOIA. In 2020, the Virginia Supreme Court decided the case of *Cole v. Smyth County Board of Supervisors*, which concerns the provisions for conducting closed meetings. The Supreme Court found that the Board in that case had violated FOIA in two ways: (i) by failing to identify in a motion to convene the closed meeting the subject matter of that closed meeting as required by subsection A of § 2.2-3712 and (ii) by straying beyond the topics allowed to be discussed under the closed meeting exemption for discussion of actual or probable litigation. In a different case, *Gent v. Adams* (Case No. GV20-1202, Final Order Entered Oct. 8, 2020), the General District Court for Wise County found that a locality's website must be a ".gov" website obtained through the United States GSA to be an "official government website" for meeting notice purposes. Because various localities use different types of domains (.gov, .com, .net, etc.) for their websites, the Council determined it would take up this issue for study in 2021.

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 2020, Council staff conducted 37 FOIA live training programs 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

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<sup>8</sup> Subdivision 10 of § 2.2-3705.1 of the Code of Virginia.

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 of which are 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 the general public. 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 that year.

In 2020, numerous training presentations that were scheduled to be conducted in person were canceled due to the COVID-19 pandemic. As a result, the vast majority of training presentations conducted during this reporting period were presented live using virtual technology rather than in person. The Council also developed a new online training program for local elected officials to satisfy the statutory requirements of § 2.2-3704.3 (effective July 1, 2020). Because some users had technical difficulties with one version of the local elected officials training, the training module was made available in multiple pre-recorded formats and used to accompany live presentations.

For this reporting period, the Council responded to 2,000 inquiries. Of these inquiries, four resulted in formal, written opinions, three of which were requested by citizens, none by media representatives, and one by a government representative. The remaining requests were for informal opinions, given via telephone and email. Of these requests, 1,300 were made by government officials, 639 by citizens, 56 by media representatives, and one by an unidentified source. 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 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 2019 and 2020, there has been an increase in inquiries about training for local elected officials pursuant to new § 2.2-3704.3, which went into effect on July 1, 2020. In March 2019, staff switched from using paper records to an electronic spreadsheet to track informal requests. This year, the data regarding such inquiries is presented in a graphic format for the first time (see Appendix F to this report).

FOIA was again the subject of significant legislative activity in the 2020 Session. The General Assembly passed a total of 23 bills amending the Virginia Freedom of Information Act (FOIA) during the 2020 Session. Five bills passed the General Assembly that were recommended by the FOIA Council:

- SB 138, which (i) adds regional public bodies to the type of public bodies that are required to have a FOIA officer, (ii) requires FOIA training every two years instead of every year, and (iii) requires a FOIA officer's name and contact information to be reported to the FOIA Council when the officer is first trained and then only if the information changes;

- SB 139, which allows for live, in-person training, as well as online training for local elected officials, and clarifies that constitutional officers are subject to such training requirements;
- SB 140 and identical bill HB 510, which amend the current exemption for donor records by clarifying that the exemption does not protect "information relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor" except if "the donor has requested anonymity in connection with or as a condition of making a pledge or donation" or if "the pledge or donation does not impose terms or conditions related to academic decision-making"; and
- SB 153, which (i) adds that the time to respond to a FOIA request is tolled for the amount of time that elapses between notice of the cost estimate and the response from the requester; (ii) adds 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; and (iii) clarifies that if a cost estimate exceeds \$200 and the public body 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.

A more detailed report of the bills discussed above and other public access bills passed during the 2020 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 virtual meetings technologies has increased tremendously across all public bodies at both the state and local levels due to the COVID-19 pandemic, and as a result, there has been a noticeable increase in inquiries concerning electronic meetings. As previously mentioned, the Council recommended two draft bills concerning electronic meetings to the 2021 Session of the General Assembly and intends to continue the study of electronic meetings issues next year.

In 2020, the Council welcomed new members Delegates Marcus B. Simon, who replaced Delegate Luke E. Torian, Delegate William C. Wampler, III, who replaced Delegate Glenn R. Davis, Jr., and Chidi I. James, who replaced Michael Stern as a citizen member, all appointed by the Speaker of the House. The Council thanks Delegate Torian, Delegate Davis, and Mr. Stern for their service.

## WORK OF THE COUNCIL

The majority of the Council's work in 2020 involved continuing the Phishing Study from 2019 and studying the bills referred by the 2020 Regular Session and Special Session I of the General Assembly. Due to the COVID-19 pandemic and the Special Session I of the General Assembly, the Council met twice in 2020 and both meetings were conducted virtually pursuant to Budget Item § 4-0.01 (g).

### **August 4, 2020**

The Council met electronically with Senator Richard H. Stuart, chair, presiding.<sup>9</sup> The meeting began with introductions and opening remarks followed by the election of the chair and vice-chair, presentations, and assignment of subcommittees. Materials presented at the meeting are accessible through the *Council's website*.

### **Election of Chair and Vice-Chair**

Because Senator Stuart had served as chair since 2018, elections for a new chair and vice-chair were held.<sup>10</sup> Senator Mamie E. Locke was elected chair and Delegate Marcus B. Simon was elected vice-chair, both by unanimous vote.<sup>11</sup>

### **Presentation: Recap of FOIA and Related Access Bills from 2020 Session**

#### *Council Staff*

Staff informed the Council that the 2020 Regular Session of the General Assembly enacted a total of 23 bills amending the Virginia Freedom of Information Act (FOIA).

Sixteen bills clarify four existing records exemptions and add seven new records exemptions in FOIA as follows:

- HB 313 and SB 259 clarify that information contained in library records that can be used to identify any library patron who has borrowed or accessed material or resources from a library, as well as the material or resources such patron borrowed or accessed, is exempt from disclosure under FOIA. (§ 2.2-3705.7)
- HB 510 and SB 140 clarify 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 unless (i) the donor has requested anonymity in connection with or as a condition of making a pledge or donation and (ii) the pledge or donation does not impose terms or conditions directing academic decision-making. (§ 2.2-3705.4)

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<sup>9</sup> **Members Present:** Senator Richard H. Stuart (chair), Senator Mamie E. Locke (vice-chair), Delegate Marcus B. Simon, Delegate William C. Wampler, III, Lee Bujakowski, William Coleburn, Matthew Conrad, Shawri King-Casey, Bruce Potter, Sterling Rives, Cullen Seltzer, Michael Stern, Sandra Treadway, and Amigo Wade. NOTE: All members participated by electronic means, and the meeting was live-streamed on the Senate's website pursuant to § 4-0.01 (g) of the 2020-2022 State Budget. A video recording of the meeting is available on the Council's website.

**Members Absent:** None

<sup>10</sup> Subsection D of § 30-178 of the Code of Virginia provides as follows: "The members of the Council shall elect from among their membership a chairman and a vice-chairman for two-year terms. The chairman and vice-chairman may not succeed themselves to the same position."

<sup>11</sup> Note that Cullen Seltzer was present when the meeting began but had to disconnect due to a scheduling conflict, so he was not present when the votes for chair and vice-chair were taken.

- HB 1012 and SB 578 clarify that any correspondence and information furnished in confidence to the Department of Education in connection with an active investigation of an applicant or licensee with regard to early childhood care and education pursuant to Chapter 14.1 (§ 22.1-289.02 et seq.) of Title 22.1 is exempt from mandatory disclosure under FOIA. These bills have a delayed effective date of July 1, 2021. (§ 2.2-3705.5)
- HB 1211 and SB 34 clarify that information maintained in connection with fundraising activities by the Veterans Services Foundation that reveals the social security number or other identification number appearing on a driver's license or other document issued under Chapter 3 (§ 46.2-300 et seq.) of Title 46.2 or the comparable law of another jurisdiction is exempt from mandatory disclosure under FOIA. These bills have a delayed effective date of January 1, 2021. (§ 2.2-3705.7)
- HB 548 exempts from the mandatory disclosure provisions of FOIA pertaining to records relating to administrative investigations records of active investigations that are being conducted by the Department of Behavioral Health and Developmental Services. (adding an exemption in § 2.2-3705.3)
- HB 722 and SB 269 exempt from the mandatory disclosure provisions of FOIA relating to proprietary records and trade secrets financial and proprietary records submitted with a loan application to a locality for the preservation or construction of affordable housing that is related to a competitive application to be submitted to either the U.S. Department of Housing and Urban Development (HUD) or the Virginia Housing Development Authority (VHDA), when the release of such records would adversely affect the bargaining or competitive position of the applicant. The bill also provides that such financial and proprietary records shall not be withheld after they have been made public by HUD or VHDA. (adding an exemption in § 2.2-3705.6)
- HB 896 and SB 384 exempt from the mandatory disclosure provisions of FOIA personal information provided to or obtained by the Virginia Lottery (i) in connection with the voluntary exclusion program administered pursuant to § 58.1-4015.1 and (ii) concerning the identity of any person reporting prohibited conduct pursuant to § 58.1-4043. (adding an exemption in § 2.2-3705.7)
- HB 1017 and SB 576 exempt from the mandatory disclosure provisions of FOIA relating to proprietary records and trade secrets information relating to a grant, loan, or investment application or accompanying a grant, loan, or investment application submitted to the Commonwealth of Virginia Innovation Partnership Authority (the Authority), an advisory committee of the Authority, or any other entity designated by the Authority to review such applications if certain conditions are met. The bills also create an exemption for information held by the Authority, an advisory committee of the Authority, or any other entity designated by the Authority relating to (i) internal deliberations of or decisions by the Authority on the pursuit of particular investment strategies prior to the execution of such investment strategies and (ii) trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided by a private entity to the Authority, if such disclosure of records pursuant to clause (i) or (ii) would have an adverse impact on the financial interest of the Authority or a private entity. (adding exemptions in §§ 2.2-3705.6 and 2.2-3705.7)
- SB 482 exempts from the mandatory disclosure provisions of FOIA relating to health and social services records information acquired during a review of any death conducted by the



Developmental Disabilities Mortality Review Committee to the extent that such information is made confidential by § 37.2-314.1. (adding an exemption in § 2.2-3705.5)

Seven bills add four new meetings exemptions in FOIA as follows:

- HB 4 and SB 36 create an exemption from the open meeting requirements of FOIA for deliberations of the Virginia Lottery Board in a licensing appeal action conducted pursuant to § 58.1-4105 regarding the denial or revocation of a license of a casino gaming operator and any discussion, consideration, or review of matters related to investigations exempt from disclosure under subdivision 1 of § 2.2-3705.3. (§ 2.2-3711)
- HB 896 and SB 384 create an exemption from the open meeting requirements of FOIA for deliberations of the Virginia Lottery Board in an appeal conducted pursuant to § 58.1-4007 regarding the denial of, revocation of, suspension of, or refusal to renew a permit related to sports betting and any discussion, consideration, or review of matters related to investigations excluded from mandatory disclosure under subdivision 1 of § 2.2-3705.3. (§ 2.2-3711)
- HB 1017 and SB 576 create an exemption from the open meeting requirements of FOIA for the discussion or consideration of grant, loan, or investment application records subject to the exclusion in subdivision 28 of § 2.2-3705.6 for a grant, loan, or investment pursuant to Article 11 (§ 2.2-2351 et seq.) of Chapter 22 of Title 2.2. (§ 2.2-3711)
- SB 482 creates an exemption from the open meeting requirements of FOIA for those portions of meetings in which individual death cases of persons with developmental disabilities are discussed by the Developmental Disabilities Mortality Review Committee. (§ 2.2-3711)

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

- HB 1527 and SB 701 require the executive director and members of each industrial development authority and economic development authority to take training on the provisions of the Virginia Freedom of Information Act at least once every two years. (amending § 2.2-3704.3)
- SB 138 (i) adds regional public bodies to the types of public bodies that must designate a FOIA officer, (ii) changes the frequency for required FOIA officer training from annually to once during each consecutive period of two calendar years, and (iii) provides that the name and contact information of a FOIA officer trained by legal counsel of a public body only needs to be submitted by July 1 of the initial year of training and updated if there are changes to that information. (amending § 2.2-3704.2)
- SB 139 (i) adds the option for in-person training sessions to the current requirement of online training sessions for local elected officials provided by the FOIA Council or a local government attorney and (ii) clarifies that "local elected officials" includes constitutional officers. (amending § 2.2-3704.3)
- SB 153 provides that if a requester asks for a cost estimate in advance of a FOIA request, 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 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. (amending § 2.2-3704)

## **Presentation: House Bill 321 (Levine)<sup>12</sup>**

*Delegate Mark H. Levine*

*Elizabeth Bennett-Parker, Vice Mayor of the City of Alexandria*

Delegate Mark H. Levine informed the Council that the Honorable Elizabeth Bennett-Parker, Vice Mayor of the City of Alexandria, had presented the idea for HB 321 (2020) before the COVID-19 state of emergency in order to help members of public bodies, particularly public bodies that meet many times per year, to carry out their responsibilities as members while helping family members who are ill. Delegate Levine also described limitations on electronic participation in meetings under current law and said that, while his bill would help members continue to participate in meetings electronically, it contained limits, including on the number of meetings per year that can be attended electronically, in order to prevent abuse. Delegate Levine also related that the bill was supported by the Virginia Association of Counties and the Virginia Municipal League. Vice Mayor Bennett-Parker explained that the electronic meetings restrictions currently in FOIA might cause a member of a public body to miss meetings if the member was caring for a sick family member in another state. She also expressed how such restrictions could act as a barrier to participation for many people who might otherwise run for election or volunteer to serve as appointed members of various public bodies. In conclusion, Vice Mayor Bennett-Parker explained how HB 321 could help increase participation and diversity in representation while maintaining transparency and accountability. After further discussion between the Council and Delegate Levine concerning how the bill would operate, Senator Locke stated that the Council would form a subcommittee to study the bill (see below).

## **Assignment of Subcommittees**

*Senator Mamie E. Locke*

Members of the Council were assigned to specific subcommittees to study each of the bills presented during the meeting. Senator Locke followed staff recommendations by establishing an Electronic Meetings Subcommittee to study HB 321 (Levine, 2020) and other electronic meetings issues, and by continuing the Phishing Study Subcommittee that began its work in 2019.

The Electronic Meetings Subcommittee, consisting of Council members Billy Coleburn, Matthew Conrad, Bruce Potter, Sterling Rives, Cullen Seltzer, Michael Stern, and Amigo Wade, will study HB 321. It will also study other issues related to electronic meetings as needed, including issues that have been raised due to the COVID-19 pandemic and state of emergency.

The Phishing Study Subcommittee, consisting of Council members Sandy Treadway (chair), Lee Bujakowski, Shawri King-Casey, Sterling Rives, and Amigo Wade, will continue its study of the threat of phishing attacks using information obtained through FOIA as proposed by House Joint Resolution 628 (Heretick, 2019).

Delegate Simon, noting current concerns over access to law-enforcement and public safety information, asked whether the Council should form a subcommittee to study those issues. Senator Locke agreed that such issues would likely come in the future but advised waiting until they were brought to the Council before forming a subcommittee.

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<sup>12</sup> HB 321 was introduced during the 2020 Regular Session of the General Assembly and was referred to the Council by letter from the Senate Committee on General Laws and Technology.

## **Other Business and Updates; Current FOIA Training**

### *Council Staff*

Staff reported that in order to facilitate compliance with the new statutory requirement for local elected officials and members and executive directors of economic development authorities and industrial development authorities to receive FOIA training,<sup>13</sup> a new online FOIA training program for local elected officials was developed and made available on July 1, 2020. According to staff, some users of the new training program have experienced technical difficulties, so staff is working with IT staff to resolve those issues. Staff also reported that due to the COVID-19 state of emergency, most in-person training sessions have been canceled, but staff has presented several live, virtual training sessions. Additionally, the Council has purchased webinar hosting software, and staff will provide additional free, live, virtual training presentations to be scheduled after the adjournment of the 2020 Special Session I of the General Assembly.

### **Public Comment and Next Meeting**

Staff reported receiving seven public comments for the meeting that were posted to the *Council's website*, including a paper from the Virginia Coalition for Open Government and Virginia Press Association, all in support of studying electronic meetings issues. Staff also said about 20 public comments were received concerning other electronic meetings, with some reporting positive experiences, some negative, and some mixed. At the direction of Senator Locke, those public comments and any additional public comments about specific electronic meetings will be posted on the *Council's website*. There were no live public comments, but one additional public comment concerning electronic meetings was received during the meeting and read aloud by staff.

Senator Locke directed staff to poll members of the Council about future meeting dates for the Council and its subcommittees after the adjournment of the 2020 Special Session I of the General Assembly.

### **December 2, 2020**

The Council met electronically with Senator Mamie E. Locke, chair, presiding.<sup>14</sup> The meeting began with roll call and welcoming new Council member Chidi I. James, partner with the law firm of Blankingship & Keith, P.C., who was appointed by the Speaker of the House of Delegates to fill the seat for a citizen member that was formerly held by Michael Stern, followed by reports from the Council's three subcommittees, recommendations on the legislative drafts presented by each subcommittee, other business, and updates from staff. Materials presented at the meeting are accessible through the *Council's website*.

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<sup>13</sup> Such training is required pursuant to § 2.2-3704.3 of the Code of Virginia (effective July 1, 2020).

<sup>14</sup> **Members Present:** Senator Mamie E. Locke (chair), Delegate Marcus B. Simon (vice-chair), Senator Richard H. Stuart, Delegate William C. Wampler, III, Lee Bujakowski, William Coleburn, Matthew Conrad, Chidi James, Shawri King-Casey, Bruce Potter, Sterling Rives, Cullen Seltzer, Sandra Treadway, and Amigo Wade. Mr. Coleburn and Mr. Seltzer joined shortly after the meeting began, before any votes were taken. NOTE: All members participated by electronic means, and the meeting was live-streamed on the Senate's website pursuant to § 4-0.01 (g) of the 2020–2022 State Budget. A video recording of the meeting is available on the Council's website.

**Members Absent:** None

## **Phishing Study Subcommittee Report and Recommendations**

*Dr. Sandra Treadway, Phishing Study Subcommittee Chair*

Dr. Treadway provided a review of the work of the Phishing Study Subcommittee (the Subcommittee) to date; the Subcommittee began its study last year and met once this year on November 17 to examine the relationship between the Virginia Freedom of Information Act (FOIA) and phishing and related cybersecurity issues. Dr. Treadway informed the Council that because the Subcommittee had only been able to meet once this year a decision had not been made on whether to recommend any legislation, but the Subcommittee had directed staff to prepare two legislative drafts to present for the Council's consideration:

- The first draft (number 21100968D, available on the *Council's website*) would amend subdivision 10 of § 2.2-3705.1 of the Code of Virginia to provide that personal contact information provided to a public body or any of its members for the purpose of receiving electronic communications from the public body or any of its members is excluded from the mandatory disclosure provisions of FOIA, unless the recipient of such electronic communications indicates his approval for the public body to disclose such information. Currently, the law provides protections for personal contact information provided to a public body, not to its members; only applies to electronic mail; and requires the electronic mail recipient to request the public body not to disclose his personal contact information in order for the information to be exempt from mandatory disclosure.
- The second draft (number 21100969D, available on the *Council's website*) would amend subdivision 10 of § 2.2-3705.1 of the Code of Virginia to provide that personal contact information provided to a public body or any of its members or employees during general correspondence is excluded from the mandatory disclosure provisions of FOIA. Currently, the law provides protections for personal contact information provided to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information.

The Subcommittee then heard public comments. Milissa Spring, Senior Deputy County Attorney for Loudoun County, spoke in support of the proposed amendments. Joshua Heslinga, Director of Legal and Legislative Services for the Virginia Information Technologies Agency (VITA), submitted written comments (posted on the *Council's website*) and said that the bills could cause an increased number of redactions, which may increase the time and costs involved in responding to requests. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), said that VCOG did not oppose the proposed concept, but she said that draft number 21100969D was too broad and shielded too much information and that VCOG opposed switching the "opt out" provision in draft number 21100968D to an "opt in" provision. Mark Hickman, speaking on behalf of the Virginia Press Association (VPA), said that VPA was not opposed to adding "members" in draft number 21100968D but opposed changing the "opt out" provision to an "opt in" provision and that VPA was opposed to draft number 21100969D as being too broad. Sherri Neil, Intergovernmental Affairs Manager for the City of Portsmouth, spoke in support of the proposed changes but expressed a concern that citizens need to be made aware of the requirement to either "opt out" or "opt in," as there is currently no provision requiring that citizens be notified of that element of the exemption. Delegate Steve E. Heretick, patron of HJ 628 (2019), thanked the Subcommittee for its work and spoke to the background facts for the phishing study, which stemmed from a phishing attack on the City of Portsmouth. After further discussion of both drafts, the Subcommittee voted 11–3 to amend line 66 of draft number 21100968D to strike "provided that" and insert "unless," then voted 11–3 to recommend the draft as amended to the

2021 Session of the General Assembly.<sup>15</sup> A motion to recommend draft number 21100969D failed by a vote of 3–10.<sup>16</sup>

## **Electronic Meetings Subcommittee Report and Recommendations**

*Cullen Seltzer, Electronic Meetings Subcommittee Chair*

Mr. Seltzer reported that the Electronic Meetings Subcommittee (the Subcommittee) had two different legislative draft proposals to present for the Council's consideration, both of which would amend the current law on electronic meetings, but in different ways. The first draft (number 21100964D) is an amended substitute version of HB 321 (Levine, 2020) that would allow for members of public bodies to participate remotely when caring for a family member with a serious illness, and allow members who participate remotely due to a personal matter that prevents physical attendance to do so twice per year or 25 percent of the meetings held per calendar year, rounded up, whichever is greater. The second draft (number 21100997D) concerns electronic meetings held due to states of emergency such as the COVID-19 pandemic; the Council decided to consider each draft separately. Mr. Seltzer said that although the Subcommittee generally expressed a preference for in-person meetings, this legislation would make public service more accessible and was supported by the overwhelming majority of public comments received.

Delegate Mark H. Levine discussed the background for the original version of HB 321, described how the amended draft would allow greater options for public service but would retain protections to prevent abuse, and expressed his support for the amended bill. The Council then heard public comment. Elizabeth Bennett-Parker, Vice-Mayor of the City of Alexandria, expressed her support for both drafts recommended by the Subcommittee, provided several examples of how they would allow for increased flexibility in public service, and suggested striking the word "serious" that appears before the term "medical condition" on lines 12 and 25 of the draft. Melanie Meren, a member of the Fairfax County School Board, expressed support for expanding flexibility for electronic participation, especially as a matter of parity for public bodies that hold a greater number of meetings than others. Phyllis Errico, speaking on behalf of the Virginia Association of Counties and the Virginia Municipal League, also expressed support for the amended version of HB 321. Libby Garvey, Chair of the Arlington County Board of Supervisors, also expressed support for the draft legislation, noting that while the goals of FOIA to provide access to government remain the same, technology has changed over time and the law needs to change accordingly to meet the goals of FOIA.

Debbie Borato, speaking as a citizen who lost a family member in the Virginia Beach shooting in May 2019, said greater access was necessary, not only to the public in general, but to family members and victims as well. Dr. Lorita Copeland Daniels, a member of the Spotsylvania County School Board, expressed support for both proposed drafts, gave examples of how they would enable greater flexibility in participation, and also recommended striking the word "serious" from draft number 21100964D. Vic Nicholls, a citizen from Chesapeake, expressed support for the draft, stating that a member of her City Council was in the military reserves and that this legislation would enable him to participate even if he was called away for military service. Amy Perron Seibert, speaking on behalf of a coalition of interested parties, expressed support for an amended

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<sup>15</sup> All Council members voted in favor of both motions, except Mr. Coleburn, Mr. James, and Mr. Potter voted against both the motion to amend and the motion to recommend.

<sup>16</sup> Senator Locke, Senator Stuart, Mr. Conrad, and Mr. Rives voted in favor; all other Council members voted against.

version of draft number 21100997D (the suggested line amendments are available on the *Council's website*). Ms. Neil (City of Portsmouth) expressed support for both of the drafts.

Ms. Rhyne (VCOG) said that while she had spoken against HB 321 and the expansion of electronic meetings in the past, she had been persuaded that more flexibility is needed and no longer opposed the bill. She expressed a concern that, following the policy of FOIA, technology should be used to afford greater opportunities for the public to witness the operation of government, not only for the convenience of government officials. Mr. Hickman (VPA) said that VPA believes that there should be a comprehensive study of electronic meetings in 2021 rather than taking a piecemeal approach. He said VPA does not oppose adding language to allow members to participate remotely when caring for sick family members but does oppose increasing the number of times a member may call in due to other personal matters.

After further discussion, the Council voted unanimously (13–0)<sup>17</sup> to amend draft number 21100964D to strike the word "serious" from lines 12 and 25. The Council then discussed the amended bill and voted to recommend draft number 21100964D as amended to the 2021 Session of the General Assembly by vote of 10–2 (all members were in favor, except William Coleburn and Bruce Potter voted against).<sup>18</sup>

Mr. Seltzer then presented draft number 21100997D, which would amend the current provisions allowing for electronic meetings during a state of emergency declared by the Governor by allowing for such meetings due to a local state of emergency, by removing the limitation on the purpose of such meetings (currently limited to addressing the emergency), and make other changes regarding the availability of videoconferencing and public comment. Mr. Seltzer and Delegate Marcus B. Simon then described the line amendments that had been proposed and mentioned previously by Ms. Seibert (available on the *Council's website*). The Council then voted 10–0–2 to adopt the line amendments (Delegate William C. Wampler, III, and Mr. Coleburn abstained). After further discussion, the Council voted to recommend draft number 21100997D as amended to the 2021 Session of the General Assembly by a vote of 10–2 (Delegate Wampler and Mr. Coleburn voted against).

### **Criminal Incident Information Subcommittee Report and Recommendations**

*Delegate Marcus B. Simon, Criminal Incident Information Subcommittee Chair*

Delegate Simon reported that the Criminal Incident Information Subcommittee (the Subcommittee) had met twice, heard from Delegate Chris L. Hurst as patron of HB 5090 (2020 Special Session I) and other interested parties, and unanimously recommended an amended version of HB 5090 to the Council (number 21100966D). Delegate Hurst then presented the amended draft and described how it was modeled on language used by other states and the federal government. The Council then heard public comment. Beth Powers, State Policy Advocate at the Innocence Project, said that the Virginia Innocence Coalition (composed of the Innocence Project at the University of Virginia School of Law, the Mid-Atlantic Innocence Project, and the National Innocence Project) strongly supports this legislation because it may help exonerate persons wrongfully convicted, provide information to crime victims and their families, and ensure fair investigations of police-involved killings. Jason Nixon, whose wife was killed in the shooting in Virginia Beach in May 2019, described his inability to get police records concerning the shooting under current law and spoke in support of the bill. First Sergeant David Ostwinkle of the Virginia

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<sup>17</sup> Note that Senator Stuart had to leave the meeting and was not present for this vote or subsequent votes.

<sup>18</sup> Note that Mr. Bujakowski had to leave the meeting and was not present for this vote or subsequent votes.

State Police stated that VSP took no position on the bill but was concerned about the potential increased demand for records, the volume of records at issue, and the time and costs involved in redacting and producing records concerning older cases. Ms. Rhyne said that VCOG supports the bill and reminded the Council that while the focus of the discussion had been on high-profile cases, the legislation would apply to all criminal investigative records. She also noted that there are tools in existing law to address time and cost concerns. After further discussion, the Council voted unanimously (11–0)<sup>19</sup> to recommend draft number 21100966D to the 2021 Session of the General Assembly.

### **Legislative Preview; Other Business and Updates; Current FOIA Training**

#### *Council Staff*

Staff reported that no one had brought forth any other legislation for the annual legislative preview this year. Staff also reported that in a general district court case a judge had ruled that the phrase "official public government website" as used in FOIA could only refer to ".gov" addresses, but that in practice public bodies use several types of web addresses; Senator Locke stated that the Council would address the issue in 2021. Staff also reported on FOIA training, including increased use of online training programs and live virtual presentations due to the COVID-19 pandemic. Staff also noted that the format of the statistics for formal and informal inquiries to the Council reported in the annual report would look different this year because it was the first full year that such statistics were tracked using Google Sheets.

### **Public Comment and Next Meeting**

Written public comments are posted to the *Council's website*; there were no additional live public comments. Senator Locke stated that the next meeting of the Council would be scheduled after the adjournment of the 2021 Session of the General Assembly. The meeting was then adjourned.

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<sup>19</sup> Note that Delegate Wampler was muted and did not vote.

## **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. This year the Council added additional online training programs for local elected officials and members and executive directors of industrial and economic development authorities to satisfy the statutory requirements of § 2.2-3704.3 (effective July 1, 2020). 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 2,000 inquiries, conducted 37 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. Most were conducted virtually rather than in person.

### **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, 2019, to November 30, 2020, Council staff fielded 1,996 informal inquiries and published four 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, 2019, through November 30, 2020:

Written Advisory Opinions: 4

State and Local Government	1
Citizens of the Commonwealth	3
Members of the News Media	0

Typically, the Council provides advice by 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, 2019, and November 30, 2020:

Telephone and Email Responses: 1,996

State and Local Government	1,300
Citizens of the Commonwealth	639
Members of the News Media	56
Not specified	1

Appendix F to this report sets out the number of inquiries received by the Council each month from December 2019 through November 2020 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. However, please note that the tracking methods and categories were changed this year. Due to the change, this year's data as shown above does not align directly with prior years, and so it is not included in the last 10-year charts in Appendix G to this report.

**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 in the past 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 training 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, at only a few locations per year, but 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. In 2020, a new training requirement for local elected officials and members and executive directors of economic and industrial development authorities went into effect on July 1.<sup>20</sup> However, due to the COVID-19 pandemic and resulting social distancing requirements, the vast majority of live, in-person presentations were canceled. As public bodies adopted virtual meeting and presentation technologies, the Council again provided training presentations on request but via electronic communication means rather than in person. In total, the Council conducted 37 live training presentations during this reporting period. Additionally, the Council developed new online training presentations and recorded live training sessions so that users would have multiple options to meet

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<sup>20</sup> Code of Virginia § 2.2-3704.3.

the statutory training requirements for local elected officials and FOIA officers. 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, as well as hosting its own online training programs for local elected officials on the FOIA Council website.

### **Educational Materials**

The Council continuously creates and updates educational materials that are relevant to requesters and helpful to government officials and employees in responding to requests and conducting public meetings. Publications range from documents explaining the basic procedural requirements of FOIA to documents exploring less-settled areas of the law. These materials are available on the Council's website. 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
- Email: 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 2,000 inquiries and conducting 37 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 the Council for their hard work and dedication.

Respectfully submitted,

Senator Mamie E. Locke, Chair

Delegate Marcus B. Simon, Vice-Chair

Senator Richard H. Stuart

Delegate William C. Wampler, III

Shawri King-Casey

Sandra G. Treadway

Mark Vucci

Lee Bujakowski

William "Billy" Coleburn

Matthew A. Conrad

Chidi James

Bruce Potter

Sterling E. Rives, III

Cullen D. Seltzer

## Training and 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, 2019, through November 30, 2020, Council staff conducted a total of 37 training seminars, which are listed below in chronological order. In past years, the Council has conducted presentations as requested by other groups, agencies, and localities, and conducted free courses based in Richmond open to all interested parties. Due to the COVID-19 pandemic state of emergency declared in March 2020, the majority of the training presentations for this reporting period were conducted virtually rather than in person. The Council also developed additional online training programs for local elected officials and members and executive directors of Economic Development Authorities and Industrial Development Authorities to satisfy the statutory requirements set forth in § 2.2-3704.3, which went into effect July 1, 2020. 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 (VSB). The Law Enforcement Records program is preapproved for 2.0 hours of in-service credit through the Department of Criminal Justice Services as well as 2.0 hours of CLE through the VSB. This year, the Council for the first time obtained approval for both live, in-person and virtual versions of these courses, again due to the COVID-19 pandemic. Additionally, the Council continued online FOIA training for FOIA officers through the Commonwealth of Virginia Learning Center administered by the Department of Human Resource Management (<https://covlc.virginia.gov/>).

December 5, 2019	Senate New Members Richmond, VA
December 10, 2019	Northern Virginia Criminal Justice Academy Ashburn, VA
December 11, 2019	Senate Legislative Aides Richmond, VA
December 11, 2019	State Compensation Board New Officer Training Glen Allen, VA
January 30, 2020	VCU Open Worlds Delegation from Kazakhstan Richmond, VA
March 24, 2020	GO Virginia Department of Housing & Community Development (virtual presentation)

May 21, 2020	Portsmouth Redevelopment and Housing Authority (virtual presentation)
June 3, 2020	Information Security Officers Advisory Group Virginia Information Technologies Agency (virtual presentation)
June 25, 2020	Commissioners of the Revenue Association Southwest District (virtual presentation)
June 26, 2020	Local Government Attorneys Regional Seminar (virtual presentation)
July 9, 2020	Newly Elected Officials Conference Virginia Municipal League (virtual presentation)
July 20, 2020	Commonwealth Regional Council (virtual presentation)
August 6, 2020	Commissioners of the Revenue Association West Central District (virtual presentation)
August 7, 2020	FOIA Training Day (hosted by Fairfax County) (Attended by representatives of over 68 localities, state and federal agencies, and citizens of the Commonwealth) (virtual presentation)
August 11, 2020	Brunswick County Industrial Development Authority (virtual presentation)
August 12, 2020	Loudoun County (virtual presentation)
August 18, 2020	James Madison University (virtual presentation)
August 24, 2020	Louisa County (virtual presentation)
August 25, 2020	Harrisonburg Police Department (virtual presentation)
August 31, 2020	Middleburg, VA (virtual presentation)

September 2, 2020	Augusta County Sheriff's Office (virtual presentation)
September 8, 2020	Commissioners of the Revenue Association Central District (virtual presentation)
September 10, 2020	Department of Housing and Community Development Building Code Academy (virtual presentation)
September 10, 2020	Virginia Coalition for Open Government Annual Conference (virtual presentation)
September 15, 2020	Chincoteague (virtual presentation)
September 24, 2020	Virginia School Board Association Legislative Advocacy Conference (virtual presentation)
October 7, 2020	Virginia Municipal League 2020 Annual Conference (virtual presentation)
October 13, 2020	Virginia Municipal Clerks Association Annual Institutes and Academy Virginia Freedom of Information Act (FOIA) Essentials (virtual presentation)
October 15, 2020	Virginia Municipal Clerks Association Annual Institutes and Academy Electronic Records and Meetings in the COVID-19 Era (virtual presentation)
October 20, 2020	Office of the State Inspector General (virtual presentation)
October 20, 2020	State Council of Higher Education for Virginia New Board Member Orientation (virtual presentation)
October 22, 2020	Virginia Municipal Clerks Association Annual Institutes and Academy Knowledge Transfer Virtual Rooms (virtual presentation)

November 10, 2020	University of Richmond (virtual presentation)
November 12, 2020	Northern Virginia Criminal Justice Academy (virtual presentation)
November 16, 2020	Virginia Association of Counties (virtual presentation)
November 19, 2020	Virginia House of Delegates New Member Orientation Richmond, VA
November 23, 2020	FOIA Training for Local Elected Officials (virtual presentation)



**Index of Written Advisory Opinions Issued**

December 1, 2019, through November 30, 2020

**ADVISORY OPINIONS ISSUED**

**Opinion No.**

**Issue(s)**

**May**

AO-01-20

Closed meeting motions must include a subject, purpose, and citation and must be set forth in detail in the meeting minutes. Votes taken after a closed meeting must reasonably identify the substance of the vote. Meeting minutes must include a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken.

AO-02-20

A public body may not provide a requester with a summary of an existing record instead of the record itself, even when the record may be redacted, unless the requester agrees to accept the summary instead.

**September**

AO-03-20

The records exclusion at subdivision 1 of § 2.2-3705.3 exempts from mandatory disclosure "information relating to investigations of applicants for licenses and permits, and of all licensees and permittees, made by or submitted to" certain public bodies. That language includes the application and materials submitted. Additionally, unlike several other exemptions in the same section, the language of this exemption does not limit its application to active investigations nor does it require the disclosure of inactive or completed reports.

**October**

AO-04-20

The provisions of § 2.2-3708.2 allowing members to participate in meetings by electronic communication means are alternative meetings procedures, not exemptions from public access that would allow meetings to be closed to the public. If a member is calling in due to a disability or medical condition or due to a personal matter, the member must specify which reason it is in order to notify the chair and comply with the requirements for minutes. A generalized concern about illness is not a sufficient reason to use the provision allowing remote participation due to a disability or medical condition, but following the recommendations of VDH and CDC to

stay home during the COVID-19 state of emergency is a sufficient reason, particularly if the member is in one of the categories for a higher risk to contract a severe illness. However, each body may set its own policy on participation as allowed by FOIA, up to and including not using these remote participation provisions at all.

**2020 Meetings of the Council**

**Tuesday, August 4, 2020**

**Virtual Meeting**

Election of chair and vice-chair; recap of FOIA and related access bills from the 2020 Session; review of the bill referred to the Council by the 2020 Session; continuation of the Phishing Study Subcommittee from 2019 and appointment of new subcommittee on electronic meetings; updates regarding FOIA training, including new online FOIA training for local elected officials.

**Wednesday, December 2, 2020**

**Virtual Meeting**

New Council member; progress reports and review of recommended drafts from the Council's subcommittees; updates regarding FOIA officer training, FOIA training for local elected officials, and current training presentations, including the use of virtual technology due to the COVID-19 pandemic.

## 2020 FOIA Legislative Update

### I. Introduction

The General Assembly passed a total of 23 bills amending the Virginia Freedom of Information Act (FOIA) during the 2020 Session. Five bills passed the General Assembly that were recommended by the FOIA Council: SB 138, which (i) adds regional public bodies to the type of public bodies that are required to have a FOIA officer, (ii) requires FOIA training every two years instead of every year, and (iii) requires a FOIA officer's name and contact information to be reported to the FOIA Council when the officer is first trained and then only if the information changes; SB 139, which allows for live, in-person training, as well as online training for local elected officials, and clarifies that constitutional officers are subject to such training requirements; SB 140, which is identical to HB 510, amends the current exemption for donor records by clarifying that the exemption does not protect "information relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor" except if "the donor has requested anonymity in connection with or as a condition of making a pledge or donation" or if "the pledge or donation does not impose terms or conditions related to academic decision-making"; and SB 153, which (i) adds that the time to respond to a FOIA request is tolled for the amount of time that elapses between notice of the cost estimate and the response from the requester; (ii) adds 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; and (iii) clarifies that if a cost estimate exceeds \$200 and the public body 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.

Sixteen bills clarify four existing records exemptions and add seven new records exemptions in FOIA as follows:

- HB 313 and SB 259 clarify that information contained in library records that can be used to identify any library patron who has borrowed or accessed material or resources from a library, as well as the material or resources such patron borrowed or accessed, is exempt from disclosure under FOIA. (§ 2.2-3705.7)
- HB 510 and SB 140 clarify 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 unless (i) the donor has requested anonymity in connection with or as a condition of making a pledge or donation and (ii) the pledge or donation does not impose terms or conditions directing academic decision-making. (§ 2.2-3705.4)
- HB 1012 and SB 578 clarify that any correspondence and information furnished in confidence to the Department of Education in connection with an active investigation of an applicant or licensee pursuant to Chapter 14.1 (§ 22.1-289.02) of Title 22.1 is exempt from mandatory disclosure under FOIA. These bills have a delayed effective date of July 1, 2021. (§ 2.2-3705.5)

- HB 1211 and SB 34 clarify that information maintained in connection with fundraising activities by the Veteran Services Foundation that reveals the social security number or other identification number appearing on a driver's license or other document issued under Chapter 3 (§ 46.2-300 et seq.) of Title 46.2 or the comparable law of another jurisdiction is exempt from mandatory disclosure under FOIA. These bills have a delayed effective date of January 1, 2021. (§ 2.2-3705.7)
- HB 548 exempts from the mandatory disclosure provisions of FOIA pertaining to records relating to administrative investigations records of active investigations that are being conducted by the Department of Behavioral Health and Developmental Services. (adding an exemption in § 2.2-3705.4)
- HB 722 and SB 269 exempt from the mandatory disclosure provisions of FOIA relating to proprietary records and trade secrets financial and proprietary records submitted with a loan application to a locality for the preservation or construction of affordable housing that is related to a competitive application to be submitted to either the U.S. Department of Housing and Urban Development (HUD) or the Virginia Housing Development Authority (VHDA), when the release of such records would adversely affect the bargaining or competitive position of the applicant. The bill also provides that such financial and proprietary records shall not be withheld after they have been made public by HUD or VHDA. (adding an exemption in § 2.2-3705.6)
- HB 896 and SB 384 exempt from the mandatory disclosure provisions of FOIA personal information provided to or obtained by the Virginia Lottery (i) in connection with the voluntary exclusion program administered pursuant to § 58.1-4015.1 and (ii) concerning the identity of any person reporting prohibited conduct pursuant to § 58.1-4043. (adding an exemption in § 2.2-3705.7)
- HB 1017 and SB 576 exempt from the mandatory disclosure provisions of FOIA relating to proprietary records and trade secrets information relating to a grant, loan, or investment application or accompanying a grant, loan, or investment application submitted to the Commonwealth of Virginia Innovation Partnership Authority (the Authority), an advisory committee of the Authority, or any other entity designated by the Authority to review such applications if certain conditions are met. The bills also create an exemption for information held by the Authority, an advisory committee of the Authority, or any other entity designated by the Authority relating to (i) internal deliberations of or decisions by the Authority on the pursuit of particular investment strategies prior to the execution of such investment strategies and (ii) trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided by a private entity to the Authority, if such disclosure of records pursuant to clause (i) or (ii) would have an adverse impact on the financial interest of the Authority or a private entity. (adding exemptions in §§ 2.2-3705.6 and 2.2-3705.7)
- SB 482 exempts from the mandatory disclosure provisions of FOIA relating to health and social services records information acquired during a review of any death conducted by the Developmental Disabilities Mortality Review Committee to the extent that such information is made confidential by § 37.2-314.1. (adding an exemption in § 2.2-3705.5)

Seven bills add four new meetings exemptions in FOIA as follows:

- HB 4 and SB 36 create an exemption from the open meeting requirements of FOIA for deliberations of the Virginia Lottery Board in a licensing appeal action conducted pursuant to § 58.1-4105 regarding the denial or revocation of a license of a casino gaming operator and any discussion, consideration, or review of matters related to investigations exempt from disclosure under subdivision 1 of § 2.2-3705.3. (§ 2.2-3711)
- HB 896 and SB 384 create an exemption from the open meeting requirements of FOIA for deliberations of the Virginia Lottery Board in an appeal conducted pursuant to § 58.1-4007 regarding the denial of, revocation of, suspension of, or refusal to renew a permit related to sports betting and any discussion, consideration, or review of matters related to investigations excluded from mandatory disclosure under subdivision 1 of § 2.2-3705.3. (§ 2.2-3711)
- HB 1017 and SB 576 create an exemption from the open meeting requirements of FOIA for the discussion or consideration of grant, loan, or investment application records subject to the exclusion in subdivision 28 of § 2.2-3705.6 for a grant, loan, or investment pursuant to Article 11 (§ 2.2-2351 et seq.) of Chapter 22 of Title 2.2. (§ 2.2-3711)
- SB 482 creates an exemption from the open meeting requirements of FOIA for those portions of meetings in which individual death cases of persons with developmental disabilities are discussed by the Developmental Disabilities Mortality Review Committee. (§ 2.2-3711)

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

- HB 1527 and SB 701 require the executive director and members of each industrial development authority and economic development authority to take training on the provisions of the Virginia Freedom of Information Act at least once every two years. (amending § 2.2-3704.3)
- SB 138 (i) adds regional public bodies to the types of public bodies that must designate a FOIA officer, (ii) changes the frequency for required FOIA officer training from annually to once during each consecutive period of two calendar years, and (iii) provides that the name and contact information of a FOIA officer trained by legal counsel of a public body only needs to be submitted by July 1 of the initial year of training and updated if there are changes to that information. (amending § 2.2-3704.2)
- SB 139 (i) adds the option for in-person training sessions to the current requirement of online training sessions for local elected officials provided by the FOIA Council or a local government attorney and (ii) clarifies that "local elected officials" includes constitutional officers. (amending § 2.2-3704.3)
- SB 153 provides that if a requester asks for a cost estimate in advance of a Virginia Freedom of Information Act request, 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 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. (amending § 2.2-3704)

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.

For more specific information on the particulars of each bill, please see the bill itself. Unless otherwise indicated, the changes were effective July 1, 2020.

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

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

**SB 153 Virginia Freedom of Information Act; cost estimates; response time.** Provides that if a requester asks for a cost estimate in advance of a Virginia Freedom of Information Act request, 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 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. This bill is a recommendation of the Virginia Freedom of Information Advisory Council (2020 Acts of Assembly, c. 1142).

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

**SB 138 Virginia Freedom of Information Act; FOIA officers; training and reporting requirements.** Adds regional public bodies to the types of public bodies that must designate a FOIA officer. The bill also changes the frequency for required FOIA officer training from annually to once during each consecutive period of two calendar years and provides that the name and contact information of a FOIA officer trained by legal counsel of a public body only needs to be submitted by July 1 of the initial year of training and updated if there are changes to that information. Current law requires this information to be submitted by July 1 of each year. This bill is a recommendation of the Virginia Freedom of Information Advisory Council (2020 Acts of Assembly, c. 1141).

**§ 2.2-3704.3 Training for local officials.**

**HB 1527 and SB 701 State and Local Government Conflict of Interests Act and Virginia Freedom of Information Act; training requirements; executive directors and members of industrial development authorities and economic development authorities.** Requires the executive director and members of each industrial development authority and economic development authority, as created by the Industrial Development and Revenue Bond Act, to take training on the provisions of the State and Local Government Conflict of Interests Act and the Freedom of Information Act at least once every two years. The bill requires such officials in office on July 1, 2020, to complete such training no later than December 31, 2020. Training on the Virginia Freedom of Information Act may be provided online by the Virginia Freedom of Information Advisory Council or the local government attorney. Training on the State and Local Government Conflict of Interests Act shall be provided by the Virginia Conflict of Interest and Ethics Advisory Council and may be provided online. The clerk of the respective governing body is responsible for maintaining training records (2020 Acts of Assembly, cc. 76 and 80).

**SB 139 Virginia Freedom of Information Advisory Act; training requirements.** Adds the option for in-person training sessions to the current requirement of online training sessions for local elected officials provided by the Virginia Freedom of Information Advisory Council or a local government attorney. The bill also clarifies that "local elected officials" includes constitutional officers. As introduced, this bill was a recommendation of the Virginia Freedom of Information Advisory Council (2020 Acts of Assembly, c. 904).

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

**HB 548 Virginia Freedom of Information Act; exclusions; Department of Behavioral Health and Developmental Services; records of active investigations.** Exempts from mandatory disclosure under the Virginia Freedom of Information Act records of active investigations that are being conducted by the Department of Behavioral Health and Developmental Services (2020 Acts of Assembly, c. 48).

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

**HB 510 and SB 140 Virginia Freedom of Information Act; public institutions of higher education; information related to pledges and donations.** 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 (i) the donor has requested anonymity in connection with or as a condition of making a pledge or donation and (ii) the pledge or donation does not impose terms or conditions directing academic decision-making. As introduced, this bill was a recommendation of the Virginia Freedom of Information Advisory Council (2020 Acts of Assembly, cc. 71 and 78).



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

**HB 1012 and SB 578 Early childhood care and education; licensing.** Requires the Board of Education to establish a statewide unified public-private system for early childhood care and education in the Commonwealth to be administered by the Board of Education, the Superintendent of Public Instruction, and the Department of Education. The bill transfers the authority to license and regulate child day programs and other early child care agencies from the Board of Social Services and Department of Social Services to the Board of Education and Department of Education. The bill maintains current licensure, background check, and other requirements of such programs. Such provisions of the bill have a delayed effective date of July 1, 2021. The bill requires the Superintendent of Public Instruction to establish a plan for implementing the statewide unified early childhood care and education system and requires the Department of Social Services and the Department of Education to enter into a cooperative agreement to coordinate the transition. The bill also requires the Board of Education to establish, no later than July 1, 2021, a uniform quality rating and improvement system designed to provide parents and families with information about the quality and availability of certain publicly funded early childhood care and education providers and to publish the initial quality ratings under such system in the fall of 2023 (2020 Acts of Assembly, cc. 860 and 861).

**SB 482 Developmental Disabilities Mortality Review Committee; penalty.** Creates the Developmental Disabilities Mortality Review Committee to review the death of any person with a developmental disability who was receiving services from a provider licensed by the Department of Behavioral Health and Developmental Services or in a training center or other state facility at the time of his death to ensure that the deaths of such persons are reviewed and analyzed in a systematic way (2020 Acts of Assembly, c. 851).

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

**HB 722 and SB 269 Virginia Freedom of Information Act; exclusions; proprietary records and trade secrets; affordable housing loan applications.** Excludes from mandatory disclosure financial and proprietary records submitted with a loan application to a locality for the preservation or construction of affordable housing that is related to a competitive application to be submitted to either the U.S. Department of Housing and Urban Development (HUD) or the Virginia Housing Development Authority (VHDA), when the release of such records would adversely affect the bargaining or competitive position of the applicant. The bill also provides that such financial and proprietary records shall not be withheld after they have been made public by HUD or VHDA (2020 Acts of Assembly, cc. 72 and 79).

**HB 1017 and SB 576 Research and development in the Commonwealth.** Creates the Commonwealth of Virginia Innovation Partnership Authority (the Authority) to oversee and support research, development, and commercialization, as well as related investment and seed-stage funding, in the Commonwealth. The Authority is governed by an 11-member Board, consisting of the Secretary of Commerce and Trade, six nonlegislative citizen members appointed by the Governor, and four nonlegislative citizen members appointed by the Joint Rules Committee. Existing grant, loan, and investment funds currently administered by the Innovation and Entrepreneurship Investment Authority and the Virginia Research Investment Committee,

repealed under the bill, would be consolidated under the Authority, and the Authority would be responsible for developing an Innovation Index for the Commonwealth. The bill contains technical amendments (2020 Acts of Assembly, cc. 1164 and 1169).

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

**HB 313 and SB 259 Virginia Freedom of Information Act; library records.** Clarifies that information contained in library records that can be used to identify any library patron who has borrowed or accessed material or resources from a library as well as the material or resources such patron borrowed or accessed is exempt from disclosure under the Virginia Freedom of Information Act (2020 Acts of Assembly, cc. 70 and 587).

**HB 896 and SB 384 Sports betting; Problem Gambling Treatment and Support Fund; penalties.** Directs the Virginia Lottery (the Lottery) to regulate sports betting. The bill prohibits the Lottery from issuing any permits to conduct sports betting until it has developed and published a consumer protection bill of rights.

Before administering a sports betting operation, an entity is required to apply for a three-year permit and pay a nonrefundable application fee of \$250,000 as well as an additional \$250,000 fee if its application is approved. Permit holders must apply for renewal of a permit every three years, which includes a nonrefundable renewal fee of \$200,000. The Director of the Virginia Lottery may issue from four to 12 permits at one time and is directed to issue a number of permits that will maximize tax revenue collected pursuant to the bill. In issuing permits, the Director is required to give preferred consideration to applicants that are (i) certain major league sports franchises and (ii) certain casino operators.

The bill prohibits betting on Virginia college sports and youth sports and prohibits proposition bets on all college sports. The bill prohibits betting by Lottery employees, permit holders and certain related persons, athletes and coaches with respect to events in their league, and persons under age 21. The penalty for engaging in prohibited betting is a Class 1 misdemeanor.

The bill prohibits betting on the biometric data of an athlete without his consent and includes provisions for the Lottery to investigate prohibited conduct, such as attempting to influence an athlete or the outcome of an athletic event.

The bill directs the Lottery to establish a voluntary exclusion program, which allows individuals to request that the Lottery exclude them from engaging in various kinds of betting activity.

The bill allows the governing body of a sports league to request that the Lottery (a) limit or prohibit people from betting on events of the league that it governs and (b) restrict the information sources used to resolve bets that are placed after a sports event has begun.

The bill imposes a 15 percent tax on a permit holder's adjusted gross revenue, defined in the bill. The bill authorizes permit holders to carry over and deduct net losses for up to 12 months.

The bill creates the Problem Gambling Treatment and Support Fund, administered by the Department of Behavioral Health and Developmental Services. The Fund is established to provide counseling to compulsive gamblers, implement problem gambling treatment and prevention programs, and provide grants to organizations that assist problem gamblers. The Fund is funded by 2.5 percent of the revenue generated from sports betting, with the remaining 97.5 percent accruing to the general fund (2020 Acts of Assembly, cc. 1218 and 1256).

**HB 1017 and SB 576 Research and development in the Commonwealth.** *See summary under § 2.2-3705.6, supra* (2020 Acts of Assembly, cc. 1164 and 1169).

**HB 1211 and SB 34 (incorporating SB 643) Driver privilege cards; penalty.** Authorizes the issuance of new driver privilege cards by the Department of Motor Vehicles to an applicant who (i) has reported income from Virginia sources or been claimed as a dependent on an individual tax return filed with the Commonwealth in the preceding 12 months and (ii) is not in violation of the insurance requirements for the registration of an uninsured motor vehicle. The bill provides that driver privilege cards shall confer the same privileges and shall be subject to the same provisions as driver's licenses and permits; however, driver privilege cards shall not (a) confer voting privileges, (b) permit an individual to waive any part of the driver examination, or (c) have their issuance be contingent upon the applicant's ability to produce proof of legal presence in the United States. The bill limits the release of certain information stored by the Department. The bill provides for the term "driver's license" to consistently refer to all driver's licenses, permits, driver privilege cards, and special identification cards issued by the Commonwealth or the comparable law of another jurisdiction. The bill allows the issuance of a limited-duration driver's license and special identification card to an applicant presenting valid documentary evidence that a federal court or federal agency having jurisdiction over immigration has authorized the applicant to be in the United States for a period of at least 30 days from the date of application. The bill authorizes the Tax Commissioner to provide to the Commissioner of the Department information sufficient to verify that an applicant for a driver privilege card or permit reported income from Virginia sources or was claimed as a dependent on an individual tax return filed with the Commonwealth in the preceding 12 months. The bill has a delayed effective date of January 1, 2021 (2020 Acts of Assembly, cc. 1227 and 1246).

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

**HB 4 (incorporating HBs 374, 428, 560, 1343, and 1661) and SB 36 (incorporating SBs 102, 374, 609, 743, and 1083) Lottery Board; regulation of casino gaming.** Authorizes casino gaming in the Commonwealth to be regulated by the Virginia Lottery Board. The bill specifies the requirements for licensure of casino gaming operators and the conduct of casino gaming and imposes criminal and civil penalties for violations of the casino gaming law. The location of casino gaming establishments shall be limited to eligible host cities that meet specified criteria: the Cities of Portsmouth, Richmond, Norfolk, Danville, and Bristol. The bill requires each eligible host city to hold a referendum on the question of whether to allow casino gaming in the city and, with the exception of the City of Richmond, to hold such referendum at the November 2020 general election. The bill imposes a tax ranging from 18 to 30 percent of the adjusted gross receipts of licensees, based upon a licensee's annual adjusted gross receipts, and provides for disbursement of the tax revenues. The bill requires the Board to establish a voluntary exclusion program allowing

individuals to voluntarily list themselves as being barred from entering a casino gaming establishment or other facility under the jurisdiction of the Board. The bill establishes the Problem Gambling Treatment and Support Fund, administered by the Commissioner of Behavioral Health and Developmental Services, and the Virginia Indigenous People's Trust Fund, both of which are funded by proceeds from the casino gaming tax revenues. The bill also establishes the Regional Improvement Commission, consisting of a representative of each jurisdiction composing the transportation district in which the City of Bristol is located, to receive disbursements of gaming tax revenues and to prioritize and fund improvements in those jurisdictions. The bill requires the Virginia Racing Commission to authorize an additional 600 historical horse racing terminals each time a local referendum held by an eligible host city is approved, provided that the total number of additional machines does not exceed 2,000 statewide, and includes other provisions relating to the placement of historical horse racing terminals in the Commonwealth (2020 Acts of Assembly, cc. 1197 and 1248).

**HB 896 and SB 384 Sports betting; Problem Gambling Treatment and Support Fund; penalties.** *See summary under § 2.2-3705.7, supra* (2020 Acts of Assembly, cc. 1218 and 1256).

**HB 1017 and SB 576.** *See summary under § 2.2-3705.6, supra* (2020 Acts of Assembly, cc. 1164 and 1169).

**SB 482 Developmental Disabilities Mortality Review Committee; penalty.** *See summary under § 2.2-3705.5, supra* (2020 Acts of Assembly, c. 851).

**Bills Referred to the FOIA Council by the  
2020 Session of the General Assembly**

- **HB 321 (Levine, 2020); Virginia Freedom of Information Act; electronic meetings; serious medical condition of immediate family member.** Allows a public body to conduct a meeting through electronic communication means if, on or before the day of a meeting, a member of the public body holding the meeting notifies the chair of the public body that he is unable to attend due to a serious medical condition of an immediate family member that prevents the member's physical attendance. The bill also limits such participation in an electronic meeting due to a personal matter to either two meetings per calendar year or 10 percent of the meetings held that calendar year, rounded up to the nearest whole number, whichever is greater.
- **HB 5090 (Hurst, 2020 Special Session I); Virginia Freedom of Information Act; law-enforcement criminal incident information; criminal investigative files.** Adds criminal investigative files, defined in the bill, to the types of law-enforcement and criminal records required to be released in accordance with the provisions of the Virginia Freedom of Information Act. Under current law, the release of criminal investigative files is discretionary. The bill also allows a law-enforcement agency or attorney for the Commonwealth to petition a court of record for permission not to release criminal incident information that would otherwise be subject to release, if the release of such information is likely to jeopardize an ongoing investigation or cause certain other harms.
- **HJ 628 (Heretick, 2019); 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.

[NOTE: Study began in 2019 and was continued in 2020.]

**FOIA Council Action on Each Bill:**

- **HB 321 (Levine, 2020); Virginia Freedom of Information Act; electronic meetings; serious medical condition of immediate family member.** Subcommittee met twice and recommended an amended version of HB 321. Subcommittee also recommended a separate bill to amend the provisions for conducting electronic meetings during states of emergency, an issue that was added due to the COVID-19 pandemic. The full Council recommended both bills to the 2021 Session of the General Assembly.

- **HB 5090 (Hurst, 2020 Special Session I); Virginia Freedom of Information Act; law-enforcement criminal incident information; criminal investigative files.** Subcommittee met twice and recommended an amended version of the bill. The full Council concurred with the Subcommittee's recommendation and recommended the amended bill to the 2021 Session of the General Assembly.
- **HJ 628 (Heretick, 2019 Session); Study; Virginia Freedom of Information Advisory Council; threat of phishing attacks; report.** Subcommittee met three times in 2019 and once in 2020 to study phishing attacks and related issues. Subcommittee concluded that such issues were best addressed through training and cybersecurity measures, rather than FOIA. Subcommittee also considered proposals to amend the current exemption for personal contact information provided to a public body in order to receive email from the public body (subdivision 10 of § 2.2-3705.1 of the Code of Virginia), and presented two drafts without recommendation to the full Council for its consideration. The full Council recommended to the 2021 Session of the General Assembly a draft would provide that that personal contact information provided to a public body or any of its members for the purpose of receiving electronic communications from the public body or any of its members is excluded from the mandatory disclosure provisions of FOIA, unless the recipient of such electronic communications indicates his approval for the public body to disclose such information.

## **Breakdown of Inquiries to Council**

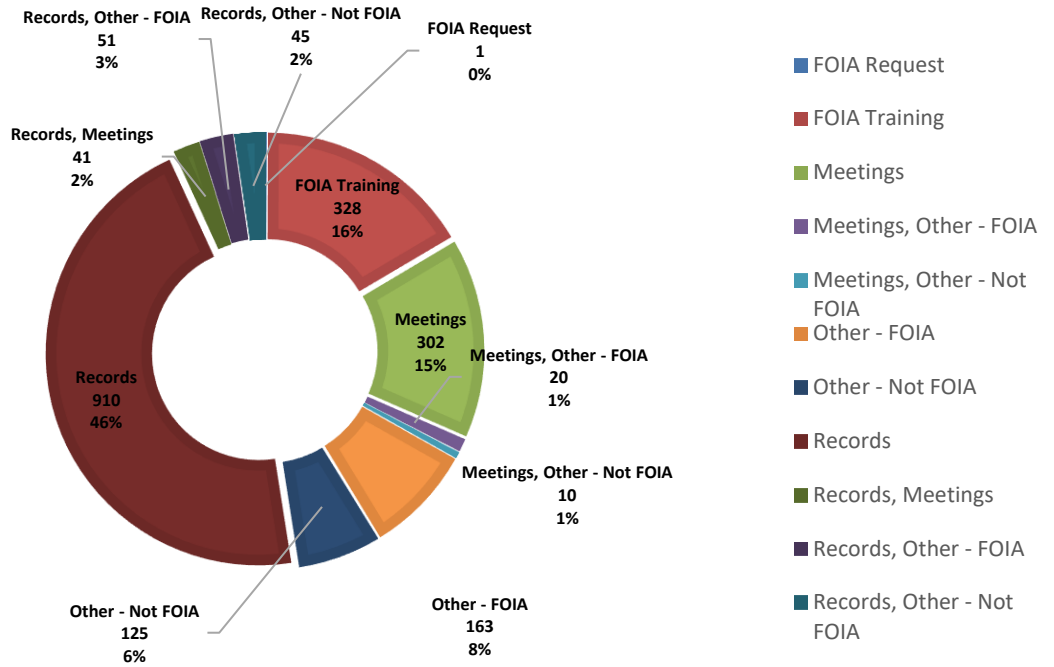
### **December 1, 2019, through November 30, 2020**

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. Please note that this year, for the first time, we are presenting this data in a graphic format to better demonstrate the different types of users who contact the Council and how some inquiries concern multiple subject areas.

Time period: December 1, 2019, through November 30, 2020

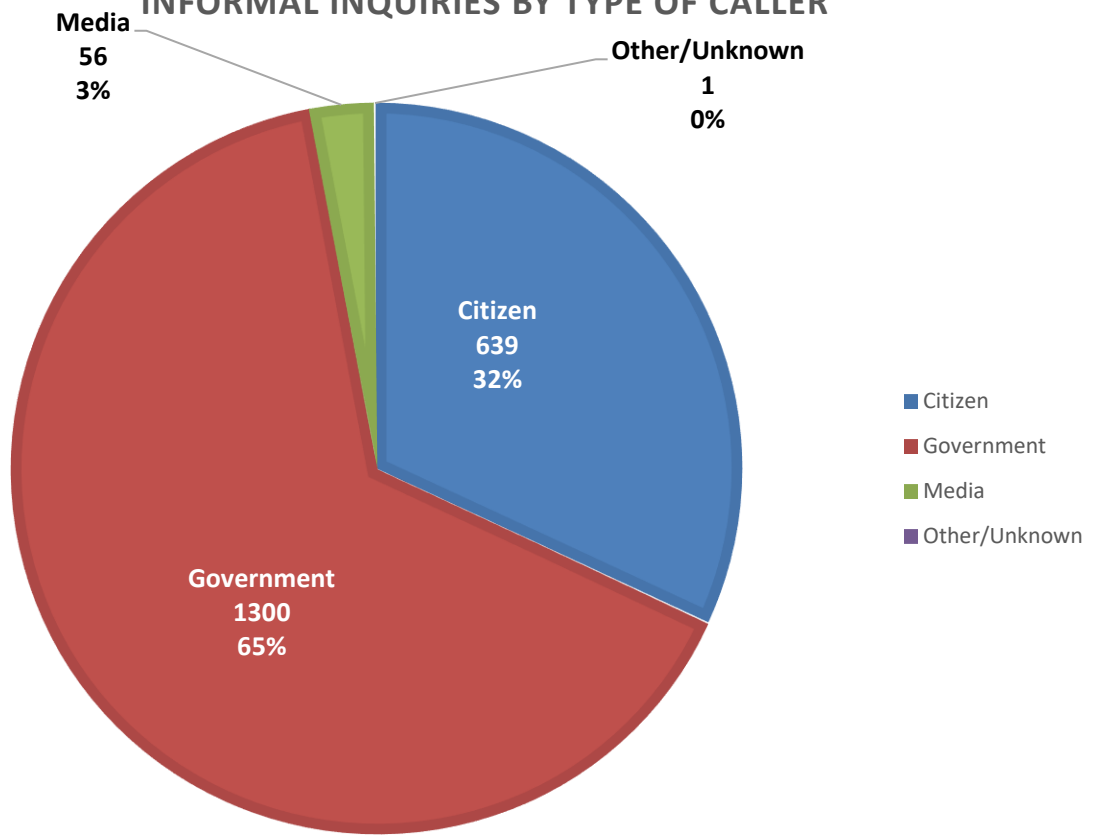
Total number of inquiries: 2,000 (1,996 informal inquiries, four published advisory opinions)

## INFORMAL INQUIRIES BY SUBJECT MATTER





### INFORMAL INQUIRIES BY TYPE OF CALLER



## Opinions Issued by FOIA Council

### December 2009 through November 2019

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. Note that the tracking methods and categories were changed in 2020. Due to the change, the 2020 data does not align directly with prior years, so 2020 data is not included in these 10-year charts. See section on Services Rendered by the Council for 2020 data.

#### Written Opinions:

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
<b>Government</b>	2	3	3	2	1	3	0	5	0	2
<b>Public</b>	3	4	2	5	2	3	2	3	9	4
<b>News Media</b>	1	0	0	3	3	3	1	0	0	3

#### Informal Opinions:

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

#### Total Number of Opinions:

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



