



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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FOIA Council Meeting Summary

April 22, 2014

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 2014.¹ This meeting was held to hear bills referred by the 2014 Session of the General Assembly, to establish a study plan pursuant to House Joint Resolution 96, to establish Subcommittees, and to present other issues of interest to the Council.

Other Business

After calling the meeting to order, Delegate LeMunyon took up a later agenda item first because Delegate Bulova was present with his constituent, Mr. Donald Garrett. After Delegate Bulova introduced him, Mr. Garrett spoke to the Council about his concerns that there are currently no provisions addressing retaliation in the Virginia Freedom of Information Act (FOIA). He related that as a student at a public institution of higher education, he had been labeled as a "student of concern" after making records requests under FOIA and attending public meetings. He said that his motives for requesting records and attending meetings had been questioned by administrators. Mr. Garrett submitted an issue paper for the Council's consideration, herein incorporated by reference. Delegate LeMunyon asked whether the school had provided the records Mr. Garrett had requested; Mr. Garrett said that while the response to his FOIA request followed the law, he was concerned over what happened afterward. Delegate LeMunyon asked whether Mr. Garrett was labeled a "student of concern" before or after he made his FOIA requests. Mr. Garrett replied that he was not entirely sure, but he became aware of it after making his FOIA requests. In response to further inquiry, Mr. Garrett said that once he was labeled a "student of concern," he was monitored and questioned by the administration several times, but it had been about half a year since the last such meeting. The Council had no further questions and took no action on this item at this time.

¹ FOIA Council members Delegate LeMunyon, Ashby, Dooley, Hamlett, Landon, Payne (sitting as the Attorney General's designee), Selph, Tavenner, and Whitehurst were present; members Senator Stuart, Jones, and Treadway were absent.

Recap of FOIA and Related Access Bills from 2014 Session of General Assembly

Staff presented a preview of the 2014 Legislative Update, herein incorporated by reference, noting that it is currently in draft form, as the Governor has submitted recommendations to amend several bills and the Reconvened Session is to be held April 23, 2014. The General Assembly passed a total of ten bills amending the Virginia Freedom of Information Act (FOIA) during the 2014 Session. One bill passed the General Assembly that was recommended by the FOIA Council: House Bill 219 (Albo), which amends an existing record exemption for confidential letters and statements of recommendation placed in the records of educational agencies or institutions to include records respecting an application for promotion. One bill, House Bill 380 (Surovell), creates a new section in FOIA that provides that nothing in FOIA shall have any bearing upon disclosures required to be made pursuant to any court order or subpoena, nor shall any discretionary exemption from mandatory disclosure be construed to make records covered by such discretionary exemption privileged under the rules of discovery, unless disclosure is otherwise prohibited by law. One bill, House Bill 272 (Loupassi), adds a new records exemption to FOIA for certain records of the judicial performance evaluation program. The remaining bills all amend existing provisions of FOIA. Two of the bills amending FOIA, and several other access-related bills, were awaiting action on the Governor's recommendations. Please see the full Draft 2014 Legislative Update for further details.

Bills referred to Council for study by 2014 Session of General Assembly

Staff related the General Assembly had referred four bills to the Council for study this year. House Bill 339 (Anderson) and SB 387 (Reeves)² are identical bills addressing certain proprietary records of the Department of Rail and Public Transportation. No one appeared to speak to these bills. House Bill 788 (LeMunyon)³ addressed out-of-state requests for records. Currently FOIA grants rights to citizens of the Commonwealth and certain media representatives, and the United States Supreme Court upheld this limitation last year.⁴ Delegate LeMunyon noted that currently out-of-state requesters get around the limitation by having someone in Virginia make the same request on their behalf, but that there was also a concern that public bodies could be inundated with a large volume of requests from out-of-state if there were no limitations. House Bill 839 (Brink)⁵ addressed

² **HB 339 (Anderson)/SB 387 (Reeves) - FOIA; certain proprietary records of the Department of Rail and Public Transportation.** Provides an exemption for confidential proprietary information and trade secrets, including commercial or financial information, balance sheets, revenue and cost projections, and detailed freight origin and destination information provided by a private transportation business to the Virginia Department of Transportation and or the Department of Rail and Public Transportation for any purpose authorized or regulated by state law, including obtaining and administering grants or other financial assistance for transportation projects, provided such information is exempt from disclosure under federal laws governing transportation or the federal Freedom of Information Act.

³ **HB 788 (LeMunyon) - FOIA; out-of-state requests for records.** Sets out the process for public bodies to respond to record requests made by out-of-state requesters.

⁴ *McBurney v. Young*, 133 S.Ct. 1709 (2013).

⁵ **HB 839 (Brink) - FOIA; applicability to the Office of the Attorney General.** Clarifies that for the purposes of FOIA applicable to access to public records, the Office of the Attorney General shall be

the applicability of FOIA to the Office of the Attorney General (OAG). Delegate Brink stated that he brought the bill because the former Attorney General had included with some FOIA responses a footnote indicating that the OAG may not be subject to FOIA, following the reasoning of the Supreme Court of Virginia holding that FOIA does not apply to the State Corporation Commission.⁶ While the former Attorney General had told his staff to stop including that note, Delegate Brink indicated he felt it would be best if FOIA explicitly stated that it does apply to the OAG so there would be no confusion or doubt in the future.

FOIA Refresher

Staff presented a brief overview of FOIA addressing the statutory structure of FOIA, the policy of FOIA favoring openness as the default rule, the procedure for making and responding to records requests, open and closed meetings requirements, and the remedies provisions of FOIA. Regarding statutory structure, staff observed that FOIA begins with the policy statement and several miscellaneous provisions, such as setting forth entities which are not subject to FOIA, requiring that elected and appointed officials familiarize themselves with FOIA, and the requirement for state agencies to post a statement of FOIA rights and responsibilities on their websites. The next sections of FOIA address the procedure for making and responding to FOIA requests, and set forth over 100 records exemptions. The following sections detail the procedures for holding open and closed meetings, and set forth approximately 45 closed meeting exemptions. FOIA concludes with remedies provisions to address violations. The policy of FOIA states that all public records and meetings are presumed to be open unless a specific exemption is invoked, and that all exemptions must be construed narrowly. Staff briefly addressed the requirements for making and responding to a records request under FOIA, noting that a requester cannot violate FOIA and that FOIA requests are not meant to be adversarial. Regarding meetings, staff noted the main requirements are that meetings be noticed, open to the public, and that minutes be taken. Closed meetings require that an open meeting be convened, then there must be a motion and vote to close the meeting. The motion must identify the subject and purpose of the closed meeting, and cite the appropriate statutory exemption. Paraphrasing or quoting the statutory language of the exemption is sufficient to identify the purpose of the closed meeting. However, the identification of the subject must be something more than a reference to the exemption, but need not be so specific as to defeat the reason for having the closed meeting. After a closed meeting the public body must reconvene in an open meeting and certify that the body only discussed matters identified in the motion that are allowed to be discussed in closed meeting. Regarding remedies, staff noted that the statutory remedy is a petition for mandamus or injunction, meaning that a court would order the public body to do something (mandamus) or not to do something (injunction), and that each court could craft orders to fit the particular violation(s). Additionally, FOIA provides that a petitioner shall be entitled to recover reasonable costs, including court costs, attorney fees, and expert witness fees, if the

considered a public body and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records. The bill contains technical amendments.

⁶ *Christian v. State Corporation Commission*, 282 Va. 392, 718 S.E.2d 767 (2011).

petitioner substantially prevails on the merits, unless the court finds special circumstances that would make the award unjust. Staff noted that such fees can be substantial, and related examples of awards in the tens of thousands of dollars. Additionally, FOIA contains provisions where an individual who is found to have knowingly and wilfully violated FOIA can be made to pay a civil penalty to the State Literary Fund.

Public Comment

Ginger Stanley of the Virginia Press Association commended the passage of House Joint Resolution No. 96 directing the Council to conduct a three-year study of FOIA. She stated that she had been involved with two prior legislative studies of FOIA and believed this one would be the most thorough. She informed the Council that she had already received dozens of comments from reporters and correspondents with concrete examples of what does and does not work in FOIA currently.

Mary Davye Devoy, a citizen concerned with issues involving the Virginia Sex Offender Registry, indicated that she felt the discretion to disclose otherwise exempt records had been used improperly. Specifically, she related that she had been denied certain records she requested from the State Police, but a very similar request from researchers at Longwood University had been filled. She submitted written remarks on this issue, herein incorporated by reference.

Megan Rhyme of the Virginia Coalition for Open Government (VCOG) announced that VCOG will hold a workshop on June 4, 2014 in Fredericksburg. She stated that Maria Everett would speak on FOIA, someone from the Library of Virginia would speak on the Virginia Public Records Act, and that the Acting Public Information Director for the City of Alexandria would discuss the interaction between both Acts. More information is available on VCOG's website (www.opengovva.org).

Study of the Virginia Freedom of Information Act - HJR No. 96 (LeMunyon)

House Joint Resolution No. 96 (2014) directs the FOIA Council to study all exemptions contained in FOIA to determine the continued applicability or appropriateness of such exemptions and whether FOIA should be amended to eliminate any exemption from FOIA that the FOIA Council determines is no longer applicable or appropriate. HJR No. 96 also requires the FOIA Council to examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA. The FOIA Council is required to consider comment from citizens of the Commonwealth; representatives of state and local governmental entities; broadcast, print, and electronic media sources; open government organizations; and other interested parties. All agencies of the Commonwealth are required to provide assistance to the FOIA Council for this study, upon request. The bill requires the FOIA Council to report its findings and recommendations by December 1, 2016. Staff distributed a Study Plan Discussion Draft, herein incorporated by reference, which addresses the actual implementation of HJR No. 96. Staff observed that it was originally anticipated as a two-year study, but HJR No. 96 was actually passed as a three-year study. The goal is to look at all of the FOIA exemptions, asking whether they are needed, to look at the structure of FOIA, and to

consider comments from others. After reviewing the Study Plan Discussion Draft, staff discussed the use of the word "proprietary" as a specific example, noting a recent decision of the Supreme Court of Virginia addressing the issue (case brief, *infra*), that the term "trade secrets" is defined in another statute, and that FOIA generally uses an "earmarking" process that allows vendors to designate categories of records to be protected, and gives government the ability to agree or disagree in advance. Staff suggested that some of the bills referred by the General Assembly could be taken up within the context of the HJR No. 96 study. It was agreed to begin the study as suggested in the Study Plan Discussion Draft by forming two subcommittees, one to start studying records exemptions, and the other to address meetings.

Delegate LeMunyon opened the floor to questions about the study. Mr. Landon asked how the Council might look at the experience of the office, noting that there was no FOIA Council for previous legislative studies to consider, and that FOIA does not have a provision concerning the Council's role as an informal mediator for FOIA disputes. Staff noted the Council can examine any issue it chooses regarding access and open government. Mr. Landon further noted that many years ago the Office of the Attorney General (OAG) indicated it would generally agree with FOIA Council opinions unless there was severe disagreement, but that policy was not written anywhere. Staff related that the Council has always maintained a very good relationship with the OAG, and is consulted on FOIA matters. Staff also noted that the specific language of HJR No. 96 does not address the role of the FOIA Council.

Ms. Dooley asked whether the Meetings Subcommittee suggested in the Study Plan Discussion Draft to be established in 2014 would continue its work in 2015, noting that with 45 exemptions to consider as well as procedural issues, it might not complete its work in 2014. Staff agreed that the Subcommittee would continue its work in 2015 if needed, or as the Council decides.

Delegate LeMunyon noted that if the next Council meeting is in July, the subcommittees would be able to meet once or twice before then. Staff noted that it would be more convenient to schedule subcommittee meetings on the same day. Delegate LeMunyon stated that the study would take a "zero based FOIA" approach by assuming everything was open to the public and requiring justification for any exemptions. He further noted that there is no requirement to hold meetings in Richmond, and suggested it might be useful to hold regional meetings to hear from local governments. Taking up the bills referred to the Council by the 2014 Session of the General Assembly, the Council agreed without objection to refer HB 339 and SB 387 to the Records Subcommittee, and that HB 788 and HB 839 would stay in the full Council for consideration.

Appointment of Subcommittees related to bills referred and study of FOIA

Delegated LeMunyon then asked for volunteers to comprise the subcommittees, beginning with the Records Subcommittee. Members Ashby, Hamlett, and Tavenner volunteered, and Mr. Payne volunteered the designee of the Attorney General. Members Dooley, Landon, Selph, and Whitehurst comprise the Meetings Subcommittee. Staff was

directed to contact those Council members who could not be present today so that they might choose to participate in a Subcommittee as well.⁷

Of Note

American Tradition Institute v. Rector and Bd. of Visitors of the University of Virginia

The decision of the Supreme Court of Virginia in *American Tradition Institute v. Rector and Visitors of the University of Virginia* was issued Thursday, April 17, 2014. This case concerned a request for a former professor's electronic mail concerning climate science research. The decision addressed an exemption for certain higher education records and the use of the term "proprietary" in that exemption, as well as charges allowed under FOIA. Staff prepared a case brief, herein incorporated by reference. In summary, the Court upheld the decisions of the trial court in favor of the University, holding that the term "proprietary" should be given its ordinary usage, and reflects rights of ownership and control; that the University had established all of the elements for the exemption to apply; and that public bodies may charge under FOIA for reviewing records "to assure that those records are responsive, are not exempt from disclosure, and may be disclosed without violating other provisions of law."

Electronic meetings; July 1, 2014 sunset provision on subsection H of § 2.2-3708

Subsection H of § 2.2-3708 was passed last year to allow certain state-level advisory bodies to conduct meetings using audio-visual technology without assembling a quorum in a single physical location. The General Assembly did not act to extend the sunset provision; this subsection will expire on July 1, 2014. Staff observed that none of the annual electronic meeting reports received by the Council this year mentioned any use of this provision.

State Council on Higher Education for Virginia FOIA video press release

Staff announced that the State Council on Higher Education for Virginia (SCHEV) had issued a press release stating that its FOIA video, created in conjunction with the Office of the Attorney General and the FOIA Council, is available on SCHEV's website. Staff noted that the video was shown at the conclusion of the December 5, 2013 meeting of the FOIA Council.

Future Meetings

The Council scheduled the remainder of its meetings for 2014 to occur on July 8, September 16, and November 18, all of which are Tuesdays. Pending any future changes, all of the meetings have been scheduled to be held at 1:30PM in House Room C of the General Assembly Building, 21 North 9th Street, Richmond, Virginia, 23219.

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⁷ After being contacted by staff, Mr. Oksman, the designee of the Attorney General, subsequently indicated he would be willing to participate as a member of both subcommittees.