

Department of Planning and Budget 2021 Special Session I Fiscal Impact Statement

1. Bill Number: HB2004ER

House of Origin ☐ Introduced ☐ Substitute ☐ Engrossed

Second House ☐ In Committee ☐ Substitute ☒ Enrolled

2. Patron: Hurst

3. Committee: Passed both houses

4. Title: Virginia Freedom of Information Act; law-enforcement criminal incident information; criminal investigative files

5. Summary: The proposed legislation provides that if a public body subject to release of information pursuant to FOIA makes a reply to a requester that it is not practically possible to provide the requested records or to determine where they are available within the allotted five-work-day period, the public body shall, in the case of a request for records pursuant to the proposed § 2.2-3706.1 (pertaining to the disclosure of law enforcement records, criminal incident information, and certain criminal investigative files), 60 work days in which to provide a response. The bill also amends §2.2-3706 and provides that all public bodies engaged in criminal law enforcement activities must provide criminal incident information relating to felony offenses contained in any report, notes, electronic communication, or other document, including filings through an incident-based reporting system upon request. Such information shall include: a general description of the criminal activity reported; the date and time the alleged crime was committed; the general location where the alleged crime was committed; the identity of the investigating officer or other point of contact; a description of any injuries suffered or property damaged or stolen; and any diagrams related to the alleged crime of the location where it was committed, except any that are exempted from mandatory disclosure elsewhere in the Code but may be disclosed by the custodian in his discretion, except where disclosure is prohibited by law. The bill also requires the release of criminal investigative files, defined as any documents and information, including complaints, court orders, memoranda, notes, initial incident reports, filings through any incident-based reporting system, diagrams, maps, photographs, correspondence, reports, witness statements, or evidence, relating to a criminal investigation or proceeding that is not ongoing.

According to the bill, the above provisions do not apply if the release of such information: would interfere with a particular ongoing criminal investigation or proceeding in a particularly identifiable manner; would deprive a person of a right to a fair trial or an impartial adjudication; would constitute an unwarranted invasion of personal privacy; would disclose (i) the identity of a confidential source or (ii) in the case of a record compiled by a law enforcement agency in the course of a criminal investigation, information furnished only by a confidential source; would disclose law enforcement investigative techniques and procedures, if such disclosure could reasonably be expected to risk circumvention of the law; or would endanger the life or physical safety of any individual.

Exceptions are provided for photographic, audio, video, or other records depicting a victim or allowing for a victim to be readily identified, except for transcripts of recorded interviews between a victim and law enforcement. These cannot be released to anyone except the victim; members of the immediate family of the victim, if the victim is deceased, or the parent or guardian of the victim, if the victim is a minor. In the event of a conflict between this section as it relates to requests made under this section and other provisions of law, the other provisions of law, including court sealing orders that restrict disclosure of criminal investigative files, shall control.

6. **Budget Amendment Necessary:** Yes, Items 4, 57 and 427.
7. **Fiscal Impact Estimates:** Final. See Item 8 below.
8. **Fiscal Implications:** According to the Department of State Police (VSP), the agency's FOIA office handled approximately 3,831 requests in calendar year 2019. Of the denied cases, 275 were denied closed criminal cases which could be subject to release under the provisions of the proposed legislation. The agency has criminal investigation files dating to the 1940's in various formats (including paper, microfilm, and electronic media). The average criminal investigation exceeds 50 pages and contains a combination of investigative documents, video files, and photographs. According to VSP, each page of each file would be required to be reviewed to comply with the victim information redaction requirements of the bill. VSP estimates each FOIA request would require a minimum of five hours to research and prepare. The agency estimates it would need one program support technician position, at an annual cost of \$72,537 (salary and benefits), to comply with the proposed bill. VSP also estimates it would need additional funding for office space, furniture, and office supplies, including high-capacity thumb drives; the agency estimates it would cost \$96,476 the first year for office space rental, office furniture, information technology services and equipment, postage, and miscellaneous office supplies. The agency anticipates \$78,604 in ongoing expenses per year for office space rental, information technology services, postage, and office supplies.

The fiscal impact statement is being revised based upon new information received from the Office of the Attorney General (OAG). According to the OAG, the proposed legislation would result in an increase in litigation as OAG represents state law enforcement agencies in FOIA cases. The bill requires court involvement to prove by a preponderance of evidence the withholding of information by law enforcement. OAG estimates it will need two attorney positions and one administrative staff position, at an estimated cost of \$404,273 annually, to respond to the requirements of this bill.

According to the Division of Capitol Police (DCP), the proposed legislation will require an additional position to fulfill FOIA requests. The estimated annual cost for this position is approximately \$72,537.

According to the Compensation Board, the agency's liability program under the Division of Risk Management does not include coverage for FOIA violation claims for constitutional officers. Pursuant to § 15.2-1606, the Compensation Board is responsible for reimbursing

localities for attorney costs when the officer charged with a violation does not have insurance coverage for the matter, and the officer petitions the court for assignment of counsel. It is not possible to estimate any such potential additional costs to the Commonwealth at this time.

There is no anticipated fiscal impact as a result of the provisions of this bill on the Office of the State Inspector General (OSIG), the Department of Juvenile Justice (DJJ), or the Virginia Alcoholic Beverage Control Authority (ABC). Any additional fiscal impact as a result of this bill could be absorbed by existing resources, according to the Department of Conservation and Recreation (DCR). Any potential fiscal impact on other state or local law enforcement agencies cannot be determined at this time. The fiscal impact statement will be updated if additional information is made available by law enforcement agencies.

- 9. Specific Agency or Political Subdivisions Affected:** Department of State Police, Department of Motor Vehicles, Department of Corrections, Department of Juvenile Justice, Virginia Alcoholic Beverage Control Authority, Department of Conservation and Recreation, College and University Police Departments, Division of Capitol Police, Department of Wildlife Resources, Marine Resources Commission, Virginia Lottery, Office of the State Inspector General, Office of the Attorney General, Compensation Board/Sheriff's offices, and local law enforcement agencies.

10. Technical Amendment Necessary: No.

11. Other Comments: None.