

VA FOIA Council
Sept 10, 2007 Meeting
Richmond, VA

The Freedom of Information Advisory Council (the Council) held its third meeting of 2007 to receive progress reports from its two subcommittees.¹ The Council also welcomed new Council member Dr. Sandra G. Treadway, Librarian of Virginia, to the Council. Dr. Treadway replaces Nolan Yelich, who retired from state service effective July 1, 2007. In addition, the Council heard from the University of Virginia (UVA) regarding a proposed exemption for certain donor records held by UVA.

Subcommittee Reports

Electronic Meeting Subcommittee

John Edwards, Chair of the Subcommittee, reported that the Subcommittee met three times (on May 10, June 7, and July 12, 2007) to address three bills referred to it.² Delegate McClellan spoke to her bill, HB 2293, at the first meeting of the Subcommittee. The other patrons did not attend the meetings of the Subcommittee. Mr. Edwards reported that the Subcommittee voted 4 to 0 to recommend against HB 2293, which would have allowed local public bodies to meet through electronic means only when gathering information and no action is to be taken at the meeting. Regarding SB 1271 (Whipple), the Subcommittee voted 4 to 0 to table the bill unless the patron requested further consideration; the patron has not done so. The bill would have eliminated the requirement that a quorum of a state public body be physically assembled in one primary location in order for the public body to conduct a meeting through electronic communications means. Instead of the quorum, the bill provided that at least two members of the public body be physically assembled at one location.

Regarding HB 2553 (Ebbin), the Subcommittee voted 5 to 0 to recommend a revised draft of this bill to the Council. The draft as revised would allow a local public body to meet by electronic means without a physically assembled quorum when the Governor has declared a state of emergency, the catastrophic nature of the emergency makes it impracticable or unsafe to assemble a quorum in one location, and the purpose of the meeting is to address the emergency. The local public body must also (1) give public notice contemporaneously with the notice given the members, using the best possible methods given the nature of the emergency; (2) make arrangements for public access to the meeting; and (3) otherwise comply with the usual rules for electronic meetings. The minutes must reflect the nature of the emergency and the fact that the meeting was held electronically. Additionally, the draft bill makes a technical amendment in the definition of "meeting" to include the provisions of

¹ All Council members were present except Mr. Miller, Mr. Hopkins and Dr. Treadway.

² HB 2293 (McClellan), SB 1271 (Whipple), and HB 2553 (Ebbin).

§ 2.2-3708.1 (added in 2007). Mr. Edwards moved that the full FOIA Council vote to recommend this draft. The motion carried by unanimous vote.

Mr. Edwards also presented a statement of principles regarding electronic meetings for the Council's consideration. Mr. Edwards noted that in the three years the Subcommittee had met to consider various issues regarding electronic meetings, it had consistently favored requiring face-to-face meetings of local public bodies and the physical assembly of quorums of state public bodies. Mr. Edwards moved that the Council adopt his statement reflecting those two principles as guidance and a starting point for future discussions of electronic meetings.

In response, Council member Wiley stated that while he understood Mr. Edwards' view, he could not support the statement of principles because he does not share the same concerns regarding electronic meetings. Mr. Wiley expressed that as a practical matter, electronic meetings will be a part of our lives, that such meetings increase efficiency and greatly reduce transportation costs, and that there is a difficulty in getting good people to serve without being paid, so we should make it as easy as possible to do so.

Council member Fifer opined that in this situation, where the Subcommittee has been meeting for some time and is not addressing a new subject area, it may be helpful for the Subcommittee to have guidance from the full Council regarding general principles rather than starting anew each time. Additionally, Mr. Fifer noted that the Subcommittee could recommend that the policy be discontinued or changed later.

Delegate Griffith indicated that his support for the concepts behind the proposed statement, especially for face-to-face meetings. Delegate Griffith indicated the value in seeing firsthand a speaker's body position, tenor of voice, and other characteristics that convey a speaker's passion and conviction regarding a topic that can be lost in transmission by even the best technology. He also indicated that people often do not pay as close attention to a speaker who is not physically present.

Council member Axselle indicated his support for the statement of principles setting a standard but noting that the standard may deviate, as stated by Mr. Fifer. An example is of such deviation is the bill today endorsed by the Council that would allow local governments to meet electronically under specific emergency circumstances. Mr. Axselle also described a problem that occurred with an electronic meeting in which he participated, regarding the distribution of documents to members who are not physically present. When someone physically present distributed a document at the meeting, someone who had called in asked whether it was the same one that the member had sent him by electronic mail the night before.

Council member Malveaux questioned (1) whether these principals were best expressed by the FOIA Council or rather added to § 2.2-3700, the policy section of FOIA, and (2) whether it is a bad thing or perhaps instead is beneficial to repeat these discussions as technology changes and the Subcommittee addresses the same questions anew. Mr. Edwards stated that he agreed that there is a need to continue these discussions, and the

statement is offered only as a starting point. Council member Spencer indicated she did not agree with the underlying premise that is the Council's job to determine these matters for individual agencies, that she otherwise agreed with Mr. Wiley's position, and that she intended to vote against the statement.

Senator Houck agreed with Delegate Griffith, that the dynamic of live human discourse cannot be captured by technology and that dynamic is what citizens want and expect. However, while agreeing with the substance of the principles expressed, Senator Houck indicated he was reluctant to support the statement because the strength of the Council is to have an independent forum for relevant topics. Adopting the statement would give the appearance that the Council has already determined limits on electronic meetings, in effect "drawing a line in the sand." For that reason, to maintain the Council's autonomy, Senator Houck indicated he could not support the statement at this time.

Mr. Fifer indicated that he supported the merits of the statement of principles, and would prefer the burden of repeated discussion rather than the perception of bias by the Council. The Council then voted on the statement of principles as a resolution of the Council. Delegate Griffith and Council members Edwards, Axselle, and Fifer voted in favor of the resolution. Senator Houck and Council members Malveaux, Wiley and Spencer voted against it. Because the vote was tied, the resolution did not pass and the statement of principles was not adopted by the Council.

Personal Identifying Information Subcommittee

Senator Houck, Chair of the Subcommittee, reported that the Subcommittee has held three meetings to date to deliberate on the nine bills referred for study.³ Two meetings were joint meetings with a subcommittee of the Joint Commission on Technology and Science (JCOTS). Those joint meetings addressed two bills, HB 2821 (Sickles), concerning access to Social Security Numbers (SSNs), and SB 819 (Cuccinelli), concerning access to personal information including date of birth, social security number, driver's license number, bank account numbers, credit or debit card numbers, personal identification numbers, electronic identification codes, automated or electronic signatures, biometric data, or fingerprints. The Joint Subcommittee decided to focus on HB 2821, concerning Social Security Numbers, because SB 819 is too broad, with possible unintended consequences. In its meetings, the Joint Subcommittee has examined the treatment of Social Security Numbers under Virginia law, federal law, and the laws of other states, all of which take somewhat different approaches. The Joint Subcommittee has also looked at what personal information is collected by government from a practical perspective using real-life examples. The Joint Subcommittee found that government collects too much personal information in the first place, and that this over-collection needs to be addressed. The Joint Subcommittee decided that these issues are best addressed by legislation outside of FOIA for two reasons: (1) the law should address the treatment of Social Security Numbers in the private sector as well as in public records (and FOIA only applies to public records); and (2) under FOIA, a

³ HB 2821 (Sickles), SB 819 (Cuccinelli), HB 2558 (Brink), HB 3097 (Cole), SB 1106 (Chichester), HB 3118 (Carrico), SB 883 (Deeds), HB 3161 (Marshall, D.), and SB 1404 (Hanger).

requester's purpose in requesting records does not matter. There are both good and bad reasons to share Social Security Numbers, and any proposed law may need to account for good or bad intent. Other laws outside of FOIA do account for intended use when determining who may have access to certain information, and so it is appropriate to address this matter outside of FOIA. Additionally, the Joint Subcommittee has found that definition of "personal information" in the Government Data Collection and Dissemination Practices Act needs to be updated. The Joint Subcommittee will continue its work to attempt to draft legislation that will best address the issues identified to date. The next meeting of the Joint Subcommittee has yet to be scheduled.

Additionally, apart from the joint meetings with JCOTS, the Personal Identifying Information Subcommittee considered seven other bills and the issue of concealed carry handgun permits (CCH permits). Regarding HB 2558 (Brink), concerning an exemption for certain information in rabies vaccination certificates, at a prior meeting it was stated that the Virginia Treasurers' Association and the Virginia Veterinarians' Association are working on a form for use state-wide that limits the amount of personal information available to the public. The Subcommittee is waiting to see that form before taking further action on the bill. Regarding HB 3097 (Cole) and SB 1106 (Chichester), identical bills concerning the release of certain information in constituent correspondence, the bills were tabled without objection. No consensus was reached after the Subcommittee debated the issues involved and considered draft legislation that attempted to distinguish between personal correspondence and correspondence addressing public business. Regarding HB 3118 (Carrico) and SB 883 (Deeds), identical bills exempting certain records held by the Department of Game and Inland Fisheries (DGIF), the bills were discussed at the first Subcommittee meeting, but no action was taken. Further action on these bills will be dependent on what the Subcommittee decides regarding the larger issue of SSNs and personal information generally. Regarding HB 3161 (Marshall, D.) and SB 1404 (Hanger), identical bills expanding a current exemption regarding certain complainant information to include information in complaints for violations of any local ordinance, the bills were tabled by vote of 4 to 0. After discussion there was a consensus that the bills were overreaching.

CCH permits became an issue of concern to the Council earlier this year after the Roanoke Times published on its website a list of CCH permit holders obtained from the Department of State Police (DSP). Shortly thereafter the newspaper removed the list from its website after a great deal public outcry concerning the online publication of permit holders' personal information. Lisa Wallmeyer, of the Division of Legislative Services, presented draft legislation that would codify the opinion of the Attorney General issued in April, 2007, by providing that DSP shall withhold from public disclosure permittee information submitted to DSP for purposes of entry into the Virginia Criminal Information Network (VCIN). Additionally, the draft presented today addresses a concern that arose at the last Subcommittee meeting by clarifying that that records about nonresident permits issued by DSP remain open to the same extent that records held by the clerks of court concerning resident permits are open. Craig Merritt, on behalf of the Virginia Press Association (VPA), suggested that further revision be made to the draft to keep personal information confidential but to allow statistical information to be released. Senator Houck indicated that unless there was objection from the Council, no vote would be taken on this

draft today. Instead, as it is a sensitive topic, it would be left for further consideration until the next Council meeting. There was no objection, and so the draft is left on the table until the next Council meeting. Senator Houck further indicated that the Subcommittee intends to have a draft concerning SSNs prepared by the next full Council meeting as well.

Other Business

On behalf of UVA, Robert Lockridge, Executive Assist to The President for State Government Relations, presented draft legislation that would exempt certain donor records held by UVA from the mandatory disclosure requirements of FOIA. The proposed exemption would be added to § 2.2-3705.4, and would read as follows:

Records that contain personal information concerning donors and prospective donors in connection with fund-raising by or for a public institution of higher education; except that the amount, date and purpose of any pledge or donation, and the identity of the donor shall be released, unless the donor has requested anonymity in connection with or as a condition of making the pledge or donation.

As background, Mr. Lockridge stated that the total UVA endowment is approximately \$4.1 billion, of which \$2.7 billion is controlled directly by UVA and \$1.4 billion is controlled by foundations that contribute to UVA. Mr. Lockridge indicated that most university endowments are held by foundations, and that UVA is atypical in that it controls so much of its endowment directly. Mr. Lockridge further explained that while the foundations are not subject to FOIA, because of the way the UVA endowment is handled, many of the foundations' records end up in the possession of UVA itself, where they are subject to disclosure under FOIA. Mr. Lockridge reported that UVA is one of the most successful universities in the country in its fundraising efforts. In regard to donor records, Mr. Lockridge listed three confidentiality concerns: (1) many records contain sensitive personal information about individual donors, such as if a donor is going through a divorce or selling a privately-owned business; (2) the records may contain strategies UVA uses in approaching particular donors, also reflecting personal information about those donors; and (3) some donors expressed their own wish to remain anonymous. Explaining further, Mr. Lockridge indicated donors most often gave one of three reasons for requesting anonymity: (1) the donor does not want to be solicited for donations by other organizations; (2) the donor has a child attending UVA and does not want the child's educational experience to be affected by the donation; and (3) the donor does not wish for his or her spouse to know of the donation. Mr. Lockridge stated that not being able to promise anonymity to donors would lead to the erosion of donor confidence and a decrease in donations. As safeguards for public access, Mr. Lockridge pointed out that one could still obtain the total number of donors and total amount of donations, there would still be access to procurement records, the Auditor of Public Accounts would continue to have full access to all donation records, and UVA has two committees to ensure academic freedom and prevent undue influence from any anonymous donor, the Gift Policy and Gift Acceptance Committees.

Also speaking on behalf of UVA, Robert Sweeney, Senior Vice President for Development and Public Affairs, explained that when raising money at these levels, often there are many

very large gifts from individual donors that require extensive, delicate negotiations. For example, Mr. Sweeney related that in the current fundraising efforts, there have been over 133 gifts valued at or above \$5 million each. In response to a question from the Council, Mr. Sweeney also explained that the Gift Policy and Gift Acceptance Committees are comprised of UVA administrative personnel, and their function is to carefully examine any gift that would be outside the norm. Mr. Sweeney also stated that every gift valued at or above \$100,000 has a written agreement associated with it. In response to another question from the Council, Mr. Sweeney explained that UVA has greater control of its endowment and associated records than other universities because UVA prefers to retain greater direct control over audits and policies regarding these gifts. UVA requires the foundations to provide certain data to UVA regarding gifts, and those records are not currently protected when possessed by UVA. Additionally, Mr. Sweeney pointed out that as part of its fundraising efforts, UVA generally seeks press coverage of large gifts because then other donors are encouraged to make large donations as well. Senator Houck noted that with the extremely competitive nature of admissions to UVA, one might question whether an anonymous gift might be used as a backdoor to gain admission for a donor's child. Mr. Sweeney stated that that could not happen because the Admissions staff and the Development staff are kept insulated from each other. Admissions personnel would not know who the donors are, nor would Development office staff be allowed to contact Admissions personnel.

After further clarification that the exemption sought would still permit the disclosure of the amount, date, and purpose of a donation, Senator Houck opened the floor to public comment. Jennifer Perkins, of the Coalition for Open Government (VCOG), indicated that UVA had approached VCOG before today's meeting to discuss this proposed exemption. While acknowledging that UVA made some good arguments, Ms. Perkins pointed out that it is UVA's choice to include foundation records in UVA's own files, thus subjecting those foundation records to disclosure under FOIA. Ms. Perkins suggested the possibility of using a separate database for anonymous donors and leaving the main database completely open. Delegate Griffith noted that in the past there were many questions concerning university foundations and the flow of money between the foundations and universities. He asked whether the UVA approach is not better than having the foundations control everything, because the public sees none of the foundations' records. Ms. Perkins responded that ideally, the public would have access to both foundation and university records, especially because there are situations where a donor's name could be important. Council member Wiley requested clarification concerning how much state funding UVA receives. Mr. Lockridge indicated that 14.2% was earned interest on the endowment, 15.2% was funding from the state, and the remainder of the funding comes from tuition fees and federal funding. Mr. Merritt stated that Delegate Griffith was correct, that in the late 1990's there had been an unsuccessful movement to open to public disclosure university foundation records. Mr. Merritt also stated that it is a choice by UVA and its Board of Visitors to maintain a commingled system regarding both private and public operations in a public database, and that database should be subject to the same presumption of openness as other public records. Recognizing that foundations do provide a vehicle for anonymous donations, Mr. Merritt also stated that as a matter of public policy no one should give anonymously to a public body. Lynwood Butner, representing the Virginia Association of

Broadcasters (VAB), followed by stating that as UVA is a public entity, donations to UVA should be subject to public scrutiny just as are campaign contributions.

Senator Houck suggested that considering the different viewpoints expressed regarding this proposed exemption, it would not be appropriate for the Council to take any action on it today. Instead the respective interested parties should continue to meet and seek to reach common ground regarding the exemption, and give the Council a report on their efforts at the next Council meeting. Additionally, Senator Houck asked that the parties inform the Council when they will meet so that any interested Council members may also participate. There was general agreement from representatives of UVA, VPA, VAB, and VCOG to follow this course of action.

Of Note

There were no matters of note to report at today's meeting.

Public Comment

Senator Houck opened the meeting to public comment; there was none.

Future Meetings

The next meeting of the Council is scheduled for December 3, 2007.