

Virginia Freedom of Information Advisory Council
Tuesday, May 3, 2011 Meeting Summary
Richmond, Virginia

The Freedom of Information Advisory Council (the Council) held its first meeting of 2011¹. This meeting was an organizational meeting, which included a 2011 legislative update, review of bills referred to the Council for study, establishment of a work plan with the appointment of necessary subcommittees, and setting future meeting dates. The Council also welcomed its newest member, James Schliessmann, Esquire, a designee of the Attorney General.

Legislative Update

Staff provided a recap of the bills amending the Freedom of Information Act (FOIA) passed by the 2011 Session of the General Assembly. Twenty bills amending FOIA were passed during the 2011 Session. House Bill 1860 (Anderson) and identical Senate Bill 763 (Puller), which require that the party against whom a FOIA petition is brought must receive a copy of the petition at least three working days prior to the filing of the petition, both passed as recommendations of the Council. Senate Bill 951 (Houck), which clarifies that the Library of Virginia is the custodian of records transferred to it for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.) and for responding to requests for such records made under FOIA, also passed as a recommendation of the Council. Of the 20 bills, two bills create new records exemptions and 18 amended existing provisions of FOIA. The complete 2011 Legislative Update is available on the Council's website.

Bill Referred for Study

The Council next reviewed the four bills referred to it by the General Assembly for additional study. A summary of each referred bill appears below.²

¹ All members of the Council were present except Mary Yancey Spencer. Note that the vacancy caused by the election of former Delegate H. Morgan Griffith to the U.S. Congress has not been filled.

²**HB 1722** (Marshall, R.G.) FOIA; designation of records; penalties for certain violations. Requires that at the time of creation of any public record, the custodian of such records that are subject to FOIA shall designate whether the record is subject to FOIA's mandatory disclosure provisions or otherwise exempt from disclosure. The bill requires that such designation shall appear on the face of the record and be updated by the custodian in a timely manner in the event of any changes. Failure to make the required designation shall, upon receipt of a request for such record, waive any charge authorized under FOIA. The bill also provides that in addition to the civil penalty under FOIA, a public employee found to have committed a willful and knowing violation of FOIA may be subject to other disciplinary action, including suspension, demotion, or termination of public employment. The bill contains technical amendments.

SB 812 (Martin) FOIA; access to salary information, etc., of public employees. Allows public access to the records of only the job position, official salary, or rate of pay of, and the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body. The bill specifically excludes the name of any such officer, official, or employee from disclosure.

SB 1467 (Edwards) FOIA; criminal investigative records. Amends the definition of "criminal investigative file" so that the exemption applies to records relating to active or ongoing investigations or prosecutions.

1. HB 1722 (Marshall, R.G)--FOIA; designation of records; penalties for certain violations.
2. SB 812 (Martin)--FOIA; access to salary information.
3. SB 1467 (Edwards)--FOIA; disclosure of criminal investigative records.
4. HB 1935 (Ware, O.) -Legal notices; use of websites, radio, and television, etc.

Senator Martin was present at the Council meeting and presented his SB 812. Senator Martin told the Council that the bill was introduced as a result of the publication of state employees' salaries by the Richmond Times Dispatch in its online publication. He noted that he represents many state employees and that the bill was an attempt to balance the public's right to know and the privacy of state employees. The bill sought to disconnect an employee's name from his salary. He mentioned that he did not think the original intent of FOIA was to require disclosure of lower echelon employees' salaries. Senator Martin stated that he is sensitive to the situation where a janitor whose salary is published in the newspaper goes to choir practice and everyone there knows how much he makes. The situation is embarrassing and an invasion of one's privacy. Senator Martin reminded the Council that when FOIA was first enacted, the threshold below which salary information was not required to be released was, and still is, \$10,000. He pointed out that virtually no public employee makes less than \$10,000 year in 2011. Council member Roger Wiley stated that the Senator had a point with respect to the \$10,000 threshold. Mr. Wiley explained that his first job was as the Charlottesville city attorney and he earned \$18,300 and his name and salary were in the local newspaper. He noted that he was one of the top three paid employees in the city and that most employees earned less than \$10,000 per year. Council members questioned whether the Senator had any figure in mind, based on inflation, to raise the \$10,000 threshold. Staff noted that during the General Assembly Session, it was estimated that in today's dollars, the threshold would be approximately \$35,000. Senator Martin stated that he was told disclosure of salary information by name was bad for agency morale especially when employees found out what their supervisors earn. Council member George Whitehurst stated that every newspaper he has ever worked for has published salary information attributable to each public employee. Mr. Whitehurst stated that all public employees should be held to the same standard, regardless of position. After further discussion, it was a consensus of the Council to create a subcommittee, comprised of Ed Jones, Roger Wiley³, and Frosty Landon to study the issues raised by SB 812, including raising the salary threshold while keeping individual public employee's salaries public. In closing, Senator Martin told the Council that he preferred his amendment proposed in the FOIA subcommittee of the Senate Committee on General Laws that would require the

HB 1935 (Ware, O.) Legal notices. Allows localities to meet certain notice requirements by utilizing their web sites, radio or television rather than a newspaper of general circulation.

³ Kathleen Dooley, who was appointed to replace Roger Wiley when his term expires on July 1, 2011, will serve on the subcommittee when Mr. Wiley's term ends.

disclosure of both name and salary of all elected and appointed officials, including those holding upper echelon positions.⁴

The Council next reviewed HB 1722 and after discussing the substantial practical difficulties in requiring each public employee creating public records to designate on the record whether it is open or exempt, the Council agreed unanimously not to go forward with HB 1722. It was the consensus of the Council that trying to get government more organized vis a vis FOIA is a good idea; the bill, however, has the opposite effect and is unworkable as written.

Senate Bill 1467 was then discussed by the Council. Staff advised that this bill was substantially the same as SB 711 studied by the Council in 2010. Essentially, SB 1467 exempts criminal investigative files as long as they are "active or ongoing." Based on the Council's 2010 study of SB 711, it is difficult to determine when an investigation becomes inactive or closed. Staff also noted that the SB 711 subcommittee recommended a rewrite of § 2.2-3706 to make it more easily read and understood, but that recommendation did not go forward because of the concern of unnecessary tinkering in an election year. Staff advised that the issue has remained the same over the years--reporters and others want greater access to criminal investigative files and law-enforcement agencies routinely fail to exercise any discretion because of concern for the myriad of personal and other information contained in a criminal investigative file, coupled with the time it takes to review the file. Council member Craig Fifer, who also chaired last year's subcommittee, told the Council that the issue was not going to go away because of significant interest by many parties. He suggested that a subcommittee be appointed, at a minimum, to facilitate further discussion in the hopes of an acceptable resolution. Chairman Houck continued the subcommittee from 2010, which consists of Council members Fifer, Treadway, Selph, and Schliessmann.

The Council next reviewed HB 1935. Roger Wiley told the Council that while the issue of publication of legal notices was very important to local governments and citizens, it was his belief that it was not a FOIA issue and therefore not within the purview of the Council. The Council requested staff to identify other entities that may have subject matter jurisdiction over the issue raised by HB 1935. Initially, staff suggested the House Committee on Counties, Cities and Towns, the Senate Committee on Local Government, and the Governor's Reform Commission. The Council will make a referral decision at its next meeting in July.

Other Business

Staff updated the Council on its efforts to accomplish last year's Council directive to provide training for legislative agencies, committees and commissions. Staff reported that FOIA

⁴ The proposed amendment would have deleted the new language in the bill as introduced and inserted the following new language on line 20 after "officers or employees." *For the purposes of clause (ii), no such records shall disclose the name of any such officer, official, or employee unless he (a) is elected, (b) is appointed by the Governor or the General Assembly, (c) holds a position within the Office of the Governor as that term is defined in § 2.2-3705.7, (d) is a state employee who has accepted serving in the capacity of chief deputy or equivalent, or confidential assistant for policy or administration, or (e) is appointed by a political subdivision of the Commonwealth, including school boards and the governing body of any county, city, or town.*

training had been provided to the joint committee of conference on the budget bill and that implementation of the advice provided by Council staff resulted in more open budget conference discussions without negative impact to the process. Staff reported that training of legislative agencies, commissions and council will continue this spring.

Maria J.K. Everett, executive director of the Council, advised the Council of staff concerns with the almost exclusive use of email by government entities and its impact on processing FOIA requests and charges made therefore. Ms. Everett reminded the Council that this issue had been discussed last year when the circumstances involving the Department of Environmental Quality's attempts to retrieve electronic records from the Virginia Information Technologies Agency (VITA) and the resulting charges from VITA. Staff related that DEQ had received a FOIA request for records maintained by VITA. Under FOIA, DEQ remains the custodian of these records and was initially charged \$14,000 by VITA to make the records available to DEQ in response to the FOIA request. Ultimately, this charge was reduced by VITA to \$3,800. VITA's initial estimate came one month after the records were requested by DEQ, and the last estimate was almost two months after DEQ's request--neither time period was in compliance with the response times required by FOIA and imposed on DEQ as the custodian of the records. At the time, the question to the Council was whether DEQ could charge the requester this additional charge to retrieve records from VITA as part of the actual charges allowed under FOIA, and further, whether it would be reasonable to do so. Ms. Everett advised that after preliminary discussions with VITA, the issue is one of organization of email and other electronic records by state and local government entities. According to VITA, it is not responsible for organizing records of agencies, but merely to maintain them. As a result, if an agency is not properly categorizing/organizing their records, what is maintained by VITA is that lack of organization. The problem is widespread and while email and electronic records were originally perceived to be a tool to help public bodies easily retrieve files and reduce charges to citizens for providing records under FOIA, it has had the opposite effect. Searching for email and electronic records is difficult and time consuming and the charges reflect this. The skill set that applied in the paper world has not transferred to the electronic world. Staff suggested that the Council take the lead in educating public bodies, in conjunction with the Library of Virginia, in an attempt to close this gap or at least keep it from growing wider. No statute dictates how records should be organized; it is incumbent on each governmental entity, however, to set up filing systems that facilitate the rights of the public to access public records under FOIA. Ms. Treadway advised that VITA is working on a potential solution to this problem. Mr. Wiley concurred with staff that this issue is not limited to state government and suggested that it is a different skill set required due to the sheer volume of email sent and received.

The Council unanimously adopted two resolutions honoring Council members Roger Wiley, whose term will expire on July 1, 2011 and E.M. Miller, who will be retiring from state service effective July 1, 2011, for their contributions to the work of the Council.

Public Comment

Megan Rhyne, executive director of the Virginia Coalition for Open Government (VCOG) advised the Council of their 2011 program about FOIA and record retention/management

that will be held in several regions of Virginia. She stated that both Craig Fifer and Maria Everett are participating in this program.

James Lawrence, citizen of the City of Fredericksburg, advised the Council of his continuing FOIA issues with the Fredericksburg City Council, including the holding of meetings in violation of FOIA and prohibiting the recording of City Council meetings, also a violation of FOIA

Ginger Stanley, executive director of the Virginia Press Association praised both Messrs. Wiley and Miller for their service on the Council. She advised the Council that HB 1935 had been studied by several committees of the Governor's Reform Commission but was referred to the Council due to the respect for Council and their process for careful consideration of access issues. Ms. Stanley reported that the number of FOIA exemption bills was down considerably in 2011, again in part due to the Council's reputation for fully examining access issues and providing a forum for access discussions.

Future Meetings of Council

The Council set the following dates for its future meetings:

- Monday, July 18, 2011, 1:30 p.m., House Room C, General Assembly Building, Richmond;
- Monday, November 14, 2011, 1:30 p.m., House Room C, General Assembly Building, Richmond; and
- Tuesday, January 3, 2012, 1:30 p.m., House Room C, General Assembly Building, Richmond.