

Virginia Freedom of Information Advisory Council
Meeting Summary
Monday, September 21, 2009
11:00 AM
Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its third meeting of the 2009 interim on July 13, 2009.¹ The purpose of this meeting was to receive subcommittee reports and hear about possible FOIA legislation.

Subcommittee Reports

Personal Identifying Information Subcommittee

Senator Houck advised the Council that the Personal Identifying Information Subcommittee (PII Subcommittee) had met briefly at 9:30 a.m. before the Council meeting. Unfortunately, the PII Subcommittee lacked a quorum for this meeting and by consensus of those members in attendance decided to hold another subcommittee meeting if needed or specifically requested by patrons of bills being studied by the subcommittee on November 9, 2009. Delegate Griffith announced, however, that the redraft of SB 880 prepared by staff should be reviewed by the Council at today's meeting.

Staff presented the redraft it had prepared for SB 880 (Senator Stuart), which provides that the name, address, telephone number, email address, and credit card or bank account data; of individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department shall be exempt from disclosure FOIA, provided that such individuals have requested that the Department not disclose such information.

Council member Fifer inquired whether there was any general law the protected credit card or other bank card information. Staff responded in the negative. Mr. Fifer asked whether licensee information should be open, save the bank card information, and further inquired whether the Council was now predisposed to keep licensee information away from the public. The consensus of the Council was that it was not predisposed to protect certain licensee information. Delegate Griffith stated that credit card and bank card information, and perhaps a licensee's email address should be protected. The Council by consensus that there should be a general exemption to protect credit card and bank card information; however, it is important that the public know who the licensed people are. The Council asked for public comment on this issue.

Craig Merritt, representing the Virginia Press Association (VPA) expressed that there is a legitimate need to protect people from identity theft and agrees that credit card and bank card information should be protected. However, he noted that the remainder of the information is already in the public domain via the telephone book, internet search engines and the like.

¹ Delegate Griffith, Senator Houck, and Messrs. Axselle, Fifer, Landon, Malveaux, Miller, and Whitehurst were present. Council members Spencer, Treadway, Wiley, and Selph were absent.

Chris White, representing Reed Elsevier (parent company of Lexis-Nexis), advised the Council that there were legitimate uses for licensee information. For example, in the context of child support enforcement, licensee information (i.e. who has a registered boat) is helpful to track "deadbeat dads" who may be hiding assets.

Other members of the Council felt that while name and address information should be public, telephone numbers and email addresses should be protected. As a result of the discussion, Delegate Griffith directed staff to again redraft the bill in two ways--first to protect credit card and bank card information and the second version also to include protection for telephone numbers and email addresses. He indicated that the PII Subcommittee would meet again on Friday, November 6, 2009 at 10 a.m. to review these drafts. He asked staff to post the drafts by November 2, 2009.

Public Records Subcommittee

Staff reported that it was working on publication of a guidance document that would clarify what is covered under the definition of "public records" found in FOIA and give specific examples of those records.

Public Comment

Rob Lockridge for the University of Virginia (UVA) reported to the Council that it would be seeking an exemption in FOIA for the findings of threat assessment teams created under chapter 450 of the 2008 Acts of Assembly. Chapter 450 requires public institutions of higher education to implement a crisis and emergency management plan to prevent violence on campus, including assessment and intervention with individuals whose behavior poses a threat to the safety of the campus community. Delegate Griffith inquired whether as a parent he should know about the assessments. He questioned whether there was a difference between an individual who may be behaving badly as a result of alcohol and someone who is truly a threat.

Jim Council for the Prince William County Public Schools and Mary McGowan, Counsel to Prince William County Public Schools told the Council that they had two legislative initiatives. First, to address the serious unintended consequences from SB 1505 (2009) that attempted to clarify that enforcement actions under FOIA take precedence over other general provisions of law relating to writs of mandamus or injunction. Mr. Council and Ms. McGowan indicated that the changed language could be abused by a plaintiff who would only notice a public body of a petition on the day the petition was to be heard by the court, depriving the public body of any opportunity to prepare. By consensus, the Council agreed that this matter should be an agenda item for its meeting on November 9, 2009.

The second issue presented by Mr. Council and Ms. McGowan involved an exemption for the visitor surveillance system recently implemented in the Prince William County Public Schools, which was the subject of a Council opinion in 2008 (AO-03-08). That opinion held that to withhold any of the requested records relating to the visitor surveillance system from disclosure, whether the records are exempt portions of a school safety audits or may be withheld under other FOIA exemptions, the School must respond in writing, identify with

reasonable particularity the volume and subject matter of the withheld records, and cite the specific statutory exemption or exemptions that allow the records to be withheld. Ms. McGowan indicated that this was a case where technology was ahead of the law. In brief, visitors are required to present government-issued identification, then the system scans the identification and performs a multi-state background check against various databases. Information retained in the systems is routinely shared with local law-enforcement. Mr. Council indicated that essentially the system was a background check for sex offenders and other individuals who may pose a threat to children, and is also useful for locating visitors in the case of any emergency.

Council member Axelle inquired whether persons attending a school play were subject to the visitor surveillance system, to which Ms. McGowan replied in the affirmative. In response to another question from Mr. Axelle concerning visiting teams and the visitor surveillance system, Ms. McGowan advised that she was not sure whether the system was in use for evening events. Mr. Fifer stated that with the suggested amendment, that FERPA was being trumped by FOIA. Ms. McGowan answered that this is the intent. She indicated that to print out the records and redact as allowed by law was a huge and time consuming undertaking. Mr. Fifer asked whether there is any legal requirement for the retention of background checks. Ms. McGowan responded that retention is a practice of the school system and it has been useful in litigation with parents. She indicated that notice of the retention of these records is posted on the wall in the schools near the scanning equipment. Mr. Fifer continued that he agrees with them as it relates to school safety, but stated that there may be legitimate reasons for the public to get some of this information, such as parents finding out about who has access to their children during school. Mr. Whitehurst stated that he felt the system was over kill in the name of school safety. He did not savor the idea of having his driver's license scanned every time he picks up his kids at school. He noted that in Spotsylvania County, he is given a pass after he shows his identification. He opined that the Prince William School System put the cart before the horse in that it purchased the system first and thought about FOIA and the school system's obligation for openness later. He noted that the system is required by § 2.2-1111 of the Code of Virginia to work in a way that comports with FOIA. Delegate Griffith inquired whether teachers and staff are in the system. Ms. McGowan replied that they are not; however the principals have a schedule of school personnel. She stated that the system allows visitors to the schools to be known to law-enforcement just in case. Senator Houck requested more information about the criteria to segregate visitors or to deny entry into the schools. Senator Houck questioned what happens when a student is born to undocumented parents. Ms. McGowan responded that if parent cannot produce documentation, they are not denied entry, but escorted while they are there. Mr. Landon urged Prince William County Schools to explore with private vendors ways to redact sensitive information related to school safety. Mr. Landon asked if the school system was collecting more information than before. Ms. McGowan answered in the affirmative and indicated that the system records date of birth, photograph, and status as a criminal to name a few. Mr. Council indicated that it is feasible to separate information in the system to distinguish between open public records and other sensitive information. Mr. Fifer agreed with Mr. Whitehurst that the problem was not in the law, but in Prince William County Schools using technology first before acknowledging their FOIA responsibilities. He suggested that a workgroup to examine this issue may be

helpful. Mr. Whitehurst stated that too much information is being collected which should not have been collected in the first place. He averred that Prince William County Schools did not think first and now the Council has to address the issue after the "milk is spilled" to fix their problem.

As a result of the lengthy discussion and concerns, Delegate Griffith requested that the Public Records Subcommittee chaired by Mr. Fifer study this issue.² Mr. Axselle requested that the subcommittee identify what information is collected and then address what should be available and what should not. Delegate Griffith expressed his concern about the speed with which the system runs its checks and the resulting misidentification that can take place. He stated that it is generally held that the faster the processing of information the greater the likelihood of misidentification. He noted that implementation of this system certainly would have a chilling effect on people participating with the school system, especially someone with an old criminal conviction of which he has not told people (perhaps not even to a spouse). With this system, this would be known. The subcommittee was directed to study these issues and report back to the Council with a recommendation.

Of Note:

Staff reported that the 2009 statewide FOIA Workshops had been scheduled as follows:

- o Monday, September 14, 2009 - Richmond, VA
- o Monday, September 28, 2009 - Staunton, VA
- o Tuesday, September 29, 2009 - Abingdon, VA
- o Tuesday, October 6, 2009 - Suffolk, VA
- o Tuesday, October 27, 2009 - Manassas, VA
- o Monday, November 2, 2009 - Richmond, VA

Megan Rhyne for the Virginia Coalition for Open Government advised the Council of the upcoming VCOG conference in Staunton on October 15 and 16, 2009.

Future meetings

The next meeting of the FOIA Council is scheduled to be held at 3:00 p.m. on Monday, November 9, 2009 for the Council's annual legislative preview. The meeting will be held in House Room D of the General Assembly Building.

The Honorable H. Morgan Griffith, Chair
Maria J.K. Everett, Executive Director

² The Public Records Subcommittee is comprised of Messrs. Fifer, Malveaux, and Selph.