

# **Report of the Virginia Freedom of Information Advisory Council December 2016**

## **EXECUTIVE SUMMARY**

In its sixteenth year, the Council continued to fulfill its role as a clearinghouse for public access issues for the Virginia General Assembly. The Council has kept abreast of trends, developments in judicial decisions, and emerging issues related to the Virginia Freedom of Information Act (FOIA) and access generally. In its 16-year history, the Council has provided more than 24,100 formal and informal advisory opinions to citizens of the Commonwealth, media representatives, and state and local government officials and has conducted over 950 FOIA training programs. The Council is recognized as the forum for evaluating proposed FOIA and related public access legislation and routinely conducts comprehensive studies of FOIA and other Virginia laws to ensure Virginia's commitment to open government while balancing the need to protect the public's negotiating and litigation positions, privacy, and safety.

During this reporting period—December 1, 2015, through November 30, 2016<sup>1</sup>—the Council examined FOIA legislation and other public access issues referred to it by the General Assembly. This year the General Assembly referred 14 bills to the Council for further study. Each of these bills referred was scheduled for review. Some bills were reviewed by the Council directly, while others were referred by the Council to its Records Subcommittee or Meetings Subcommittee to be incorporated into the three-year FOIA study pursuant to House Joint Resolution No. 96 (HJR 96, 2014, LeMunyon). All patrons were invited to Council meetings to provide the background for their respective bills. Some of the patrons came to Council meetings to speak to their bills, but unfortunately, several members did not attend a Council meeting. The Council did however review each of these bills, but took no action to advance or reject the access concepts reflected in most of them. Out of the 14 bills referred, the Council voted to recommend to the 2017 Session of the General Assembly only one bill, an amended version of HB 336 (Pogge), which would protect from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years. A full list of all of the bills referred and actions taken appears as Appendix E to the 2016 Annual Report of the FOIA Council.

This year the Council completed its third and final year of study of FOIA pursuant to HJR 96, which directs the Council to (i) study all exemptions contained in FOIA and determine the continued applicability or appropriateness of such exemptions, (ii) determine whether

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<sup>1</sup> Note that the final Council meeting this year was held December 5, 2016. This report includes that meeting, but for all other purposes the reporting period covered in this report ended on November 30, 2016.

FOIA should be amended to eliminate any exemption from FOIA that the Council determines is no longer applicable or appropriate, (iii) examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA, and (iv) report its findings and recommendations by December 1, 2016. At each of its meetings, the Council received progress reports from its two HJR 96 subcommittees and reviewed the draft legislation that was recommended by each Subcommittee. The Council decided that rather than introduce individual legislative recommendations as separate bills while the study was ongoing, it would recommend for the 2017 Session two omnibus bills at the conclusion of the study, one bill incorporating the Council-approved recommendations of the Records Subcommittee, the other incorporating the Council-approved recommendations of the Meetings Subcommittee.<sup>2</sup> Both recommendations were approved by unanimous vote of the Council (9-0) on December 5, 2016. Summaries of the Records Subcommittee's and Meetings Subcommittee's work, including agendas, recommendations, and other materials are available on the Council's website. The entire HJR 96 study is chronicled in a separate final study report.

The Council also heard other legislative proposals as part of its Annual Legislative Preview, and voted to recommend to the 2017 Session of the General Assembly proposed legislation to require guidance documents of the Virginia Parole Board to be made available as public records. The language of the proposal was identical to HB 397 (2012), which did not pass at that time.

The Council continued to monitor Virginia court decisions relating to FOIA. The Supreme Court of Virginia did not issue any opinions interpreting FOIA this year. However, the Supreme Court granted an appeal in the case of *Daily Press v. Office of the Executive Secretary of the Supreme Court*.<sup>3</sup> That case concerns access to the case management system compiled from records of 118 of the 120 Virginia circuit courts and maintained by the Office of the Executive Secretary of the Supreme Court of Virginia (OES). Access to these records was the subject of Freedom of Information Advisory Opinion 03 (2015). After that advisory opinion was issued, OES reiterated its denial of the Daily Press' request and the Daily Press filed a FOIA petition in the Newport News Circuit Court. News reports stated that OES argued that the individual circuit court clerks were the custodians of the records rather than OES, that it was up to each clerk to decide whether to release records of his or her circuit court, and that OES could not release the database without the permission of the clerks. The Daily Press argued that since the records were available publicly on a limited basis through OES' case management system and had been made available in bulk in the past, OES is the custodian and must make the entire database available. The Newport News Circuit Court ruled in favor of OES. The Council will continue to monitor the case as it is expected to be heard and decided by the Supreme Court of Virginia in 2017.

The Council continued its commitment to providing FOIA training. The Council views its training duty as its most important mission and welcomes every opportunity to provide FOIA training programs. During 2016, Council staff conducted 67 FOIA training programs throughout Virginia at the request of state and local government officials, the media, and

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<sup>2</sup> House Bills 1539 (2017) and 1540 (2017), respectively.

<sup>3</sup> SCV Record No. 160889.

citizens. Training programs are tailored to meet the needs of the requesting organization and are provided free of charge. In 2015, the annual statewide FOIA Workshops conducted by Council staff were discontinued in favor of providing training upon the request of any interested group. Under this approach, Council staff travels to the location of the group requesting training, provides relevant training materials, and presents training tailored to meet the needs of the particular group. All such Council training programs are preapproved by the Virginia State Bar for continuing legal education credit for licensed attorneys. The training programs are also preapproved by the Department of Criminal Justice Services for law-enforcement in-service credit, the Virginia Municipal Clerks Association, and the Virginia School Board Association for academy points. Responses to this training approach in the past year have been consistently positive. Additionally, plans for Council-provided FOIA Officer training as per HB 818 (c. 748 2016 Acts of Assembly) are in progress for an online training program available through the Knowledge Center administered by the Department of Human Resource Management. This format will make it easy for FOIA officers to be trained at a time when it is convenient for them, to generate records of who has completed training, and for issuance of a certificate of completion contemporaneously with successful course completion. The Council also hopes to use the Knowledge Center training to compile a database of contact information for FOIA officers across the state as a further service to the citizens of the Commonwealth.

For this reporting period, the Council, with a staff of two attorneys, responded to 1,730 inquiries. Of these inquiries, three resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: none by government officials, one by a media representative, and two by citizens. The remaining requests were for informal opinions, given via telephone and email. Of these requests, 1058 were made by government officials, 561 by citizens, and 108 by media. Starting in 2006, the Council has seen an increase in the number of informal opinion requests compared with requests for formal written opinions. For the past decade this trend has remained consistent. This continuing trend appears to stem from the Council's reputation for fairness and reliability in its informal opinions and as a credible source for FOIA guidance before disputes arise. This year there also was a noticeable increase in the number of inquiries concerning the new requirements for FOIA officers.

FOIA was again the subject of significant legislative activity in the 2016 Session. The General Assembly passed a total of 16 bills amending FOIA during the 2016 Session. Of the 16 bills passed by the 2016 Session, three bills create two new sections in FOIA and amend existing provisions; three bills add three new records exemptions; three bills add two new meetings exemptions; and eight bills amend other existing provisions of FOIA. A more detailed report of the bills discussed above and other public access bills passed during the 2016 Session appears on the Council's website and is attached as Appendix D to the 2016 Annual Report of the FOIA Council.

Keeping abreast of the latest access trends, access to public records contained in databases continues to be an issue of interest, as well as other issues concerning access and technology. As stated above, the Council will continue to monitor the *Daily Press v. OES*

case as it may have wide implications regarding access to databases. The Council has also indicated that in 2017 it intends to study several other technology-related issues:

- Whether to include in FOIA a policy statement to the effect that: "Any public body procuring any computer system, equipment or software, shall ensure that the proposed system, equipment or software is capable of producing public records in accordance with this chapter;"
- The impact of technology on FOIA, such as the use text messages by members of a public body during a meeting;
- The exemption for "vendor proprietary software" (subdivision 6 of § 2.2-3705.1);
- Posting meeting minutes online.

In addition to technology issues, the Council has stated that it intends in 2017 to continue studying access to proprietary records and trade secrets, personnel records, law enforcement records, and the organization of FOIA.

In 2016, the Council said farewell to three members. The Council praised the service to the Council and to public access generally of Council members John Selph and Frosty Landon who had served for eight years. Both gentlemen completed two four-year terms on the Council and by law were not eligible for reappointment. Both Mr. Selph and Mr. Landon made significant contributions to the work of the Council and could always be counted on to participate in the work of the Council subcommittees. The Council thanked them for their service, acknowledged that they will be sorely missed and wished them the best in future endeavors. Christopher Ashby's first four-year term on the Council also expired July 1, 2016, but without the appointment of a successor or the reappointment of Mr. Ashby. Because of this apparent vacancy on the Council, the Council recommended that the Council's enabling legislation be amended to state that members continue in office until a successor is appointed.

This year the Council welcomed new members Michael Stern, Esq., who was appointed to a four-year term by the Speaker of the House of Delegates as a citizen member the Council, and William D. Coleburn, General Manager of the Courier-Record newspaper and Mayor of the Town of Blackstone, who was appointed to a four-year term by the Senate Committee on Rules as a citizen member the Council. The Council also welcomed Jessica L. Budd, Esq., who recently joined the Division of Legislative Services as one of the staff to the Council.

The Council also acknowledged the 2016 retirement of Ginger Stanley, Executive Director of the Virginia Press Association. Ms. Stanley has been a staunch advocate for transparency in government and has participated in every Council study since the Council's inception. The Council recognized her efforts and thanked her for her support of the Council's work.

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