

## **AMENDMENTS TO VIRGINIA FOIA LAW TAKE EFFECT OCTOBER 1, 2001**

In Virginia, a revised Freedom of Information Act [“FOIA”] will take effect on October 1, 2001. In large part, the revised FOIA preserves the substance of the current FOIA, although the FOIA will now be found in a different section of the Virginia Code and there are several changes of which practitioners should be aware. The old FOIA was codified at Va. Code §§ 2.1-340 to 2.1-346.1, and the new FOIA will be codified at Va. Code §§ 2.2-3700 to 3714.

In general, the amendments are designed to:

1. increase the enforceability of the FOIA;
2. bring electronic records stored on the internet, or that pass via email, within the purview of the FOIA; and
3. expand the list of organizations exempt from FOIA.

In striving to increase the enforceability of FOIA, the provisions stress that each public official must be familiar with FOIA in order to adhere properly to it. In that respect, the revised FOIA also requires that all public officials shall read and be familiar with it.

The revised FOIA also prohibits any meeting conducted through telephonic, video, or electronic means where the members are not physically assembled to discuss or transact public business. In addition, the revised FOIA prohibits any public body from voting by secret ballot, written ballot, telephone, or other electronic means.

The revisions make it clear that failure by a public body to respond to a request shall be deemed a denial of such request, and is a violation of the FOIA. However, a public body may deny a request made pursuant to FOIA if that information does not exist. Under the revised FOIA, a public body does not have to create a record in response to a request for information when that record does not already exist.

The revised FOIA incorporates electronic databases and email into its purview. The revised FOIA requires that a public body, in response to a FOIA request, will provide, in addition to the information required to be disclosed under the current FOIA, all records that are electronic recordings or other forms of data compilations, however stored. The revised FOIA requires that records stored in a computer or electronic database shall be made available at a “reasonable” cost. To make electronic records easier to access, the revised FOIA requires that each public body shall compile an index of computer databases that contains all databases created since July 1, 1997.

The revised FOIA expands the number of organizations it exempts, and places a burden of proof on the public body that wishes to be exempt from it. Under the current FOIA, a public body that is exempt does not have to respond to a request for documents by a citizen of the Commonwealth. In addition, the revised FOIA specifically provides for exemptions that include all confidential proprietary information or trade secrets, confidential proprietary records, and all records of the University of Virginia Medical Center and the Virginia Commonwealth University Health System Authority. As under the previous law, a public body that wishes to show it is exempt under FOIA has the burden of proof to establish by a preponderance of the evidence that an exemption to the FOIA applies.

Finally, the revised FOIA increases the number of permissible purposes to hold a meeting that is closed to the public. The current FOIA lists several purposes in which a public body may hold a closed meeting. The revised FOIA retains, in large part, the purposes listed in the current FOIA. In addition, the revised FOIA increases the number of purposes to hold a closed meeting. Such purposes include meetings involving child death cases, and meetings held by the Virginia Commonwealth University Health System Authority and the University of Virginia Board of Visitors.