



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

Monday, November 20, 2017 - 1:30 p.m.
House Room 1, Capitol Building

SUGGESTED AGENDA

ANNOTATED

- 1. Call to Order, introduction of members.**
- 2. Bills referred to Council for study by 2017 Session of General Assembly; presentations by Patrons: *Patrons were invited to attend to discuss their bills.***
 - HB 2223, Kory: Virginia Freedom of Information Act; right to speak at open meetings.
 - SB 972, DeSteph: Requests for information by members of the General Assembly; responses not subject to redaction.¹
- 3. Public Comment.**

¹ HB 2223, Kory: 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.

SB 972, DeSteph: Requires all departments, agencies, and institutions of the Commonwealth and staff and employees thereof to respond to a request for information made by a member of the General Assembly. The bill further provides that notwithstanding the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), a response to a request for information made by a member of the General Assembly shall not be subject to redaction.

4. Discussion and recommendations, if any.

5. Electronic Meetings Subcommittee Report. *As you will recall, the General Assembly this year referred to the Council House Bill 2316,² which would have allowed the Tobacco Commission to hold electronic meetings without opening the remote locations to the public. At its May meeting, the Council considered the bill and asked staff to prepare an alternative version that would remove from § 2.2-3708 the requirement that remote locations be open to the public for all state public bodies, not just the Tobacco Commission. This draft was presented at the Council's August meeting. During consideration of the draft, certain other issues related to technology and meetings were raised, such as the definition of "electronic communication" and the use of mobile devices during public meetings. The Council referred consideration of the draft and these issues to the Electronic Meetings Subcommittee for further study. The Subcommittee met on October 4, 2017, and November 1, 2017, and has recommended three drafts for the Council to consider.*

6. Electronic Meetings Drafts.

- Remote locations draft (LD 18100760). *This draft is based on the original Tobacco Commission proposal to allow electronic meetings without requiring that the remote locations be open to the public, and is expanded to apply to all state-level public bodies. The draft also requires that if members wish to participate in a meeting by electronic communication means, then the public body must provide to the public a substantially equivalent electronic communication means through which they may witness the meeting.*
- Combination draft (LD 18100758). *This draft was proposed by the Subcommittee to clarify FOIA by combining current §§ 2.2-3708 and 2.2-3708.1 into a single section addressing all types of meetings conducted using electronic communication means, without making substantive changes to current law.*
- Definition draft (LD 18100757). *Under current law the term "electronic communication" is defined in § 2.2-3701 to mean "any audio or combined audio and visual communication method." This definition omits purely visual electronic communications such as electronic mail and text messages. Additionally, the current definition does not specify what is "electronic" as opposed to other communication means. The Subcommittee has recommended a new definition, contained in this draft, to address these issues.*

7. Trade Secrets Drafts.

- Trade secrets exemption draft (LD 18100192). *At its last meeting the Council voted to recommend an amended version of the trade secrets draft that would create a general exemption for trade secrets (without language regarding the apportionment of attorneys' fees and costs).*

² HB 2316, Marshall, D.W.: Tobacco Region Revitalization Commission; meetings by teleconference. Provides that the remote locations from which additional members of the Commission participate in a Commission meeting that is conducted through electronic communication means shall not be required to be open to the public.

- Trade secrets remedies draft (LD 18100193). *At its last meeting the Council voted to adopt a separate draft setting out the language regarding apportionment of attorneys' fees and costs in trade secrets cases.*
- Public Procurement Act draft (LD 18100197). *At its last meeting the Council voted to recommend an amended draft based on Department of General Services policy language addressing overly broad designations of proprietary records and trade secrets under the Virginia Public Procurement Act.*

8. Declaratory judgment draft (LD 18100218). *At its last meeting the Council heard a proposal to add declaratory judgment as an option in the remedies section of FOIA, and asked staff to prepare draft language implementing that proposal.*

9. Criminal and Law-Enforcement Records Draft (LD 18100198). *At the last Council meeting staff informed the Council that certain amendments to § 2.2-3706 may have inadvertently led to unintended consequences regarding what public bodies may use certain exemptions. Specifically, it appears that some of the provisions of subsection A should apply to public bodies that are not necessarily engaged in criminal law-enforcement activities, and that the provisions of subsection B regarding noncriminal records were intended to apply only to public bodies engaged in criminal law-enforcement activities. The Council directed staff to prepare a draft addressing these issues.*

10. Public Comment.

11. Discussion and recommendations, if any.

12. Annual Legislative Preview.

13. FOIA Litigation Issues (update).

14. Other Business.

- FOIA Council policy on individual participation by electronic means. *As required by § 2.2-3708.1(B)(1), at its meeting on November 18, 2014, the Council adopted a policy on individual members' participation in Council meetings by electronic means. It is recommended that the Council adopt a revised version of the policy to reflect amendments to the law that became effective July 1, 2017 (note that these amendments were part of the omnibus legislation recommended by the Council). Specifically, the former version allowed such participation in cases where an emergency or personal matter prevented physical attendance, and limited such participation to two occasions per calendar year or 25% of the public body's meetings, whichever was fewer. As amended, the language about emergencies was removed so the provision now only refers to personal matters, and the limitation was set at two meetings per calendar year.*
- Public comment forms. *As required by House Bill 2146 (LeMunyon, 2017), the Council has published a public comment form on the "Forms and Sample Letters" page of the Council's website so requesters may comment on the quality of assistance they received in response to a request. The Council directed staff to present the forms it has received to the Council for the Council's review.*

- *FOIA Training. For 2018, we plan to adjust how FOIA training is delivered by holding more free trainings here in Richmond and continuing to offer online training. We also will explore other ways to deliver training through online, prerecorded video, and other technologies.*

15. Public Comment.

16. Future meetings.

17. Adjournment.

Council Members

Delegate James M. LeMunyon, Chair
Senator Mamie E. Locke
Sandra G. Treadway
Stephanie Hamlett
Mark Vucci
Marisa Porto
William "Billy" Coleburn

Senator Richard H. Stuart, Vice-Chair
Delegate Luke E. Torian
Ed Jones
Kathleen Dooley
Shawri King-Casey
Michael Stern
Cullen Seltzer

Staff

Alan Gernhardt, Executive Director
 Jessica L. Budd, Attorney

The FOIA Council's web site is: [http:// foiacouncil.dls.virginia.gov](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 (i) e-mail to staff prior to meetings or (ii) diskette furnished to staff at 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.