

## **Virginia Freedom of Information Advisory Council**

**October 6, 2008**

**1:00 PM**

**House Room D**

**General Assembly Building**

**Richmond, Virginia**

The Freedom of Information Advisory Council (the Council) held its fourth meeting of 2008.<sup>1</sup> The purpose of the meeting was to hold Part I of the Council's annual legislative preview and to receive reports from subcommittees. Part II of the annual legislative preview will be held at the next meeting of the Council on December 1, 2008.

### ***Legislative Preview (Part I)***

The Council heard from Gary McLaren of the Virginia Economic Development Authority (VEDP) concerning expansion of the current record exemption found at subdivision 3 of § 2.2-3705.6. Mr. McLaren stated that the current exemption arguably does not cover government efforts to retain Virginia businesses. He advised that VEDP is working on a statewide business retention database called "Executive Pulse," which is a collection of information from local economic development agencies across Virginia indicating what is of interest and/or concern to businesses. Many local economic development agencies are reluctant to contribute to the statewide database because of concern that such records are not adequately protected from public disclosure. Mr. McLaren indicated that VEDP has been working with the Virginia Press Association (VPA) and the Virginia Coalition for Open Government (VCOG) to craft an exemption that would address the above-stated concerns. In response to draft language offered by VEDP, VPA made a counter proposal that does not protect business retention data, but instead rewrites the current exemption in a manner patterned after subdivision 11 of § 2.2-3705.6 for confidential proprietary records submitted under the provisions of the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.).

Craig Merritt, representing VPA, distributed VPA's counter proposal to the Council. He stated that generally VPA sought the orderly development of the current exemption and noted that more recent exemptions to FOIA are limited as to time and scope. Mr. Merritt indicated that the substantive issues were the inclusion of counties, cities, and towns and not to over protect business records. He noted that there are current exemptions in FOIA to cover what VEDP felt should be protected, including legal matters and investment of public funds, in addition to the exemption related specifically to economic development. He stated that VPA understands the competitiveness of economic development efforts. He mentioned that the Executive Pulse survey information contains both exempt and nonexempt information and VPA wants to ensure that the entire record is not withheld.

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<sup>1</sup> All Council members were present except Senator Houck and Messrs Axselle and Miller.

Delegate Griffith asked for an explanation of why the VPA counterproposal did not offer the protection sought by the VEDP. VEDP responded that it did not cover business retention efforts and the earmarking process for protection of proprietary records submitted by businesses was perceived as unworkable as a practical matter. Delegate Griffith requested the VEDP, VPA, and VCOG to continue to work to resolve the issues in conflict and that the Council would revisit the issue at its next meeting in December. Council staff was asked to send notice of these meetings to the Council mailing list.

The Council then heard from Mark Flynn of the Virginia Municipal League (VML) concerning the expansion of the exemption for complainant information related to zoning violations found at subdivision 10 of § 2.2-3705.3. He mentioned that this exemption, enacted in 2002, codified a Virginia Supreme Court decision in the case of *Lawrence v. Jenkins* (258 Va. 598, 521 S.E. 2d 523 (Va., 1999)). Mr. Flynn indicated that this exemption should also provide protection for individual building code and fire prevention code complaints. He noted that there was reluctance among neighbors and tenants in rental properties to report building or fire code violations for fear of retaliation as the complainant's name and address would be accessible under FOIA. Violations of the Uniform Statewide Building Code and the Fire Prevention Code are misdemeanors. Craig Merritt, representing VPA, told the Council that VPA opposed the exemption in 2002 on the basis that an accused has a right to know his accuser. He indicated that he had just seen the suggested amendment and would like more time to digest it with VPA's membership. Megan Rhyne, acting director of VCOG, noted that while she shares the public safety concerns, the identity of the complainant already can be protected under the criminal investigative information exemption. She suggested that localities consider using anonymous reporting of these violations. Additionally, Ms. Rhyne pointed to the "Christmas tree" effect of expanding the current exemption. B.J. Ostergren, Virginia Watchdog, indicated that while she agreed with Ms. Rhyne's comments, anonymous complaints are not received with the same importance as complaints where the complainant is identified. The Council unanimously deferred action on this matter until the December Council meeting to allow the parties to work to resolve their differences.

### ***Subcommittee Reports***

Personal Identifying Information Subcommittee. Delegate Griffith reported that the Personal Identifying Information Subcommittee (PII Subcommittee) had tabled two (HB 1087 and HB 1088) of Delegate Sickles' bills from the 2008 Session, but was still working the remaining two bills (HB 1096 and HB 1102).<sup>2</sup> In addition, with regard to public access to the holders of concealed handgun permits, the PII Subcommittee voted to endorse the original recommendation of the FOIA Council made to the 2008 Session of the General Assembly that would continue public access to these records at the local courthouses, but

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<sup>2</sup> HB 1087 (Sickles)--providing a social security number exemption outside of FOIA for local government records; HB 1088 (Sickles)--providing a social security number exemption outside FOIA for Department of Game & Inland Fisheries records; HB 1096 (Sickles)--establishing the Protection of Social Security Numbers Act; and HB 1102 (Sickles)--providing a general FOIA exemption for social security numbers.

would prohibit disclosure of the statewide list by the Department of State Police. The PII Subcommittee will meet again on Wednesday, November 12, 2008 at 10:00 a.m.

Electronic Meetings Subcommittee. Craig Fifer, chair of the Electronic Meetings Subcommittee (EMeetings Subcommittee) reported that the subcommittee had met three times concerning the conflict in the basic law for the Air and Water Boards with FOIA's requirements for conducting an Emeeting. Mr. Fifer advised that there was resolution on the issue that the remote locations from which members of these boards participated would be open to the public. He noted that the final sticking point was requiring a physical quorum as a condition precedent for conducting an Emeeting; but noted that the subcommittee would be meeting again on November 12, 2008 following the PII Subcommittee meeting.

Database Index Subcommittee. Frosty Landon, chair of the Database Index Subcommittee, stated that the subcommittee was meeting for the first time today upon adjournment of the Council's meeting.

Meeting Minutes Subcommittee. Roger Wiley, chair of the Meeting Minutes Subcommittee advised that his subcommittee had met previously and has recommended that written minutes of meetings held under FOIA be required. Draft legislation was presented for the Council's review. He noted that he viewed this recommendation as a clarification of existing law. He stated that the sole issue before the subcommittee was whether audio recording of meetings are sufficient for minutes. Mr. Wiley stated that by a vote of 3 to 1, the subcommittee adopted the above recommendation. The underlying policy being that written minutes are the best and most lasting historical record. He noted that with other technologies, the data (whether audio or video) would have to be migrated to the current form of technology to be reviewed. The Council voted unanimously to approve the recommendation of the subcommittee and include it as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

#### ***Other Business***

Mr. Fifer proposed that the FOIA rights and responsibilities statement currently required for state public bodies under § 2.2-3704.1 be expanded to apply to local public bodies. The Council directed staff to prepare a draft for the Council's consideration at its December meeting.

#### ***Public Comment***

Except for public comment requested and made during the legislative preview, no additional public comment was made.

#### ***Next Council Meeting***

The next meeting of the Council is scheduled for Monday, December 1, 2008 at 1:00PM in House Room D of the General Assembly Building in Richmond.

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