

Virginia Freedom of Information Advisory Council
July 26, 2010 Meeting Summary

The FOIA Council held its first meeting of 2010.¹ The Council welcomed its newest members Ed Jones, Editor of the Free Lance-Star and Eric Gregory, designee of the Attorney General. The Council also thanked outgoing member Courtney Malveaux for his service to the Council. The Council next held elections for chair and vice chair. Upon properly seconded motions, Senator Houck was elected chair and Delegate Griffith was elected vice chair. Both elections were unanimous.

2010 Legislative Update

Staff presented the 2010 legislative update to the Council. The General Assembly passed a total of 12 bills amending FOIA during the 2010 Session. Of note, House Bill 434 (Griffith), which allows the redaction of financial account numbers and routing information, passed as a recommendation of the Council. This bill was passed with an emergency clause and became law effective April 11, 2010. The General Assembly also passed House Bill 433 (Griffith), which sets out the original date (January 1, 1975) when social security numbers were authorized to be collected or required by state and local agencies under federal law, and makes other changes to the Government Data Collection and Dissemination Practices Act (GDCDPA), also a recommendation of the Council. The complete legislative update was distributed to Council members and to the public. A copy of the 2010 legislative update is also posted on the Council's website.

Staff explained the five bills referred to the Council for further study by the 2010 General Assembly:²

1. HB 449 (Ware, RL)--remedy for public bodies for requester harassment.
2. HB 641 (Armstrong)--extending the right to make FOIA requests in VA to U.S. citizens.
3. HB 976/SB147 (Anderson) and (Puller)--proceedings for enforcement; when notice of suit must be filed by petitioner on public body.
4. SB 711 (Edwards)--disclosure of criminal investigative records.

Two subcommittees had previously been appointed to study the above bills. First, the Rights and Remedies Subcommittee will study the following bills: HB 449 (Ware, R.L.) (remedy for public bodies for harassment by requesters), HB 641 (Armstrong) (extending the right to make FOIA requests in Virginia to United States citizens), and HB 976 (Anderson)/SB 147 (Puller) (proceedings for enforcement; when notice of suit must be filed by the petitioner on the public body). At this meeting, the Council also directed the Rights and Remedies Subcommittee to develop a plan for proactive training for legislators, aides, and legislative agencies, committees and commissions, as well as studying other possibilities to promote FOIA education (see discussion under Other Business). The Rights and

¹ Delegate Griffith, Senator Houck and Messrs. Fifer, Whitehurst, Selph, Landon, Gregory, and Jones, and Ms. Treadway were present. Messrs. Wiley and Miller, and Ms. Spencer were absent.

² Summaries of each of the bills referenced above appear as Appendix A to this summary.

Remedies Subcommittee consists of Council members Senator Houck (Chair), Roger Wiley, Frosty Landon, Mary Yancey Spencer, Eric Gregory, George Whitehurst, and Ed Jones.

The Criminal Investigative Records Subcommittee was appointed to study SB 711 (Edwards), which was referred to the Council by the 2010 Session of the General Assembly for study. The bill would limit the exemption for criminal investigative or prosecution records to those investigations or prosecutions that are ongoing. As a result, criminal investigative and prosecution records would be open to the public after the ongoing criminal investigation or prosecution has become final or has been otherwise terminated, unless there is jeopardy to any other criminal investigation or prosecution. This Subcommittee consists of Council members Craig Fifer (Chair), Delegate Griffith, E.M. Miller, John Selph, and Sandra Treadway.

Rights and Remedies Subcommittee Report

Staff advised the Council that the Rights and Remedies Subcommittee met on July 22, 2010 to review the bills assigned to it and took the following actions:

With regard to HB449 (Ware, R.L.), the Subcommittee was generally empathetic to the plight of public bodies faced with FOIA requests intended to harass because of the volume and frequency of these requests as well as the associated increase in allocation of resources to respond to them. The Subcommittee noted that while this issue occurs infrequently it does cause problems. The Subcommittee will look at what, if anything, other states do in these instances. The Subcommittee will also investigate other approaches, including the payment of charges similar to the charges provision that was added in response to the 2002 bill on same issue.

With regard to HB 641 (Armstrong), the Subcommittee recommended no action on the bill as presented. Virginia is one of only six states that limit FOIA requests based citizenship.³ The Subcommittee is aware of the recent decision of the Third Circuit Court of Appeals⁴ that upheld a decision of the federal District Court for the District of Delaware,⁵ holding that the limitation of rights under Delaware's FOIA law to Delaware citizens violates the Privileges and Immunities Clause of the Constitution of the United States. The Subcommittee will also continue to monitor a similar suit in Virginia. In the *McBurney v. McDonnell*, the United States District Court for the Eastern District of Virginia, three out-of-state plaintiffs challenged on federal constitutional grounds (privileges and immunities) the provisions of FOIA granting access rights to Virginia citizens. On April 29, 2009, the Court entered an order dismissing the claims of the three out-of-state plaintiffs on procedural grounds.⁶ However, on appeal, the United States Court of Appeals for the Fourth Circuit ruled for two of the three plaintiffs, saying they can proceed with their challenge on the merits to the citizens-only provision of FOIA. It is the recommendation of the Subcommittee to await the outcome of the *McBurney* case. In the meantime, however,

³ Arkansas, Georgia, New Hampshire, and Tennessee are the other states that limit FOIA requests based citizenship.

⁴ *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).

⁵ *Lee v. Minner*, 369 F.Supp.2d 527, 2005 U.S. Dist. LEXIS 8892 (D. Del., 2005).

⁶ The Court held that the three-out-of-state plaintiff's lacked standing to bring the claims and improperly named the Attorney General as a party to the action.

the law can be successfully dealt with following the advice of the Council to work it out with out-of-state requesters to provide records, including prepayment and supplying records within a reasonable time. Virginia public bodies should not control on the in-state or out-of-state status of the requester. By consensus, the Subcommittee agreed that the bill should not go forward as drafted.

With regard to HB 976 (Anderson)/SB 147 (Puller), the Subcommittee recommended revision of the language to specify a time period when a public body against whom a FOIA petition is brought must receive a copy of the petition before the petition is filed with the court. The Subcommittee recommends the following:

1. After "petition" on Line 29 of the House Substitute:
Strike "within a reasonable time" and insert "at least three working days;" and
2. Recommend language "has received a copy" (HB 976) instead of "has been served with a copy" (SB 147).

The Council directed staff to redraft the bills according to its recommendation and to notify the patrons and Prince William County Public Schools of the recommendation. The draft will be posted on the Council's website.

Access to Budget Conferences

Helen Tansey, a citizen who attempted to follow the budget conferences at the end of the 2010 General Assembly Session and wrote live blogs concerning the same addressed the Council about her experience. Ms. Tansey has 10 years of experience lobbying the General Assembly on water and land conservation issues. In her new role as a blogger remarking on the budget process in Virginia, Ms. Tansey stated that she was told she was not welcome as a lobbyist or a citizen to the budget conferences. In preparation for her work, she indicated that she had contacted the staff directors of the Senate Finance Committee and the House Appropriations Committees, and each budget conferee to advise them of her activities. She described the budget conference process as old, antiquated and dysfunctional, and noted that there were many closed door meetings. Ms. Tansey advised that she tried to file a criminal complaint with law-enforcement officials and was told that it was a civil matter. She advised that Council that she was aware that she could sue for a violation of FOIA, but did not want to pursue this course of action. Instead, she requested the Council to provide annual FOIA training to the budget conferees, noting that the conferees were doing the public's business.

Other Business

Senator Houck advised the Council that given the issue raised by Ms. Tansey and some FOIA issues related to the appointment of a new director by the Joint Legislative Audit and Review Commission (JLARC) at a meeting earlier this summer, he believed the Council should become more proactive in training legislators and their aides, and all legislative commissions, councils, and agencies. It was his intent that the matter be added to the study charge of the Rights and Remedies Subcommittee. Senator Houck noted that he is a budget conferee and that budget conference process has moved dramatically in the right direction over the years. He stated that it is not yet perfect. That any citizen feels aggrieved by the actions of the budget conferees is of concern and the issue should be examined. With regard

to the JLARC action, he noted that while unintentional, the law was not followed. Delegate Griffith indicated that he agreed with Senator Houck but believes that the law as conceived in 1968 was not intended to cover the General Assembly. He noted there has been confusion on this issue and that is the reason he introduced HB 1357 in the 2004 to clarify the application of FOIA's open meeting rules to the General Assembly. He stated that there needs to be a balance between access and getting the budget work done within the tight time constraints imposed on the General Assembly. Senator Houck added that there is a practical dynamic for budget conferees; however practicality should not overshadow a citizen's right of access. He described a closed door gathering between the two money committee chairs and their respective staffs; which is not a "meeting" under FOIA. However, other conferees came in to listen to the discussion and the result was possibly a violation of FOIA because the door was closed. He noted that this is a perfect example of the logistics involved. Ms. Treadway agreed and indicated as Librarian of Virginia, the same problem exists with respect to the Virginia Public Records Act (VPRA). She stated that without constant training on the law the institutional memory is lost. Mr. Fifer added that while he was in agreement, citizens do have the responsibility to knock on a closed door. He stated that he would like local government officials included in the training as the issues are the same. Mr. Landon suggested that there should be mandatory FOIA training for the staff of the public bodies.

Public Comment

Megan Rhyne, Virginia Coalition for Open Government, advised the Council of the upcoming FOIA and VPRA seminar that was being held in September with the assistance of the Council, the Virginia Association of Counties, the Virginia Municipal League, and VDOT.

Ginger Stanley, Virginia Press Association, complimented both Senator Houck and Delegate Griffith on their legislative activity relating to public access during the 2010 Session. She advised the Council of the many articles written and the activities that took place during Sunshine Week in March, 2010.

Mark Flynn, Virginia Municipal League (VML), praised Council staff Alan Gernhardt for his great job providing FOIA training to new members of city and town councils at a recent VML conference. In addition, Mr. Flynn suggested, with regard to HB 976/SB147, that using the phrase "service of process" is more effective because it allows a FOIA petition to proceed on the merits of the case in a timely manner instead of the first hearing relating only to the procedural requirements for notice of a FOIA suit.

James Lawrence, a Fredericksburg citizen, chronicled his difficulties when trying to exercise his FOIA rights with local officials. He indicated that some of these issues have been resolved.

Future Meetings

The next two meetings of the Council will be held on Monday, September 13, 2010 and Monday, November 8, 2010. Both meetings will be held in Richmond at 1:30 p.m. in

House Room D of the General Assembly Building. The Council's annual Legislative Preview will be held in conjunction with the September 13, 2010 meeting.

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