

FOIA Council Meeting Summary
September 19, 2016
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 the 2016 Interim on September 19, 2016.¹ This meeting was held to review draft legislation recommended by the Records Subcommittee and the Meetings Subcommittee, which subcommittees were created in 2014 as part of the study of FOIA in accordance with House Joint Resolution No. 96, to receive progress reports from the Subcommittees, to consider bills referred by the 2016 Session of the General Assembly to the Council for further study, and to discuss other issues of interest to the Council. The Council also welcomed its newest members William "Billy" Coleburn, Editor of the Courier Record in Blackstone, appointed by the Senate Committee on Rules for a term of four-years, and Michael Stern, Esq., citizen member appointed by the Speaker of the House of Delegates for a term of four-years.

Review of Bills Referred by the 2016 Session of the General Assembly

Chairman LeMunyon told the Council that Delegate Pogge was unable to attend the meeting as she had previously planned and so review of Delegate Pogge's HB 334 and HB 336² would be deferred until the next Council meeting. Additionally, Delegate Villanueva (HB 432) and Senator Garrett (SB 678) were unable to attend this meeting, therefore consideration of their bills was also deferred until the October 17, 2016 meeting.

Delegate Morris, patron of HB 61 (2016) attended the meeting and advised the Council that his bill was in response to public bodies deliberately failing to respond to any citizen requests for records under FOIA. He noted that this bill has been introduced in the last two Sessions and what he offered today is a far cry from the Class 1 misdemeanor penalty for willful and knowing violations of FOIA from previous years. He stated that the current form of his bill did not require mandatory termination of public officers or employees for willful and knowing violations, but is permissive. Chairman LeMunyon arrayed the Council's

¹ Council members Delegate LeMunyon (Chair), Treadway, Dooley, King-Casey, Porto, Vucci, Coleburn, and Stern were present; members Senator Stuart (Vice Chair), Hamlett, and Jones were absent.

² **HB 334** Pogge--Bill Summary: Provides that in an enforcement action, if the court finds the public body violated certain meeting notice requirements, the court may invalidate any action of the public body taken at such meeting.

HB336 Pogge--Bill Summary: Protects from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years. The bill provides that access shall not be denied to the parent, including a noncustodial parent, or guardian of such person, unless the parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For records of persons under the age of 18 years who are emancipated, the right of access may be asserted by the subject thereof. Any parent or emancipated person under the age of 18 years who is the subject of the record may waive, in writing, the protections afforded by the bill. If the protections are so waived, the public body shall open such records for inspection and copying.

options as it related to Delegate Morris's bill. Namely, the Council could (i) recommend HB 61 to the 2017 Session of the General Assembly, (ii) take no action, or (iii) decide not to recommend the bill as presented by Delegate Morris. Delegate LeMunyon asked staff to do additional research about the termination of public officers and employees given due process rights. The Council deferred further action on HB 61 until its October 17, 2016 meeting.

Before addressing SB 492, Senator Surovell discussed with the Council his legislative proposal aimed at alleged abuses of public bodies using closed meetings. Senator Surovell specifically mentioned the Prince William Board of Visitors voting to raise their salaries across the board, following discussion of the matter improperly in a closed meeting. He noted that three months ago the city council of Fairfax discussed in a closed meeting the issue of when to hold general elections. He also mentioned the board of visitors at the University of Virginia held a closed meeting about the consolidation of certain reserve funds for which the stated purpose of the closed meeting motion was personnel and regulatory matters. Senator Surovell stated that his proposal would authorize a judge in a FOIA case to impose a \$500 monetary penalty against each member of a public body who certified that a closed meeting was proper when in fact the member knew that the closed meeting was held in violation of FOIA. He noted that bad publicity alone does not work to curtail these FOIA abuses. The Council noted that this proposal needed some further work and asked staff to prepare a new draft addressing certain technical fixes to be considered at the next meeting of the Council in October.

Turning to SB 492³, Senator Surovell told the Council that family members of victims are routinely denied access to completed unattended death investigations and cited the case in Virginia Beach where the parents was denied access to records concerning the death of their son by suicide. He noted that when the parents filed a FOIA petition, the Virginia Beach Circuit Court ruled in favor of the City and that the Virginia Supreme Court denied the writ for further review. Senator Surovell indicated that he was trying to get closure for the families in instances like this. The Chairman called for public comment. Dan Wilson, Department of State Police, told the Council that the bill does not say that a crime has been committed. Dave Ress, Daily Press, commented that the Virginia Beach police never release any information and described this as a fundamental problem with FOIA in that discretionary exemptions are treated as mandatory. Megan Rhyne, Virginia Coalition for Open Government, told the Council that her organization had filed an amicus brief in the case and therefore is in favor of SB 492. Council member Kathleen Dooley suggested that the bill be amended to define "immediate family." The Council deferred further consideration on SB 492 until its next meeting in October.

HJR No. 96 Study Subcommittee Reports

The Meetings Subcommittee has held five meetings in the 2016 Interim (April 11, May 4, June 6, July 18, and August 11, 2016) to continue its study of meetings law under FOIA

³ SB 492 Summary: Limits the application of the criminal investigative file exemption by providing that nothing in FOIA shall be construed to authorize the withholding of information from the records of completed unattended death investigations from immediate family members of the victim, provided that (i) such information is in a form that does not reveal the identity of persons supplying information or other individuals involved in the investigation and (ii) the immediate family members of the victim have been ruled out as suspects.

and the general provisions of FOIA. The Meetings Subcommittee has finished its study of meeting exemptions, meeting procedural matters and electronic meetings, and has moved on to consider more general issues no longer limited to meetings issues, such as definitions, general provisions in order to complete the HJR 96 study.

The Records Subcommittee has held seven meetings so far in the 2016 Interim (April 11, May 9, June 1, June 23, July 20, August 18, and September 8, 2016), to continue its study of records exemptions as directed by HJR No. 96. To date, the Subcommittee has considered all of the records exemptions in FOIA, the definition of public records, and the procedure for making and responding to a request for public records. Additionally, the Council had asked the Subcommittee to consider four bills from the 2016 Session of the General Assembly offered by Delegate Robert G. Marshall that concern nondisclosure agreements and access to certain site plans.⁴ The background to these bills concerned a site being built in Prince William County and the County's denial of certain records related to the site. Delegate Marshall, representatives of Prince William County, and other interested parties spoke to the bills before the Subcommittee. After consideration, the Subcommittee referred the bills back to the Council without making any recommendation for action. The Council deferred consideration of the bills until its meeting on October 17, 2016 because Delegate Marshall was unable to attend today's meeting. At previous meetings the Auditor of Public Accounts, Office of the State Inspector General, and Joint Legislative Audit and Review Commission had discussed removing themselves from a current administrative investigation exemption⁵ and creating a new exemption that better reflects the work of these agencies. They plan to present a draft to the Subcommittee at its next meeting. The Subcommittee also had two workgroups meet separately to examine issues related to (1) proprietary records and trade secrets, and (2) personnel records, respectively. The proprietary records work group met four times in 2015 and once in 2016, but was unable to reach consensus and so recommend that the issues raised be studied further. The Subcommittee adopted this recommendation and in turn recommended that the Council take no action regarding proprietary records and trade secrets this year, but continue its work in this area next year, particularly in regard to drafting a general exemption for trade secrets. The personnel

⁴ **HB 280** Marshall RG-- any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under the Virginia Freedom of Information Act. *NOTE: HB 280 would amend § 15.2-2259.*

HB 281 Marshall, RG--Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of the Freedom of Information Act (FOIA) that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body. *NOTE: HB 281 would amend § 2.2-3705.6.*

HB 282 Marshal, RG--Requires that a nondisclosure agreement by a public body be approved at an open meeting if it is to serve as the basis for an exclusion from the provisions of the Freedom of Information Act (FOIA) of confidential proprietary records of a private business. Such an approval must be renewed at least every three months at further open meetings if it is to continue to supply the basis for the FOIA exclusion. *NOTE: HB 282 would amend §§ 2.2-3705.6 and 2.2-3711.*

HB 383 Marshall, RG--Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of the Freedom of Information Act (FOIA) that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body and provides that any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA. *NOTE: HB 383 would amend §§ 2.2-3705.6 and 15.2-2259.*

⁵ Subdivision 3 of § 2.2-3705.3.

records work group met three times this year to consider amendments to the personnel records exemption, particularly the possibility of defining what are "personnel records," but was unable to reach consensus to move forward this year. Other pending matters include further consideration of access to criminal investigative files, the procedure for making and responding to a records request, and possible unintended consequences from the "global language change" enacted this year with HB 817/SB 494 (certain exemptions had phrasing stating that "nothing ... shall prohibit" disclosure or release of certain records, which was amended to require release of those records). The Subcommittee plans to meet again on September 29, 2016 to complete its work.

Other Business

The Council next reviewed the draft consolidating certain public safety FOIA exemptions into one exclusion (LD 17100035). This draft was referred from the Records Subcommittee without recommendation. Staff advised that despite several attempts to get comment from the Secretariat of Public Safety and Homeland Security on whether this consolidation draft correctly reflected current law and made no substantive changes, this specific question has not been answered. Instead, the response that has been made is that the FOIA exclusion for cybersecurity, critical infrastructure and other records related to terrorism planning and response was in need of revision. Given the length of the draft, the Council decided to defer consideration of the draft until Council members had more time to review the draft and material prepared by staff to assist in understanding why the consolidation had been proposed. The Council also deferred consideration of the working papers draft recommended previously by Records Subcommittee (LD 17100581), as well as the proprietary records and trade secrets draft proposed by the Virginia Press Association.

Review of Subcommittee Recommendations

Maria J.K. Everett, Executive Director of the Council, reviewed the draft legislation that has been recommended to date by both Subcommittees. As a reminder, the Council has previously indicated that rather than introduce individual legislative recommendations as separate bills while the HJR No. 96 study is ongoing, the Council prefers to introduce omnibus legislation at the conclusion of the study. As this is the third and final year of the study, the Council will hear the Subcommittee recommendations throughout this year in an ongoing fashion in order to incorporate those recommendations into the omnibus legislation as the study progresses, rather than trying to consider all of the Subcommittee recommendations at once in a single meeting at the end of the year.

Records Subcommittee Recommendations

Staff presented to the Council the proposed amendments recommended by the Records Subcommittee to date. Specifically, the Council reviewed:

- **Personal information of beneficiaries and certain other individuals; Virginia College Savings Plan.** Exempts from mandatory disclosure personal information provided to the Board of the Virginia College Savings Plan or its employees related to (i) qualified beneficiaries, (ii) designated survivors, or (iii) authorized individuals. The bill defines these terms. (LD 0033).

- **Department of Health Professions and certain social services records.** Consolidates the various record exclusions for the Department of Health Professions into one exclusion. The bill also consolidates the record exclusions for certain social service records into one exclusion. The bill contains several technical amendments as either cross reference changes or deletion of obsolete exclusions. (LD 17100067D).

Following review of the above drafts, the Council voted unanimously to recommend them to the 2017 Session of the General Assembly as part of the omnibus study draft(s) that will be recommended by the Council by a vote of 8 to 0.

Meetings Subcommittee Recommendations

Staff presented to the Council the proposed amendments recommended by the Meetings Subcommittee to date. Specifically, the Council reviewed:

- **Open meeting exemptions; providing context for those meeting exemptions that cross-reference corollary records exemptions ("Context Draft").** Makes technical corrections to several meeting exemptions to provide context for those meeting exemptions that cross-reference corollary records exemptions. (LD 17100049D)
- **Electronic communication meetings; remote participation by electronic communication means by members of public bodies.** Clarifies the notice requirement for special, emergency, or continued meetings held as electronic meetings. The bill removes the requirement that the annual report for public bodies holding electronic communication meetings be sent to the Joint Commission on Technology and Science. The bill also removes the term "emergency" as a condition of a member's remote participation in a meeting of the public body, as that term is included in the current use of the term "personal matters." (LD 1710176D)

All of the above Meetings Subcommittee recommendations were approved by the Council unanimously by a vote of 8 to 0.

Public Comment

Bill Richardson, Virginia Cure, told the Council that he was a member of the Governor's Parole Review Task Force in 2015, which made certain recommendations. He stated that he supports modification of the Parole Board's FOIA exemption. Mr. Richardson stated that he did not want information on specific cases, but more transparency in the process undertaken by the Parole Board. He suggested the total elimination of the total FOIA exemption for the Parole Board found in § 2.2-3703 and was in favor of making the Parole Board subject to FOIA for records only and granting exclusions from release for specific case file records of the Parole Board. Alternatively, he supported HB 397 (Delegate Hope) from the 2012 Session.⁶ Chairman LeMunyon suggested that if Mr. Richardson wanted a

⁶ HB 397 Summary: Requires guidance documents of the Parole Board to be available as public records under the Freedom of Information Act. The bill has a delayed effective date to give the Freedom of Information Advisory Council an opportunity to review the legislation and report on its implementation.

recommendation from the Council, he should talk with Delegate Hope about his preferred approach and bring the issue back to the Council at its October meeting.

Dave Ress, Daily Press, advised the Council that much progress had been made in addressing FOIA concerns during the course of the HJR 96 study, but that several issues remain. Namely, access to criminal investigative records, the scope of the working papers exclusion, and the scope of the personnel records exclusion. Mr. Ress indicated that all of the above issues were resolvable with a bit more work.

Cindy Wilkinson, VRS, told the Council that VRS had submitted written comment on the HJR 96 study overall. Ms. Wilkinson indicated that VRS still had concerns regarding ensuring that investment information remained protected records, interpretation of the personnel records exclusion, and the protection of proprietary records and trade secrets.

The last item of business discussed by the Council was raised by staff and concerned how Council members would like to be notified of formal advisory opinions issued by the executive director. In the past, Council members referred to the Council's website to read these opinions. Given that two members had been recently appointed to the Council, staff inquired whether Council members would like an email advising them of the posting of an opinion or would prefer a copy of the opinion itself. Council members Mark Vucci, Sandra Treadway, Michael Stern, and Billy Coleburn indicated that they would prefer an email notifying them that a new opinion had been posted. The remainder of the Council elected to continue their practice of checking the Council's website periodically.

Future Meetings

Delegate LeMunyon asked if there was any other business or additional public comment. There was none. The next meeting of the Council is scheduled its meetings for Monday, November 21, 2016 at 1:30 p.m. in Richmond, Virginia.

There being no further business, the meeting was adjourned.

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