



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

Senator Richard H. Stuart, Chair
Delegate Luke E. Torian, Vice-Chair

Alan Gernhardt, Esq., Executive Director
Chad Ayers, Esq., Attorney
foiacouncil@dls.virginia.gov

Pocahontas Building ~ 900 East Main Street, Pocahontas Building, 8th Floor ~ Richmond, Virginia 23219
804-698-1810 ~ (Toll Free) 1-866-448-4100 ~ (Fax) 804-698-1899 ~ <http://foiacouncil.dls.virginia.gov>



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
Wednesday, October 17, 2018 - 1:00 p.m.
House Room 3, Capitol Building

SUGGESTED AGENDA

ANNOTATED

1. Call to Order, introduction of members.

2. Subcommittee Reports. *At its meeting on April 4, 2017, the FOIA Council assigned the bills referred by the 2018 Session of the General Assembly to three subcommittees for further study as listed below. The Council heard the reports of the Records and Remedies Subcommittees on August 27, 2018, but carried over one bill from the Records Subcommittee and deferred the report of the Meetings Subcommittee until today's meeting.*

Records Subcommittee

The Records Subcommittee has met three times on May 21, June 27, and August 8, 2018. The Subcommittee voted to send an amended version of SB 730, without a recommendation, to the Council for further discussion.

Meetings Subcommittee

The Meetings Subcommittee was scheduled to meet on June 5, July 18, and August 22. At the June 5 meeting, a quorum was not present but the Subcommittee members who were present heard from interested parties on the issue of requiring public comment periods at public meetings. Because this issue has been studied in prior years and views are divided, the members present recommended bringing this issue before the full Council and cancelling the remaining Subcommittee meetings, as they felt it required a policy discussion by the full Council. The members also considered the issue of members using text messages to communicate during a public meeting,

and suggested that this issue be addressed through a guidance document, rather than in legislation.

- **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.
- **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. Electronic communications and social media. *As stated above, the issue of the use of text messages during a public meeting was brought before the Council in prior years and referred to the Meetings Subcommittee this year, with a suggestion to address the issue through guidance rather than legislation. The following related issues have also been raised for the Council's consideration:*

1. Consolidate all guidance with regard to electronic communications (email, texting and social media) in a single document.
2. Address questions related to when use of electronic communications by members of a public body can constitute a prohibited meeting. For example,
 - a. If a member of a public body uses social media to communicate about matters within the jurisdiction of that body, can that constitute a meeting?
 - b. Does it matter if the member is followed by or connected to one or more other members of the public body on the social media platform in question?

3. Address questions related to when use of electronic communications by public officials or employees become public records subject to FOIA. For example,
 - a. Are all texts related to public business automatically public records or does there have to be some substantive content?
 - b. Under what circumstances would social media posts from personal accounts be considered public records and how are public officials or employees supposed to preserve and produce them?
4. Provide practical guidance/best practices for each type of electronic communication.
5. Identify any model electronic communication and social media policies available from Virginia or other jurisdictions.

4. Annual Legislative Preview.

5. Discussion.

6. Public Comment.

7. Other Business.

- Public comment forms. *The Council asked that staff share any public comment forms received at each meeting of the Council. None have been received since the Council's last meeting.*
- Electronic meetings participation policy. *Former Code §§ 2.2-3708 and 2.2-3708.1 were consolidated into new § 2.2-3708.2 effective July 1, 2018. A new version of the Council's policy on electronic participation, originally adopted in 2014 and last revised in 2017, has been prepared to reflect the Code changes.*
- Electronic meetings held to address a state of emergency declared by the Governor. *In consolidating the provisions of former §§ 2.2-3708 and 2.2-3708.1 into new § 2.2-3708.2, it appears there have been unintended substantive changes regarding the procedure for electronic meetings held to address a state of emergency declared by the Governor. Specifically, there is an apparent conflict in that subdivision A 3 provides that these meetings do not require a quorum be assembled in one physical location, but subdivision C 3 appears to require such a quorum.*

8. Public Comment.

9. Discussion.

10. Reminder: The next meeting of the Council is scheduled to be held on December 5, 2018 at 1:00 PM in House Room 3 of the Capitol Building.

11. Adjournment.

Council Members

Senator Richard H. Stuart, Chair
Senator Mamie E. Locke
Sandra G. Treadway
Stephanie Hamlett
Mark Vucci
Marisa Porto
William "Billy" Coleburn

Delegate Luke E. Torian, Vice-Chair
Delegate Glenn R. Davis, Jr.
Lee Bujakowski
Kathleen Dooley
Shawri King-Casey
Michael Stern
Cullen Seltzer

Staff

Alan Gernhardt, Executive Director
Chad Ayers, Attorney

The FOIA Council's web site is: <http://foiacouncil.dls.virginia.gov>. To assist us in providing Internet dissemination of materials, presenters are requested to submit written comments and handouts in electronic format by email to staff prior to meetings. Presenters are also requested to bring 20 copies of their remarks or handouts to meetings. These copies will be provided to FOIA Council members and the public.
E-mail: foiacouncil@dls.virginia.gov.