



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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FOIA Council Meeting Summary

June 6, 2013

1:30 PM

House Room C

General Assembly Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its second meeting of 2013.¹ This meeting was held to hear updates from the Council's two subcommittees, the Electronic Meetings Subcommittee and the Rights and Remedies Subcommittee, as well as to present other issues of interest to the Council.

Subcommittee Reports

Electronic Meetings Subcommittee

Ms. Dooley reported that the Electronic Meetings Subcommittee had met on May 20, 2013, and June 6, 2013, to study HB 2032 (May) and SB 889 (Black).² She stated that after discussing the bills, the Subcommittee recommended taking no action at this time. The Subcommittee felt that the legislation recommended by the Council and passed by the 2013 Session of the General Assembly may alleviate many of the problems these bills sought to address, as it will allow individual members of all public bodies to participate in meetings by electronic means when personal matters prevent their attendance in person.³ As the legislative change does not take effect until July 1, 2013, the Subcommittee recommended taking a wait-and-see approach to see how this change will work in practice before recommending any additional legislation. The Council voted

¹ FOIA Council members Sen. Stuart, Ashby, Dooley, Hamlet, Jones, Landon, Schliessmann, Selph, Tavenner, and Treadway were present; members Del. Iaquinto and Whitehurst were absent.

² **HB 2032 (May) - Freedom of Information Act; electronic meetings.** Allows regional public bodies to conduct electronic meetings in the same manner as state public bodies. The bill also removes the requirement that a public body hold one meeting each year at which no member participates using electronic means. This bill is a recommendation of the Joint Commission on Technology and Science.

SB 889 (Black) - Virginia Freedom of Information Act; electronic communication meetings; school boards. Allows local school boards to hold electronic communication meetings to the same extent allowed currently for state public bodies. The bill contains technical amendments.

³ SB 1263 (Stuart) and HB 2026 (Dudenhefer).

unanimously to accept the Subcommittee's recommendation to take no action at this time on HB 2032 and SB 889. This concluded the Subcommittee's report and the work of the Subcommittee.

Rights and Remedies Subcommittee

Mr. Landon reported that the Rights and Remedies Subcommittee met on May 20, 2013, to study HB 2125 (Keam), HB 2321 (Surovell), and SB 1371 (Stuart).⁴ Regarding HB 2125, Mr. Landon observed that the Council had been waiting for the federal courts to render a final decision on whether Virginia FOIA's citizenship limitation was constitutional, and that this year the Supreme Court of the United States had ruled that it was. The Subcommittee heard from Delegate Keam in support of his bill that would grant access rights to all citizens of the United States, and also heard from opposing parties who felt the current law should be kept with the citizenship limitation in place. The Subcommittee had no recommendation at this time, as it wishes to meet again and discuss the matter further, giving particular consideration to persons who are not citizens of the Commonwealth but have some nexus to Virginia, such as former citizens who have moved out-of-state, or citizens of other states who work or own property in Virginia.

Regarding HB 2321, the Subcommittee heard from Delegate Surovell in support of his bill, and from representatives of the State Corporation Commission (SCC) and regulated industries who opposed it. Through discussion it appeared that the patron and the representatives of the SCC had not previously discussed the issues among themselves before the bill was introduced; the Subcommittee suggested that such a discussion might be productive. Therefore the Subcommittee had no recommendation at this time, but planned to discuss the issue further at a later meeting after the patron and interested parties had a chance to discuss the matter among themselves.

The Subcommittee reported that it had discussed the history of SB 1371 and previous bills that would have provided different forms of remedies for public bodies who felt

⁴ **HB 2125 (Keam) - Virginia Freedom of Information Act; requests for records.** Provides that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth. The bill also allows a public body to require prepayment before providing requested records when the cost for production of the records is likely to exceed \$100.

HB 2321 (Surovell) - Virginia Freedom of Information Act; application to the State Corporation Commission. Makes the State Corporation Commission (SCC) subject to the Freedom of Information Act (FOIA) and designates venue for FOIA petitions against the SCC. The bill reverses a case holding that the Freedom of Information Act is not applicable to the SCC (*Christian v. State Corporation Commission*, November 2011).

SB 1371 (Stuart) - Virginia Freedom of Information Act; repetitive requests; remedies. Allows a public body to petition the appropriate court for additional time to respond to a request for records when the request is one of a series of requests by the same requester and a response by the public body within the time required by FOIA will prevent the public body from meeting its operational responsibilities. The bill also authorizes a court, in any action to enforce the provisions of FOIA, to decline to order production of the requested records if the evidence shows that the frequency or volume of the record requests made by the petitioner (i) constitutes an unreasonable burden on the resources of the public body, (ii) will prevent the public body from meeting its operational responsibilities, or (iii) has been made to evade the payment of any charges assessed in accordance with FOIA. The bill contains technical amendments.

overburdened or harassed by repetitive requests. As there appeared to be no support for the bill moving forward, the Subcommittee recommended laying the bill on the table, and it was so moved for the Council's consideration. Because he was the patron of the SB 1371, Senator Stuart made Mr. Landon the Acting Chair of the Council for the purpose of considering the motion to lay SB 1371 on the table. The motion passed by a vote of nine-to-one (all present in favor except Senator Stuart voted against), and Mr. Landon returned the gavel to Senator Stuart. The Subcommittee reported that its next meeting was not yet scheduled; this concluded the Subcommittee's report.⁵

Other Business

2013 FOIA Workshops

Staff reported that fulfilling its statutory mission to conduct educational programs about FOIA, the FOIA Council conducts a series of day-long workshops around the state. From 2000 through 2005 the workshops were held every year in multiple locations in an effort to maximize the availability of training throughout the Commonwealth. From 2005 through 2012, the workshops were held every other year instead due to declining attendance as many interested persons had already attended a conference just the year before. However, staff still receives requests for the workshops every year. Beginning in 2013, in an effort to satisfy the demand for annual programs without over-saturating any particular area, we are going to resume presenting the workshops annually, but at only a few locations per year (note that other individualized free training presentations will remain available by request, as always). We intend to present the workshops in the City of Richmond every year due to its central location and large concentration of interested participants. This year, the workshops will be held as follows:

Richmond, VA -- Tuesday, September 10, 2013
Lebanon, VA -- Monday, September 16, 2013
Lynchburg, VA -- Tuesday, September 17, 2013
Harrisonburg, VA -- Wednesday, September 18, 2013

For 2014, we expect to present workshops in Richmond, Northern Virginia, and Tidewater (exact locations to be determined). Staff also discussed the general format and content of the workshops, covering public records, public meetings, law enforcement records, and a topical segment that changes from year to year. Senator Stuart and the Council expressed their appreciation and support for the Workshops in fulfilling the Council's educational mission.

Attorney General's Statement regarding the application of FOIA to the Office of the Attorney General

⁵ Note that the next meeting of the Rights and Remedies Subcommittee was subsequently scheduled to be held at 1:00 PM on August 20, 2013 in the Speaker's Conference Room, Sixth Floor, General Assembly Building.

Staff noted that there had been several news reports and editorials recently discussing a footnote in FOIA responses from the Office of the Attorney General (OAG) that raised the possibility that the OAG may not be subject to FOIA, following the Virginia Supreme Court's reasoning in the *Christian v. State Corporation Commission* case.⁶ Staff read into the record the official statement from Attorney General Cuccinelli dated May 20, 2013:

"I have always instructed my staff to fully abide by FOIA. Several staff members are assigned to work on FOIA requests, we have always complied with all FOIA requests, and we will continue to respond to every one of the hundreds of requests we get each year.

The attorneys who work on FOIA requests were diligently attempting to preserve any potential legal arguments this office may have based on a 2011 Supreme Court case. However, I have instructed my staff to remove the recently inserted footnote referencing *Christian v. SCC* because it has created confusion and it does not comport with the office's practice of fully complying with FOIA."

Senator Stuart asked if there was any comment or question from the Council, or the public; there was none.

Treatment of Geographic Information Systems (GIS) under FOIA

Staff informed the Council that FOIA currently addresses GIS maps in subsection F of § 2.2-3704, which provides special charging provisions for copies of topographic maps.⁷ This language has been in FOIA since 1987. Unfortunately, the FOIA GIS terminology is outdated and refers only to the production of topographical maps. Staff has been told by GIS professionals that topographic maps are a very small part of GIS capabilities, and the current charging provisions do not provide for actual cost recovery. Staff had been contacted by the Virginia Information Technologies Agency (VITA) about this issue, but was unable to reach the contact person before today's meeting. As no one appeared before the Council today to request any specific action, the Council directed staff to try again to reach the contact person at VITA, and to add this item to the agenda for a future meeting as appropriate.

Public Comment

Senator Stuart opened the floor to public comment; there was none.

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

⁷ "The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres."

Future Meetings

The Council is scheduled to meet on September 12, 2013, and December 5, 2013. Both meetings will be in House Room C of the General Assembly Building. There being no further business, the meeting was adjourned.

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