

**FOIA Council Meeting Summary**  
**October 17, 2016**  
**1:30 PM**  
**House Room D**  
**General Assembly Building**  
**Richmond, Virginia**

The Virginia Freedom of Information Advisory Council (the Council) held its fourth meeting of the 2016 Interim on October 17, 2016.<sup>1</sup> 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.

**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 336<sup>2</sup> would be deferred until the next Council meeting on November 21, 2016. The Council took no action on the following bills:

- HB 432, Delegate Villanueva
- SB 678, Senator Garrett
- HB 61, Delegate Morris

Senator Surovell again discussed his SB 492<sup>3</sup> with the Council and presented two options for the Council's consideration. Senator Surovell stated that he preferred the second option which more clearly defines which family members would have access to completed unattended death investigations. Senator Surovell reminded the Council that the reason for the introduction of SB 492 was because family members of victims are routinely denied

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

<sup>2</sup> **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.

<sup>3</sup> **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.

access to completed unattended death investigations. He cited the case in Virginia Beach where the parents were 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 and stated that there was nothing to prevent a family member from releasing the completed investigation to someone who may be a suspect in the case. Captain Fertig, Chesterfield Police Department, stated that he concurred with the remarks of Mr. Wilson and added that there are too many unknown variables and while family members may be ruled out initially, there may be after acquired evidence that may make a family member a suspect. Kevin Carroll, representing the Fraternal Order of Police (FOP), told the Council that the FOP opposed the proposal in either form and suggested that a better path to achieve Senator Surovell's goal was to require the Department of Criminal Justice Services (that sets out accreditation standards for law-enforcement agencies) to include a mandatory standard that the law-enforcement talk to the victim's family. Katherine Donhauser, Assistant County Attorney, speaking on behalf of the Hanover County Sheriff, stated that she agrees with the remarks previously made and added that unattended death investigations involve more than just suicides. Doug Goodwin, representing the Virginia Chiefs of Police and the Ashland Police Department stated that while he appreciated Senator Surovell's concerns, he agreed with the comments already made. Captain Scott Burke, Portsmouth Police Department suggested that records be released after a determination that the death was not criminal in nature. Dave Ress, Daily Press, reiterated his concern that this is a fundamental problem with FOIA in that discretionary exemptions are treated as mandatory. Senator Surovell was given the opportunity to address the concerns raised. Senator Surovell stated that his draft says "completed" investigations, therefore the concern about unintended consequences would be limited. Delegate LeMunyon questioned what Senator Surovell felt about the accrediting standard option presented by the FOP. Senator Surovell replied that while he felt it was an interesting option, he didn't know enough about DCJS accrediting standards to give an answer. Ms. Dooley inquired whether the issue was limited to just suicide cases, to which the Senator replied suicide is not always clear. By way of example, Senator Surovell stated that in the case of a terminally ill individual who died alone, initially it is unclear whether he died of his terminal illness, committed suicide, over dosed on some medication, or died of some other cause. He stated that the inconsistent application of the law is the real issue and that Virginia citizens need consistent application by all jurisdictions. In closing, he stated that all criminal investigative files are exempt from mandatory disclosure and law-enforcement does not want any erosion of current law. Chairman LeMunyon asked for any motion on SB 492 as presented. Ms. Porto moved to recommend the amended SB 492. There being no second, the motion failed. The Chairman suggested that Senator Surovell should keep trying to work with law-enforcement.

Senator Surovell next discussed his legislative proposal for establishing monetary penalties for wrongfully certify the lawfulness of a closed meeting discussion (LD 17100867D). Senator Surovell stated that the draft was an incentive to do the right thing the first time. Mr. Stern inquired whether there was a requirement for bad faith in the proposal. It was

answered in the negative. Ms. Porto asked what event(s) precipitated the draft. Senator Surovell responded that he had heard stories from all around about the lack of limiting discussions in closed meetings. He noted that the latest such story was about a board of visitors at an institution of higher education.

The Council called for public comment on Senator Surovell's draft. Dave Ress with the Daily Press stated that he favored the draft and noted there is a lot of vagueness in the understanding of what is a proper topic for a closed meeting. Phyllis Errico on behalf of the Virginia Association of Counties stated that she was concerned about the breadth of the draft. She explained that such a violation may be an honest mistake or that a public body or its members may be unaware that a mistake was made.

Mr. Coleburn made a motion to recommend Senator Surovell's draft, which was seconded by Ms. Porto. Discussion among Council members followed. Ms. Dooley noted that the draft imposed a tough strict liability standard and requires the court to impose a monetary penalty. She stated that all FOIA issues that may arise are not always black and white. Mr. Stern said that he agreed with Ms. Dooley and pointed out that current law states that "...to the best of his knowledge..." Mr. Coleburn opined that closed meeting certifications are much too routine in actual practice. On the motion to recommend the draft, the motion failed by a vote of 4 to 4.<sup>4</sup>

Delegate Hope was present at the meeting and discussed the current exemption from FOIA afforded to the Parole Board under § 2.2-3703. He suggested that records related to general policy guidance for parole decision making should be available to the public. Delegate Hope noted that the 2015 Governor's Commission on Parole Review recommended the modification of the Parole Board's FOIA exemption as noted above. Delegate LeMunyon inquired whether Delegate Hope would also like the Council to consider the concept presented by HB 397 from the 2012 Session<sup>5</sup>. Delegate Hope answered in the affirmative.

Public comment was again requested. Steve Northup, Esq., told the Council that he represented old law prisoners who were still eligible for parole. He stated that there are 3,000 such prisoners in the system and have been for at least 20 years. Mr. Northup stated that there must be reasons why these prisoners continued to be denied parole, but that the process is opaque. These prisoners have no idea of what they need to do to be granted parole. Mr. Northrop stated that he knows that risk assessments are done pursuant to Parole Board guidelines, but no one knows what those guidelines are. Karen Brown, chair of the Parole Board, stated that she was unclear about the concerns raised in light of the fact that the Board's policies and procedures are available online. She stated that the Board does a risk assessment for reoffending, reoffending violently, and for needs if paroled and that the risk assessments are online. Ms. Brown said that the inmates are not provided the risk assessment by the Parole Board, but it may be provided to them under Department of

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<sup>4</sup> Those voting in favor of the motion: LeMunyon, Treadway, Porto, and Coleburn. Those voting against the motion: Hamlett, Dooley, Vucci, and Stern.

<sup>5</sup> HB 397 (2012) 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.

Correction procedures. The Council then discussed the issue. Mr. Vucci stated that it appeared the changes to FOIA would be codifying existing practices of the Parole Board. Delegate Hope responded that that was not the case. He pointed out that the Governor's Commission had recommended that all Board policies and procedures be posted online. Chairman LeMunyon, with the consent of Council, deferred further consideration of Delegate Hope's proposal until the November Council meeting when the Council would have the bill before them.

### **HJR No. 96 Study Subcommittee Reports**

Staff reported that the Records Subcommittee has held eight meetings in the 2016 Interim (April 11, May 9, June 1, June 23, July 20, August 18, September 8, and September 29, 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.<sup>6</sup> 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 again deferred consideration of the bills until its meeting on November 21, 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 exemption<sup>7</sup> and creating a new exemption that better reflects the work of these agencies. They presented a draft to the Records Subcommittee on September 29, 2016, but after discussion the Subcommittee took no action on the draft, instead suggesting that the interested parties continue working on it

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<sup>6</sup> **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.*

<sup>7</sup> Subdivision 3 of § 2.2-3705.3.

and then present it to the full Council. 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 records work group met three times in 2016 to consider amendments to the personnel records exemption, particularly the possibility of defining what "personnel records" are, but was unable to reach consensus to move forward this year. Out of concern for 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 voted to recommend reverting the changed language of the affected exemptions back to its prior form. The Subcommittee also considered § 2.2-3704 regarding the procedure for making and responding to a records request. After reviewing the section to spot issues of concern, the Subcommittee directed staff to prepare a draft amending the section for consideration by the full Council. The Subcommittee concluded its work for the year with further consideration of access to criminal investigative files, but chose to take no action on this issue because Senator Surovell's SB 492 and Delegate Villanueva's SB 432, both of which would amend the criminal investigative files exemption, were still pending before the full Council.

Ms. Dooley reported that the Meetings Subcommittee has held seven meetings in the 2016 Interim (April 11, May 4, June 6, July 18, August 11, 2016, September 19, and October 17, 2016) to continue its study of meetings law under FOIA 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.

### **Review of Subcommittee Recommendations**

The Council next decided to consider drafts recommended by the Subcommittees, taking this issue up before other items on the agenda. 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**

The Council began by considering the Records Subcommittee recommendation to amend the definition of "public record" by striking the last sentence in the current definition in § 2.2-3701 (LD 17100698D). Staff informed the Council that there had been unintended consequences after the addition of this sentence which had worked to withhold records. There was no comment from the Council or the public. The Council voted unanimously to recommend this amendment.

Next the Council considered a draft amending certain provisions of § 2.2-3704 relating to the procedure for making and responding to a records request (LD 17100765D). Staff noted that this draft had been recommended in concept by the Subcommittee with direction for staff to prepare the draft for the full Council's consideration. Changes made by this draft include the following: clarifying that public bodies cannot require citizens to come in to the public bodies' offices to make copies (amending subsection A); stating that a denial of a request in whole or in part must cite the Code section or other provision of law that allows the records to be withheld (amending subsection B), where the current law only says "Code section;" stating that if a requester asks for an estimate, then the time to respond is tolled after the estimate is provided until the requester states whether to proceed (amending subsection F); and clarifying that a public body may require a requester "to pay" an advance deposit if the estimate exceeds \$200, rather than merely "to agree to payment" as written in current law (amending subsection H). Mr. Vucci asked whether it would be incumbent on the public body to provide an estimate as soon as possible; staff replied that all responses are interpreted within the five working day time limit. Craig Merritt, Esq., representing the Virginia Press Association (VPA), stated several concerns with the draft: uncertainty whether the change regarding inspection and copying might have unintended consequences; that use of the term "custodian" is currently an issue in a FOIA case on appeal before the Supreme Court of Virginia; concerns regarding tolling provisions applicable to all estimates as compared to the tolling provisions in current law which are tethered to advance deposits triggered by the \$200 threshold amount; and opposition to the change in language regarding advance deposits because for the working media, payment is typically made on a 30 day cycle and having to wait for the issuance of a check is an unnecessary delay in access to public records. Cari Tretina, FOIA Officer for Henrico County, asked whether online media had been considered. Staff noted that it had been considered, but would need to be further studied along with other technology issues beyond the scope of the HJR No. 96 study. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), expressed that the provision for tolling after providing an estimate was to protect citizens as well as public bodies, because otherwise a public body would have to respond within the five working day time limit and thus might provide records and bill the citizen before the citizen has a chance to respond to the estimate. In further discussion the Council observed that getting an estimate and discussing limits on costs is often where negotiation starts. Ms. Porto informed the Council she had a conflict regarding the custodian issue because her organization was a party in the case on appeal before the Supreme Court. She asked that the Council not act on that part of the recommendation until after the Court had rendered its decision in the case. Delegate LeMunyon asked interested parties to send their recommendations to staff, and stated that the Council would consider the draft further at its November meeting.

The Council next considered the draft that would revert the "global language change" effected by HB 817/SB 494 as described above (LD 17100766D). Staff related that the original language stating that certain records were not prohibited from release at first appeared ambiguous because FOIA does not prohibit release of records, but upon further consideration, that language actually meant that records were still exempt, but could be released. The change made by HB 817/SB 494, which would require release of these records therefore appeared to be an inadvertent substantive change, and the Subcommittee recommended reverting the language of the affected exemptions. Ms. Rhyne stated that reverting to the prior phrasing may cause more confusion, and stated that the current law requiring mandatory release should be kept. Ms. Hamlett said the discussion at the Subcommittee level had raised the issue of court interpretation, noting that HB 817/SB 494 did not have an enactment clause stating that these changes were declaratory of existing law. Ms. Porto noted that in Subcommittee she had voted against changing the language back, that the comments from affected agencies were inconsistent, and that the current law appears to provide more transparency and reverting the language seems like a step backward. Delegate LeMunyon asked how the Council wished to proceed, but there were no further comments or motions made.

The Council next considered two drafts addressing the working papers and correspondence exemption (subdivision 2 of § 2.2-3705.7): one presented by Delegate LeMunyon (LD 17100603), and the other as recommended previously by Records Subcommittee (LD 17100581). Delegate LeMunyon's version incorporates the changes recommended by the Records Subcommittee, to move the term "correspondence" within the definition of working papers, and also seeks to ensure that records that are otherwise open remains subject to disclosure. In explanation of his proposal, Delegate LeMunyon posited a hypothetical of a spreadsheet identifying accredited schools, which would be subject to mandatory disclosure at the state level. If the spreadsheet was attached with a memo advising the Governor, Delegate LeMunyon stated his proposal is to make clear that the spreadsheet is still subject to disclosure, but the memo could be withheld as a working paper of the Governor. After further discussion among the members, David Lacy, Esq. (representing VPA), and David Ress of the Daily Press, the Council voted 6 to 1<sup>8</sup> to recommend Delegate LeMunyon's version with a clarifying technical amendment.

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. After discussion of the legislative history of these exemptions following the events of 9/11, the Council voted 6-0-1<sup>9</sup> to recommend this draft.

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<sup>8</sup> Ms. Dooley voted against, and stated that it was because she did not feel she really understood the change. Ms. Treadway was not present when this vote was taken.

<sup>9</sup> Mr. Coleburn abstained, and Ms. Treadway was not present when the vote was taken.

Turning next to the proprietary records and trade secrets draft proposed by the Virginia Press Association, the Council chose to take no action this year, but to defer this item for additional consideration in 2017.

### **Meetings Subcommittee Recommendations**

The Council reviewed the draft that would make clarifying changes to the current requirement for certain state public bodies in the executive branch to post meeting minutes (§ 2.2-3704.1). Staff informed the Council that the Subcommittee had considered expanding this requirement to local governing bodies and school boards as well as other branches of state government, but after identifying many issues with such expansion decided only to recommend language clarifying existing law. After noting that related technology issues should be studied further, the Council voted unanimously to recommend this draft.

The next draft addressed would make changes to the notice requirements for meetings, including posting notice online if the public body has a website if it has one, requiring notice when meetings are continued, and clarifying agenda requirements (LD 17100047D). The Council discussed the draft and suggested certain clarifying and technical amendments, then voted unanimously to recommend the draft as amended.<sup>10</sup>

Considering the work to be addressed at the November meeting, Delegate LeMunyon noted that Delegates Marshall and Kory had contacted him about their bills referred to the Council, but he had not heard from the patrons of other bills referred to the Council. Therefore those other bills would not be added to the November agenda unless the members made contact. Delegate LeMunyon also noted that the drafts relating to the procedure for making and responding to a records request (LD 17100765D) and the reversion of the global language change (LD 17100766D) were still before the Council for further consideration. Rather than a single omnibus bill incorporating all of the recommended changes, staff suggested two bills, one for records recommendations, the other for meetings recommendations, in order to make the amendments and enactment clauses of each bill easier to follow.

### **Public Comment**

Ms. Rhyne suggested that the training requirement set out in § 2.2-3704.2, which currently requires FOIA officers "be trained at least annually by legal counsel for the public body or the Virginia Freedom of Information Advisory Council," be amended to allow training under any such program approved by legal counsel or the FOIA Council. She informed the Council that VCOG had recently conducted a "FOIA basics" webinar with over 200 participants. The webinar information stated explicitly that it would not satisfy the annual training requirement, but Ms. Rhyne noted that most of the participants were FOIA officers who participated anyway.

### **Legislative Preview**

Staci Henshaw, speaking on behalf of the Auditor of Public Accounts (APA), stated that the APA, the Office of the State Inspector General (OSIG), and the Joint Legislative Audit and

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<sup>10</sup> Note that Mr. Coleburn had to leave after this vote was taken.

Review Commission (JLARC), were still working with interested parties on a draft that would remove these agencies from their current administrative investigation exemption (subdivision 7 of § 2.2-3705.3) and create a new exemption in the same section that better reflects these agencies' actual work and duties.

### **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 for Monday, November 21, 2016 at 1:30 p.m. in Richmond, Virginia. This meeting is the last scheduled for 2016.

There being no further business, the meeting was adjourned.

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