**VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**
COMMONWEALTH OF VIRGINIA

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Delegate James M. LeMunyon, Vice-Chair

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**FOIA Council Meeting Summary**
**May 20, 2015**
**1:30 PM**
**House Room C**
**General Assembly Building**
**Richmond, Virginia**

The Virginia Freedom of Information Advisory Council (the Council) held its first meeting of 2015.[1] This meeting was held to hear bills referred by the 2015 Session of the General Assembly, to refer bills and other study issues to the Records Subcommittee and the Meetings Subcommittee which were created in 2014 as part of the study of FOIA in accordance with House Joint Resolution No. 96, and to present other issues of interest to the Council.

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

Staff presented a recap of FOIA and related access bills from the 2015 Session of General Assembly and advised that the General Assembly passed a total of 16 bills amending FOIA during the 2015 Session. At its last meeting of 2014, the FOIA Council voted favorably to recommend the subject matter of three bills that passed the General Assembly in 2015: HB 1633 and SB 968, identical bills that create an exemption for certain records of certain health care committees and entities to the

[1] FOIA Council members Senator Stuart, Delegate LeMunyon, Ashby, Dooley, Treadway, Oksman, and Selph, were present; members Hamlett, Jones, Landon, Tavenner, and Whitehurst were absent.

extent that they reveal information that may be withheld from discovery as privileged communications, and HB 2104, which provides that the record and open meeting exemptions for VCU Medical Center shall also apply when the records are in the possession of VCU or the discussion of certain matters occurs at a meeting of the Virginia Commonwealth University Board of Visitors.

In addition, HB 1776 and its Senate counterpart, SB 1032, in addition to eliminating the Alcoholic Beverage Control (ABC) Board and replacing it with the Virginia Alcoholic Beverage Control Authority, add a new FOIA exemption for certain proprietary records, trade secrets, financial records, and cost estimates held by the ABC Authority. The bill amends an existing records exemption in § 2.2-3705.3, adds a new records exemption in § 2.2-3705.7, and adds a new meetings exemption in § 2.2-3711, all subject to the delayed effective date of July 1, 2018. The thirteenth enactment, effective July 1, 2015, directs the FOIA Council to include a review of the amendments to § 2.2-3705.7 in the FOIA Council's three-year study directed by House Joint Resolution No. 96 (2014).

Four bills add two new meetings exemptions in FOIA as follows. HB 1618 and SB 1126, both amending § 2.2-3711, allow a closed meeting to be held for the discussion of certain exempt records related to Resource Management Plans. HB 1776 and SB 1032 amending §§ 2.2-3705.3, 2.2-3705.7, and 2.2-3711, as summarized above, allow a closed meeting to be held to discuss certain exempt records held by the ABC Authority.

Finally, twelve bills amend existing provisions of FOIA. Please see on the Council's website the full 2015 Legislative Update for further details.

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

Staff advised the Council that the General Assembly had referred eight bills to the Council for study this year and provided an overview of each bill. The Council then discussed each bill in depth.

Delegate Pogge's HB 1646 provided that in an enforcement action, if the court finds the public body did not provide personal notice of a meeting as provided in subsection E of § 2.2-3707, the court may invalidate any

action of the public body taken at such meeting. Mr. Oksman asked if there were standards for how serious a violation must be before an action would be invalidated. Staff replied there were no such limits or thresholds in the bill. Mark Flynn of the Virginia Municipal League (VML) observed that an inadvertent mistake in sending individual notice could lead to invalidation. Staff confirmed for Delegate LeMunyon that the bill would only apply to individual notice sent under subsection E of § 2.2-3707, not other types of notice. Mr. Oksman and Mr. Flynn discussed what effect such invalidation might have on zoning actions and bond issues. The Council by unanimous vote then referred the bill to the Meetings Subcommittee for further study.

Identical bills HB 1722 (Ramadan)and SB 893 (Petersen) would have eliminated the working papers and correspondence record exemption for the president or other chief executive officer of any public institution of higher education in Virginia. Delegate Ramadan was present and advised the Council that no other heads of state agencies are able to use this exemption, and that its use by university presidents has caused negative press coverage and is bad for the reputation of the universities. Staff confirmed that community colleges are also considered public institutions of higher education in response to a question from Delegate LeMunyon. The Council by unanimous vote then referred the bills to the Records Subcommittee for further study.

HB 1776 (Albo)/SB 1032 (McDougle) were referred to FOIA Council by an enactment clause contained in both bills. The thirteenth enactment clauses in these bills requires the Council to include in its study of FOIA (in accordance with House Joint Resolution No. 96 of the Acts of Assembly of 2014) a review of the provisions of § 2.2-3705.7 that create a new exemption for the Alcoholic Beverage Control Authority for records that contain (i) information of a proprietary nature gathered by or in the possession of the Authority from a private entity pursuant to a promise of confidentiality; (ii) trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), of any private entity; (iii) financial records of a private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; (iv) contract cost estimates prepared for the (a) confidential use in awarding contracts for construction or (b) purchase of goods or services; or (v) the determination of marketing and operational strategies where disclosure of such strategies would be

harmful to the competitive position of the Authority. The enactment clauses direct the Council to make any recommendations it deems necessary and appropriate to this new exemption. Staff noted that the bill was referred because there was some question as to the need for the new records exemption it creates. The Council by unanimous vote referred the bill to the Records Subcommittee for further study.

HB 2223 (Morris) provides that in addition to the civil enforcement provisions of FOIA, any officer, employee, or member of a public body who, without legal excuse or justification, deliberately, willfully, and knowingly violates certain FOIA provisions is guilty of a Class 1 misdemeanor. In response to questions from Senator Stuart, staff confirmed that if enacted, these would be the first criminal penalties for violations of FOIA in Virginia. Staff also confirmed that a public employee could face criminal prosecution over a failure to respond to a FOIA request. Delegate LeMunyon stated that after a conversation with a constituent regarding a request taking months, where the only recourse left is going to court, he thought that current law is insufficient. Staff noted that current law provides monetary penalties for knowing and willful violations. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that a cursory review showed about twelve other states with fee penalties and several with criminal misdemeanor or other penalties, such as subjecting a public official to recall. She stated that she agreed with Delegate LeMunyon that citizens currently are at a loss for adequate remedies. Mr. Flynn expressed concern that a criminal penalty might be used or abused to get a warrant from a magistrate and generate newspaper headlines, and could be used as a political weapon. Senator Stuart stated that potential mischief is a big concern. Mr. Oksman asked if someone swears to a magistrate for a warrant, how would the magistrate know the official did not act with legal advice, or in bad faith, or otherwise? Mr. Flynn said the magistrate would not know. LaBravia Jenkins of the Petersburg Commonwealth's Attorney's Office and the Virginia Association of Commonwealth's Attorneys (VACA) stated that VACA opposes criminalizing FOIA. She observed that the criminal justice system is about crime and punishment whereas FOIA is about how public officials go about their work, and noted that a Class 1 misdemeanor is punishable by up to one year in jail and a $2,500 fine. Delegate LeMunyon asked if criminalizing is not the right answer, then what are some other ideas? Ms. Jenkins stated that good public officials take FOIA seriously, and suggested increased fines or other

alternatives would be better than criminalization. Senator Stuart asked if there was anywhere else in the Code with a criminal punishment for a civil, ministerial act; Ms. Jenkins replied that there was not. The Council then voted unanimously to recommend against HB 2223.

SB 1166 (Hanger) makes a public service corporation subject to the public records provisions of FOIA with respect to any project or activity for which it may exercise the power of eminent domain and has filed or prefiled for a certificate or other permitting document. Staff noted this bill does not amend FOIA, but rather concerns other access provisions outside of FOIA. David Ogburn, representing Verizon, stated that the genesis of the bill was a utility pipeline being built and an attempt to get routing information on the pipeline. He further stated that while he was not directly involved in the pipeline project, the broader concern is that the bill would extend FOIA to records held by private companies that are "authorized to use eminent domain." He said that such language would include all public service corporations, not just those that actually use eminent domain. Those private corporations do not want their competitors to know their costs, economic development prospects, and other information. Mr. Ogburn provided other examples besides the pipeline, such as a data center and building facilities. Ms. Rhyne stated that Mr. Ogburn was correct about the origin of the bill, but noted that a private entity can be subject to FOIA already if it is principally or wholly supported by public funds or performing a government service. She further stated that the power of eminent domain is granted by the legislature, and the legislature can place conditions on it. The Council then voted 6-to-1 in favor of referring the bill to the Records Subcommittee for further study; all members present voted "aye," except Senator Stuart voted "no."

SB 1402 (Cosgrove) authorizes a public body to convene a closed meeting for consultation with or briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning criminal street gang-related activities. Senator Stuart, Delegate LeMunyon and staff discussed how under current law the topic of gang-related activities does not appear to be covered under any current exemptions. Staff related that the patron, Senator Cosgrove, had spoken with a City Attorney who indicated the topic was not covered by the current exemption for terrorist activity or other threats to public safety

under subdivision A 19 of § 2.2-3711. The Council by unanimous vote then referred the bill to the Meetings Subcommittee for further study.

**Subcommittee Reports**

**Records Subcommittee.** Council member and Subcommittee Vice-chair Chris Ashby advised the Council that the Records Subcommittee held its first meeting of the 2015 Interim on May 11, 2015 and was continuing its study of records exemptions as directed by HJR No. 96. Mr. Ashby provided the following recap of the Subcommittee's work to date:

2014 recap:

- Met four times in 2014 to begin studying record exemptions pursuant to House Joint Resolution No. 96 (2014).
- Addressed exemptions of general application (§§ 2.2-3705.1 and 2.2-3705.) and exemptions to records of specific public bodies (§ 2.2-3705.7).
- Specific recommendations to be included in omnibus legislation at the end of the three-year study.

2015 recap: First meeting, May 11, 2015 (Monday of last week):

Old Business:

- Carried over for further study two exemptions:
  (1) advice of legal counsel (§ 2.2-3705.1(2)) and
  (2) working papers and correspondence of certain officials (§ 2.2-3705.7(2)).

- Looked at an exemption for certain records maintained by the Department of the Treasury or participants in the Local Government Investment Pool (§ 2.2-3705.7(27)). Asked that a legislative proposal be drafted to eliminate this specific exemption, and instead expand a more general exemption for financial account and routing numbers to cover the data that needs protection (§ 2.2-3705.1(13)). To be considered at next meeting.

New Business:

- The Subcommittee began looking at exemptions for proprietary records and trade secrets (§ 2.2-3705.6).

- Suggested to consolidate the many specific individual exemptions into one or more broader exemptions in this area. The Subcommittee directed that staff and interested parties form a work group on this issue to develop draft language for the Subcommittee's consideration. The work group has not yet set its first meeting date.

- The next Subcommittee meeting has not yet been scheduled.

**Meetings Subcommittee.** Council member and Subcommittee Chair, Kathleen Dooley advised the Council that the Meetings Subcommittee held its first meeting of the 2015 Interim on May 12, 2015, to continue its study of meetings exemptions as directed by HJR No. 96. Ms. Dooley indicated that the Subcommittee had reviewed draft legislation that made several technical corrections to the meeting exemptions found in § 2.2-3711. She advised that there had been several discussions of the personnel meeting exemption, but that there was not yet resolution on that issue. The next meeting date for the Subcommittee is set for June 17, 2015.

**Public comment**

The Council offered the opportunity for public comment. No public comment was offered.

**Expiring FOIA Council Membership terms.**

Staff advised the Council that member George Whitehurst's second full 4-year term ends July 1, 2015 and he is ineligible for reappointment. In addition, Stephanie Hamlett's first 4-year term ends July 1, 2015, but she is eligible for reappointment. Kathleen Dooley's first 4-year term ends July 1, 2015 and Ms. Dooley was reappointed by Senate Rules to a second 4-year term ending July 1, 2019.

**Other Business**

<u>Databases and recent Council Advisory Opinion.</u>

Staff discussed its recent advisory opinion (AO-03-15, issued on April 23, 2015) that addressed the question of whether the Office of the Executive Secretary of the Supreme Court of Virginia (OES) improperly withheld the electronic compilation of circuit court case status records in OES' case management system. OES has released those records in the past, but declined repeated requests for it recently, citing a change in policy last year. After lengthy analysis of pertinent provisions of law, AO-03-15 concluded that it appears that OES by statute operates and maintains a case management system, the operation and maintenance of the system is the transaction of OES' public business, and therefore OES' case management records are public records subject to FOIA.[2] By operation of law, the respective clerks also remain custodians of those records, and they bear responsibility for maintaining the integrity of those records. To the extent that OES owns or possesses such data, it is also a custodian of such records and likewise responsible to respond to a request for it under FOIA.

Further, staff informed the Council that access to public records contained in databases owned and maintained by many governmental entities has become the subject of numerous inquiries to the Council. Staff provided several database examples and indicated how, under FOIA or other law, such databases were to be treated for public access purposes.

1) VITA maintains IT architecture and equipment for executive branch agencies. The Library of Virginia archives records from all over the Commonwealth. Both are addressed in § 2.2-3704(J) re: transferring possession of records:

> "In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for

[2] Note that such records may still be subject to other exemptions depending on their contents, such as records concerning access control features of such a system (which may be exempt under subdivision 3 of § 2.2-3705.2) or the underlying software itself (which may be exempt under subdivisions 6 or 7 of § 2.2-3705.1).

> retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester. Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia shall be the custodian of such permanently archived records and shall be responsible for responding to requests for such records made pursuant to this chapter."

2) DLAS maintains legislative records for the General Assembly, Clerks of the House and Senate, DLS and other legislative agencies. Has provision for documents not to be revealed by DLAS in § 30-34.14(5):

> "Every document or file maintained or stored on equipment of the Division shall be considered the property of the person for whom the document or file is maintained or stored. Neither the Director nor any employee of the Division shall reveal any of this property to any person outside of the Division, except with the consent of the owner of the property. "

3) OES maintains case management system for circuit courts. Recent advisory opinion (AO-03-15) with which OES disagrees re: release of full database. Some jurisdictions allow individual records to be accessed online, some allow their portion of full database to be released, others do not participate in OES' case management system.

4) State Compensation Board - Local Inmate Data System

> Citizen requested database for a particular jail, denied due to criminal history and FOIA exemption for "All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment." (§§ 19.2-389 and 2.2-

3706(A)(2)(d).) However, individual records and statistical records are available online (vinelink.com and SCB website, respectively).

5) Concealed handgun permits - changes over time through legislation (open, then full State Police database closed, but individual circuit court records open, now all closed except statistical and aggregate info).

> § 18.2-308.02 (D): " The clerk of court shall withhold from public disclosure the applicant's name and any other information contained in a permit application or any order issuing a concealed handgun permit, except that such information shall not be withheld from any law-enforcement officer acting in the performance of his official duties or from the applicant with respect to his own information. The prohibition on public disclosure of information under this subsection shall not apply to any reference to the issuance of a concealed handgun permit in any order book before July 1, 2008; however, any other concealed handgun records maintained by the clerk shall be withheld from public disclosure."

**FOIA Roadshows**

Staff advised that, while well attended, the annual statewide FOIA Workshops posed considerable administrative burdens in their planning and execution. While staff views FOIA training as its most critical mission, it was considering changing the way FOIA training would be conducted statewide. Essentially, staff proposed that in fulfilling its statutory mission to conduct educational programs about FOIA, it would provide training upon request to interested groups, such as the staff of state and local agencies, members of local governing bodies, media organizations, citizen organizations, and any other group that wishes to learn more about FOIA. Council staff will travel to the location of the group requesting training. The training is and would be tailored to meet the needs of the particular group, can range from 45 minutes to several hours, and can present a general overview of FOIA or focus specifically on particular exemptions or portions of FOIA frequently used by that group or organization. Organizations requesting training are strongly encouraged, but not required, to consolidate training by including other like organizations within a single or

neighboring jurisdiction(s) wherever possible. This training is free of charge and is available generally from March through November. Because the FOIA Council is a legislative agency, training is generally not available while the General Assembly is in session. The Council deferred to staff the authority to fashion any alternative to the statewide FOIA workshops it deemed advisable.

**Next Council Meeting**

The next Council meeting is set for Thursday, July 22, 2015 at 1:30 p.m. in the House Room D of the General Assembly Building in Richmond.

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