



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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FOIA Council Meeting Summary

May 23, 2012

1:30 PM

House Room 1

State Capitol Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its first meeting of 2012.¹ This meeting was an organizational meeting, which included a 2012 legislative update, review of bills referred to the Council for study, establishment of a work plan with the appointment of necessary subcommittees, and setting future meeting dates.

Legislative Update

The General Assembly passed a total of 10 bills amending the Virginia Freedom of Information Act (FOIA) during the 2012 Session.

Of the 10 bills, two bills create new records exemptions as follows:

- Creates an exemption for personal information in constituent correspondence, unless the correspondence relates to the transaction of public business. HB 141 (Cole) amending § 2.2-3705.7;
- Creates an exemption for records of a fire/EMS company or fire/EMS department, to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties. SB 193 (Miller) amending § 2.2-3705.2.

Eight bills amend existing provisions of FOIA as follows:

- Establishes the Virginia All-Payer Claims Database. Among other changes, amends an existing exemption for certain records disclosed to the State Health Commission to exempt certain records of the Virginia All-Payer Claims Database as well. HB 343 (O'Bannon) and SB 135 (Puller) amending § 2.2-3705.6;

¹ All FOIA Council members were present, except Senator Stuart, Msrs. Jones and Whitehurst.

- Provides that a member of a public body shall be permitted to attend a closed meeting held by any of its committees or subcommittees, provided such member does not participate in any discussions held by the committee or subcommittee conducting the closed meeting. The bill requires that the minutes of the committee or subcommittee include the identity of such member who attended the closed meeting. HB 480 (Albo) amending § 2.2-3712;
- Changes the terminology used for mental health and developmental services, including technical changes within several existing provisions of FOIA. HB 552 (Garrett) and SB 387 (Martin) amending §§ 2.2-3705.3, 2.2-3705.5, and 2.2-3711;
- Reorganizes the executive branch of state government. The bill contains numerous technical amendments to FOIA and other laws to accomplish this reorganization. HB 1291 (Gilbert) and SB 678 (McDougle) amending §§ 2.2-3705.2, 2.2-3705.3, 2.2-3705.5, and 2.2-3711;
- Amends an existing exemption to include certain information furnished to the Attorney General under the Virginia Fraud Against Taxpayers Act. SB 451 (Vogel) amending § 2.2-3705.5.

The complete 2012 Legislative Update is available on the Council's website.

Bill Referred for Study

The Council next reviewed the three bills referred to it by the General Assembly for additional study. A summary of each referred bill appears below.²

² **HB 397 (Hope) Virginia Parole Board; exceptions to the Freedom of Information Act.** Requires guidance documents of the Board to be available as public records under the Freedom of Information Act. The bill has a delayed effective date to give the Freedom of Information Advisory Council an opportunity to review the legislation and report on its implementation.

HB 1105 (Greason) Freedom of Information Act; electronic communication meetings. Revises the rules for which meetings of state public bodies may be conducted by audio or video means. The bill provides that (i) at least one member of the public body must be physically assembled at the principal meeting location, (ii) the quorum of the public body is determined by members participating in person or by electronic means in the meeting, (iii) a member of the public shall pay for the documented marginal cost that a public body may incur in expanding public participation to the meeting, and (iv) the number of meetings a public body may conduct through electronic communications means is limited to 50 percent of its regular meetings in any calendar year. The bill contains technical amendments.

HB 1149 (Dudenhefer) Freedom of Information Act; electronic communication meetings by local and regional public bodies. Expands the authority for the conduct of electronic communication meetings to all public bodies. Currently, local public bodies are prohibited from conducting public meetings in this manner, except when the Governor declares a state of emergency. The bill contains technical amendments.

- HB 397 (Hope)--FOIA; guidance documents of the Virginia Parole Board.
- HB 1105 (Greason)--FOIA; electronic communication meetings.
- HB 1149 (Dudenhefer)--FOIA; electronic communication meeting by local and regional bodies.

Delegate Hope was present at the meeting and told the Council that he introduced HB 397 in order to allow for public inspection of guidance documents regarding the Parole Board's policies and procedures. He pointed out concerns about restrictions on civil liberties, the costs of incarceration, and that currently no policy or procedural documents are available from the Parole Board.³ Steve Northup, from the law firm of Troutman Sanders, elaborated that based on his experience in litigation, the Parole Board generally operates in secrecy, and that what published information is available is not helpful. He further noted concerns for prisoners who were convicted before the abolition of discretionary parole in Virginia, effective in 1995. He related that many such prisoners were given very lengthy sentences with the expectation that they would be released on parole once eligible, but many have not been so released. The result is that those convicted before 1995 often serve longer sentences than those convicted after 1995, for the same offenses. He also noted that the bill would not only address documents about granting discretionary parole, but would also make available guidance documents about the revocation of parole. Delegate Hope and Mr. Northup both indicated that the bill was not intended to reach individual case information, but only general policy guidelines and procedures. Carla Peterson also spoke to the bill, as Director of Virginia CURE, an advocacy organization for prisoners and their families. She indicated they supported the bill because they would like to know how the Parole Board makes its decisions to ensure the process is fair. Mr. Fifer stated that the general approach under FOIA was to make all records public, and to place the burden on government to show why a record should be exempt. With that in mind, he suggested a possible approach to this issue would be to make the Parole Board subject to FOIA just as any other public body would be, but to give it the exemptions it would need both for meetings and records, particularly those involving the discussion of individual case files and criminal history.

Delegate Dudenhefer was also present at the meeting and advised the Council that he introduced HB 1149 to allow local and regional bodies to conduct meetings by electronic means. He noted that technology has come a long way in recent years, and he had personal experience with world-wide electronic conferences. As an example, he described a recent dinner in Virginia where the guest speaker was in Afghanistan. He noted that at times the restrictions on electronic meetings prevent good people from running for office or other public service due to scheduling conflicts that would not allow them to attend meetings in person. He further

³ With certain limited exceptions, the Parole Board currently is not subject to FOIA, pursuant to subdivision A 1 of § 2.2-3703.

indicated he was open to the idea of having a test case to see how the bill would work if implemented on a limited basis. Mark Flynn, speaking on behalf of the Virginia Municipal League (VML) and the Virginia Association of Counties (VaCO), indicated support for the approach of looking at the ability to use technology to conduct meetings. Delegate Iaquinto asked if there were problems getting quorums assembled at the local level. Mr. Flynn indicated it was sometimes a problem, but not all the time. Delegate Dudenhefer stated that from his experience as a former Board of Supervisors member, Board meetings were usually not a problem, but there were problems with committee meetings and in just getting good people with demanding jobs to serve at all.

Delegate Greason was unable to attend, but indicated that he was interested in participating in the work of the Council as it relates to HB 1105. Staff indicated that currently, only state public bodies are permitted to conduct electronic meetings as a general rule,⁴ because state officials are often geographically separated whereas officials serving on local and regional bodies generally live in the same area. Staff related that the FOIA Council had a continuing Electronic Meetings Subcommittee from 2005 through 2008, which over those years recommended loosening the requirements for conducting electronic meetings. Staff highlighted that HB 1105 would eliminate the requirement to have a quorum physically assembled in one location, and would require the public to pay to participate in public meetings by electronic means. As further background, staff described a policy statement adopted by the FOIA Council in 2008 by a vote of 6-5 that generally expressed support for face-to-face meetings but recognized continuing improvements in communications technology.⁵

The Council created two subcommittees to study the referred bills. The Parole Board Subcommittee, consisting of Council members Robert Tavenner, James Schliessman, and Frosty Landon, will study HB 397 during the 2012 interim. The second subcommittee, the Electronic Meetings Subcommittee, consisting of Council members Craig Fifer, John Selph, and George Whitehurst will study HB 1105 and HB 1149. Staff will check with Senator Stuart and Ed Jones about serving on either or both of the above subcommittees.

Other Business

Craig Fifer briefed the Council on the work of the Criminal Investigative Subcommittee, which is continuing to work in 2012. Mr. Fifer told the Council that the Criminal Investigative Records stakeholders group will continue to meet. Included in the work of the stakeholders group will be the consideration of the release of adult arrestee photographs ("mug shots") and access to criminal history records.

⁴ There are certain limited exceptions where a local or regional public body, or individual members thereof, may participate in meetings by electronic means, as set forth in §§ 2.2-3708 and 2.2-3708.1.

⁵ The discussion, vote, and full text of the statement are set forth in the minutes for the June 9, 2008 meeting of the FOIA Council, available on the FOIA Council website.

Delegate Iaquinto commended Mr. Fifer for his service to the Council. Delegate Iaquinto noted that during his tenure on the Council, Mr. Fifer has participated in and chaired several subcommittees, and has made other significant contributions to the work of the Council and to open government in general. Mr. Fifer's second four-year term expires on July 1, 2012 and he is not eligible for reappointment according to the Council's enabling statute. Mr. Fifer will continue to serve on the Council until his successor is appointed by the Governor.

Delegate Iaquinto noted that at the next Council meeting, the election of the chair and vice-chair will take place. Delegate Iaquinto next called for public comment and there was none.

The Council by consensus agreed that a resolution commending Senator R. Edward Houck for his years of service to the Council be prepared and presented to Senator Houck at a subsequent Council meeting that is convenient for Senator Houck.

The Council then set the following meeting dates for the 2012 interim.

- Monday, July 2, 2012 at 1:30 p.m. in House Room C of the General Assembly Building
- Wednesday, September 5, 2012 at 1:30 p.m. in House Room D of the General Assembly Building
- Monday, December 17, 2012 at 1:30 p.m. in House Room C of the General Assembly Building

There being no further business, the meeting was adjourned.

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