

Meetings Subcommittee
June 5, 2018
10:00 AM
House Committee Room 300A
Pocahontas Building, Richmond, Virginia

The Meetings Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) held its first meeting on June 5, 2018, to consider House Bill 1101 (Robinson)¹ and Senate Bill 336 (Peake)² and to consider the use of text messages by members of public bodies during public meetings. Subcommittee members Michael Stern and Mark Vucci were present, but unfortunately, there were not enough members to establish a quorum to conduct business. As the meeting was well attended by interested parties, the members present decided to move forward and take public comment while recognizing they could not take action due to the lack of a quorum.

Bills referred: HB 1101 and SB 336

To begin, staff presented an overview of HB 1101 and SB 336, both of which would provide a right for public comment at public meetings, but take different approaches to do so. Staff reminded those present that two similar bills had been referred to the Council in 2016 and incorporated into the three-year study under House Joint Resolution No. 96 (2014), House Bill 698 (Kory)³ and House Bill 757 (Bell, R.B.).⁴ The Council and the Meetings Subcommittee considered these bills and heard from Delegate Kory and interested parties in 2016. A motion

¹ **HB 1101 (Robinson) Virginia Freedom of Information Act; right to speak at open meetings.** Requires that every public body, except for governing boards of public institutions of higher education, afford an opportunity for public comment during any open meeting. The bill provides, however, that if a public body holds more than four meetings in a calendar year, such public body may, by recorded vote, limit the number of meetings at which an opportunity for public comment is afforded to four meetings per calendar year. The bill requires that the notice given by a public body prior to a meeting include information as to the approximate point during the meeting when public comment will be received. In current law, this requirement applies only to public bodies where at least one member has been appointed by the Governor. The bill permits public bodies to choose the approximate point during the meeting when public comment will be received and permits public bodies to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner, but prohibits public bodies from limiting public comment to only the submission of written comments.

² **SB 336 (Peake) Virginia Freedom of Information Act; right to speak at open meetings.** Requires that every elected public body afford an opportunity for public comment during any open meeting. The bill permits elected public bodies to choose the approximate point during the meeting when public comment will be received and to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. Such rules shall not limit public comment to only the submission of written comments. The bill requires that the notice given by any public body prior to a meeting include information as to the approximate point during the meeting when public comment will be received.

³ **HB 698 (Kory; 2016) Virginia Freedom of Information Act; right to speak at open meetings.** Requires that every public body afford an opportunity for public comment during any open meeting. A public body may adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill contains technical amendments.

⁴ **HB 757 (Bell, R.B.; 2016) Meetings of local or regional public bodies; public comment.** Requires a local or regional public body to disseminate to the public an agenda for a public meeting at least seven days prior to the meeting or 24 hours prior to an emergency meeting. The bill also requires such body to provide at least five minutes for public comment on each agenda item at the public meeting.

was made to recommend an amended version of HB 698 in 2016, but the motion failed for lack of a second. Delegate Kory introduced a similar bill in 2017, House Bill 2223,⁵ which was also referred to the Council, but Delegate Kory was unable to attend a Council meeting that year and the Council took no action on HB 2223.

Mr. Vucci raised the issue of when public comment would be held during a meeting, noting that if the public comment period was at the end of a meeting, it may happen after an issue was already decided. Mr. Stern asked whether a public comment period could limit topics to be discussed. Roger Wiley, an attorney representing local government and a former Council member, stated that a public body could limit comments to topics that are on an agenda and noted that all major actions by local government, such as budgets, ordinances, and rezoning decisions, already require public hearings. Mr. Stern asked whether a public body could require someone to identify themselves in advance of making comments. Staff noted that FOIA is silent on the issue, but some public bodies do require speakers to sign-up in advance. Mr. Wiley noted that general subject matter and time limits are allowed. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government, observed that there was a recent opinion of the Attorney General about restricting personal attacks in public comments. Mr. Wiley noted that policies designed to protect public bodies from criticism are a problem.

Turning to the bills, Ms. Rhyne commented that she preferred SB 336, but without the language referring to elected public bodies. She further observed that while major decisions require public hearings, the concern is over areas "in the middle," such as hiring a city manager or a decision to endorse a bill. She also observed that reasonable concerns had been raised over the application of public comment requirements to committees and subcommittees at the local government level, and she suggested the option of a trial program applicable to local governing bodies and school boards but not their committees and subcommittees.

Cindy Koether, a Virginia citizen, expressed concern over the floor amendment to SB 336 that inserted the word "elected" before "public body," noting that most elected boards already do take public comment and that citizens would be removed from the process if there were no opportunity to speak. At the end of the meeting, Ms. Koether also noted that she was not sure what is an "elected" public body, as some bodies have a mix of elected and appointed members, and she felt public bodies should not be afraid to allow members of the public to speak.

Phyllis Errico of the Virginia Association of Counties (VACo) expressed that she felt both bills were in the wrong place and did not belong in FOIA. She stated that the various provisions throughout the Code regarding public hearings address the public's ability to participate. She further stated that public officials today interact with the public by email, text, and social media, not just at public meetings. Additionally, she stated that because the definition of "public

⁵ **HB 2223 (Kory; 2017) Virginia Freedom of Information Act; right to speak at open meetings.** Requires that every public body afford an opportunity for public comment during any open meeting and requires that the public comment periods be noticed on the public body's agenda. The bill permits the public body to have discretion in where it places the public comment period on its agenda and permits the public body to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill requires that for meetings of all public bodies, not just those state public bodies on which there is at least one member appointed by the Governor as in current law, the notice provided for any such meeting include a statement as to approximately at what point during the meeting public comment will be received.

meeting" includes any time three or more members of a public body get together, requiring public comment periods at every such meeting will cause problems. Jeremy Bennett, on behalf of the Virginia School Board Association (VSBA), reiterated the previous comments and stated he favored public comment and transparency but not these bills. Michelle Gowdy of the Virginia Municipal League also spoke in agreement with Ms. Errico. Lola Rodriguez Perkins, City Attorney for the City of Hampton, observed that there are many types of committees and boards involved in local government, including many with citizen volunteers as members, and suggested that requiring public comment at every meeting would reduce efficiency by lengthening meetings.

Mr. Stern asked what existing problem the bills sought to address. Ms. Rhyne responded that it was a lack of public understanding that public comment periods are not required at public meetings already, as many in the public assume that such periods are required. Mr. Wiley related that the origin of the original bills was a citizens group in Hampton Roads that went to meetings, became disruptive, was told they were not allowed to speak any longer, and then sought legislation from a legislator in another part of the state. The members present then asked staff to consult with the Meetings Subcommittee Chair, Ms. Dooley, suggesting that these bills be brought to the full Council for consideration due to the divergent views expressed.

Issue: Texting during public meetings

Staff related that the issue of members of a public body using text messages during a public meeting had been raised before the Council in 2016. A situation had been reported out of Loudoun County where a committee of the board of supervisors was meeting and another member of the board (who was not on the committee) was communicating with the subcommittee members by text message during the meeting. Staff opined at that time that it did not appear that an improper meeting had occurred under the specific facts of that situation, but the possibility was raised that three or more members could effectively hold a "meeting within a meeting" by communicating using text messages during a public meeting. While such text messages would be public records subject to FOIA, the public attending the meeting would not necessarily be aware of their use by the members. Mr. Wiley provided further background information on the specific instance in Loudoun County and suggested that the General Assembly should not set rules for local government that do not also apply to the General Assembly. Ms. Gowdy suggested that each body should decide how to handle the issue by addressing it in the body's code of conduct. Mr. Stern suggested staff provide guidance from the Council reflecting current law and best practices, as there are too many factual possibilities to address them all through legislation. Staff suggested updating the current guide on electronic meetings to address texting and other social media; Mr. Stern and Mr. Vucci agreed.

Given the suggested ways to address the bills and the issue of texting during meetings, the members present directed staff to inquire of the Chair after the meeting whether it would be necessary to hold any additional meetings of the Subcommittee. There being no further business before the Subcommittee, the meeting was adjourned.

Please note that staff contacted the Subcommittee Chair Ms. Dooley after this meeting was held and she agreed with the recommendations of the members present that HB 1101 and SB 336

should be discussed by the full Council; that the issue of texting should be presented to the full Council with the recommendation that it be addressed through guidance from the Council rather than legislation; and that unless other issues were raised, no further meetings of the Subcommittee would be necessary. Therefore, the two additional meetings of the Subcommittee that had already been scheduled are cancelled.