

FOIA Council Meeting Summary

April 4, 2018

1:00 PM

House Room 3

Capital Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its first meeting of the 2018 interim on April 4, 2018.¹ The meeting was an organizational meeting to consider election of the chair and vice-chair, to receive an overview of the bills referred by the 2018 Regular Session of the General Assembly to the Council for further study, to establish a work plan with the appointment of necessary subcommittees, and to set future meeting dates. Senator Stuart opened the floor for nominations for chair and vice-chair. Kathleen Dooley made motions to nominate Senator Stuart as chair and Delegate Torian as vice-chair. Both motions were properly seconded, and no further motions were made. The Council voted on the motions, and Senator Stuart was elected chair and Delegate Torian was elected vice-chair, both unanimously.

Bills Referred to Council for Study by 2018 Regular Session of General Assembly

Staff provided an overview of the 13 bills referred by the 2018 Regular Session of the General Assembly to the Council for study during the interim. Staff proposed dividing the bills among three subcommittees, addressing the topics of public records, meetings, and remedies. The bills and their summaries are listed below, grouped in the suggested subcommittee categories:

Public Records Subcommittee:

- HB 504 (Mullin) (Defining the term "custodian").
- HB 664 (Kilgore)² (Defining the term "custodian" and amending current provisions regarding the transfer of records and redaction).
- HB 904 (Robinson) (Establishing a general exemption for trade secrets).
- HB 957 (Yancey) (Defining the term "custodian").
- HB 958 (Yancey) (Amending the current section on redaction).
- HB 959 (Yancey) (Amending current provisions regarding the transfer of records).
- HB 1329 (Tran) (Prohibiting any state agency maintaining an information system that includes personal information from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity).

¹ Council members Senator Stuart (Vice-Chair), Delegate Torian, Senator Locke, Coleburn, Dooley, Porto, Seltzer, Sterns, Treadway, and Vucci were present; members Hamlett, Jones, and King-Casey were absent.

² This bill is identical to SB 876 (Mason).

- SB 730 (DeSteph) (Amending the definition of "public records," exempting certain social media records from mandatory disclosure, and providing that the public body is a necessary party to any enforcement proceeding).
- SB 876 (Mason)³ (Defining the term "custodian" and amending current provisions regarding the transfer of records and redaction).

Meetings Subcommittee:

- HB 1101 (Robinson) (Requiring that every public body, except for governing boards of public institutions of higher education, afford an opportunity for public comment during any open meeting. If a public body holds more than four meetings in a calendar year, such public body may, by recorded vote, limit the number of meetings at which an opportunity for public comment is afforded to four meetings per calendar year.).
- SB 336 (Peake) (Requiring that every elected public body afford an opportunity for public comment during any open meeting. The bill permits elected public bodies to choose the approximate point during the meeting when public comment will be received and to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner.).

Remedies Subcommittee:

- HB 213 (Mullin) (Providing that formal advisory opinions be approved by the FOIA Council and providing protection from liability for civil penalties under certain circumstances).
- SB 630 (Surovell) (Adding civil penalties for improper destruction or alteration of public records and improper certification of a closed meeting).

Appointment of Subcommittees

Senator Stuart followed staff recommendations in establishing three subcommittees to study the 13 bills referred as listed above and appointed members to the three subcommittees.

The Records Subcommittee will study bills HB 504 (Mullin), HB 664 (Kilgore), HB 904 (Robinson), HB 957 (Yancey), HB 958 (Yancey), HB 959 (Yancey), HB 1329 (Tran), SB 730 (DeSteph), and SB 876 (Mason). The subcommittee consists of Council members Marisa Porto as chair, Cullen Seltzer, Sandra G. Treadway, Shawri King-Casey, and Mark Vucci.

The Meetings Subcommittee will study bills HB 1101 (Robinson) and SB 336 (Peake). The subcommittee consists of Kathleen Dooley as chair, William Coleburn, Michael Stern, Shawri King-Casey, and Mark Vucci.

The Remedies Subcommittee will study bills HB 213 (Mullin) and SB 630 (Surovell). The subcommittee consists of Stephanie Hamlett as chair, Ed Jones, Sandra G. Treadway, Shawri King-Casey, and Mark Vucci.

³ This bill is identical to HB 664 (Kilgore).

Senator Stuart invited discussion from the members of the Council regarding the appointments. Ms. Porto advised that she may have a conflict of interest as chair of the Records Subcommittee due to her position as publisher and editor-in-chief for the Daily Press Media Group. Similarly, Mr. Seltzer expressed a similar problem due to his representation of the Office of the Executive Secretary of the Virginia Supreme Court in ongoing litigation. Staff explained that the particular litigation that led to the introduction of some of the bills in the Records Subcommittee has been completed and that the bills before the subcommittee make broader changes to FOIA that are not specific to the *Daily Press* and would impact more than one type of public body.⁴ Staff advised that no conflict exists because of the finality of the legislation and the nature of the bills before the subcommittee. Senator Stuart also explained that the members were placed on each particular subcommittee in an attempt to provide a balance between competing interests and based on the particular positions and experiences of the members in order to provide for the inclusion of as many perspectives as possible.

Ms. Porto noted that there was a list developed by former chairman Delegate James LeMunyon of issues that were also included in the Council's previous work plans that had not been assigned to any of the subcommittees. Senator Stuart noted that the subcommittees are empowered to take on additional issues and topics that are within their assigned subject matter areas.

Public Comment

David Ress of the *Daily Press* spoke to the Council of his desire for the Council to reexamine the mission of the Council, review the nature of advisory opinions, and study topics such as texting during meetings throughout the interim. Senator Stuart agreed that the issue of texting during meetings should be reviewed and advised staff to include the topic in the Meetings Subcommittee.

Staff updated the Council that no relevant public comment forms had been received since the Council's last meeting on November 20, 2017. Staff also informed the Council that three formal advisory opinions had been released by the Executive Director since the last Council meeting.

Setting Future Meetings

Staff suggested three meeting dates: August 22, 2018, at 1:00 p.m.; October 17, 2018, at 1:00 p.m.; and December 5, 2018, at 1:00 p.m. if a third meeting is needed. Senator Stuart invited comments from the members of the Council regarding the dates; there were none. The Council adopted these dates as the future meeting dates of the Council. There being no further business, the meeting was adjourned at 2:05 p.m.

⁴ HB 504 (Mullin), HB 664 (Kilgore), HB 957 (Yancey), HB 958 (Yancey), HB 959 (Yancey), and SB 876 (Mason) were introduced in the 2018 Regular Session of the General Assembly to address issues discussed in the Virginia Supreme Court case *Daily Press, LLC. v. Office of the Exec. Sec'y*, 293 Va. 551 (2017). The case was decided on June 29, 2017. The bills that will be studied address general changes to FOIA, including (i) the definition of "custodian," (ii) the transfer of public records between public bodies, and (iii) the obligations of public bodies to respond to FOIA requests for public records even if another public body has already provided the public records.