

Virginia Freedom of Information Advisory Council

March 31, 2008

The Freedom of Information Advisory Council (the Council) held its first quarterly meeting of 2008.¹ The purpose of the meeting was to review legislative changes to the Freedom of Information Act (FOIA) made by the 2008 General Assembly, identify topics for study, including bills referred to the Council for further examination, and to develop a study plan for this year's work.

Legislative Update

The General Assembly passed a total of 21 bills amending the Virginia Freedom of Information Act (FOIA) during the 2008 Regular Session. One bill amending FOIA was passed as a recommendation of the Freedom of Information Advisory Council (FOIA Council): SB 131 (Houck)/HB 854 (Ebbin), concerning emergency meetings of local public bodies. Additionally, SB 132 (Houck)/HB 634 (May), amending provisions of the Government Data Collection and Dissemination Practices Act, passed as a joint recommendation of the FOIA Council and the Joint Commission on Technology and Science (JCOTS). Similarly, SB 133 (Houck) and HB 633 (May), amending the Personal Information Privacy Act, also passed as a joint recommendation of the FOIA Council and JCOTS. SB 529 (Houck), concerning access to concealed carry handgun permits, was introduced as a recommendation of the FOIA Council and was referred to the FOIA Council for further study during the 2008 interim. In total, there were seven new records exemptions and three new meetings exemptions added, and eleven bills amend existing provisions of FOIA. A complete listing and description of these and other related access bills considered by the 2008 Session of the General Assembly is available on the FOIA Council's website.

Bills Referred to the Council for Study

Seven bills were referred to the FOIA Council for study by the 2008 Regular Session of the General Assembly, all addressing different aspects of access to personal information:

- **Protection of Personal Identifying Information:**
 1. SB 529 (Houck)
 2. HB 858 (Ebbin)
 3. SB 647 (Ticer)
 4. HB 1087 (Sickles)

5. HB 1088 (Sickles)
6. HB 1096 (Sickles)
7. HB 1102 (Sickles)

In brief, SB 529 concerns public access to concealed carry handgun permits; HB 858 and SB 647 are identical bills that would have provided an exemption for records of a publicly owned museum that could be used to identify an individual who donates or loans one or more items of personal property to the museum; all four of Delegate Sickles' bills concerned different aspects of access to social security numbers (SSNs): HB 1087 would have exempted SSNs contained in local government records, HB 1088 would have exempted SSNs contained in records of the Department of Game and Inland Fisheries, HB 1096 would have established the Protection of Social Security Numbers Act, and HB 1102 would have provided a general FOIA exemption for SSNs. Rather than consider the specifics of each bill referred for study at today's organizational meeting, the Council noted that the bills all fell into the general topic area of personal identifying information issues, and so would be addressed in depth by the Personal Identifying Information Subcommittee (see below). Senator Houck directed staff to invite the patrons of these bills to attend the Subcommittee meetings. Additionally, Senator Houck directed staff to also invite Delegate Nutter, whose HB 982 concerned the same subject matter as SB 529, access to concealed carry handgun permits.

Appointment of Subcommittees/Study Plan

1. Personal Identifying Information Subcommittee

The FOIA Council continued the Personal Identifying Information Subcommittee to study the seven bills referred to the Council by the 2008 Regular Session of the General Assembly described above. Last year, this subcommittee worked with the Joint Commission on Technology and Science (JCOTS) regarding HB 2821, a bill concerning access to SSNs that was referred to both the FOIA Council and JCOTS. The Subcommittee will continue to work with JCOTS regarding SSNs; within this context, the FOIA Council briefly discussed SB 132 (Houck)/HB 634 (May), bills that passed the 2008 Regular Session as joint recommendations of the FOIA Council and JCOTS.² These bills amend the Government Data Collection and Dissemination Practices Act, and among other changes, require that certain state agencies, cities, counties, and towns with a population in excess of 15,000 shall provide information regarding their collection and use of SSNs to the FOIA Council and JCOTS. Staff is to develop forms for this purpose in conjunction with the JCOTS, the Virginia Association of Counties, and

¹ All Council members were present except E.M. Miller and Dr. Sandra Treadway.

² This item was originally under "Other Business" on the suggested agenda, but was moved up as a topic to be addressed by the Personal Identifying Information Subcommittee.

the Virginia Municipal League. The completed forms are to be submitted to the chairs of the FOIA Council and JCOTS by October 1, 2008. The members of the Personal Identifying Information Subcommittee are Senator Houck (Chair), Delegate Griffith, Courtney Malveaux, Stewart Bryan, John Edwards, Wat Hopkins, Mary Yancey Spencer, and Sandra Treadway. Membership was left open for other interested members to join the Subcommittee if they so desire. Staff reviewed the study plan for the protection of SSNs, as detailed in the suggested agenda for today's meeting, in order to help focus the work of the Subcommittee. Generally, the study focuses on answering the questions of why protection of SSNs is needed, what other alternatives are available, and what methods may be used to protect SSNs if such protection is deemed advisable.

2. Electronic Meetings Subcommittee

During the Public Comment portion of the meeting, Craig Merritt, on behalf of the Virginia Press Association, pointed out two bills from the Legislative Update that made changes to electronic meetings provisions outside of FOIA: HB 1332 (Landes) and SB 423 (Puckett). These bills establish a uniform permit issuance process for the Air Pollution Control Board (Air Board) and the State Water Control Board (Water Board). Among other changes, the bills provide that if either Board conducts a meeting by electronic communication, it shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public. The Council voted to take up these bills for study, and to continue the Electronic Meetings Subcommittee for that purpose. The members of the Electronic Meetings Subcommittee are John Edwards (Chair), Senator Houck, Roger Wiley, E. M. Miller, Craig Fifer, and Bill Axselle. Membership was left open for other interested members to join the Subcommittee if they so desire.

Other Business

The Council addressed the study to be conducted pursuant to SB 132 (Houck)/HB 634 (May) during its consideration of the work to be conducted by the Personal Identifying Information Subcommittee (see above). No other business was considered during this portion of the meeting.

Of Note

1. Expiration of FOIA Council membership terms:

The membership terms of John Edwards, W. Wat Hopkins, and Craig Fifer expire as of July 1, 2008. Mr. Edwards and Mr. Hopkins are not eligible for reappointment, as they each have already served two four-year terms. Having served a single four-year term, Mr. Fifer is eligible for reappointment. The Council

noted that the June, 2008 meeting of the Council will be the last with Mr. Edwards and Mr. Hopkins as Council members, and thanked them for the distinguished service they have provided as Council members thus far. Mr. Fifer indicated that he is seeking reappointment to the Council for an additional term.

2. Latest statistics on services rendered by the FOIA Council:

Staff reported that for the period December 1, 2007 through February 29, 2008, it had received a total of 418 inquiries. Of the 418 inquiries, 1 request was for a formal written opinion and the remaining 422 inquiries were by telephone and electronic mail. Citizens accounted for 165 of the informal inquiries, the government for 202 inquiries, and the media for 51 inquiries. The formal opinion was requested by a citizen of the Commonwealth. Additionally, the Council expressed its view that these statistics are important as discrete measures of the work done by the Council and staff, and as such, the Council wishes for staff to continue reporting these statistics.

3. Possible lawsuit regarding changes to the Personal Information Privacy Act:

The Personal Information Privacy Act was amended by SB 133 (Houck)/HB 633 (May), bills recommended by the FOIA Council. As amended, the law will prohibit the dissemination of another person's social security number, regardless of whether such number is obtained from a public or private record. Currently, the prohibition against dissemination only applies to social security numbers obtained from private sources. News reports indicate this law may be the subject of a lawsuit on constitutional grounds as an improper prior restraint on free speech in violation of the First Amendment. It is our understanding that no suit would be filed until the changes to the law take effect on July 1, 2008. Staff will keep the Council updated on this matter as further news develops. Additionally, Council member Wiley noted a recent news article that raised a related matter concerning identity theft. The article identified one of the victims as Delegate Robert Brink, and stated that the information used to steal Delegate Brink's identity was obtained from public records published online on the Virginia Watchdog website. The Council directed staff to distribute the article for background information to Council members after the meeting. The original article was by Bob Gibson and appeared in the Charlottesville Daily Progress on March 22, 2008.

Public Comment

Megan Rhyne, on behalf of the Virginia Coalition for Open Government (VCOG), announced that VCOG will hold its annual conference on May 22-23, 2008 in Fredericksburg. The conference will include VCOG's annual presentation of its Freedom of Information awards.

As described above, Craig Merritt, on behalf of the Virginia Press Association, pointed out the changes to electronic meetings provisions made by HB 1332/SB 423, and suggested the Council take this matter up for study. Council member Axselle indicated that the bill originally was not intended to affect FOIA, but included the meetings provisions at issue as part of a compromise between competing environmental and business interests. Mr. Axselle agreed with Mr. Merritt that the topic was one that should be studied by the Council. Delegate Griffith moved to add these bills to the Council's work agenda; Mr. Edwards seconded the motion. Mr. Fifer suggested continuing the Electronic Meetings Subcommittee for this purpose. The Council then voted unanimously in favor of adding the bills to its agenda and continuing the Subcommittee. Senator Houck directed staff to invite the appropriate administration officials to the next meeting to address this matter.

James Lawrence, a citizen of Fredericksburg, indicated that he was prevented from attending a public meeting of the Fredericksburg Economic Development Authority in February. Mr. Lawrence was issued a notice forbidding him from trespassing at the Fredericksburg Visitor Center where the meeting was held; that notice states "No exception for public meetings or gatherings." Mr. Lawrence further indicated that he believes the City's actions forbidding him from attending public meetings at the Visitor Center are in violation of FOIA, and he intends to file suit against the City.

Future Meetings of the Council

The Council set its next four meeting dates to be (1) Monday, June 9, 2008, (2) Tuesday, August 5, 2008, (3) Monday, October 6, 2008, and (4) Monday, December 1, 2008 (which will include the annual legislative preview). All meetings will be held at 1:00PM. The meeting June 9, 2008 will be in House Room C of the General Assembly Building, 910 Capitol Street, Richmond, Virginia 23219. All subsequent meetings are scheduled to be held in House Room D of the General Assembly Building.

The Honorable R. Edward Houck, *Chair*
Maria J.K. Everett, *Executive Director*