

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
May 4, 2016
1:30 PM
Speaker's Conference Room, Sixth Floor
General Assembly Building
Richmond, Virginia
Meeting Summary

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its second meeting of the 2016 Interim on May 4, 2016. All Subcommittee members were present, except Mr. Landon and Ms. King-Casey.¹ The purpose of the meeting was to continue the study of FOIA in accordance with House Joint Resolution No. 96 (HJR 96). As per the study plan adopted by the Council, with the completion of the review of (i) open meeting exemptions found in § 2.2-3711, (ii) § 2.2-3712 (closed meeting procedures), and (iii) § 2.2-3707 (notice of meetings, etc.) the Subcommittee began review of § 2.2-3707.1 (posting of minutes for state boards and commissions) and § 2.2-3710 (voting).

Staff advised the Subcommittee of the legislative history of § 2.2-3707.1 (posting of minutes for state boards and commissions), which was enacted on 2002 (c. 580) and amended again in 2006 (cc. 474 and 595) and 2007 (c.300). The Subcommittee discussed why this section was limited to deliberative bodies in the executive branch. Staff averred that at the time of enactment, it was felt that there was more interest in executive branch agencies as their actions affect more people. Dave Ress, a reporter with the Daily Press, noted that many localities in the Hampton Roads area routinely post their minutes. Megan Rhyne concurred with Mr. Ress, but added that the postings are not usually done in a timely manner. There was discussion about the proper nomenclature for identifying specific websites. Staff noted that in some cases FOIA speaks to "public government websites," in others the "Commonwealth Calendar." The Subcommittee directed staff to prepare a draft amending this section to include all state public bodies and local governing bodies, including school boards; however, for such local governing bodies, require posting only upon approval of the minutes. This limitation for local governing bodies and school boards was acknowledgment of the fact that such local governing bodies meet monthly and as a practical matter, draft minutes were prepared in time for approval at the next meeting.

The Subcommittee then began review of § 2.2-3710, which sets forth voting requirements for deliberative bodies. Staff provided the legislative history of § 2.2-3710, which was originally enacted in 1987 (c.71) and amended in 2000 (c.932), 2001 (c. 710), and 2002 (c.491). Dave Ress with the Daily Press expressed concern that some public bodies do not comply with the letter or spirit of FOIA in that individual members meet serially on a one-to-one basis and then at a later time, the entire public body votes on the matter without discussion. This practice adversely impacts the public by functionally eliminating the deliberative process on

¹ Dooley (Chair), Selph, and, Porto.

a particular issue. Staff noted that the Virginia Supreme Court in the case of *Hill v. Fairfax County School Board*, 284 Va. 306, 727 S.E.2d 75 (2012), held that serial one-on-one meetings by individual members of a public body are permissible under FOIA because a meeting is defined as the informal gathering of three or more members of the body. Megan Rhyne, Coalition for Open Government (VCOG) advised the Subcommittee that while it may be permissible, the public she hears from perceive this practice as a violation of their right to know. Roger Wiley, Esq., stated that the practice varies with every topic and he believes that there is no way to write a general rule. He noted that some localities have policies in place regarding who can act on particular matters. For example, some localities authorize their attorney to agree to settlement up to a certain amount, but require the governing body to approve higher amounts. Mr. Wiley advised the Subcommittee that any restriction on one-on-one discussions by individual members of a public body could have First Amendment implications. Ms. Dooley, chair of the Subcommittee suggested that if a citizen has concerns, they may be better addressed to the public body directly. There being no further discussion, the Subcommittee by consensus agreed not to recommend any change to § 2.2-3710.

The Subcommittee turned its attention to the next agenda item--the "context draft." At previous meetings, the Subcommittee discussed whether the current meeting exemptions that reference existing FOIA record exemptions should be amended to contain more information, to include the identity of the public body(s) to which the exemption applies and a general description of the subject matter of the excluded records/topic for discussion in a closed meeting in addition to the citation to the applicable records exemption. A draft was prepared by staff, discussed by the Subcommittee, and posted on the Council website to receive further comment. At today's meeting, the Subcommittee reviewed the context draft and made the following revision discussed below. But again action was deferred on this draft to allow ample time for review and reflection by interested parties. As a result, no action to date on this approach has been taken by the Subcommittee. The revisions to the draft agreed to by the Subcommittee are:

- Revise the draft to incorporate 2016 amendments made to FOIA that impact § 2.2-3711 (open meeting exclusions); and
- Delete the proposed language in subdivision A 11 of § 2.2-3711 (discussion of tests, etc.), appearing after "§ 2.2-3705.1"² and insert a period;
- Delete the proposed language in subdivision A 40 of § 2.2-3711³ (discussion of economic development records) and replace with "relating to economic development"; and
- Delete the proposed language in subdivision A 47 of § 2.2-3711⁴ (discussion by the Alcoholic Beverage Authority (to come into existence on July 1, 2018) and also to delete "or subdivision 34 of § 2.2-3705.7, relating to marketing and operational strategies."

² "...relating to the evaluation of (i) any student or any student's performance; (ii) any employee's or employment seeker's qualifications or aptitude for employment, retention, or promotions; or (iii) qualifications for any license or certificate issued by a public body."

³ "relating to business, trade, or tourism development or retention"

⁴ "(ii) proprietary information, trade secrets, financial records, and (iii) contract cost estimates"

The Subcommittee next reviewed the draft prepared by staff amending § 2.2-3707, as directed by the Subcommittee at its April 11, 2016 meeting. Dave Ress, Daily Press, suggested that the contents of an agenda be dictated by statute. Both Subcommittee members Mr. Selph and Ms. Dooley responded that such a provision would be difficult to enforce and did not believe that the law should dictate agenda content. They noted that agenda items usually reflect matters needing action or at least discussion as they arise. In reviewing the proposed draft, the Subcommittee made the following revisions:

- Change the term "public government website" to "publicly available website" in subsection C, relating to posting of meeting notices;
- Clarify the locations where physical notice is to be posted;
- Change "[N]otice " to ""[t]he proposed agenda" in the last sentence in subsection F (which was moved from subsection C); and
- Keep working on the best manner to replace the term "Commonwealth Calendar."

The next meetings of the Subcommittee are scheduled for Monday, June 6, 2016, Monday, July 18, 2016, and August 11, 2016, all in Richmond. There being no further business, the meeting was adjourned.

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