

FOIA Council Meeting Summary

March 7, 2017

1:30 PM

House Room C

General Assembly Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its first meeting of the 2017 Interim on March 7, 2017.¹ The meeting was held to hear an update on legislation passed by the 2017 Session of the General Assembly, to consider bills referred by the 2017 Session of the General Assembly to the Council for further study, to review issues carried over from 2016 for further study this year and develop a study plan for the study of those issues, and to discuss other issues of interest to the Council. After being called to order and introducing the members present, the Council welcomed its newest member, Cullen Seltzer, Esq., appointed by the Governor for a term of four years.

Recap of FOIA and Related Access Bills from 2017 Session of General Assembly

Staff informed the Council that the 2017 Session of the General Assembly passed a total of twenty-one bills amending FOIA. The Council in 2016 completed the third year of the three-year study of FOIA directed by House Joint Resolution No. 96 (2014), and as a result of that study the Council recommend two pieces of omnibus legislation to the 2017 Session of the General Assembly incorporating all of its recommend changes. Both omnibus bills, HB 1539, the records omnibus bill, and HB 1540, the meetings omnibus bill, passed the General Assembly. Two additional bills passed the General Assembly that were recommended by the FOIA Council: HB 1734, which requires guidance documents of the Virginia Parole Board to be available as public records under FOIA, and HB 1876, which excludes from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years.

Five bills add three new records exemptions in FOIA as follows: SB 1226, amending § 2.2-3705.6, adds a new records exemption for certain proprietary information included in solar services agreements between a private business and a public body; SB 1561 and HB 2209, identical bills amending § 2.2-3705.5, add a new records exemption for records of and information held by the Emergency Department Care Coordination Program²; and SB 1006 and HB 1551, identical bills amending § 2.2-3705.5, add a new records exemption for data and information provided by the Office of the Executive Secretary of the Supreme Court of

¹ Council members Coleburn, Hamlett, King-Casey, Porto, Seltzer, Stern, and Vucci were present; member Dooley participated by telephone; members Delegate LeMunyon (Chair), Senator Stuart (Vice Chair), Jones, and Treadway were absent.

² SB 1561 and HB 2209, creating the Emergency Department Care Coordination Program, do not become effective unless and until the Commonwealth receives federal Health Information Technology for Economic and Clinical Health (HITECH) Act funds to implement its provisions.

Virginia to the Department of Behavioral Health and Development Services pursuant to § 37.2-308.1 pertaining to commitment hearings for juveniles and adults.

Two bills add two new meetings exemptions in FOIA as follows: SB 1574, amending § 2.2-3711, adds a new meetings exemption for meetings of a subcommittee of the Board of the Virginia Economic Development Partnership Authority created to consider information provided by the Virginia Employment Commission in order to verify employment and wage claims of businesses that have received incentive awards; and HB 1971, amending §§ 2.2-3705.7 and 2.2-3711, adds a new meetings exemption for discussion or consideration of (i) individual sexual assault cases by a sexual assault response team established pursuant to § 15.2-1627.4 and (ii) individual child abuse or neglect cases or sex offenses involving a child by a multidisciplinary child abuse team established pursuant to § 15.2-1627.5, and also excludes records of such multidisciplinary child abuse teams from mandatory disclosure.

The remaining fourteen bills amend existing provisions of FOIA. Of note, HB 2144, among other provisions, increases the Virginia Freedom of Information Advisory Council from 12 members to 14 members by adding one additional member from the House of Delegates and one additional member from the Senate.

Staff noted that while the Legislative Update document is complete, it is not finalized because the Governor has not yet taken action on some of the bills and has until March 27, 2017 to do so. The General Assembly will meet on April 5, 2017 for the Reconvened Session to act on any amendments or vetoes by the Governor. The final version of the 2017 Legislative Update will be posted on the Council's website after final action has been taken on all of the bills.

Bills Referred to Council for Study by 2017 Session of General Assembly

Staff advised the Council that the General Assembly had referred three bills to the Council for study this year and provided an overview of each bill.

HB 2316 (Marshall, D.) pertains to meetings of the Tobacco Region Revitalization Commission and seeks to provide 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.

SB 972 (DeSteph) would require 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.

HB 2223 (Kory) would require every public body to afford an opportunity for public comment during any open meeting and would require 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.

Issues Continued from 2016 for Further Study

Staff next provided an overview of each of the five issues carried over from 2016 for further study in 2017.

- Proprietary Records and Trade Secrets

In 2014 the Virginia Press Association submitted a white paper suggesting the creation of one or more general exemptions for proprietary records and trade secrets, as opposed to the many specific exemptions in current law that are limited to particular agencies and particular types of records. This proposal, along with a review of current exemptions addressing proprietary records and trade secrets, was studied in depth by the FOIA Council, the Records Subcommittee, and the Proprietary Records Work Group over the course of the three-year study. Various issues were identified including the lack of a statutory definition of "proprietary," various usages of the same terms in different exemptions that may be subject to differing interpretations, the proliferation of new exemptions using very similar language adding to the length and complexity of FOIA, concerns over the process of designating what records are proprietary or trade secrets, different types of records that might be exempted, and concerns over liability if a public body had to defend a designation made by a private entity. Draft proposals were presented at every level of review, and agency representatives testified regarding current exemptions, but no consensus was reached on a recommendation moving forward.

- Personnel Records

Personnel records were studied by the Records Subcommittee, the Personnel Records Work Group, the DHRM Records Work Group, and the full Council from 2014 through 2016. Amendments to clarify the existing personnel records exemption and to eliminate a redundant exemption passed the 2017 Session of the General Assembly as part of the omnibus legislation recommended by the Council (HB 1539). Additional issues were identified but not resolved concerning differing treatment of letters of recommendation in different contexts, the lack of a definition of "personnel records," and the interaction of provisions concerning personnel records with administrative investigations.

- Law Enforcement Records

The next issue that was carried over for further study is that of access to law-enforcement records, particularly criminal investigative records. Staff provided a brief overview highlighting the prior instances in which the Council has studied the issue. Staff noted that the Council formed a Criminal Investigative Records subcommittee in 2010 to study SB 711 (2010), which sought to require law enforcement agencies to disclose criminal investigative records once a criminal investigation or prosecution was final or was otherwise terminated, with certain limited exceptions. The subcommittee met three times over the 2010 interim, but ultimately, after considering arguments both in favor of and in opposition to the bill, could not find common ground for substantive change on the issue. The subcommittee did, however, recommend a draft that sought to rewrite Va. Code § 2.2-3706, the statute governing access to criminal investigative records, in an effort to make the section easier to read and understand without introducing any substantive changes. The Council voted to recommend the draft, but for several reasons it was decided that introduction of the draft be delayed until the 2012 Session of the General Assembly.

Staff explained that the Criminal Investigative Records subcommittee was continued in 2011 to study HB 1467 and a separate proposal offered by the Virginia Press Association concerning access to criminal and other law-enforcement records. HB 1467 was substantially the same as SB 711 (the bill that was studied the prior year), and after considerable discussion, which substantially echoed those comments offered both in support of and in opposition to SB 711 the prior year, the subcommittee recommended that no further action be taken on HB 1467. The subcommittee also recommended, however, that the issue of access to criminal investigative files and other law enforcement records be continued for further study due to the significant amount interest expressed by stakeholders. The Subcommittee directed staff to meet with the interested parties to see if consensus could be reached about making any changes to the existing law. Staff met with interested stakeholders, including the Virginia Press Association, law enforcement representatives, and other interested parties, three times over the remainder of the 2011 interim. The workgroup was not able to reach agreement on a legislative proposal, but intended to continue its work during the 2012 interim.

Staff noted that the Subcommittee met three times during the 2012 interim, and used a position paper drafted by the Virginia Press Association outlining its concerns with the then-existing version Va. Code § 2.2-3706 to frame its discussions. At its last meeting, the subcommittee voted to recommend a draft that was intended to simply reorganize and clarify the existing law. The Council voted to recommend the draft to the 2013 Session of the General Assembly. That draft, in the form of SB 1264, passed and amended § 2.2-3706 into essentially the version of the statute that we have today.

The issue of access to law-enforcement records was raised again in 2016, but only studied in cursory fashion due to time constraints. As a result, the issue was carried over for continued study this year. Staff told the Council that the above information was provided by way of background and was in no way an attempt to restrict further examination of § 2.2-3706.

- Technology Issues

During the course of the three-year study several issues were raised, but not resolved, concerning the effects of technology regarding access to both records and meetings:

- FOIA policy statement. At the beginning of the HJR 96 study, staff suggested that FOIA be amended to include 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." (Language from § 2.2-1111, applicable to the Department of General Services.)
 - "Vendor proprietary software" (§ 2.2-3705.1(6)) and "Computer software developed by or for [a public body]" (2.2-3705.1(7)).
 - Website posting of notice and minutes (§§ 2.2-3707 and 2.2-3707.1).
 - Texting among members during public meetings.
 - Technical terminology & definitions
 - Access to databases; the Supreme Court of Virginia is scheduled to hear a case concerning access to and custody of databases this year, and so the Council decided to wait until the Court has rendered its decision before studying this issue further.
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- Reorganization of FOIA
HJR No. 96 had directed the Council to examine the organizational structure of FOIA and make recommendations to improve readability and clarity. A draft was presented for consideration that would organize FOIA into articles for further clarity, but no consensus was reached.

Future meetings

The Council set the following meeting dates for 2017:

Monday, May 15, 2017 at 1:30 in House Room 1 in the Capitol, Richmond, Virginia;

Monday, August 14, 2017 at 1:30 p.m. in House Room 1 in the Capitol, Richmond, Virginia; and

Monday, November 20, 2017 at 1:30 p.m. in House Room 1 in the Capitol, Richmond, Virginia

There being for further business, the meeting was adjourned.

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