



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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FOIA Council Meeting Summary

March 18, 2013

1:30 PM

House Room D

General Assembly Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its first meeting of 2013.¹ This meeting was an organization meeting which included a brief overview of the 2013 legislative update, review of the bills referred to the Council by the 2013 Session of the General Assembly, establishment of a work plan including the appointment of appropriate subcommittees, the Council's participation in the March 16 celebration of James Madison's Birthday, which is also FOIA Day in Virginia, at James Madison's Montpelier, a recent opinion of the Attorney General concerning the use of license plate readers, and remembering Delegate Clifton A. "Chip" Woodrum, the first Chair of the FOIA Council, who passed away February 19, 2013.

Legislative Update - Preview

Staff provided a legislative update that highlighted nine bills from the 2013 Session of the General Assembly that made substantive changes directly to FOIA, as well as two other access-related bills. Staff noted that House Bill 2026 (Dudenhefer), and Senate Bills 1263 (Stuart) and 1264 (Stuart) all passed the General Assembly as recommendations of the FOIA Council. HB 2026 and SB 1263 concerned electronic meetings, and SB 1264 concerned access to law enforcement records. Of the highlighted bills, three bills add new records exemptions to FOIA, and the other six amend existing provisions of FOIA. Regarding the other two bills, HB 1952 (Landes) requires boards of visitors of public institutions of higher education to participate in educational programs on certain topics, including a FOIA program to be developed and delivered in conjunction with the FOIA Council; SB 1335 (Obenshain) restricts access to concealed carry permits, and is mentioned because it is a topic that was studied previously by the FOIA Council in 2007 and 2008. Additionally, staff pointed out that this legislative preview is incomplete and

¹ FOIA Council members Sen. Stuart, Del. Iaquinto, Dooley, Hamlet, Jones, Landon, Schliessmann, Selph, Tavenner, and Whitehurst were present; members Ashby and Treadway were absent.

subject to change. It will be revised after the General Assembly has concluded its Reconvened Session on April 3, 2013, and the Governor has taken action on the bills.

Staff also observed that among other provisions, SB 1263 requires the FOIA Council to develop an electronic meetings public comment form. A draft version of the form was presented and feedback from the Council and the public was invited. There was no comment at this time. Finally, staff also noted that SB 1263 would allow advisory public bodies at the state level to hold electronic meetings using audio/visual technology without having a quorum physically assembled in one location. As an advisory body, the FOIA Council and its subcommittees could choose to avail themselves of that provision.

Bills Referred by the 2013 Session of the General Assembly

Five bills were referred by the 2013 Session of the General Assembly to the Council for study during the interim, each of which is summarized below:

1. **HB 2032 (May) - Freedom of Information Act; electronic meetings.** Allows regional public bodies to conduct electronic meetings in the same manner as state public bodies. The bill also removes the requirement that a public body hold one meeting each year at which no member participates using electronic means. This bill is a recommendation of the Joint Commission on Technology and Science.
2. **HB 2125 (Keam) - Virginia Freedom of Information Act; requests for records.** Provides that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth. The bill also allows a public body to require prepayment before providing requested records when the cost for production of the records is likely to exceed \$100.
3. **HB 2321 (Surovell) - Virginia Freedom of Information Act; application to the State Corporation Commission.** Makes the State Corporation Commission (SCC) subject to the Freedom of Information Act (FOIA) and designates venue for FOIA petitions against the SCC. The bill reverses a case holding that the Freedom of Information Act is not applicable to the SCC (*Christian v. State Corporation Commission*, November 2011).
4. **SB 889 (Black) - Virginia Freedom of Information Act; electronic communication meetings; school boards.** Allows local school boards to hold electronic communication meetings to the same extent allowed currently for state public bodies. The bill contains technical amendments.
5. **SB 1371 (Stuart) - Virginia Freedom of Information Act; repetitive requests; remedies.** Allows a public body to petition the appropriate court for additional time to respond to a request for records when the request is one of a series of requests by the same requester and a response by the public body within the time required by FOIA will prevent the public body from meeting its operational responsibilities. The bill also authorizes a court, in any action to enforce the

provisions of FOIA, to decline to order production of the requested records if the evidence shows that the frequency or volume of the record requests made by the petitioner (i) constitutes an unreasonable burden on the resources of the public body, (ii) will prevent the public body from meeting its operational responsibilities, or (iii) has been made to evade the payment of any charges assessed in accordance with FOIA. The bill contains technical amendments.

Subcommittee Appointments

The Council appointed two subcommittees to study the bills referred to it: the Electronic Meetings Subcommittee, and the Rights and Remedies Subcommittee. The Electronic Meetings Subcommittee, which began its work in 2012, was reconstituted to study HB 2032 (May) and SB 889 (Black). Staff noted that Delegate May had indicated an interest in having the Council work with the Joint Commission on Technology and Science regarding electronic meetings issues, as the two bodies had worked together in the past. The Subcommittee consists of Council members Kathleen Dooley, Stephanie Hamlett, John Selph, and George Whitehurst.

The Rights and Remedies Subcommittee will study HB 2125 (Keam), HB 2321 (Surovell), and SB 1371 (Stuart). Staff noted that the Supreme Court of the United States had heard oral argument in the case of *McBurney v. Young* in February, 2013, which challenged the provisions of FOIA granting rights only to Virginia citizens and certain media representatives. It was recommended that consideration of HB 2125, which would expand FOIA rights to all citizens of the United States, be delayed pending the decision of the Supreme Court, which is expected to be rendered later this year. In regard to HB 2321, concerning the application of FOIA to the State Corporation Commission (SCC), Senator Stuart noted that industry representatives had expressed interest in serving on a Council subcommittee studying the issue, and suggested that it might also be helpful to include a representative from the SCC. The Subcommittee consists of Council members Stephanie Hamlett, Ed Jones, Frosty Landon, James Schliessmann, and Bob Tavenner, as well as industry representative David Ogburn and a member to be appointed by the SCC.

Other Business

March 16 Celebration of FOIA Day, James Madison's Birthday

Maria J.K. Everett, Executive Director, related that she had attended the Commemoration of the 262nd anniversary of the birth of President James Madison at James Madison's Montpelier, and placed a wreath there on behalf of the Council. In addition to being James Madison's birthday, March 16 is also FOIA day in Virginia, pursuant to Senate Joint Resolution 170 (2006) and Senate Joint Resolution 176 (1991). The presentation included a slide show of the festivities as well as a program pamphlet.

Remembering Delegate Clifton A. "Chip" Woodrum

Delegate Clifton A. "Chip" Woodrum, who served in the House of Delegates from 1980 through 2003, headed the General Assembly study of FOIA from 1998-2000, was chief patron of the House bill that created the FOIA Council, and was the first Chair of the FOIA Council. He passed away February 19, 2013. Delegate Woodrum is remembered as an honest and caring state legislator and for his wisdom, wit, and integrity. For Sunshine Week, Maria J.K. Everett, Executive Director, wrote an article remembering Delegate Woodrum and his role as an advocate for open government and the creation of the Council that appeared in the Roanoke Times on March 10, 2013. The Council directed staff to post a copy of the article on the Council's website.

Attorney General's Opinion on License Plate Readers

Staff related that the Attorney General had issued an opinion February 13, 2013 concerning the use of license plate readers, an issue that had been brought to the Council's attention at its meeting on September 5, 2012. At that meeting staff reported that there had been numerous news articles on the topic, which indicated that various law enforcement agencies across the state and the nation have technology which automatically reads and stores information about passing vehicles, including license plate numbers, location, time, and sometimes other data. Staff noted that the concern was more about over-collection of information, length of retention, and potential misuse, rather than access under FOIA. The opinion issued by the Attorney General was decided under the Government Data Collection and Dissemination Practices Act (GDCDPA), rather than FOIA. The Attorney General opined that general, passive collection using license plate readers to dredge data on all passing vehicles without a specific purpose violates GDCDPA, but that it was legal to use such devices in the context of specific investigations and to gather criminal intelligence information.

Public Comment

Senator Stuart opened the floor to public comment; there was none.

Setting Future Meetings

The Council directed staff to poll the members for future meeting dates for the Council and its subcommittees. There being no further business, the meeting was adjourned.

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