

Virginia Freedom of Information Advisory Council
Meeting Summary
September 13, 2010
1:30 PM
House Room C, General Assembly Building
Richmond, Virginia

The FOIA Council held its second meeting of 2010.¹ The meeting was held to hear subcommittee reports, to vote on subcommittee recommendations, and to begin the annual legislative preview.

Subcommittee Reports

Rights and Remedies Subcommittee

Staff reported that the Rights and Remedies Subcommittee met on August 30, 2010 to continue its deliberations. The subcommittee first discussed HB 449 (Ware), which would have provided a remedy for public bodies to use against requesters who use FOIA as a tool for harassment. The subcommittee was sensitive to the issue, recognizing that it was infrequent but does happen, that requesters sometimes may use FOIA with the intent to slow down government. The subcommittee looked at what other states have done, and also is considering other novel approaches, such as the charges provisions added in 2002 to address similar issues. The subcommittee will continue its deliberations on this matter at its next meeting.

The next bill addressed was HB 641 (Armstrong), which would have granted FOIA access rights to all United States citizens. The subcommittee recommended no action be taken on this matter at this time. The subcommittee was made aware that Virginia is one of six states with citizenship limitations on access, that there was a federal case in the 3rd Circuit² that found a citizens-only FOIA limitation to be unconstitutional, and that a similar case is currently on remand to the federal District Court for the Eastern District of Virginia. The subcommittee recommended no action while waiting for the federal court decision, and that staff continue to provide advice to work with out-of-state requesters to provide records, including advice on prepayment and supplying records in a reasonable time, rather than letting the requesters' status as a citizen (or not) control.

The last bills to be considered were HB 976 (Anderson) and SB 147 (Puller), identical bills regarding the provision of notice of the filing of a petition for mandamus or injunction. The subcommittee voted unanimously (5-0) to recommend a draft to the FOIA Council that revises the current language to specify that the defendant must

¹ The following members were present: Senator Houck, Delegate Griffith, Fifer, Gregory, Jones, Landon, Selph, Spencer, Treadway, Whitehurst, and Wiley. Mr. Miller was absent.

² That case would be persuasive but not controlling, as Virginia is in the 4th federal Circuit, not the 3rd.

receive a copy of the FOIA petition three working days before the petition is filed. Delegate Anderson and Senator Puller have both indicated they would be willing to carry the bill in the 2011 Session.

Finally, regarding the suggestion to provide FOIA training to legislative agencies, Senator Houck reported that leadership in the House and Senate, as well as both Clerks' offices, was receptive to the idea. Staff will work on logistics and contacting legislative commission and agency heads, as well as continuing to work on related issues.

Criminal Investigative Records Subcommittee

Chairman Fifer reported that the Criminal Investigative Records Subcommittee met on August 19, 2010 to consider SB 711 (Edwards), which would have provided greater access to criminal investigative files after criminal cases were closed. There was a great deal of interest in the subcommittee's work, with over 50 people attending, including many sheriffs, police chiefs and officers, and Commonwealth's Attorneys. The subcommittee found it difficult to reach any agreement on any wholesale change in policy, but instead looked for common ground. An idea was proposed to put in a mechanism for a requester to go to court to get records if he could demonstrate harm that would occur if the records were not released. The subcommittee will consider draft language at its next meeting, after which it may have a recommendation for the full FOIA Council to consider.

Action on Subcommittee Recommendation

The Rights and Remedies Subcommittee recommended draft language to address the notice requirements for filing a petition for mandamus or injunction, as stated above. Staff presented the draft bill. Jim Council spoke on behalf of Prince William County Schools (PWCS), who had requested the original bills under consideration. He indicated that he had spoken with the patrons, Delegate Anderson and Senator Puller, and the School Board of PWCS, and all were in favor of the new draft. Senator Houck stated that the bill has been before the legislature for two years now, that a compromise could not be reached previously during the rush of the General Assembly Session, and that he hoped that those involved would resist any temptation to tinker with the bill in the future, as it might unravel all the good work done so far. Roger Wiley suggested two technical amendments to the draft to clarify the language without changing its substance. The amendments were adopted by unanimous voice vote. The FOIA Council then voted to recommend the draft, as amended, to the 2011 Session of the General Assembly, also by unanimous voice vote.

Annual Legislative Preview

Mr. Fifer reminded the FOIA Council that he hoped to have a draft bill from the Criminal Investigative Records Subcommittee after its next meeting. Delegate

Griffith asked that anyone who knew of any upcoming FOIA bills let staff know so that the FOIA Council might be able to have a subcommittee address it before the upcoming 2011 Session, as otherwise it might just get referred to the FOIA Council by the General Assembly and thus delayed for a year.

James Conrad, a former law enforcement officer, suggested that law enforcement officers be able to get the results of their own background investigations. Currently such records are exempt from disclosure generally, and there are no special provisions for the subject of the record to be granted access. This is in contrast to the general exemption for personnel records, which allows records to be withheld from third parties but affirmatively grants access to the subject of the records. Mr. Conrad noted that as it is, there is nothing stopping someone from lying to background investigators or defaming an applicant for law enforcement agency employment. He suggested a mechanism was needed to ensure the agency at least verifies that background information it receives is truthful. The FOIA Council took no action on this matter.

Other Business

Senator Houck spoke about efforts to provide FOIA education to the legislative branch, and his concerns regarding access to committees of conference, particularly the budget committees. He noted that while the judicial and executive branches have plenty of opportunities for private deliberations, the legislative branch does not. He stated that the goal was not leave people out of the process; but that the demands of time and frank conversation lead to "cat and mouse" games among budget conferences and the public. Senator Houck suggested that a way be explored to maintain the integrity of the process while giving relief to budget conferees in certain limited instances.

Mr. Fifer commented that the utility of private meetings must be balanced with the public's right to know, and the legislative branch ultimately has the same types of limitations as the others, and that votes must still be taken in public. He further noted that just as with the executive and judicial branches, legislative staff meetings are not subject to FOIA, and that legislators may use the working papers and correspondence exemption. Mr. Wiley stated that from a local government perspective, people are very interested in the work of budget conferees and want to see everything that goes on. However, he felt the greater public interest is in having a good budget, and there comes a point in the process where the inability to hold private discussions inhibits the ability to pass a budget. He suggested there should be a limited exemption for budget conferences only, not for other committees of conference. He also noted that at the local level, the process is very different because the budget process typically is handled over four to eight weeks, whereas the budget conferees have only a few days to complete their work. Mr. Landon noted that the General Assembly has come a long way toward openness, and that making the committees of conference open and subject to FOIA was part of a political compromise in exchange for allowing political party caucus meetings not to be

subject to FOIA. He further suggested looking to other states and the use of technology to help with timely access. Mr. Jones commented that the public is more interested than ever in frank exchanges between legislators, and in the legislative process itself rather than just the end results.

Senator Houck said he wants the dialogue and conversation on this matter to continue. Noting that he was the author of the compromise Mr. Landon mentioned, he indicated that he was less mindful of the dynamics at that time, particularly in regard to budget conferences. He noted that other conference committees appear to routinely violate these provisions without any intent to mislead or obstruct the public's right to know, but just because of how conference business is conducted by informal meetings and agreements. Noting the gravity of the budget conference committee's work and the burdens of the aforementioned compromise, Senator Houck suggested moving on to the next agenda item.

Public Comment

Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), stated that VCOG would hold its annual conference October 21-22, 2010, in House Room 3 of the Capitol, Richmond, Virginia.

Ginger Stanley, Executive Director of the Virginia Press Association (VPA), spoke in regard to the issue of access to budget conference committee meetings. She noted it was unusual to rush to change the law, and suggested considering the whole process, not just budget conferences, but the also the compromise made previously to including committees of conference under FOIA while excluding political party caucuses. She also handed out new copies of the Reporters' Guide to FOIA published by VPA.

Adjournment

There being no further public comment or other business, the meeting was adjourned. The next meeting of the FOIA Council will be held November 9, 2010.

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