

FOIA Council Meeting Summary

August 22, 2018

1:00 PM

House Room 3

Capital Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its second meeting of the 2018 interim on August 22, 2018.¹ The meeting was held to welcome new members, to receive reports from the Council's three subcommittees, to take action on the subcommittees' recommendations, and to hear other business of interest to the Council. Senator Richard Stuart began the meeting by welcoming Delegate Glenn R. Davis, Jr., and Mr. Lee Bujakowski to the Council, but he noted that Mr. Bujakowski was unable to attend today.

Subcommittee Reports

Records Subcommittee:

Staff reported that the Records Subcommittee had met three times: May 21, June 27, and August 8, 2018. At the request of the subcommittee, staff and interested parties also got together to study issues related to HB 904 (see below) on July 30, 2018. Staff reminded the Council that it had referred nine bills to the Records Subcommittee for study, as follows:

- HB 504 (Mullin) (Defining the term "custodian").
- HB 664 (Kilgore)² (Defining the term "custodian" and amending current provisions regarding the transfer of records and redaction).
- HB 904 (Robinson) (Establishing a general exemption for trade secrets).
- HB 957 (Yancey) (Defining the term "custodian").
- HB 958 (Yancey) (Amending the current section on redaction).
- HB 959 (Yancey) (Amending current provisions regarding the transfer of records).
- HB 1329 (Tran) (Prohibiting any state agency maintaining an information system that includes personal information from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity).

¹ Council members Senator Stuart (Chair), Delegate Davis, Coleburn, Dooley, Hamlett, King-Casey, Porto, Seltzer, Stern, Treadway, and Vucci were present; members Senator Locke, Delegate Torian, and Bujakowski were absent.

² This bill is identical to SB 876 (Mason).

- SB 730 (DeSteph) (Amending the definition of "public records," exempting certain social media records from mandatory disclosure, and providing that the public body is a necessary party to any enforcement proceeding).
- SB 876 (Mason)³ (Defining the term "custodian" and amending current provisions regarding the transfer of records and redaction).

Of these nine bills, the patrons of HB 504, HB 664, HB 957, HB 958, HB 959, and SB 876 all requested that no further action be taken on these bills because the issue they sought to address concerning access to certain court records was addressed separately by House Bill 780 (Habeeb) and identical Senate Bill 564 (Obenshain), both of which were enacted this year. Therefore, the Council took no further action on these bills.

Staff provided a brief history of HB 904 concerning access to trade secrets. This issue had been studied at approximately 30 meetings since 2014 and resulted in HB 904, which would have created a general exemption for trade secrets. HB 904 was introduced as a recommendation of the Council at the 2018 Session of the General Assembly. However, concerns were raised during the session regarding what effect HB 904 would have on access to information about the chemical mixtures used in hydraulic fracturing. The General Assembly referred the bill back to the Council for further study to address these unintended consequences, and the Council referred the bill to the subcommittee. The subcommittee heard from environmental groups, the Department of Mines, Minerals, and Energy, oil and natural gas representatives, and other interested parties on June 27, 2018. At the subcommittee's request, staff met with these and other interested parties again on July 30, 2018, to determine whether the parties could reach some agreement regarding access to information about the chemical mixtures used in hydraulic fracturing, such as an amended version of the bill with special provisions to address the concerns presented. Staff reported that after that discussion, it appears that those opposed to the bill would continue to oppose it even if it contained special provisions addressing access to information about the chemical mixtures used in hydraulic fracturing due to concerns there may be other unknown, unintended consequences. At the August 8, 2018, subcommittee meeting, Megan Rhyme of the Virginia Coalition for Open Government (VCOG) suggested an amended version of the bill that would include a definition of trade secrets and the provisions for designating what trade secrets are to be protected ("earmarking"). After discussing the suggestion, the subcommittee recommended a new draft that would define "trade secrets" to mean the same as that term is used in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) (UTSA) and make corresponding technical changes to eliminate redundant language. The subcommittee recommended this draft to provide clarity and uniformity, as some exemptions in FOIA currently refer to the UTSA definition of "trade secrets" while others do not. Staff reported there was no opposition presented to this draft. The Council then voted unanimously to recommend this draft.

The Council next considered the redraft of HB 1329 (Tran), which would amend the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) (GDCDPA) to prohibit state agencies from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or

³ This bill is identical to HB 664 (Kilgore).

ethnicity unless such dissemination is specifically required by law. Delegate Tran stated that the bill would help to protect the ability to worship freely without fear of persecution, much like Virginia's original religious freedom statute and the First Amendment of the United States Constitution. She noted that in some instances it is important to collect such data, such as with student applications for scholarships and federal aid forms, and the amendment to the bill allows such collection. She also stated that the bill had support from several religious organizations representing diverse faiths, as well as the Family Foundation. The Council then discussed the amended bill in detail, noting that it is in the GDCDPA rather than FOIA and therefore outside the Council's usual subject matter, and especially focusing on how it would affect disclosure to the federal government. Delegate Davis expressed his support for the concept of the bill, but concern that the amended bill would allow the federal government to require disclosure without stating a purpose, or to get the information from sources other than state agencies, effectively circumventing the goal of the bill. Delegate Tran responded that it was a conundrum, as banning collection of such information entirely would be an option, but sometimes there are good reasons for such collection, and the state cannot prevent the federal government from using other sources. The Council then discussed the language of the amended bill and how it relates to current law, and it recommended a technical amendment (to change the word "consent" to "authorization" on line 91). After acknowledging the groups who attended today's meeting in support of the bill (representatives from the All Dulles Area Muslim Society and the Virginia Interfaith Policy Center and members of the Muslim, Jewish, and Hindu communities), the Council voted 9-2 (all in favor except Delegate Davis and Mr. Stern against) to recommend the amended draft of HB 1329.

Staff then presented two amended drafts of SB 730 (DeSteph), which would amend the definition of "public record," define and exempt social media records of General Assembly members, and require that public bodies be included as necessary parties to any petition for mandamus or injunction filed under § 2.2-3713. Staff informed the Council that the drafts were identical, except one would provide for the Office of the Attorney General to represent a member of the General Assembly if a FOIA petition was filed against the member. Due to time considerations, the Council and Senator DeSteph agreed to defer further consideration on the drafts until the Council's next meeting on October 17, 2018.

Remedies Subcommittee:

Staff reported that the Remedies Subcommittee met twice, on May 21 and June 4, 2018, to consider the bills listed below. The subcommittee voted to recommend amended versions of each bill to the Council for its consideration.

- HB 213 (Mullin) (Providing that formal advisory opinions be approved by the FOIA Council and providing protection from liability for civil penalties under certain circumstances).
- SB 630 (Surovell) (Adding civil penalties for improper destruction or alteration of public records and improper certification of a closed meeting).

Addressing the amended version of HB 213 first, Mr. Vucci moved and the Council voted unanimously to add language to state that the policy adopted by the Council will address when an opinion will be issued. The Council then discussed the effects of the bill, expressing concerns

that it would change the nature of the Council to one that is quasi-judicial, that there may be difficulties providing formal opinions in a timely manner depending on the volume of requests received, and that the Council is not a trier of fact and requesters do not have to sign affidavits or otherwise attest to the facts. Delegate Mullin related that the genesis of the bill for him as a practitioner is to create a body of precedent, which is what the current opinions are informally, and reduce costs by relying on opinions rather than litigation. Mr. Stern noted that the provisions that would allow staff-issued advisory opinions to be introduced as evidence in any case alleging a knowing and willful violation of § 2.2-3714 would satisfy that purpose. The Council then voted to amend the bill to keep only the provisions on lines 18-23 regarding introducing staff-issued opinions as evidence, voted to strike the changes on lines 11-17 and 46-64, and directed staff to make any necessary technical changes. The Council then voted unanimously to recommend the draft as amended.

Staff next presented the amended draft of SB 630, which would add penalties for the improper destruction of public records and for the improper certification of closed meetings. The Council discussed whether there should be a standard of intent or *mens rea* added before penalties would be incurred, particularly because as many citizens serve on public bodies as volunteers and do not have the benefit of legal counsel, they may inadvertently and unintentionally violate these new provisions. The Council considered adding language requiring violations of the closed meeting certification provisions to be willful and knowing; staff pointed out that the current provisions of § 2.2-3714 already provide a civil penalty for willful and knowing violations of FOIA, including for improper certification of a closed meeting. Ms. Dooley expressed concerns that there can be good faith disagreements about closed meeting provisions which, if found to be knowing and willful violations, could be considered misfeasance or malfeasance in office. She also stated that the penalty for improper destruction of records should be in the Virginia Public Records Act (§ 42.1-76 et seq.). Senator Stuart noted there already is a criminal penalty for the improper destruction of certain public records. Senator Surovell noted that attorneys for the Commonwealth generally do not prosecute these types of matters, as they are busy prosecuting violent crimes, drug offenses, and other criminal matters. He described several news articles depicting situations that appear to be designed to avoid FOIA, such as an attorney training local government employees to destroy records, and multiple local government bodies violating closed meeting rules. After further discussion Mr. Seltzer moved to add knowing and willful language to lines 14 and 22 of the amended draft; the motion passed by a vote of 8-3 (all in favor except Delegate Davis, Ms. Dooley, and Ms. King-Casey against). Mr. Coleburn moved to add language on line 24 to state that if the public body certified a closed meeting on the advice of its attorney and it was later found to be in violation, then the attorney would be held liable for the monetary penalties. After further discussion, the motion was amended to apply if a knowing and willful violation was committed on the advice of the attorney; the motion failed on a vote of four in favor (Ms. Porto, Mr. Coleburn, Dr. Treadway, and Delegate Davis), two against (Mr. Seltzer, with the disclosure that he represents local public bodies in his professional practice, and Mr. Stern), and five abstentions (Senator Stuart, Ms. Dooley, Ms. Hamlett, Mr. Vucci, and Ms. King-Casey). Mr. Coleburn then moved to change the word "may" on line 24 to "shall" to make the penalty for improper certification of a closed meeting mandatory. The motion failed on a vote of four in favor (Ms. Porto, Dr. Treadway, Mr. Coleburn, and Mr. Vucci) to seven against (the remaining members present). Delegate Davis then moved to make no recommendation on SB

630; after further discussion of the motion, the motion passed by vote of six to five (all in favor except Ms. Porto, Dr. Treadway, Mr. Coleburn, Mr. Vucci, and Senator Stuart).⁴

Meetings Subcommittee:

The Meetings Subcommittee was scheduled to meet on June 5, July 18, and August 22, 2018. The subcommittee had two bills referred to it, HB 1101 (Robinson) and SB 336 (Peake), both of which would have required public comment periods at public meetings. At the June 5 meeting, a quorum was not present, but the subcommittee members who were present heard from interested parties on the issue of requiring public comment periods at public meetings. Because this issue has been studied in prior years and views are divided, the members present recommended bringing this issue before the full Council and canceling the remaining subcommittee meetings, as they felt it required a policy discussion by the full Council. The members also considered the issue of members using text messages to communicate during a public meeting, and they suggested that this issue be addressed through a guidance document, rather than in legislation. Due to time constraints, the Council decided to defer the Meetings Subcommittee report until the Council's next meeting on October 17, 2018, in order to give full consideration to all of the issues raised.

Other Business

Staff updated the Council that no relevant public comment forms had been received since the Council's last meeting on November 20, 2017. Staff also updated the Council that staff has begun offering free FOIA training here in Richmond to all who are interested. The training offered counts for 1.5 hours of continuing legal education credit for attorneys and satisfies the annual training requirement for FOIA officers. The first four sessions were limited to 50 participants each, and registration was full within two weeks, so two additional sessions allowing up to 100 participants each have been added. Staff has continued to provide individualized training on request as well but hopes to offer more programs in Richmond next year, including programs specifically addressing public meetings and law-enforcement records. Staff also informed the Council that since the Council considered the issue of declaratory judgment last year, two more circuit cases had been decided, both of which held that declaratory judgment against a public body is unavailable under FOIA. Staff noted that a prior circuit court case did allow a declaratory judgment action to be brought, but the posture was different because in that case it was the public body that brought the action.

Public Comment

Ms. Rhyne informed the Council that two FOIA cases are currently pending, one regarding attorney billing records and the scope of redaction allowed and the other concerning whether the judiciary is subject to FOIA. She also stated that the majority of FOIA transactions and meetings run smoothly but that she does hear about a lot of "horror stories." She said the common theme of these stories is that citizens see violations and cannot do anything about them and judges do not find violations. Therefore, she encouraged the Council to keep the Remedies Subcommittee in place to consider alternatives so that citizens can be heard.

⁴ Note that Senator Stuart had to leave after this vote was taken, and Delegate Davis acted as chair for the remainder of the meeting.

Future Meetings

The next meetings of the Council are scheduled for October 17, 2018, and December 5, 2018, both at 1:00 p.m. in House Room 3 of the Capitol Building. There being no further business, the meeting was adjourned.