

VA Freedom of Information Advisory Council
Monday, April 27, 2009
Meeting Summary

The Virginia Freedom of Information Advisory Council (the Council) held its first meeting, a teleconference, of the 2009 interim on April 27, 2009.¹ This meeting was an organizational meeting, including a legislative update, review of bills referred to the Council for study, establishment of a work plan with the appointment of necessary subcommittee, and setting future meeting dates.

Legislative Update

Staff provided a recap of the bills amending the Freedom of Information Act (FOIA) and other public access legislation. The General Assembly passed a total of 19 bills amending FOIA during the 2009 Session. Two bills amending FOIA were passed as recommendations of the Council (Council): SB 1316 (Houck), which strikes the requirement that state agencies publish annually an index of computer databases and amends the requirement to publish a statement of rights and responsibilities to ensure that the public can find out generally what types of public records a public body has and what exemptions may apply to those records, and SB 1319 (Houck), which clarifies the existing requirement that meeting minutes be in writing. Additionally, SB 1317 (Houck), concerning certain electronic meetings held by the Air Pollution Control Board and the State Water Control Board, also passed as a recommendation of the FOIA Council. The General Assembly also passed SB 1318 (Houck) and HB 2426 (May), extending the implementation date of the prohibition against collecting an individual's social security number and other changes under the Government Data Collection and Dissemination Practices Act (GDCDPA), as a recommendation of the FOIA Council and the Joint Commission on Technology and Science (JCOTS). Finally, the General Assembly also passed HB 2144 (Nutter), concerning access to concealed carry handgun permits. The language of HB 2144 is identical to SB 529 (Houck), which was introduced as a recommendation of the FOIA Council in the 2008 Regular Session. SB 529 did not pass at that time, but was referred back to the FOIA Council for further study, after which the substance of the bill was again recommended by the FOIA Council for 2009. The 2009 Legislative Update is available on the Council's website.

Bill Referred for Study

The Council next reviewed the five bills referred to it by the General Assembly for additional study.² Essentially, the five bills could be categorized as follows:

- **Protection of Personal Identifying Information:**

¹ Council members Delegate Griffith, Senator Houck, Wiley, Treadway, Miller, Malveaux, Fifer, Whitehurst, Landon, and Selph were present. Council members Axselle and Spencer were absent. Senator Houck participated via teleconference.

² Summaries of each of the bills referenced below appear as Appendix A.

1. SB 880 (Stuart)
2. HB 2471 (Hugo)
3. HB 2630 (Crockett-Stark)
- **Other bills:**
 4. SB 1332 (Cuccinelli)
 5. HB 2421 (May)

Delegate Crockett-Stark was present at the Council meeting to discuss HB 2630. She indicated that there is a similar law in place in Ohio that was enacted because a family member of a law enforcement officer was murdered after personal information about the officer was made available. She stated that her sheriff had requested a similar law in Virginia. Staff noted that in Virginia personal information about public employees is exempt from FOIA; however, real property assessment records and court records are open to the public as a matter of law. The Council noted that there are two competing policies at work in this instance-- privacy versus a community's awareness of the identity of its officers. The Council asked Delegate Crockett-Stark to have her contact call Delegate Griffith to identify the specific issue of concern so that the scope of the bill could be narrowed to address the issue.

Concerning HB 2421, the Delegate Griffith appointed Council members Fifer (chair), Selph, and Malveaux to a subcommittee to study the issue and to make a recommendation to the full Council.

Concerning SB 1332, members of the Council agreed that the issue behind this bill was unclear. Delegate Griffith directed staff to re-invite Senator Cuccinelli to address the Council at its next meeting.

The remainder of the bills, HB 2471 and SB 880, along with HB 2630, were referred to the Personal Identifying Information (PII) Subcommittee for further review and recommendation. Membership of the PII Subcommittee would remain the same as in 2008.³

Social Security Numbers

In 2008, the Council indicated it would continue the work of PII subcommittee in studying social security numbers (SSNs) and other personal identifying information in conjunction with the Joint Commission on Technology and Science (JCOTS).

- **Collection of SSNs:** The Council has already indicated its intent to continue studying this area, which will coincide with the analysis of the results of last year's survey regarding collection and use of SSNs (see "Other Business," below). This aspect of the study will focus on identifying and eliminating the unnecessary collection of SSNs by government. It is hoped that by limiting collection in the

³ PII Subcommittee members are Senator Houck (chair), Delegate Griffith, Courtney Malveaux, Mary Yancey Spencer, George Whitehurst, Roger Wiley, and Sandy Treadway.

first instance, the need for additional protections to be added later will be reduced or eliminated.

- Disclosure of SSNs: HB 2427 (May) establishes the Protection of Social Security Numbers Act (the Act), which will become effective July 1, 2009. In brief, the Act exempts from FOIA the first five digits of SSNs except under certain limited circumstances, and provides penalties for improper disclosure. The final four digits of SSNs found in public records will remain open to public disclosure under FOIA. In past meetings the Council has debated the merits of this and other protective schemes that would limit the disclosure of SSNs. The Act's passage this year raises the question of whether any further action regarding disclosure is necessary at this time, and if so, what form should that action take.

Other Business

SB 1318 (Houck)/HB 2426 (May)⁴

Last year the General Assembly passed SB 132/HB 634 (May). These bills passed with provisions requiring 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. The survey was conducted successfully with an unexpectedly large volume of responses that necessitate additional time for analysis. SB 1318/HB 2426 were passed this year as recommendations of the FOIA Council to extend the implementation date of the provisions of SB 132/HB 634 that would prohibit the collection of an individual's social security number unless collection of such number is (i) authorized or required by state or federal law and (ii) essential for the performance of that agency's duties. Note that in light of HB 2427 (May), establishing the Protection of Social Security Numbers Act, as discussed above, the Council needs to decide what further action, if any, needs to be taken.

Of Note:

Staff advised that for the period December 1, 2008 through March 31, 2009, it had rendered 567 opinions on FOIA on behalf of the Council. Four of these opinions were formal, written opinions. Of the 563 informal opinions, 311 were requested by government officials, 206 by citizens, and 46 by representatives of the media.

Ginger Stanley, Executive Director of the Virginia Press Association, provided a report on the activities by newspapers and radio to celebrate Sunshine Week in 2009. Ms. Stanley displayed for the Council newspaper editorials and various articles published around the state during Sunshine Week (March 15 - 21, 2009). Ms. Stanley told the Council that this was a good year for access advocates and that citizens are making a difference by insisting on access generally.

Concealed Carry Handgun Permits. In 2008, the Council recommended SB 529 (Houck) to the 2008 Session of the General Assembly. That bill was referred back to the Council for

⁴ The summary and enactment clauses of SB 1318 referenced below appear as Appendix B (the provisions of HB 2426 are identical).

additional study, and the Council again recommended it to the General Assembly for the 2009 Session. This year the General Assembly passed HB 2144 (Nutter), which uses language identical to that found in SB 529. In summary, the bill protects from public disclosure permittee names and descriptive information held by the Department of State Police for purposes of entry into the Virginia Criminal Information Network. However, the information would still be available to law-enforcement agencies, officers, and agents in the course of law-enforcement duties, and nonidentifying statistical information would be available to the general public.

McBurney v. McDonnell (Case No. 3:2009cv44, United States District Court for the Eastern District of Virginia). In this consolidated case, three out-of-state plaintiffs challenge on federal constitutional grounds (privileges and immunities) the provisions of FOIA granting access rights to Virginia citizens. The Court heard oral arguments on April 14, 2009, on the plaintiffs' motions for preliminary injunction. Staff will keep the Council apprised as the case develops.

Future meetings

The Council set the following dates for its meetings in 2009:

Monday, June 8, 2009--PII Subcommittee meeting at 1:00 p.m.;

Monday, July 13, 2008--full Council at 1:00 p.m.;

Monday, September 21, 2009--full Council at 11 a.m.; and

Monday, November 9, 2009--full Council at 3:00 p.m.

The Honorable H. Morgan Griffith, Chair

Maria J.K. Everett, Executive Director

APPENDIX A

BILLS REFERRED TO COUNCIL FOR STUDY BY 2009 SESSION OF GENERAL ASSEMBLY

SB 880 (Stuart)

Department of Game and Inland Fisheries; disclosure of official records; exceptions. Provides that records of the Department shall be subject to the disclosure provisions of the Freedom of Information Act, except that personal information, as defined in § 2.2-3801, of individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department shall be withheld from public disclosure, provided that such individuals have requested that the Department not disclose such information. However, statistical summaries, abstracts, or other records containing information in an aggregate form that does not identify individual applicants or licensees shall be disclosed. The bill provides, however, that such information may be released (i) in accordance with a proper judicial order, (ii) to any law-enforcement agency, officer, or authorized agent thereof acting in the performance of official law-enforcement duties, or (iii) to any person who is the subject of the record.

SB 1332 (Cuccinelli)

Private entities operating, managing, or supervising any portion of the state highway system. Provides that a private entity that operates, manages, or supervises any portion of the state highway system and receives funding from the Commonwealth or any of its political subdivisions shall be considered a public body for purposes of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) of the Code of Virginia as it relates to that portion of the private entity's business operations responsible for operating, managing, or supervising the portion of the state highway system.

HB 2421 (May)

Freedom of Information Act; definition of public record. Clarifies that the definition of public record does not include correspondence, messages or other records or portions thereof created or received by a public employee, appointee or officer that relate to personal matters and do not address public business; however such records may be disclosed in the discretion of the custodian.

HB 2471 (Hugo)

Freedom of Information Act; salary records of teachers. Provides that the disclosure of the names of individual teachers is not required under FOIA in response to a request for the official salary or rate of pay of employees of a local school board.

HB 2630 (Crockett-Stark)

Law-Enforcement Officers' Privacy Protection Act. Allows a law-enforcement officer to request that personal information about the officer be withheld from disclosure on public records. For purposes of the Act, "personal information" includes the officer's name, social security number, address, phone number, and any other information that could be used to physically locate the officer.

APPENDIX B

SB 1318 (Houck)

Government Data Collection and Dissemination Practices Act; collection of social security numbers. Extends from July 1, 2009, to July 1, 2010, the implementation of the prohibition against collecting an individual's social security number unless collection of such number is (i) authorized or required by state or federal law and (ii) essential for the performance of that agency's duties. This bill is a recommendation of the Freedom of Information Advisory Council.

Enactment clauses:

"2. That the second and fourth enactments of Chapter 840 of the Acts of Assembly of 2008 are amended and reenacted as follows:

2. That the provisions of this act shall become effective on ~~July 1, 2009~~ July 1, 2010, except that the third and fourth enactments of this act shall become effective on July 1, 2008.

4. That every county and city, and any town with a population in excess of 15,000 shall, no later than September 10, 2008, provide the Virginia Municipal League or the Virginia Association of Counties, as appropriate, information on a form agreed upon by the Virginia Municipal League, the Virginia Association of Counties and staff of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science identifying (i) all state or federal statutes authorizing or requiring the collection of social security numbers by such county, city or town and (ii) instances where social security numbers are voluntarily collected or (iii) in the absence of statutory authority to collect social security numbers, written justification explaining why continued collection is essential to its transaction of public business. In conducting such a review, each such county, city or town shall be encouraged to consider whether such collection and use is essential for its transaction of public business and to find alternative means of identifying individuals. The information required by this enactment shall be submitted no later than October 1, 2008 to the chairmen of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science, on forms developed by the Council and the Commission. *The chairmen of the Council and the Commission may withhold from public disclosure any such lists or portions of lists as legislative working papers, if it is deemed that the public dissemination of such lists or portions of lists would cause a potential invasion of privacy.*

3. That the second and fourth enactments of Chapter 843 of the Acts of Assembly of 2008 are amended and reenacted as follows:

2. That the provisions of this act shall become effective on ~~July 1, 2009~~ July 1, 2010, except that the third and fourth enactments of this act shall become effective on July 1, 2008.

4. That every county and city, and any town with a population in excess of 15,000 shall, no later than September 10, 2008, provide the Virginia Municipal League or the Virginia Association of Counties, as appropriate, information on a form agreed upon by the

Virginia Municipal League, the Virginia Association of Counties and staff of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science identifying (i) all state or federal statutes authorizing or requiring the collection of social security numbers by such county, city or town and (ii) instances where social security numbers are voluntarily collected or (iii) in the absence of statutory authority to collect social security numbers, written justification explaining why continued collection is essential to its transaction of public business. In conducting such a review, each such county, city or town shall be encouraged to consider whether such collection and use is essential for its transaction of public business and to find alternative means of identifying individuals. The information required by this enactment shall be submitted no later than October 1, 2008 to the chairmen of the Freedom of Information Advisory Council and the Joint Commission on Technology and Science, on forms developed by the Council and the Commission. *The chairmen of the Council and the Commission may withhold from public disclosure any such lists or portions of lists as legislative working papers, if it is deemed that the public dissemination of such lists or portions of lists would cause a potential invasion of privacy.*

4. That the provisions of the first enactment of this act shall become effective on July 1, 2010.
5. That an emergency exists and the second and third enactments of this act are in force from their passage."

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