

Virginia Freedom of Information Advisory Council
Monday, July 13, 2009
1:00 PM
General Assembly Building
Richmond, Virginia

Meeting Summary

The Virginia Freedom of Information Advisory Council (the Council) held its second meeting of the 2009 interim on July 13, 2009.¹ The purposes of this meeting were to hear about issues regarding the holding of a closed meeting by the Information Technology Investment Board (ITIB) and to receive subcommittee reports.

Information Technology Investment Board Meeting²

James F. McGuirk, II, Chair of the ITIB, spoke to the Council regarding a closed meeting held by the ITIB on April 16, 2009. The events of that ITIB meeting have been the subject of inquiry by the House Committee on Technology and Science, which met on June 29, 2009, and the Senate Finance Subcommittee on General Government/Technology, which met on July 13, 2009. Statements made at these meetings gave rise to concerns that the topics discussed by the ITIB may have strayed from those set forth in the motion to convene the closed meeting. That motion cited subdivisions A 6 and A 7 of § 2.2-3711, concerning the investment of public funds and consultation with legal counsel, respectively.³

Delegate Griffith opened the discussion by noting that Secretary Pomata had indicated at the House Committee on Technology and Science meeting that the ITIB had met in closed session but was not talking about renegotiating the Commonwealth's contract with Northrop Grumman during that meeting. Delegate Griffith asked Chairman McGuirk for an explanation of the purpose of the closed meeting and asked whether there was any misunderstanding involved. Chairman McGuirk indicated that the ITIB generally prefers to meet in public rather than in closed meeting, and always consults its representative from the Office of the Attorney General (OAG) before holding any closed meeting. Regarding the meeting held April 16, 2009, Chairman McGuirk indicated that the discussion concerned

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

² This item was originally scheduled on the agenda under "Other Business," but was moved ahead to accommodate Chairman McGuirk's schedule. Secretary Pomata, also listed on the agenda to appear with Chairman McGuirk, was unable to attend today's meeting.

³ As quoted in the minutes of the April 16, 2009 meeting of the ITIB, the motion at issue reads in relevant part as follows: "I move that the Board go into closed session pursuant to § 2.2-3711(A)(6) for the purpose of discussing the potential cost efficiencies for investment of public funds in transformation through the Northrop Grumman contract in support of any agency infrastructure budget deficiencies in FY2010, as this will involve bargaining, and discussion in open session would adversely affect the financial interest of VITA and the Commonwealth; and pursuant to § 2.2-3711(A)(7) for the purpose of conferring with legal counsel regarding the contract and regarding rules for conduct of the closed meeting."

the contract with Northrop Grumman, including financial details and items in the contract for which changes might be sought in the future. The closed meeting was convened due to concerns over revealing details that would adversely affect the ITIB's negotiating strategy. Chairman McGuirk further indicated that there was a power point presentation given by the Secretary during the closed session in order to keep the members of the ITIB apprised of the contractual items at issue for possible future renegotiation. The presentation at issue apparently was prepared by Northrop Grumman and was shared with the ITIB with Northrop Grumman's permission.

In response to further questions from the Council, Chairman McGuirk stated that the OAG had been consulted prior to the meeting, had approved the motion made to close the meeting, and was in attendance during the closed meeting. Chairman McGuirk could not recall with certainty, but thought the OAG representative may have commented once about the discussion straying from the subjects described in the motion. Additionally, he indicated that the closed session was initiated after discussions with the Secretary, and agreed in hindsight that it would have been preferable for the Secretary to have made his own presentation rather than use that provided by Northrop Grumman. Apparently there were concerns over the confidentiality of the presentation itself, and in reply to additional inquiries, Chairman McGuirk indicated that Northrop Grumman had marked the presentation as propriety. In response to later inquiries, he further stated that he believed a copy had been requested by and provided to the House Committee on Technology and Science.

The Council also discussed its role in this inquiry as one for informational purposes and to help clear up any misunderstandings in regard to FOIA. The Council then asked staff to provide an analysis of the motion used by the ITIB to convene the closed meeting at issue.⁴ Staff first discussed the requirement that a motion to convene a closed meeting must contain three elements: (1) the subject of the closed meeting, (2) the purpose of the closed meeting, and (3) a citation to an appropriate exemption which allows the meeting to be closed.⁵ In examining the motion in question, the subject for the closed meeting was vague. Additionally, because the contract has been awarded already, it is not certain that the exemption regarding the investment of public funds would apply to this discussion (i.e., the agreement to invest the funds has already been made). It was also unclear whether the citation to subdivision A 7 of § 2.2-3711 was in reference to litigation or to consultation with legal counsel regarding specific legal matters, two different aspects of the same exemption.⁶ Overall, giving consideration to Chairman McGuirk's description as well as the motion

⁴ *Id.*

⁵ Subsection A of § 2.2-3712 states as follows: "No closed meeting shall be held unless the public body proposing to convene such meeting has taken an affirmative recorded vote in an open meeting approving a motion that (i) identifies the subject matter, (ii) states the purpose of the meeting and (iii) makes specific reference to the applicable exemption from open meeting requirements provided in § 2.2-3707 or subsection A of § 2.2-3711. The matters contained in such motion shall be set forth in detail in the minutes of the open meeting. A general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting."

⁶ For further discussion of this distinction, please see Freedom of Information Advisory Opinion 01 (2007).

itself, it appears that at least some of what the ITIB discussed would properly be the subject of a closed meeting, but the subjects discussed were not necessarily covered within the purview of the exemptions cited in the motion made. In response to further questions from the Council, staff indicated that at least part of the discussion appeared to concern consultation with legal counsel regarding specific legal matters, which matters could be discussed in closed meeting.

The Council also noted concerns regarding the interpretation of the exemption for the investment of public funds (subdivision A 6 of § 2.2-3711) and the exemption for contract negotiations (subdivision A 29 of § 2.2-3711). Mr. Wiley noted that in light of the description of the ITIB's discussion, he had expected to see a citation to the contract negotiation exemption, rather than one citing the exemption for the investment of public funds. Mr. Fifer also indicated concern whether "investment of public funds" was being interpreted to mean making continuing payments under an existing contract, and suggested the Council examine the policy and intent of the exemption. Later in the meeting the Council appointed a subcommittee for this purpose (see Other Business, *infra*).

Subcommittee Reports

Personal Identifying Information Subcommittee

Staff reported that the Personal Identifying Information Subcommittee met on June 8, 2009 to (i) consider four bills referred to it for further study, (ii) continue the study of the Government Data Collection and Dissemination Practices Act (GDCDPA), and (iii) set a study plan for its work.⁷

Staff advised that the Subcommittee reviewed the four bills referred for study that fell within the purview of the PII Subcommittee⁸. No patrons, however, were able to attend the meeting to discuss their bills.

⁷ Subcommittee members Delegate Griffith, Mary Yancey Spencer, Courtney Malveaux, and George Whitehurst were present at the meeting. Subcommittee members Senator Houck, Roger Wiley, and Sandra Treadway were absent.

⁸ **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.

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.

Below is a summary of the Subcommittee's discussion and action with regard to each of the four bills.

SB 880--Summary: Records of the Department of Game and Inland Fisheries containing 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:

- Similar bills were introduced during the 2007 and 2008 Session of the General Assembly and were also referred to the FOIA Council for further study.
- The Subcommittee discussed the impact of the passage of HB 2427 (May), which created the Protection of Social Security Numbers Act. Staff advised that while SB 880 is broader, it could be read together with HB 2427 to give both bills effect. The result being that the first five digits of a SSN would be deemed confidential and not releasable; however, the last four digits could be released if the individual applicants for or holders of any hunting, fishing, boating, or trapping license have requested that the Department of Game and Inland Fisheries (the Department) not disclose such information.
- **Subcommittee Action:** Request staff to work on a redraft of SB 880 given the passage of HB 2427.

HB 2471 (Hugo)--Summary: 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:

- Delegate Griffith noted that in the Roanoke valley, 10 employees received raises, but no others. He suggested that without the names of the employees being disclosed, it is impossible to assess who did and did not receive the raise.
- Council member Spencer questioned the wisdom of excluding the names of one type of public sector employee but no others.
- Phyllis Errico, representing the Virginia Association of Counties concurred.
- **Subcommittee Action:** The Subcommittee agreed to give Delegate Hugo another opportunity to present his bill at the next Subcommittee meeting and deferred consideration until that time.

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.

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 2630 (Crockett-Stark)--Summary: Allows a law-enforcement officer to request that personal information about him/her 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. .

- Delegate Crockett-Stark had discussed her bill with the FOIA Council at its April meeting where she indicated that there is a similar law in place in Ohio. The Ohio law 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 police chief had requested a similar law in Virginia.
- Staff advised the Subcommittee that it had discussed this issue with the police chief who requested the bill. The Chief advised that gang members are using to internet to locate law-enforcement officers and their families. The Chief had advised that it was the online disclosure of home address information that was the source of his concern.
- The bill, however, limits protection to state and local law-enforcement officials.
- The Subcommittee noted that attorneys for the Commonwealth as well as federal law-enforcement officials are also part of the law-enforcement community, but were not included in the bill.
- **Subcommittee Action:** Agreed that overall issue was of some concern and requested staff to identify the laws that require online disclosure of home address information to focus the Subcommittee's future deliberations on this bill.

SB 1332 (Cuccinelli)--Summary: Provides that 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 FOIA 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.

- Issue behind this bill was unclear.
- Delegate Griffith had directed staff to re-invite Senator Cuccinelli to address the Council at its next meeting.
- **Subcommittee Action:** No action was taken by the Subcommittee at this time.

The Subcommittee also discussed the Government Data Collection and Dissemination Practices Act (GDCDPA) as it relates to the disclosure and collection of Social Security Numbers as follows:

1. Disclosure of SSNs and HB 2427 (May),⁹ issue considered for last two years by the PII Subcommittee and the FOIA Council as well as other protective schemes

⁹ 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, thereby making them confidential. HB 2427 provides penalties for improper disclosure. The final four digits of SSNs found in public records will remain open to public disclosure under FOIA.

limiting the disclosure of SSNs. The May's bill's passage in 2009 raises the question of whether any further action regarding disclosure of SSNs is necessary at this time, and if so, what form should that action take.

- **Subcommittee Action:** The Subcommittee by consensus decided to adopt a wait and see approach to this new law, adding that if there are problems, the Subcommittee would revisit the issue.
2. Collection of SSNs, study of this issue will continue by PII Subcommittee and JCOTS Subcommittee.
- Awaiting the results of staff analysis of last year's SSN survey.
 - Study in 2009 will focus on identifying and eliminating the unnecessary collection of SSNs by government.
 - Federal law¹⁰ prohibits the denial of any service, right or privilege if an individual refused to provide a SSN. However, an agency may ask for an SSN, but could not require it or deny a right or privilege as noted above.
 - Remaining issues before the Subcommittee: (i) how to address current collection of SSN practices where there is no authorization and (ii) the voluntary disclosure of SSNs as well as the transfer of records already containing SSNs between government entities.
- Amendment to SB 1318/HB 2426 (recommended to the Governor by the Office of the Attorney General (OAG)). Staff met with several attorneys from the OAG to further clarify the language of the amendment at the direction of the FOIA Council.
 - **Subcommittee Action:** The Subcommittee voted unanimously to recommend the language suggested by staff¹¹.

Public Records Subcommittee

Mr. Fifer, Chair of the Public Records Subcommittee, reported that the subcommittee had met this morning for the first time. The subcommittee heard from Delegate May, the patron of HB 2421, which would have amended the definition of "public records" in § 2.2-3701. Delegate May had introduced the bill at the request of Loudoun County; Jack Roberts, the County Attorney, appeared to provide background information and represent the County.¹² After discussion with the subcommittee and interested parties, Delegate May withdrew the bill and the subcommittee directed staff to look at alternative ways to clarify the definition of "public record" to eliminate any confusion regarding what records are and are not subject to disclosure under FOIA.

Public Comment

¹⁰ 5 U.S.C. § 552a Note ("Section 7" refers to § 7 of Pub. L. No. 93-579, 88 Stat. 1909 (1974)).

¹¹ Pages 2 and 3 of Chapter 849 of the 2009 Acts of Assembly in § 2.2-3808 A 1 to read as follows:

1. After the words "such number is specifically required by", Strike "federal or;" and
2. After the words "prior to January 1, 1975" Insert "or federal statute."

¹² For additional detail, please see the meeting minutes for the subcommittee meeting, today's date.

Delegate Griffith asked if any members of the public wished to comment to the Council; no comments were forthcoming.

Other Business

In light of the ITIB meeting previously addressed, Council member Wiley suggested it may be helpful for the Council to further examine the closed meeting exemptions at subdivisions A 6 and A 29 of § 2.2-3711, concerning the investment of public funds and contract negotiations, respectively. To that end the Council appointed a subcommittee consisting of members Wiley (Chair), Spencer, Malveaux, Whitehurst, and Delegate Griffith.

The Council also inquired of staff regarding any FOIA training provided to the Office of the Attorney General (OAG). Staff indicated that we do provide such training upon request, have frequent contact with OAG attorneys regarding FOIA matters, and generally have an excellent relationship with the OAG.

Of Note:

No matters of note were reported.

Future meetings

The next meeting of the FOIA Council is scheduled to be held at 11:00 AM on Monday, September 21, 2009 in House Room D of the General Assembly Building.

The Honorable H. Morgan Griffith, Chair
Maria J.K. Everett, Executive Director