

Freedom of Information Advisory Council
Richmond, Virginia

The Freedom of Information Advisory Council (the Council) held its second meeting of 2006¹ on October 11, 2006. The Council heard progress reports from its three subcommittees, considered draft legislation concerning venue under FOIA, discussed public access to travel reimbursement records, received a presentation from representatives the Virginia Retirement System regarding possible FOIA legislation, and received a presentation concerning online access to records held by the clerks of court.

Subcommittee Progress Reports

PPEA/PPTA Subcommittee: The PPEA/PPTA Subcommittee met on August 9, 2006, and on August 23, 2006. The main topic for consideration was SB 5011, which passed during the 2006 Special Session with a sunset provision such that it expires July 1, 2007. Bill Axselle, Chairman of the Subcommittee, reported that the Virginia Department of Transportation (VDOT) had requested that the sunset provision of SB 5011 be removed so that its provisions will not expire. Mr. Axselle indicated that the Subcommittee had agreed to recommend that legislation be passed similar to SB 5011 but narrower in scope. The recommended draft would preserve the position that the public body can keep certain records confidential after the signing of a comprehensive or interim agreement, as does SB 5011, but would be narrower in scope of application. In response to questions from the Council, Mr. Axselle noted that VDOT had participated in the Subcommittee meetings, but deferred to VDOT to make any comments of its own regarding the recommended draft. Senator Houck asked the Subcommittee to submit its recommendation for the full Council's consideration at the next Council meeting, which will include the annual preview of upcoming legislation. Note that the Virginia Press Association (VPA) distributed a proposed change to the draft bill at today's meeting, but the Subcommittee had not had an opportunity to review the VPA's proposal before making its report.

Electronic Meetings Subcommittee: The Electronic Meetings Subcommittee met on August 9, 2006, August 23, 2006 and October 11, 2006. John Edwards, Chairman of the Subcommittee, reported that the work of the Subcommittee was not yet finished. Mr. Edwards indicated that the Subcommittee members had agreed to propose reducing the notice requirements for electronic meetings from the seven working days currently required down to three working days; to keep the current requirement that a quorum be physically assembled; to add an emergency participation provision to FOIA to allow members to participate by electronic means in emergency situations where the member originally intended to be physically present but is unable to do so; and to authorize regional public bodies to hold electronic meetings. There is a divergence of opinion regarding the definition of "regional public body," and the Subcommittee intends to meet again to reach consensus on that definition. Additionally, language was drafted to make allowance for disabled members of public bodies to participate in meetings by electronic means at the request of the Statewide Independent Living Council (SILC). However, the Subcommittee has not yet

¹ All Council members were present.

been able to meet with a representative of SILC. Mr. Edwards indicated that the Subcommittee was not comfortable recommending language on this issue without first getting feedback directly from SILC. Senator Houck agreed that the Subcommittee should meet again to work out the unresolved issues and to hear from SILC, and report back to the Council at its next meeting.

"Fifth Response" Subcommittee: The Fifth Response Subcommittee met on July 27, 2006. Craig Fifer, Chairman of the Subcommittee, reported that the Committee had agreed to propose a draft that made four primary changes to existing law. First, the draft removes the term "custodian" from subsection § 2.2-3704(B). The Subcommittee proposed this change because the term "custodian" currently is not defined in FOIA, and use of the term can lead to confusion regarding who is responsible for responding to a records request. Second, the draft changes the presentation format of the responses to clarify unequivocally that if the public body is going to provide records in response to a request, it must do so within five working days of receipt of the request. Third, the draft adds a fifth response allowing public bodies to indicate that the requested records do not exist or cannot be found. This section of the draft also provides that if a public body has knowledge of where the records may be found (i.e., they are held by a different public body), it shall so inform the requester. Fourth, the draft allows a public body to invoke additional time to respond if the request requires an extraordinarily lengthy search for records. Currently additional time may be invoked if the request is for an extraordinary volume of records, but no provision is made for situations where other factors increase the time needed to search for records. Council members expressed concern regarding the removal of the term "custodian," and how it may affect the attribution of responsibility for responding to requests. Concern was also expressed regarding new language in the draft that could be interpreted as attributing knowledge to the public body itself, rather than to individual persons. The Council also asked the Subcommittee to consider the effects of the draft on the particular situation where an elected official receives numerous requests immediately prior to an election (i.e., someone abusing FOIA as a means of political harrassment). Senator Houck directed the Subcommittee to continue its work and present a revised draft for consideration at the next full Council meeting.

Other Business

Venue: At the June meeting of the Council, staff briefed the case of Shaw v. Casteen, which highlighted confusion regarding the venue provisions of subsections A and B of § 2.2-3713. The Council then directed staff to prepare draft legislation that would clarify these venue provisions. Staff presented the draft at today's meeting. The draft places both venue provisions within subsection A of § 2.2-3713, using the terms "local" and "state" in separately numbered subdivisions to clarify the intended dichotomy. The draft also makes additional technical changes for purposes of clarification, but does not substantively change the existing venue provisions. The Council expressed concern that while the draft clarifies the venue provisions regarding state and local public bodies, confusion could still arise regarding the proper venue against regional public bodies. Neither the current law nor the proposed draft bill contains language specifically addressing regional public bodies. The Council directed staff to draft additional language to clarify what is the proper venue against

such regional public bodies, and to present the revised draft for consideration at the next full Council meeting.

Reimbursement for travel expenses: § 2.2-3705.8 states that public access shall not be denied to "...(ii) records of the position, job classification, official salary or rate of pay of, and **records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body.**" (Emphasis added). There has been considerable debate among the media and public bodies as to precisely what records must be provided under this section of FOIA. Staff brought the issue before the Council to get the Council's sense of whether this provision requires the release of (i) credit card and hotel receipts appended to a travel voucher, (ii) the travel voucher and work sheet submitted for reimbursement, and (iii) the memorandum of the payment of the reimbursement identifying the amount paid, to whom paid, and the purpose of the travel. The Council expressed its opinion that while social security numbers and other individually-identifiable information may be redacted as exempt personnel records, all records of allowances or reimbursements should be disclosed upon request, including all receipts, vouchers, reimbursement request forms, and records of payments made.

Virginia Retirement System (VRS): This item was added to the day's agenda by request of VRS. Bob Schultze, Director, and Charles Grant, Chief Investment Officer, made a presentation to the Council regarding the need for a FOIA exemption that will allow the delayed release of certain sensitive investment information and the ability to protect confidential information provided by external entities doing business with VRS. Mr. Schultze and Mr. Grant indicated that without such an exemption, certain private investment managers would not work with VRS for fear that their private records might be disclosed under FOIA. Additionally, certain factual situations could create conflict between VRS' fiduciary duties in managing investments and its duties as a public body under FOIA to respond to records requests. Council members expressed concern over the definitions to be used and the scope of the exemption, and how it would differ from the existing exemption for VRS records found at subdivision 12 of § 2.2-3705.7. Senator Houck suggested that the Council and staff might work with VRS to create a draft for presentation at the next Council meeting. Council Members Malveaux and Yancey-Spencer volunteered to help participate in this drafting process.

Access to Court Records: This item was added to today's agenda by request of Mr. John G. "Chip" Dicks. Mr. Dicks briefed the Council on ongoing work regarding records maintained by the clerks of the circuit courts, which include not only court records, but land records, marriage records, notary commissions, and other records. Specific rules for the clerks of court and records they hold are found in Title 17.1 of the Code, rather than in FOIA. Current law in Title 17.1 has provisions for posting land records online through a secure remote access system, and for electronic filing of land records, which allows business to be conducted without actually coming to the courthouse. The concern is that many of the land records contain individuals' social security numbers and other information that could be misused by identity thieves. Additionally, there is concern that private information vendors will request entire databases from the clerks and then sell this data indiscriminately, without the safeguards put in place by public bodies as required under Title 17.1. Mr. Dicks

presented the problems and concerns that have been raised as well as various proposed solutions, primarily concerning the redaction of social security numbers from existing records as they are converted into electronic format. He indicated that a major problem is practical in nature, as the clerks offices currently lack the personnel and technological resources to redact the millions of pages of documents they hold. Additionally, Mr. Dicks indicated that there are legal questions regarding interstate and international commerce and jurisdiction that must be addressed. Senator Houck called for volunteers from the Council to help work with Mr. Dicks and staff in developing a draft to address these issues; Council Member Fifer volunteered.

Of Note

Due to time considerations, matters of note on the agenda for today's meeting were deferred for later consideration.

Public Comment

Senator Houck called for public comment; there was none.

Future Meetings

The Council will meet on December 15, 2006 in the General Assembly Building, Richmond, Virginia. This will be the final Council meeting for 2006 and will include the annual legislative preview.

The Honorable R. Edward Houck, *Chair*
Maria J.K. Everett, *Executive Director*