

Virginia Freedom of Information Advisory Council  
Electronic Meetings Subcommittee  
August 22, 2012  
1:30 PM  
General Assembly Building  
Richmond, Virginia  
Meeting Summary

The Electronic Meetings Subcommittee (the Subcommittee) held its second meeting on Wednesday, August 22, 2012 to consider legislation referred to the FOIA Council for study by the 2012 Session of the General Assembly.<sup>1</sup> The Electronic Meetings Subcommittee continued its study of HB 1105 (Greason) and HB 1149 (Dudenhefer).

After the meeting was called to order and the members and interested parties introduced themselves, the first order of business for the Subcommittee was to elect a new Chair. The former Chair, Craig Fifer, was term-limited as of July 1, 2012 and is no longer a member of the FOIA Council. Kathleen Dooley was elected Chair by unanimous vote of the members present.

Next, staff presented an overview of HB 1105 and HB 1149. HB 1105 would revise the rules for which meetings of state public bodies may be conducted by audio or video means. The bill provides that (i) at least one member of the public body must be physically assembled at the principal meeting location, (ii) the quorum of the public body is determined by members participating in person or by electronic means in the meeting, (iii) a member of the public shall pay for the documented marginal cost that a public body may incur in expanding public participation to the meeting, and (iv) the number of meetings a public body may conduct through electronic communications means is limited to 50 percent of its regular meetings in any calendar year. The bill also contains technical amendments. HB 1149 would expand the authority for the conduct of electronic communication meetings to all public bodies. Currently, local public bodies are prohibited from conducting public meetings in this manner, except when the Governor declares a state of emergency. The bill also contains technical amendments.

It was suggested at the last meeting of the Subcommittee that a review of the annual reports required to be submitted to the FOIA Council by state public bodies holding electronic meetings may be helpful in the Subcommittee's deliberations. Staff presented an overview of those reports received by the Council since 2000; please see the spreadsheet titled "FOIA Electronic Meetings Report - August, 2012," incorporated herein by reference.<sup>2</sup> Staff observed that out of 307 reports, only 12 were meetings of a parent public body; the rest were committees, subcommittees, and other such subordinate entities. Additionally, 12 meetings were held using audio/visual devices, the rest were audio-only. Members of the

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<sup>1</sup> Subcommittee Members Kathleen Dooley, George Whitehurst and John Selph were present. Subcommittee member Stephanie Hamlett was absent.

<sup>2</sup> The spreadsheet is available on the FOIA Council website on the 2012 Subcommittees web page.

public or media were present at 60 of the meetings. Staff noted that most comments received were positive regarding the convenience and efficiency of holding electronic meetings, although some commented on difficulties using the technology. Only one comment noted difficulty in assembling a quorum in one physical location.

The Subcommittee next heard from Mary Yancey Spencer of the Virginia State Bar (the Bar) regarding the Bar's experience in conducting electronic meetings. Ms. Spencer related that the Bar carried out most of its work by committees. She stated that the Bar's 81-member governing body and 12-member Executive Committee do not use electronic meetings as a matter of policy, but the Bar's eight standing committees and some special committees do conduct electronic meetings. She observed that the physical quorum requirement was often a problem because members were geographically dispersed throughout the Commonwealth, and it made no sense to ask busy attorneys to drive for hours for a 20 or 30 minute meeting. She indicated that all the Bar's electronic meetings were conducted by telephone, that a call-in number was made available to the public, but that no one other than representatives from Virginia Lawyers Weekly had called in or shown up in person, either at the main location or at remote locations (which were generally lawyers' offices). She stated they had never experienced technical problems. However, they had had problems where there was an emergency involving a member's client, causing the member to be unable to attend the meeting. The member's absence meant there was no physically assembled quorum, so the body was unable to conduct any business. Ms. Spencer also expressed her opinion that the definition of "public body" was overly inclusive, and should not apply to all of the subordinate entities such as subcommittees. In response to questions from the subcommittee, she indicated that she felt this aspect of the definition was a bigger problem than the requirement that there be a physical quorum, but that removing the quorum requirement would help. Further, Ms. Spencer stated that the Bar would not charge the public for access, and currently hold over 50% of its meetings by electronic communication means.

Michelle Parker, from the Virginia Department of Education (the Department), spoke next regarding the Department's experience conducting electronic meetings. She indicated that the Department had a nine member Board that met once per month, ten months per year. The Board has subcommittees, and generally schedules subcommittees to meet the day before the full Board. Ms. Parker stated that members who did not live locally would typically travel to Richmond for the subcommittee meetings and stay overnight, attend the full Board meeting the next day, then return home. She indicated that the Departments' meetings were generally of great interest to the public, lobbyists, and the press, and were well attended. She stated that the Department had recently completed a new Board room equipped with television screens enabling one to see the speaker and agenda items from anywhere in the room, but as of yet electronic meetings had been conducted by telephone, not video. She stated that the new equipment would lend itself to video meetings, but had not yet been so used. Ms. Parker noted that consultants had conducted audio-visual presentations using the new equipment, including having power point presentations on-screen while speaking from remote locations. She also stated that all of the 132 school divisions in Virginia were equipped to handle electronic meetings, so members could always

find a remote location from which to call in to the main meeting site. She stated that it was easier for a smaller agency with fewer meetings, and that the Department preferred to have a quorum physically assembled for its meetings. She stated that the Department would not charge the public for access.

Ms. Dooley requested comments from any other state agency representatives who wished to speak. Cindy Berndt, from the Department of Environmental Quality (DEQ), stated that DEQ had three regulatory boards with several advisory boards and committees. She agreed with Ms. Parker that the definition of "public body" could be a problem. She gave an example of an advisory committee that might meet only once, then make a recommendation. She stated a preference for face-to-face meetings, but that the flexibility of holding electronic meetings is sometimes necessary to conduct business. She indicated she was not sure if the quorum requirement had been a problem, but it would be more flexible without the quorum requirement. She also disagreed with charging the public for access. In response to a question from Ms. Dooley, Ms. Berndt stated that DEQ's committees usually had a core group from the Richmond area, but sometimes would have experts such as professors from all over the state or even out of state.

Next, Phyllis Errico of the Virginia Association of Counties (VACo) and Mark Flynn of the Virginia Municipal League (VML) discussed the results of their survey of their constituents. Ms. Errico indicated that they had sent the survey to counties, cities, and towns, and had received about 50 responses. Please see the accompanying memorandum, incorporated herein by reference. Ms. Errico indicated that overall there was a preference for governing bodies to hold face-to-face meetings, but the responses indicated more interest in enabling advisory groups, committees, regional authorities, and similar entities to hold electronic meetings. Mr. Flynn indicated there was also more interest in electronic meetings from larger, urban communities, particularly in northern Virginia where travel was often a problem. He stated that smaller, rural communities generally had less interest in electronic meetings. Ms. Errico stated that VACo would like localities to have electronic meetings available as a tool, but that no one favors electronic meetings as a replacement for face-to-face meetings; face-to-face meetings are still important and preferred. Mr. Whitehurst noted he did not see why the state would reserve to its own agencies the power to hold meetings by electronic means, and deny the same to localities.

Ms. Dooley then asked if there was any other comment from those representing local government. Roger Wiley, speaking as an attorney who represents regional public bodies, indicated that many of his clients drew their membership from 50-75 miles and found it difficult to assemble quorums, but he was unsure if either bill addressed the concerns of regional bodies. He stated it was particularly frustrating when the only purpose of the meeting was to conduct a closed session, and someone would have to drive 40 miles to a meeting that was closed to the public anyway. He also gave an example of a three-member committee that was reviewing applications and wanted to do so by conference call, but could not. The members were themselves busy administrators for their respective localities and so getting together physically was a problem. He also noted that sometimes the inability to conduct electronic meetings could lead to worse results, such as when a board

tries to act on a decision based on a series of one-on-one conversations rather than an actual meeting of the board. In response to questions from the Subcommittee, Mr. Wiley clarified that regional bodies were treated like local bodies, except that individual members could call in if they lived 60 miles or more from the meeting location. He noted that while that helped the individuals sometimes, it did not solve the quorum problems. Additionally, he noted that he could not recall instances where the public or press had attended a regional body meeting in a dozen years. Ms. Errico noted it was very confusing to people to have different rules for different types of public bodies. Ms. Dooley asked if HB 1149 addressed regional bodies, and if it would clean up the 60-mile rule. Mr. Wiley stated that it did not do so explicitly, but as regional bodies were generally treated the same as local bodies, the 60-mile rule would no longer be necessary if regional bodies were allowed to hold electronic meetings. He also stated that members often saw the electronic meetings limitations as "ridiculous technicalities."

Patrick Cushing, from the law firm of Williams-Mullen, spoke to two specific issues on behalf of Stafford County, who had requested HB 1149 be introduced. First, he indicated that Stafford County wanted the bill to help with recruiting people to serve on local bodies. Second, he indicated it would help with travel arrangements, for example, for people who live in Stafford but work in Washington, D.C., who often encounter traffic delays. He elaborated that in such cases people could make arrangements beforehand to call in from work in D.C., thus avoiding any potential traffic delays and not having to take as much time off work. Staff noted that under the present law addressing individual participation in emergencies, members may call in if they are prevented from reaching the meeting physically due to traffic. Mr. Cushing noted that such participation is limited to twice per year or less, and that limit could be a problem.

Ginger Stanley, Executive Director of the Virginia Press Association (VPA), observed that the Subcommittee was dealing with a topic that had been dealt with many times before. She noted that many valid comments had been made, and that changes had been made in the law as the legislature has tried to accommodate reasons why electronic meetings are necessary. She stated that VPA has always felt face-to-face meetings were best. She gave an example of a recent VPA Board meeting where three members were stuck in traffic and tried to call in; all three gave up "because it just didn't work." She noted the FOIA Council statement from 2008 also gave preference to face-to-face meetings. She went on to state that based on a presentation at a meeting of the Joint Committee on Science and Technology's Electronic Meetings Subcommittee, she was convinced that with new audio-visual virtual meeting technology, electronic meetings would become acceptable to everyone, including VPA. She stated that telephones were the old way of doing business, they do not work well, and VPA would not want to expand telephonic meetings. However, she stated that VPA would support using new technology that allows all participants to see and hear the members and the public at all meeting locations. In response to questions, Ms. Stanley indicated VPA could support elements of both bills expanding the use of electronic meetings so long as this new technology was incorporated, but VPA could not support expansion of the existing law if meetings were held just using telephones. She also stated that the presentation she saw did not set out the cost of this virtual meeting technology.

Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), offered that the difference between state and local government was that state government draws members from all over the state, but most localities are small. She also expressed hope that if localities use electronic meetings as state bodies do, they also post statements of FOIA rights and responsibilities on their websites, meeting minutes, notices, etc. as state bodies must under current law. Regarding recruitment, she noted that there are many personal factors that go into the decision of whether to serve on a public body, travel time being but one such factor. She also noted that efficient scheduling and "piggybacking" meeting dates, such as Ms. Parker stated regarding Department of Education committee and Board meetings, could address many of the issues raised. She noted that General Assembly members make far greater time and travel commitments than most who serve on local bodies. She further stated that public policy changes should not be based on the convenience of members, as the purpose of FOIA is to keep the public informed, not to make it easy for government to conduct business.

Mr. Cushing noted that he attended the same presentation regarding virtual meeting technology, and stated that the technology would not be as "turn-key" for localities as one might think from seeing the presentation.

After hearing the presentations and public comment, the Subcommittee proceeded to discuss the bills in detail. Regarding HB 1105, Ms. Dooley noted that the idea of charging the public was opposed generally, and the Subcommittee concurred. Regarding the quorum requirement, Mr. Whitehurst stated that he would want at least two or three members present physically, but that a full quorum was always preferable. Mr. Selph indicated he could agree to a rule requiring that at least three members be physically present. Ms. Dooley indicated she was concerned about the breadth of application of such a rule, for example to three-member committees. She indicated she was comfortable with the bill's requirement that there be at least one member physically present, and the quorum could be assembled electronically. After further discussion the Subcommittee agreed that members should identify themselves by roll call, and keep the requirement from current law that all members can hear, or see and hear, each other. Regarding the limitation on the number of meetings to be held electronically per year, the Subcommittee expressed a continued preference for face-to-face meetings, and to further that end, supported the idea that there be some limit on the number of meetings conducted by electronic communications means. However, the Subcommittee found the language of HB 1105 limiting electronic meetings to "no more than 50 percent of the regular meetings held by a public body in any calendar year" to be problematic. Mr. Selph noted that the language referred to "regular meetings" and therefore did not address special (or emergency) meetings. It was noted that many committees, subcommittees, and other smaller public bodies do not have regularly scheduled meetings at all, and often cannot predict how many meetings they may hold. The Subcommittee discussed using language requiring at least one meeting per year to be held physically (such as is current law), but noted that could cause problems as well, for example, when a committee holds one electronic meeting and concludes its work. The Subcommittee also discussed requiring agenda materials to be distributed in advance or posted to a

website. Melanie West, of the Department of Planning and Budget, noted that regulatory bodies generally post their agenda materials to the Regulatory Town Hall website. Generally, the Subcommittee reiterated that it did not want electronic meetings to replace face-to-face meetings, but there was no consensus regarding what the exact limitations should be in regard to both the number of members physically present, and the number of meetings that may be held by electronic communication means. Regarding HB 1149, the Subcommittee voted unanimously to support allowing local and regional public bodies to conduct meetings by electronic communications means with the same limitations as are imposed on state public bodies, as amended based on today's discussions. Ms. Dooley noted that she had had a legal intern do 50-state research regarding electronic meetings, and that research did not reveal any other state that made a distinction between local and state public bodies conducting electronic meetings. The Subcommittee directed staff to prepare a draft incorporating these concepts for the consideration of the Subcommittee and interested parties, to be considered at the next Subcommittee meeting. That meeting was scheduled for 10:00 AM on September 5, 2012, in House Room D of the General Assembly Building, preceding the next meeting of the full FOIA Council at 1:30 PM the same day.

There being no further business, the meeting was adjourned.

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