

Electronic Meetings Subcommittee of the FOIA Council
August 25, 2008 Meeting Summary
Richmond, Virginia

The Electronic Meetings Subcommittee (the Subcommittee) held its third meeting¹ to continue its deliberations on statutory changes made in 2008 that would allow members of the State Air Pollution Control Board (Air Board) and the State Water Control Water Board (Water Board) to meet via teleconference under certain circumstances (HB 1332 (Landes)/SB 423 (Puckett). While this issue was not the central thrust of HB 1332/SB423, these specific provisions conflict with the FOIA provisions for teleconferences and electronic meetings. The Subcommittee also welcomed recently appointed FOIA Council members Frosty Landon and John Selph to the Subcommittee.

Staff presented a draft that reflected the consensus the subcommittee reached at its previous meeting concerning the conduct of public hearings by members of the Air Board and the Water Board. Staff advised that the draft language was essentially clarifying. As previously requested by the Subcommittee, staff, representatives of the Virginia Press Association (VPA), and DEQ met to attempt to resolve the conflict between HB 1332/SB423 and FOIA as it related to the presence of a quorum and public accessibility to remote meeting locations. Staff reported that there was agreement that individual board members could go to public venues, such a community college that has audio/visual capabilities to participate in teleconferences. This agreement was reflected in the draft. However, staff advised that the main issue of controversy--the presence of a quorum--was not addressed in the draft.

Craig Merritt, representing the VPA, told the subcommittee that as passed, subsection D of §§ 10.1-1322.01 and 62.1-44.15:02 (contained in HB 1332/SB 423) made explicit that the remote locations from which respective members of the Water Board or Air Board were participating were not open to the public. Further these same sections implicitly eliminated the physical quorum requirement found in § 2.2-3708 of FOIA. He stated that DEQ was creating for itself a lower bar than what is required by FOIA. He indicated that VPA's concerns were expressed during Session; but given that this issue was a small piece of the entire bill, VPA was asked by the patrons to wait to raise the issue until after passage of the bill. VPA's preference would be to eliminate the last full sentence of subsection D in both §§ 10.1-1322.01 and 62.1-44.15:02. Mr. Merritt thanked DEQ for working with the VPA to resolve its issues.

Rick Linker, Policy Coordinator, DEQ, advised the Subcommittee that DEQ understood the pitfalls of this approach; but noted that it was an 11th hour decision among 40 stakeholders working on the bill to vary from the requirements of FOIA. He noted that it was and is anticipated that these electronic meetings would be

¹ All members of the Subcommittee, specifically, Mssrs. Fifer (chair), Axselle, Landon, Miller, and Selph, and Senator Houck were present.

extremely brief, lasting only 10 to 15 minutes. Mr. Linker stated that it was difficult to schedule a meeting among seven members within a 20-day period. He stated that if the time frame dictated by statute was coincident with a regular meeting of the respective Boards, the issue would be added to the agenda for that regular meeting. Mr. Linker presented a compromise draft on the quorum issue, which provided, "[A] quorum of the Board shall be physically assembled at a single meeting location when possible." He indicated that the DEQ proposal had not been shared with the wider community of stakeholders; however he noted that several of the stakeholders were in attendance at the Subcommittee meeting. He told the Subcommittee that ultimately DEQ did not want to adversely affect the permit process, nor did it want to use its resources to reimburse individual Board members for travel to Richmond for what they anticipate to be a brief meeting.

The Subcommittee discussed alternative methods for addressing the quorum issue, including setting a lower quorum by law for these types of meetings thereby allowing a physical quorum to be assembled in one location as required by FOIA. Subcommittee discussions also included increasing the 20-day meeting requirement to 30 or 45 days to allow more flexibility in scheduling a meeting of the respective Boards. Mr. Linker noted that the permit process takes about nine months and the 20-day period does not adversely affect that. However, any longer period would add to the nine months.

August Wallmeyer, representing the Virginia Independent Power Producers and the Virginia Energy Providers Association, explained that during the 2008 Session, the stakeholders took a blood oath not to touch this legislation. He noted that in the DEQ permitting process generally, there was no lack of public participation in the process as concerned citizens find out about permit application that affect them.

Subcommittee member E.M. Miller inquired whether the permitting process was different from the process required by the Administrative Process Act (APA) (§ 2.2-4000 et seq.) Mr. Linker advised that it was a different and shorter process for issuing permits than for promulgating regulations under the APA, which he noted takes about 18 to 24 months from start to finish.

Chairman Fifer arrayed for the Subcommittee the various options presented at the meeting to resolve the remaining issue in dispute. Specifically, (i) adopting the VPA suggestion to delete the last full sentence in subsection D, (ii) adopting the DEQ suggestion to require a quorum of the respective board to be physically assembled in a single meeting location when possible, (iii) specifying a smaller quorum required for the respective boards to review the Director's decision, or (iv) stating explicitly in the relevant code sections that any electronic communication meeting conducted to review to the Director's decision is subject to § 2.2-3708 of FOIA in all other respects except for the requirement for a physical quorum in one location.

Subcommittee member Bill Axelle noted that the bill was a balance between allowing the respective board to have input but not having to be burdened with

hearing every permit application. Mr. Fifer suggested language that the decision of the Director stands unless a certain number of board members request a review of the Director's decision. Mr. Linker advised that approach was considered by the stakeholders during Session but discarded because they felt it eliminates openness of the process altogether. Mr. Linker noted that the requirements of FOIA were taken into account and the sentiment of the stakeholders was to ensure openness even though some procedural requirements of FOIA would not be met.

Mr. Axselle suggested the following amendment to DEQ's proposal requiring a quorum of the respective board to be physically assembled in a single meeting location when possible. Instead of "when possible," insert "when practical, in consideration of the board members' availability, as determined by the Director." Mr. Merritt, VPA, told the Subcommittee that the difficulty with this suggestion and DEQ's proposal was interpretation by a court of either phrase "when possible" or "when practical." He noted that the terms are indefinable and the end result would be that the courts would defer to DEQ's decision. As a result, this provision would be difficult to enforce in any meaningful way.

The Subcommittee generally agreed that if there was a time to reduce the importance of a quorum, it should not be for a matter of consequence, and this issue appears to be a matter of considerable consequence. In response to a question asking about the public policy behind the requirement for a physically-assembled quorum for electronic meetings, Subcommittee member Frosty Landon stated it was about access. Mr. Landon elaborated that the requirement represented a delicate compromise between "troglodytes and geeks," (i.e. those resistant to technology and those who embrace every technology) noting that there is more quality to a meeting when public officials are meeting face-to-face. He reminded the Subcommittee of the policy statement recently adopted by the FOIA Council concerning electronic meetings.² Mr. Landon also stated that it is part of public service to attend meetings and if a member could not meet that obligation, appointment to the position should be declined.

Senator Houck noted that the Subcommittee had suggested language to ensure the public access to the electronic meetings of the respective boards, but felt that the quorum issue did not make sense as the meeting was essentially an administrative function. In response, Craig Merritt, VPA, stated that testimony today was that 90%

² "The Freedom of Information Advisory Council believes that technology can expand public monitoring of and participation in the affairs of government. It also believes representative government is best served when public officials meet face-to-face in regularly scheduled public meetings. One of the primary responsibilities of accepting public office is the regular participation in face-to-face public meetings. The Council believes such meetings should continue to be the rule rather than the exception. As technology advances, the use of electronic meetings will accelerate. As that occurs, the FOIA Council will continue to balance the preference for face-to-face meetings against the emerging technology in light of the clear policy statement of FOIA to afford citizens every opportunity to witness the operation of government, "since at all times the public is to be the beneficiary of any action taken at any level of government."

of permit decisions were done by DEQ; however HB 1332/SB 423 contemplates a permit issue controversial enough that the respective board may be lobbied to take the permit decision away from DEQ. He averred that the stakeholders are really indifferent to access but going for speed. DEQ is arguing that it is inconvenient to get four board members together looking from the point of view of the convenience to the board members, when the convenience ought to belong to the public. Mr. Merritt told the Subcommittee that this issue was common to every public body and therefore it is indistinguishable for future decisions of how important is it for a quorum to be physically assembled. Mr. Wallmeyer told the Subcommittee that it may get to a point where it becomes difficult to get qualified citizens to serve on boards. He mentioned that the issue to the stakeholders was making a correct permitting call in an expeditious manner. Ginger Stanley, VPA, reminded the Subcommittee that during the 2008 Session, VPA was told it was correct with regard to the FOIA implications of HB 1332/SB423 and was given support in both the House and Senate to fix the FOIA problem after passage. Senator Houck opined that would be hard to get anything passed in the 2009 Session on this issue without the agreement of the stakeholders. He stressed the importance of trying to build consensus among the stakeholders on this issue. The subcommittee also discussed the idea of adding a sunset clause to the draft to ensure that the issues would be revisited later, but there was no consensus to do so.

For purposes of discussion at its next meeting, the Subcommittee unanimously voted to have staff prepare a new draft incorporating three features: (1) a requirement that members participate from locations open to the public (as previously agreed by consensus), (2) a requirement that the topic addressed be limited to a review of the Director's decision whether to hold a public hearing, including a prohibition on the discussion or transaction of other business, and (3) an explicit exception to the requirement that a quorum be physically assembled that includes a reference to FOIA.

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