

## **FOIA Council Meeting Summary**

**October 17, 2018**

**1:00 PM**

**House Room 3**

**Capital Building**

**Richmond, Virginia**

The Virginia Freedom of Information Advisory Council (the Council) held its third meeting of the 2018 interim on October 17, 2018.<sup>1</sup> The meeting was held to receive reports from the Records and Meetings Subcommittees, to take action on the subcommittees' recommendations, and to hear other business of interest to the Council. As an introductory matter, Senator Stuart observed that Council meetings are not streamed online, although the meeting rooms have the technology to do so. The Council agreed without objection that Council meetings should be streamed online and directed staff to make inquiries of the respective Clerks' Offices about using the equipment and having the facilities made available to do so.

### **Subcommittee Reports**

#### Records Subcommittee:

Staff presented two amended drafts of SB 730 (DeSteph), which had been carried over for further consideration after the Council's meeting on August 22, 2018. One draft (LD #19100039D) would amend the definition of "public record," define and exempt social media records of General Assembly members, require that public bodies be included as necessary parties to any petition for mandamus or injunction filed under § 2.2-3713, and provide for the Office of the Attorney General to represent a member of the General Assembly if a FOIA petition was filed against the member. The other draft (LD #19100756D) includes only the provision that would provide for the Office of the Attorney General to represent a member of the General Assembly if a FOIA petition was filed against the member. Senator DeSteph indicated that the -0756D draft was the newer version that he wished to move forward. He also stated that he had met with other interested parties and believed there was no opposition to the new draft, and he confirmed that this draft does not amend any definitions or address social media as the original bill did. The floor was opened to public comment on the draft. Aimee Perron Siebert, speaking on behalf of the Virginia Press Association (VPA), stated that the new draft uses appropriate language and VPA takes no position on it. She also stated that Megan Rhyne of the Virginia Coalition for Open Government (VCOG) agreed, but Ms. Rhyne was unable to attend today's meeting. No one spoke in opposition to the new draft. The Council then voted unanimously to recommend the new draft (LD #19100756D) to the 2019 Session of the General Assembly.

#### Meetings Subcommittee:

Staff reminded the Council that the Meetings Subcommittee had two bills referred to it, HB 1101 (Robinson) and SB 336 (Peake), both of which would have required public comment periods at public meetings, and provided a brief summary of each bill. Staff noted that at the June 5

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<sup>1</sup> Council members Senator Stuart (Chair), Delegate Torian (Vice Chair), Senator Locke, Delegate Davis, Bujakowski, Coleburn, Dooley, Hamlett, Porto, Seltzer, Stern, Treadway, and Vucci were present; Ms. King-Casey was absent.

meeting, a quorum was not present, but the subcommittee members who were present heard from interested parties. Because this issue has been studied in prior years and views are divided, the members present recommended bringing this issue before the full Council.

Senator Stuart asked for public comment on the bills, beginning with SB 336. Phyllis Errico of the Virginia Association of Counties (VACo) stated that she felt both bills went beyond the scope of FOIA, as FOIA addresses public access to records and meetings, but not the public's ability to speak during meetings. She also expressed concern over the use of the term "elected public body" in relation to the definition of "public body" already in FOIA and the scope of entities affected by the bill. Additionally, Ms. Errico pointed out that searching the Code of Virginia for the term "public hearing" returns almost 300 responses, over 100 of which are in Title 15.2 concerning local government, so there is already ample opportunity for the public to address substantive topics. Finally, she noted that town halls and other informational meetings are available. Michelle Gowdy of the Virginia Municipal League (VML) agreed with Ms. Errico's comments and also pointed out that requiring public comment could in some instances let someone present their case twice, for example, during proceedings before a board of zoning appeals. Jeremy Bennett of the Virginia School Boards Association (VSBA) also agreed with Ms. Errico's remarks and stated that the bill may have unintended consequences with a negative impact and is unnecessary. Mr. Coleburn stated that as mayor of a town he felt that elected officials must remember who elected them and that open government includes open participation. Mr. Seltzer indicated he was sympathetic to the idea behind the bills but unsure they were a good fit within FOIA. Mr. Stern informed the Council that at the subcommittee meeting the testimony expressed a lot of concern from localities about the practical effects of these bills, and that open government advocates had expressed similar concerns about which he would like to hear more. Delegate Davis asked whether other restrictions on public comment would be allowed; staff responded that other restrictions would be allowed within the limits imposed by the First Amendment regarding freedom of speech at public forums. Senator Stuart asked representatives of local government and school boards whether they knew if any of the public bodies in their membership currently do not allow public comment at public meetings. Ms. Gowdy stated that no governing bodies prohibit public comment but some small committees or subcommittees might not allow public comment. She also said that, practically speaking, the public does not attend the majority of such meetings and such small public bodies usually have interested citizens as members, so there is still citizen input. Senator Stuart also expressed concerns about the applicability of the bills to the General Assembly, particularly as they would appear to require public comment periods during floor sessions of the House and Senate. After further discussion, the Council decided to have staff address this issue through guidance and training. The Council voted unanimously to direct staff to prepare a policy statement, solicit input from Council members regarding the draft policy, and then prepare a final version of the policy statement to post on the Council website.

The Council then addressed HB 1101. Stacie Gordon of Partners for College Affordability and Public Trust spoke to the exception in the bill (to requiring public comment during any open meeting) for governing boards of public institutions of higher education, describing tuition increases and their impact while noting that many boards allow very little or no input from parents, students, or the general public. She urged the Council to strike the provision that would exempt such governing boards from the provisions of HB 1101. In discussion with the Council, she further stated that some boards do seek public input and some solicit online comments, but others have raised tuition without allowing public comment even after receiving a petition from

students opposing the tuition hike. Ms. Errico spoke against HB 1101, stating that the same arguments would apply as with SB 336 and that the definition of "public body" is so broad it would include all subsets. She also noted that since HB 1101 requires only four public comment periods per year, some bodies that currently allow public comment at every meeting may curtail the number of public comment periods available. Delegate Davis noted that there were bills regarding notice of tuition increases this past session but the bills did not pass. He moved to amend HB 1101 to strike lines 43 through the word "received" on line 48 and insert the following language instead: "All public institutions of higher education should afford an opportunity for public comment during any open meeting where a vote to recommend or change any fee or tuition amounts occur." After discussion of whether such a directive should appear within FOIA or in Title 23.1 regarding higher education, Mr. Seltzer suggested instead to add the suggested language to the policy statement and training described above, to pass by both SB 336 and HB 1101 at this time, and to reconsider the issue in a year. Delegate Davis agreed and withdrew his earlier motion. Senator Stuart asked Christopher Whyte, representing the University of Mary Washington, if he could help get the message regarding providing public comment periods to other governing boards. Mr. Whyte agreed, and he noted that Mary Washington's board meetings are open to the public and that legislation requires posting public notice of tuition increases 30 days in advance. The Council then voted unanimously to include the language suggested by Delegate Davis as best practices in the policy statement to be drafted and in future training for governing boards of public institutions of higher education.

The members of the Meetings Subcommittee also considered the issue of members using text messages to communicate during a public meeting, and they suggested that this issue be addressed through a guidance document, rather than in legislation. The Council took these issues up in the larger context of electronic communications and social media generally, not just text messaging. Staff described current guidance materials, how the current statutory definition of "public record" is broad enough to include social media "regardless of physical form or characteristics," prior court precedents on email, and how the use of social media could be construed to be a meeting if a sufficient number of members of a public body were communicating about public business simultaneously. The Council directed staff to update the Council's guidance materials to address additional forms of social media besides email.

### **Annual Legislative Preview**

Staff reported that no one had brought any legislative proposals for consideration in advance of today's meeting. Senator Stuart opened the floor to anyone who wished to present any such legislative proposals; there were none.

### **Other Business**

Staff informed the Council that no public comment forms had been received since the Council's last meeting. Staff also presented a revised version of the Council's electronic meetings participation policy that reflects the Code changes effective July 1, 2018, but is substantively the same as the previous policy. The Council adopted the new version without objection. Finally, staff also pointed out an apparent conflict in current law that resulted from the consolidation of former Code §§ 2.2-3708 and 2.2-3708.1 into new § 2.2-3708.2 effective July 1, 2018. Specifically, a public body is not required to assemble a quorum in one location for meetings held by electronic communication means to address a state of emergency declared by the

Governor (subdivision A 3 of § 2.2-3708.2), and, under former law, no policy on participation was required for such meetings. Current subsection C of § 2.2-3708.2 imposes these requirements on such meetings, as well as the requirement that the voice of any member participating from a remote location be heard by those at the primary or central meeting location. Staff informed the Council that the simplest solution would be an amendment to current subsection C that would address the conflict by clarifying that the provisions of subsection C imposing these requirements apply only to subdivisions A 1 and 2 (regarding participation by electronic communication means due to medical conditions or personal matters) and subsection B (regarding such participation for members of regional public bodies who live 60 miles or more from the central meeting location). The Council voted unanimously to recommend that amendment to the 2019 Session of the General Assembly.

### **Public Comment**

There was no additional public comment.

### **Future Meetings**

The next meeting of the Council is scheduled to be held on December 5, 2018, at 1:00 p.m. in House Room 3 of the Capitol Building. Observing that the Council had completed its review of the bills referred to it by the 2018 Session of the General Assembly and other work planned for the 2018 interim, the Council decided not to meet as scheduled in December unless called to do so by the Chair. There being no further business, the meeting was adjourned.