



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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Delegate James M. LeMunyon, Vice-Chair

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FOIA Council Meeting Summary

September 12, 2013

1:30 PM

House Room C

General Assembly Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its third meeting of 2013.¹ This meeting was held to welcome Delegate LeMunyon to the Council, to elect a Vice-Chair, to hear updates from the Council's two subcommittees, the Electronic Meetings Subcommittee and the Rights and Remedies Subcommittee, to begin the Legislative Preview, and to present other issues of interest to the Council.

Geographic Information Systems and FOIA

After calling the meeting to order, Senator Stuart announced that certain agenda items would be taken up out of order. He first invited Dan Widner, Coordinator of the Virginia Geographic Information Network (VGIN) for the Virginia Information Technologies Agency (VITA), to speak regarding his concerns over the treatment of Geographic Information Systems (GIS) under FOIA.² Mr. Widner informed the Council that the current language in FOIA only addresses charges for topographic maps and is outdated. He stated that while data collection remains much the same as it was in the past, the technology used is more accurate, higher quality, and easier to access. He referred to Google mapping technology which allows for viewing by address, tax parcel, aerial views, structural footprints, and other means as one example, along with other competitive software providers and "cloud" technologies. He noted that many states and localities now provide free online access to mapping technology. Given this

¹ FOIA Council members Senator Stuart, Delegate LeMunyon, Ashby, Dooley, Jones, Landon, Schliessmann, Selph, Tavenner, and Whitehurst were present; members Hamlett and Treadway were absent.

² Subsection F of § 2.2-3704 provides as follows: "The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres."

technological progress, he proposed that GIS data need not be treated differently from other records subject to FOIA. As a further example, Mr. Widner related that the Virginia Base Mapping Program has a FOIA exemption and latitude to set charges, but now operates at a much lower cost than it did in 2002. In response to questions from the Council, Mr. Widner stated that there should not be any privacy issues from using "cloud" technologies, and that maps could be produced at any desired size. He suggested simply striking the relevant language concerning charges for topographic maps, so that charges for GIS data would then be the same as charges for other public records under FOIA. Senator Stuart proposed without objection that staff and interested parties form a workgroup to consider the issue and draft language to bring before the Council at its next meeting.

2013 FOIA Workshops

Staff reported that the Richmond FOIA Workshop was held Tuesday, September 10, 2013, but that due to a lack of air conditioning at the facility, a number of participants had to leave. Make-up dates will be scheduled for October and November for those who were registered at the Richmond FOIA Workshop. The other Workshops will be held next week in Lebanon, Virginia on Monday, September 16, 2013, Lynchburg, Virginia on Tuesday, September 17, 2013, and Harrisonburg, Virginia on Wednesday, September 18, 2013. For 2014, we expect to present workshops in Richmond, Northern Virginia, and Tidewater (exact locations to be determined).

Subcommittee Reports

Electronic Meetings Subcommittee

Ms. Dooley reminded the Council that the Electronic Meetings Subcommittee had met on May 20, 2013, and June 6, 2013, to study HB 2032 (May) and SB 889 (Black).³ She stated that the Subcommittee had not met since June. She reminded the Council that after discussing the bills, the Subcommittee recommended taking no action at this time, in order to gauge the effects of the 2013 Council-recommended amendments to electronic meetings law before considering additional changes. The Council voted unanimously at its June meeting to accept the Subcommittee's recommendation to take no action, which concluded the Subcommittee's report and the work of the Subcommittee.

Rights and Remedies Subcommittee

Mr. Landon reported that the Rights and Remedies Subcommittee met on May 20, 2013, and August 20, 2013, to study HB 2125 (Keam), HB 2321 (Surovell), and SB 1371

³ **HB 2032 (May) - Freedom of Information Act; electronic meetings.** Allows regional public bodies to conduct electronic meetings in the same manner as state public bodies. The bill also removes the requirement that a public body hold one meeting each year at which no member participates using electronic means. This bill is a recommendation of the Joint Commission on Technology and Science.
SB 889 (Black) - Virginia Freedom of Information Act; electronic communication meetings; school boards. Allows local school boards to hold electronic communication meetings to the same extent allowed currently for state public bodies. The bill contains technical amendments.

(Stuart).⁴ Mr. Landon reminded the Council that following the Subcommittee's recommendation, the Council had tabled SB 1371 at the Council's meeting on June 6, 2013. Regarding HB 2125, Mr. Landon reported that after hearing from Delegate Keam in support of his bill, and also from opposing parties, he felt that because Virginia is one of the few states that limit access to its own citizens, and due to rapid changes in technology, the language granting FOIA rights only to citizens of the Commonwealth and certain media representatives should be re-written. However, the Subcommittee had no recommendation as it did not feel a need to make a policy change at this time. Regarding HB 2321, the Subcommittee had heard from Delegate Surovell in support of his bill, and from representatives of the State Corporation Commission (SCC) and regulated industries who opposed it. After giving consideration to the issues, the Subcommittee concluded its work without recommendation on HB 2321.

Legislative Preview

Delegate Surovell - State Corporation Commission and FOIA

Delegate Surovell discussed his bill, HB 2321, which would have made the SCC subject to FOIA. He related a brief history of the bill, stemming from the Virginia Supreme Court's decision holding that the SCC was not subject to FOIA, to the bill's introduction to the General Assembly, referral to the FOIA Council, and study by the Rights and Responsibilities Subcommittee. He stated that he personally believed the SCC should be entirely subject to FOIA, but that after hearing from interested parties and discussing the matter with SCC representatives, he was willing to compromise. To that end, he brought a second draft of his bill that attempts to carve out regulatory functions of the SCC as exempt from FOIA, but that the language was a little vague. Delegate Surovell went on to note that the SCC is incredibly powerful and should be subject to as much sunshine as possible, that various news media had run editorials in support of his bill, and that he had received no emails in opposition. Finally, he stated that contrary to the Supreme Court's

⁴ **HB 2125 (Keam) - Virginia Freedom of Information Act; requests for records.** Provides that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth. The bill also allows a public body to require prepayment before providing requested records when the cost for production of the records is likely to exceed \$100.

HB 2321 (Surovell) - Virginia Freedom of Information Act; application to the State Corporation Commission. Makes the State Corporation Commission (SCC) subject to the Freedom of Information Act (FOIA) and designates venue for FOIA petitions against the SCC. The bill reverses a case holding that the Freedom of Information Act is not applicable to the SCC (*Christian v. State Corporation Commission*, November 2011).

SB 1371 (Stuart) - Virginia Freedom of Information Act; repetitive requests; remedies. Allows a public body to petition the appropriate court for additional time to respond to a request for records when the request is one of a series of requests by the same requester and a response by the public body within the time required by FOIA will prevent the public body from meeting its operational responsibilities. The bill also authorizes a court, in any action to enforce the provisions of FOIA, to decline to order production of the requested records if the evidence shows that the frequency or volume of the record requests made by the petitioner (i) constitutes an unreasonable burden on the resources of the public body, (ii) will prevent the public body from meeting its operational responsibilities, or (iii) has been made to evade the payment of any charges assessed in accordance with FOIA. The bill contains technical amendments.

decision, he did not believe that the General Assembly had ever intended that the SCC would not be subject to FOIA.

Delegate LeMunyon indicated that HB 2321 was the kind of bill he would like to vote for, but was unsure if the language of the draft was clear enough. Senator Stuart indicated he shared the same concerns over whether the draft language was too vague as to "regulatory activities." Mr. Ashby raised the issue of differentiating based on the function being performed (such as judicial, regulatory, or administrative functions) rather than subject matter. He further asked what would be available if the SCC was subject to FOIA that is not available now. Delegate Surovell stated that the SCC would tell you they provide all they can even if they do not have to, but it is difficult to prove a negative, to know what's missing without already knowing. The Council and Delegate Surovell also discussed whether other statutes would need to be amended and whether there would be a retroactive effect were the SCC made subject to FOIA.

Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), observed that under FOIA, everything is open unless exempt, which allows citizens to decide what is important to disclose. She further stated that many other states subject their agencies which are equivalent to the SCC to their access laws. A citizen⁵ stated that she was shocked to read about the SCC, that the SCC does not separate legislative, executive, and judicial activities, and also that the SCC's stated goals including balancing business interests, but as a state agency it should serve the public interest, not business interests.

Scott White, on behalf of the SCC, stated that while the SCC appreciates and shares Delegate Surovell's concerns regarding transparency in government, the SCC does not support placing the SCC under FOIA. Instead, the SCC supports continuing to use the existing scheme providing separate access laws for the SCC. He noted that the existing scheme had worked well for years and continued to do so. He further observed that the SCC is not like the agencies in other states due to the SCC's judicial function. He suggested that additional laws could be added outside of FOIA as needed to cover any records not already covered.

David Ogburn, speaking on behalf of Verizon, and Brent Archer, speaking on behalf of natural gas utilities, both expressed concern that the language concerning "regulatory activities" of the SCC was too vague and could have unintended consequences. A representative of the Sierra Club spoke in support for Delegate Surovell's proposal, stating that as general policy all government bodies should be accountable to the people, and that there should be greater oversight of the SCC. After further discussion by the members of the Council and the patron, the Council voted to indicate its support for the concept of Delegate Surovell's bill, but to have staff and interested parties meet again to try to improve the draft language due to concerns that it was too vague as written.⁶

⁵ The citizen's first name was Marie and last name began with "St," but staff is unsure of the proper spelling.

⁶ The vote was unanimous, except for an abstention by Mr. Schliessmann, who stated for the record that the Office of the Attorney General took no position on the bill.

Delegate Peace - Definition of "meeting"

Delegate Peace stated that he brought forth a proposal on behalf of Hanover County concerning the definition of "meeting" under FOIA. Currently, the law provides that a meeting occurs when three or more members of a public body gather.⁷ The proposal from Hanover was to change that language to a quorum instead of three. Delegate Peace indicated that the initial proposal was for legislation, but he suggested asking the Council first to study the issue instead. He noted the current practice often involves members meeting two at a time, which is not a "meeting" subject to FOIA. He also observed that the proposal raises issues of transparency and accountability versus efficiency and consistency with other states' laws. Questions and discussion among the Council and Delegate Peace elucidated that the new rule would be a quorum (simple majority), rather than three, which in the case of large public bodies could allow far more than three members to meet at once, for example, six members out of a ten-member body, and even more for boards of visitors and some regional bodies. Delegate Peace indicated his understanding was that the proposal was intended to apply to local bodies such as boards of supervisors, and that he could see both sides of the issue.

Sterling Rives, Hanover County Attorney, said that the request was for the FOIA Council to study the issue. He confirmed that the proposal would change the definition of "meeting" for all public bodies to apply to a quorum, which would match current rules for the General Assembly and be more in keeping with rules in other states. He suggested it would be advantageous for "brainstorming" sessions, particularly because members may be reluctant to speak frankly in front of the press. Senator Stuart questioned whether they felt it was necessary to do so privately, noting that this proposal would allow more members to meet out of public view. Mr. Rives agreed, stating that it was not different from other professionals, or meetings with the General Assembly, citizen groups, or business groups. After some further discussion, Senator Stuart asked whether there was any motion on the matter. There being none, the Council did not take any action on this issue.

Welcome to Delegate LeMunyon & Election of Vice Chair

Having rearranged the suggested agenda, Senator Stuart took this time to welcome Delegate LeMunyon to the Council. Delegate LeMunyon introduced himself, stating that he represented western Fairfax and Loudoun, and serves on the FOIA Subcommittee of the House General Laws Committee. Senator Stuart then opened nominations for Vice

⁷ The term "meeting" is defined in § 2.2-3701 to mean "the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or 2.2-3708.1, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body."

Chair of the Council. Delegate LeMunyon was nominated and unanimously elected Vice Chair.

Public Comment

Senator Stuart opened the floor to public comment. Ginger Stanley of the Virginia Press Association (VPA) expressed her appreciation for the work of Maria Everett and the Council in putting on the annual FOIA "road show" seminars, stating that the VPA was honored to continue as a co-sponsor. She also stated she was pleased that the Council expressed support for Delegate Surovell's proposal; she continued that she did not believe the bill would work as written, but she appreciated the opportunity to continue to work on it.

Ms. Rhyne stated that she had left a handout regarding a college internship in the name of the late Delegate "Chip" Woodrum, the first Chair of the FOIA Council, which would allow a recipient to learn about and participate in the legislative process.⁸

Future Meetings

The Council is scheduled to meet at 1:30PM on Thursday, December 5, 2013 in House Room C of the General Assembly Building. There being no further business, the meeting was adjourned.

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⁸ More information is available on VCOG's website at <http://www.opengovva.org/chip-internship>.