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## Virginia Freedom of Information Advisory Council

July 17, 2019, at 1:00 p.m.

Pocahontas Building, Senate Committee Room A

[foiacouncil.dls.virginia.gov](http://foiacouncil.dls.virginia.gov)

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The Virginia Freedom of Information Advisory Council (the Council) met in Richmond with Senator Richard H. Stuart, chair, presiding.<sup>1</sup> The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting are accessible through the [Council's website](#).

### Presentation: Subcommittee Reports

*Council Staff*

#### *Forestry Records Subcommittee*

The Forestry Records Subcommittee met on [June 17](#) to consider House Bill 2201 from the 2019 Session.<sup>2</sup>

- **HB 2201 (Tyler); State Forester; confidentiality of certain records.** Excludes from the mandatory disclosure provisions of the Virginia Freedom of Information Act certain records of the Department of Forestry (the Department). The records include trade secrets and financial information, reports of criminal violations made to the Department by persons outside the Department, and records of an active administrative investigation.

The Subcommittee heard from Delegate Roslyn Tyler; Brad Copenhaver, the Deputy Secretary of Agriculture and Forestry; and Ed Zimmer, the Deputy State Forester. The bill was introduced in an effort to protect certain information submitted to the Department, including trade secrets and financial information, and certain criminal or administrative investigations conducted by the Department. The bill passed in the House of Delegates, but was passed by indefinitely in the Senate Committee on Agriculture, Conservation and Natural Resources.

Some of the major concerns regarding the bill held by members of the Subcommittee included the breadth of the bill's language, the scope of the criminal exemption, and the fact that existing FOIA exemptions may already cover the same records as the bill seeks to cover. The Subcommittee noted that they would like to hear directly from the representative of the Attorney General that advised the Department that the bill was necessary and recommended that a draft of more specific language be reviewed at the next Subcommittee meeting that was to be held on July 15.

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<sup>1</sup> **Members Present:** Senator Mamie E. Locke, Senator Richard H. Stuart (chair), Delegate Luke E. Torian, Shawri King-Casey, William Coleburn, Sterling Rives, Cullen Seltzer, Sandra Treadway

**Members Absent:** Delegate Glenn R. Davis, Lee Bujakowski, Stephanie Hamlett, Michael Stern

<sup>2</sup> Members of the Forestry Subcommittee include Kathleen Dooley, Shawri King-Casey, Dr. Sandra Treadway, and Mark Vucci. At the meeting, Mr. Vucci was elected chair and Dr. Treadway was elected vice-chair.

However, after the first Subcommittee meeting, the Department, along with the representative of the Attorney General and the patron, decided not to move forward with the study of HB 2201, as they determined that existing exemptions in FOIA would cover the types of records they were seeking to protect. As a result, the second scheduled Subcommittee meeting that was to be held on July 15 was cancelled.

### *Donor Records Subcommittee*

The Donor Records Subcommittee met on June 18 to consider House Bill 2386.<sup>3</sup>

- **HB 2386 (Bulova); Public institutions of higher education; information relating to pledges and donations.** Requires public institutions of higher education, when accepting a donation, gift, or similar financial support that is conditioned upon the acceptance of certain terms and conditions by the public institution of higher education, to provide the donor with a written document acknowledging the public institution of higher education's acceptance of such terms and conditions. The bill requires the public institution of higher education to retain a copy of such document and provides that such document shall be subject to the provisions of the Virginia Freedom of Information Act (FOIA). The bill provides that no discretionary exclusion in FOIA shall apply to protect information relating to the amount, date, purpose, and terms of a pledge or donation made to a public institution of higher education. The bill provides that the identity of the donor shall be protected only if (a) the donor has requested anonymity in connection with or as a condition of making a pledge or donation and (b) the pledge or donation does not impose terms or conditions related to academic decision-making.

The Subcommittee heard testimony regarding the bill from its patron, Delegate David L. Bulova. There is current litigation pending before the Virginia Supreme Court (*Transparent GMU v. GMU*) that shares background facts with HB 2386, but presents different legal issues regarding whether university foundations are subject to FOIA. This bill came about after requests were made for donor agreements held by George Mason University (GMU). GMU's response to the requester was that the agreements they sought were not held by the university, but by its foundation, which is a private entity and not subject to FOIA. The bill seeks to address a major concern that anonymous donors might have undue influence over the academic decision-making process of the institution.

Public comment was received from Brian Turner of the American Association of University Professors and Megan Rhyne of the Virginia Coalition for Open Government, who were both in support of the bill. Robert Tyler, Counsel to the University of Virginia, supported the bill in concept.

Some of the major concerns over the bill held by the Subcommittee included the difficulties of clarifying when FOIA does and does not apply, maintaining donor anonymity, and ensuring that terms and conditions are part of a written record and subject to FOIA. The Subcommittee voted unanimously to recommend the amendments to the FOIA portion of the bill (lines 74-

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<sup>3</sup> Members of the Donor Records Subcommittee include William Coleburn, Stephanie Hamlett, Cullen Seltzer, Michael Stern, and Mark Vucci. At the meeting, Mr. Vucci was elected chair.



84), while giving no recommendation for or against the other portion of the bill that would amend Title 23.1 (lines 101-109), as it is outside of the purview of FOIA.

Staff spoke with Delegate Bulova and he accepts the Subcommittee's recommendation regarding the FOIA portion of the bill and noted that he will work with the affected institutions of higher education regarding the portion of the bill that amends Title 23.1. The second Subcommittee meeting scheduled for July 3 was cancelled.

With a vote of 7-0-1 (Ms. King-Casey abstaining), the Council voted to accept the Subcommittee's recommendation.

### *Phishing Study Subcommittee*

The Phishing Study Subcommittee met on July 15 to consider House Joint Resolution 628.<sup>4</sup>

- **HJ 628 (Heretick); Study; Virginia Freedom of Information Advisory Council; threat of phishing attacks; report.** Directs the Virginia Freedom of Information Advisory Council (FOIA Council) to study the threat of phishing attacks on citizens and public employees whose contact and private information is legally obtained as a result of a Freedom of Information Act (FOIA) request. The study further directs the FOIA Council to examine the current FOIA provisions and make recommendations on ways to address the threat of phishing attacks on citizens and public employees of the Commonwealth.

Staff presented background information on current exemptions under FOIA that are related to the subject matter of the resolution. The resolution's patron, Delegate Steve E. Heretick, along with Solomon Ashby, Portsmouth City Attorney; Daniel Jones, Portsmouth Chief Information Officer; and Sherry Neil, Portsmouth Government Affairs Manager, gave testimony regarding the background facts surrounding the resolution and asked for the Council to study the issue. They expressed a concern that information currently available under FOIA along with just one additional data point is enough to steal someone's identity. They also noted that when a spoofed email from a high-ranking staff member is sent out with nefarious links, even with proper training it is inevitable that some employees will click such links because it appears to be coming from a trusted source. Delegate Heretick presented suggestions for legislative changes on behalf of the City of Portsmouth. Those suggestions are posted on the Council's website.

Public comment was received from Amy Judd of the Virginia Information Technologies Agency and Megan Rhyne of the Virginia Coalition for Open Government.

The Subcommittee agreed that the issue addressed by the resolution is a legitimate concern and that attention by the Council is warranted. The Subcommittee will continue its discussion of HJ 628 at its next meeting scheduled for August 21, 2019, at 10:00 am.

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<sup>4</sup> Members of the Phishing Study Subcommittee include Lee Bujakowski, Shawri King-Casey, Sterling Rives, Sandra Treadway, and Mark Vucci. At the meeting, Dr. Treadway was elected chair.



## **Presentation: FOIA Training and Reporting Requirements**

*Council Staff*

### *SB 1431 – § 2.2-3704.3*

Staff informed the Council that they have already received multiple inquiries about the FOIA training for local elected officials that will be required beginning July 1, 2020, pursuant to § 2.2-3704.3, which was created by Chapter 531 of the Acts of Assembly of 2019. Two issues have been raised: (1) the current language as enacted requires "online training sessions" under subsection A, but some local government attorneys wish to provide live, in-person training, just as they can for FOIA officers under current law and (2) whether the new training requirement includes constitutional officers as "local elected officials." Staff noted that the requirements for FOIA officers under current law explicitly include constitutional officers and treat them the same as local public bodies (subsection D of § 2.2-3704.2). The Council directed staff to prepare a draft for consideration at the next Council meeting that will amend § 2.2-3704.3 to allow for live, in-person training as well as online training, and to include constitutional officers explicitly in the training requirements.

### *Legislative Changes to § 2.2-3704.2*

Staff presented the current state of the law with regard to FOIA officer training. Currently, § 2.2-3704.2 requires FOIA officers to be trained annually and to report to the FOIA Council annually that they are the FOIA officer for a particular state or local public body. Staff presented a bill that changes the frequency for required FOIA officer training from annually to once every two years and changes the reporting requirement from once every year to by July 1 of the year an officer is initially trained and thereafter only if the reported information changes. This bill would make § 2.2-3704.2 consistent with the language in § 2.2-3704.3 in terms of the training requirement, which would serve to avoid confusion and make for a more efficient process. The Council voted unanimously to recommend this draft language.

Staff also recommended to the Council that regional public bodies be included explicitly in §2.2-3704.2 alongside state and local public bodies. The Council agreed with the recommendation and voted to adopt the bill presented with amendments that would explicitly add regional public bodies to the language in § 2.2-3704.2.

## **Other Business & Updates**

*Council Staff*

### *Electronic Communications and Social Media Guide*

Staff presented a new guidance document on FOIA and social media that addresses questions regarding social media as a public record and the use of social media to hold a meeting, offers tips for best practices when using social media, and covers other related issues. The guide is available on the "Reference Materials" page of the Council's website.

### *Current FOIA Training*

Staff provided an update on the free FOIA training sessions being held in Richmond. Last year, staff conducted six such sessions on the topic of public records, which were attended by 374 participants. This year, staff is providing sessions addressing public records, public meetings, and law-enforcement records. So far this year, 96 people have attended five free training sessions held in Richmond from May through July, and 76 people are registered for 10 additional sessions



scheduled to be held from July through November, with more expected to register as the dates approach.

### *Tolling Provision*

Staff reminded Council that at its May meeting an issue was brought to the Council's attention regarding the lack of a tolling provision when a requester asks a public body for a cost estimate. As a result, confusion and disputes over charges have occurred at times when a public body has provided an estimate, then sent records along with a bill for charges within the five working day response deadline, even though the requester did not agree to those charges. Staff noted that the intent would be to protect both requesters and public bodies by giving them a chance to agree on charges before providing records, but concerns have been raised in years past that there could be inadvertent consequences causing additional delay in providing records. The Council directed the Phishing Study Subcommittee to consider this issue and staff to prepare sample amendments for the Subcommittee's consideration at its next meeting.

### **Public Comment and Next Meeting**

There were no public comments. The next Council meeting is scheduled for Wednesday, September 18, 2019, at 1:00 pm in Senate Room A on the Ground Floor of the Pocahontas Building.

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For more information, see the [Council's website](#) or contact the Division of Legislative Services staff:

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