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**Sent time:** Thursday, November 29, 2007 9:54:19 AM  
**To:** Shepard, Brian  
**Cc:** Crouch, Robert; Hammond, Lynette; Dickson, Dave <DDickson@yesvirginia.org>  
**Subject:** FOIA Legislation  
**Attachments:** Legislative Proposal OCP-1 and 2 - 2008.doc

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Brian, as discussed, the FOIA Commission meets on Monday and we were going to discuss the potential exemption for VMAC and VNDIA. Our draft legislation (OCP-1) is attached for your review. We have been working with Virginia Press Association's lawyers and expect to have their second round of comments by COB today. I will forward that when it becomes available.

Please give me a call with any questions or comments you may have.

Regards,

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## 2008 Legislative Proposal

for

### *Office of Commonwealth Preparedness*

Approved by:		
Robert P. Crouch, Jr.	Assistant to the Governor for Commonwealth Preparedness	Date
		9/13/2007

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**Office of Commonwealth Preparedness  
2008 Session of the General Assembly**

**Summary of Legislative Proposals**

Proposal Identifier Number	Summary of Proposal	Resource Requirements		Impact	
		Funding	FTE	Service Areas	Regs
OCP-1	<i>Amend Freedom of Information Act to include an exemption for Virginia Military Advisory Council and the Virginia National Defense Industrial Authority for meetings and documents related to federal military bases</i>	<i>No additional funding required</i>	<i>No additional FTE's required</i>	<i>FOIA Advisory Council;</i>  <i>Virginia Press Association</i>	



Proposal Identifier Number: OCP-1

## Office of Commonwealth Preparedness – 454

### Statement of Need for Legislation

#### GENERAL DISCUSSION

1. Need/Description/Objective: The Virginia Military Advisory Council (VMAC) and the Virginia National Defense Industrial Authority (VNDIA) both conduct meetings and produce documents concerning strategies for maintaining federal military bases and missions in Virginia. The strategies discussed at these meetings include: (i) how to prevent Virginia military bases and missions from becoming subject to the Base Realignment and Closure (BRAC) process; (ii) whether any Virginia bases and missions are vulnerable to another state's request to the Department of Defense (DoD) to relocate the military base to that state; and (iii) whether there are federal military missions in other states that Virginia can entice the DoD to relocate to a federal military base located in Virginia.

These discussions and documents are currently subject to the Freedom of Information Act (FOIA). This proposal will provide an exemption from FOIA under Va. Code §2.2-3705.2 for discussions and documents that concern preserving Virginia's military bases or acquiring military missions currently situated in other states.

2. Background: A FOIA exemption under Va. Code §2.2-3705.2 (8) previously existed for the Virginia Commission on Military Bases which had been created by Governor Warner pursuant to Executive Order No. 49 (2003). The exemption expired in July 2006 because the Commission expired after the statutory two-year time period. VNDIA was the entity that replaced the Commission pursuant to Va. Code Section 2.2-2328. The VMAC was created pursuant to Va. Code §2.2-2666.1 as an advisory council to maintain relations with the federal military.

One of the key lessons learned from the 2005 BRAC process is that other states used that process to influence DoD in realigning tenant activity in Virginia to their states. Virginia was successful in fending off some of the challenges but not in every instance. Furthermore, Virginia may well want to pro-actively seek additional DoD investments and not broadcast our strategies.

3. Alternatives: There are no alternatives that would provide for confidentiality of discussions and documents. The lack of a FOIA exemption will allow written records and meeting discussion for both VNDIA and VMAC to be open and available for competitor states to take advantage of both our vulnerabilities and strategic thinking for DoD growth. States would only need to hire a Virginia attorney to make a FOIA request and VMAC and VNDIA would be required to disclose information, potentially harmful to Virginia's economy.

- 4. Support Governor's initiatives: This proposal will support Governor Kaine's Economic Development Strategic Plan Goal Six which states "Use Virginia's proximity to the national capital and the strong military presence in the state as a base for further economic growth."

This proposal also supports the Council on Virginia's Future's objective to "Be a national leader in the preservation and enhancement of our economy" by preserving the federal military's contribution to Virginia's economy and by seeking to enhance the contributions made to Virginia by adding additional military missions to Virginia bases.

- 5. First day introduction: This proposal does not require first day introduction.
- 6. Summary of opinion from the Office of the Attorney General (copy of letter attached):

**FISCAL IMPACT**

- 7. **Does the proposal have a fiscal impact?** Check all the following that apply to this proposal. If "no," go to Item 11.

No Fiscal Impact     
  Expenditure Increase     
  Expenditure Reduction     
  Revenue Increase     
  Revenue Reduction

8. **Provide detailed breakout of the fiscal impact.**

**Fiscal Impact Estimates are:** (Choose one: **preliminary** or **final**.)

**8a. Expenditure Impact:**

<i>Fiscal Year</i>	<i>Dollars</i>	<i>Positions</i>	<i>Fund</i>
2007-08			
2008-09			
2009-10			
2010-11			
2011-12			
2012-13			
2013-14			

**8b. Revenue Impact:**

<i>Fiscal Year</i>	<i>Dollars</i>	<i>Positions</i>	<i>Fund</i>
2007-08			
2008-09			
2009-10			
2010-11			
2011-12			
2012-13			
2013-14			

9. **Is a budget amendment needed?**

No

10. **Describe methodology for calculating the fiscal impact.**

Be sure to explain how the expenditure or revenue estimates were calculated.

**OTHER IMPACTS**

11. **Agency Strategic and Service Area Plan**

The legislation will allow the VNDIA and VMAC to more effectively analyze military tenant activity vulnerabilities and growth opportunities.

12. **Family impact:** None

13. **Impact on other affected agencies (attach correspondence)**

Virginia FOIA Advisory Council will need to review and opine on the legislation

14. **Impact on political subdivisions:** None

**15. Impact on other customers:**

We contacted the Executive Director of the Virginia Press Association (VPA) to discuss the proposed language. Her initial reaction was positive and we are confident we will obtain VPA's assistance with the legislation.

*Office of Commonwealth Preparedness – 454*

**2008 Session of the General Assembly**

**Proposal Identifier Number *OCP-1*  
Draft Legislation**

[previous](#) | [next](#)

§ [2.2-3705.2](#). Exclusions to application of chapter; records relating to public safety.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Confidential records, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses.
2. Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that would identify specific trade secrets or other information, the disclosure of which would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

Those portions of engineering and construction drawings and plans that reveal critical structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems submitted for the purpose of complying with the Uniform Statewide Building Code (§ [36-97](#) et seq.) or the Statewide Fire Prevention Code (§ [27-94](#) et seq.), the disclosure of which would jeopardize the safety or security of any public or private commercial office, multifamily residential or retail building or its occupants in the event of terrorism or other threat to public safety, to the extent that the owner or lessee of such property, equipment or system in writing (i) invokes the protections of this paragraph; (ii) identifies the drawings, plans, or other materials to be protected; and (iii) states the reasons why protection is necessary.



Nothing in this subdivision shall prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

3. Documentation or other information that describes the design, function, operation or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.

4. Plans and information to prevent or respond to terrorist activity, the disclosure of which would jeopardize the safety of any person, including (i) critical infrastructure sector or structural components; (ii) vulnerability assessments, operational, procedural, transportation, and tactical planning or training manuals, and staff meeting minutes or other records; and (iii) engineering or architectural records, or records containing information derived from such records, to the extent such records reveal the location or operation of security equipment and systems, elevators, ventilation, fire protection, emergency, electrical, telecommunications or utility equipment and systems of any public building, structure or information storage facility, or telecommunications or utility equipment or systems. The same categories of records of any governmental or nongovernmental person or entity submitted to a public body for the purpose of antiterrorism response planning may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism planning or protection. Such statement shall be a public record and shall be disclosed upon request. Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the structural or environmental soundness of any building, nor shall it prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

5. Information that would disclose the security aspects of a system safety program plan adopted pursuant to 49 C.F.R. Part 659 by the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency; and information in the possession of such agency, the release of which would jeopardize the success of an ongoing investigation of a rail accident or other incident threatening railway safety.

6. Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.

7. Security plans and specific assessment components of school safety audits, as provided in § [22.1-279.8](#).

Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the effectiveness of security plans after (i) any school building or property has been subjected to fire, explosion, natural disaster or other catastrophic event, or (ii) any person on school property has suffered or been threatened with any personal injury.

8. —Expired.] **This was the previous exemption for the Virginia Commission on Military Bases noted in the “Background” discussion on page 3 above.**

9. Records of the Commitment Review Committee concerning the mental health assessment of an individual subject to commitment as a sexually violent predator under Chapter 9 (§ [37.2-900](#) et seq.) of Title 37.2; except that in no case shall records identifying the victims of a sexually violent predator be disclosed.

10. Subscriber data, which for the purposes of this subdivision, means the name, address, telephone number, and any other information identifying a subscriber of a telecommunications carrier, provided directly or indirectly by a telecommunications carrier to a public body that operates a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system, if the data is in a form not made available by the telecommunications carrier to the public generally. Nothing in this subdivision shall prevent the release of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

11. Subscriber data, which for the purposes of this subdivision, means the name, address, telephone number, and any other information identifying a subscriber of a telecommunications carrier, collected by a local governing body in accordance with the Enhanced Public Safety Telephone Services Act (§ [56-484.12](#) et seq.), and other identifying information of a personal, medical, or financial nature provided to a local governing body in connection with a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system, if such records are not otherwise publicly available. Nothing in this subdivision shall prevent the release of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

12. Records of the Virginia Military Advisory Council or the Virginia National Defense Industrial Authority, to the extent that such records contain information relating to vulnerabilities of military installations or tenant activity in Virginia and elsewhere and strategies under consideration or developed by the Council or the Authority to either limit the effect of or prevent the realignment or closure of federal military installations located in Virginia or to seek additional tenant activity growth from the Department of Defense. Additionally, confidential proprietary records that are voluntarily provided by a public or private entity pursuant to a promise of confidentiality from the Council or Authority where if such records were made public the strategic interest of the public or private entity involved would be adversely affected. Correspondingly, records generated in

response to the aforementioned proprietary records would be protected from disclosure as well. In order for confidential proprietary information to be excluded from the provisions of this chapter, the public or private entity shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary. Such records shall not be withheld after the public body has received a final, unappealable decision from the Department of Defense, or in the event of litigation, a final unappealable order from a court of competent jurisdiction, concerning the closure, realignment or expansion of the military installation or tenant activities for which records are sought.

For purposes of this subsection (12):

(a) The term "military installation" means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility, which is located within any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, or Guam. Such term does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.

(b) The term "civilian personnel" means direct-hire, permanent civilian employees of the Department of Defense.

(c) The term "realignment" includes any action which both reduces and relocates functions and civilian personnel positions, but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, skill imbalances, or other similar causes.

(d) The term "tenant activity" means any and all functions and activities performed by the Department of Defense, other federal agency or federal contractor on a military installation.

Meetings – 2.2-3711(40)

Discussion or consideration by the Virginia Military Advisory Council or the Virginia National Defense Industrial Authority of records excluded from this chapter pursuant to subdivision 12 of Section 2.2-3705.2.

(1999, cc. 485, 518, 703, 726, 793, 849, 852, 867, 868, 881, § 2.1-342.01; 2000, cc. 66, 237, 382, 400, 430, 583, 589, 592, 594, 618, 632, 657, 720, 932, 933, 947, 1006, 1064; 2001, cc. 288, 518, 844, § [2.2-3705](#); 2002, cc. 87, 155, 242, 393, 478, 481, 499, 522, 571, 572, 633, 655, 715, 798, 830; 2003, cc. 274, 307, 327, 332, 358, 704, 801, 884, 891, 893, 897, 968; 2004, cc. 398, 482, 690, 770; 2005, c. 410.)