



COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
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COMMITTEE ASSIGNMENTS:
EDUCATION
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January 18, 2014

Ms. Maria J. K. Everett
Executive Director
Virginia Freedom of Information Advisory Council
201 North 9th Street, 2nd Floor
Richmond, Virginia 23219

Dear Ms. Everett:

Recently, a constituent of mine suggested an amendment to the Virginia Freedom of Information Act to protect an individual who has exercised his or her FOIA rights from retaliation by a public official. I have attached an issue paper prepared by the constituent, Mr. Donald Garrett, along with his suggested changes to the Code of Virginia. Clearly it is not in the public interest to tolerate any such retaliation. The purpose of this letter is to request the FOIA Council to consider whether potential legislation is necessary or prudent in light of Mr. Garrett's experience and concerns. If the Council recommends that legislation is needed, I would also appreciate any guidance on specific language that the Council may support.

Thank you very much for the Council's consideration in this matter. Please let me know how I might assist. In addition, I am happy to coordinate with Mr. Garrett since I know that he would appreciate the opportunity to testify before the Council.

Sincerely,

David Bulova

Anti-Retaliation with Virginia FOIA

Presented by: Donald Garrett

Introduction

Retaliation is the act of taking retributory action in response to a protected action. The Virginia Freedom of Information Act ensures the people of the Commonwealth ready access to public records and can see how their tax dollars are being spent. Retaliation goes against the policy and goals of FOIA; Virginia citizens should be able to hold the government accountable free from the fear of retaliation.

Currently the Virginia Freedom of Information Act has no remedies for citizens that are substantially maltreated due to the fact that they have used their rights under the law. Anti-retaliation legislation would remove this loophole and improve the atmosphere of government openness.

Current FOIA Council Opinion

The FOIA Council has affirmed that this legislation is needed. In Advisory Opinion 15-03 the staff opined, "Any actions of a public body that create a chilling effect to discourage individuals from exercising these rights would clearly be contra to the underlying policies of FOIA." This opinion only addresses public bodies discouraging requests. Anti-retaliation legislation would specifically address maltreatment as the result of a FOIA request. Retaliation is a loophole that needs to be closed in order for FOIA laws to be effective.

Legislative Action is Needed

Although FOIA mandates that the affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary, anti-retaliation is not something strictly enumerated in the act. Courts will not construe FOIA to include extra provisions and responsibilities that are not specifically provided by the act.

Courts "assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and... are not permitted to rewrite statutes. This is a legislative function'..." *Barr v. Town & Country Properties*, 240 Va. 292, 295 (1990). A circuit court has advised that a Plaintiff's suggestion that the "spirit and intent of Virginia's FOIA would be best served [with the addition of another provision] must be addressed to the General Assembly" *Wilson v. City of Salem*, 55 Va. Cir. 270, 273 (2001).

Sample Bill Text

Below is legislative language that can be used. The loophole can be fixed with the addition of two sentences to the current FOIA wording.

A BILL to amend and reenact § 2.2-3700 of the Code of Virginia, relating to the Freedom of Information Act; anti-retaliation

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3700 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-3700. Short title; policy.

A. This chapter may be cited as "The Virginia Freedom of Information Act."

B. By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted *free from retaliation*. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law. This chapter shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.

All public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested. *No person shall suffer materially adverse action from a public body or its officers or employees for utilizing the provisions of this chapter.*

Any ordinance adopted by a local governing body that conflicts with the provisions of this chapter shall be void.

Word Choice

The word choice of the sample bill matches up with federal and state statutes. This will add consistency to the Code of Virginia and will allow for easier interpretation by attorneys and courts. "Materially adverse action" is a phrase that appears when proving employment retaliation under Title VII of the 1964 Civil Rights Act.

Injunctions/Mandamus Can Address FOIA Retaliation

Claims of retaliation can be addressed through FOIA's current enforcement mechanisms. In most circumstances, the issuance of an injunction enjoining a public body or its employees from acting in a certain manner is a sufficient remedy. That order can then be enforced with contempt of court proceedings in the case of further transgressions. Anything additional like monetary awards would create a chilling environment with too much caution needed on the government's side.

Conclusion

The time for anti-retaliation with the Virginia Freedom of Information Act is now. Most cases of retaliation due to the Virginia Freedom of Information Act go unreported because there is nothing the courts can do to help. People should not have to suffer maltreatment at the hands of requesting information that already belongs to the taxpayers. Although the Act praises openness and accountability, Courts cannot help address claims of retaliation until the General Assembly gives them the ability to.