

Virginia Freedom of Information Advisory Council  
Meeting Summary  
November 8, 2010  
1:30 PM  
House Room C, General Assembly Building  
Richmond, Virginia

The FOIA Council held its final meeting of 2010.<sup>1</sup> The Council heard subcommittee reports, voted on subcommittee recommendations, and continued its annual legislative preview.

### *Subcommittee Reports*

#### *Rights and Remedies Subcommittee*

Staff reported that the Rights and Remedies Subcommittee met on October 4, 2010 to continue its deliberations. The subcommittee's work had begun with the discussion of HB 449 (Ware), which would have provided a remedy for public bodies to use against requesters who use FOIA as a tool for harassment, but the subcommittee did not favor the legislation as drafted. The subcommittee generally agreed that there are requesters who misuse FOIA to harass or impede the work of public bodies, but there was no agreement that a legislative fix was necessary. Mr. Wiley had proposed a draft that would allow a court to decline to order the production of requested records under certain conditions.<sup>2</sup>

After staff presented the draft, the Council took it up for consideration as a legislative proposal. Mr. Wiley stated that the draft was meant to follow the Kentucky approach discussed by the subcommittee at a prior meeting, but with more definite standards set forth for when a public body would be relieved of the burden to respond. Mr. Fifer opined that using terms such as "unreasonable" and "harassment" would be too vague. Further, he stated that he liked that the public body would bear the legal burden of proof, but that because the requester must bring the suit, it could lead to public bodies denying requests and saying "so sue me, see you in court." Mr. Landon said he was concerned that the bill would invite litigation, while the Council was established, at least in part, to help avoid litigation through informal mediation. Mr. Miller observed he had personal experience with an abusive requester from Central State Hospital recently, and had considered bringing a bill before the Council

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<sup>1</sup> The following members were present: Senator Houck, Fifer, Gregory, Jones, Landon, Miller, Spencer, Treadway, Whitehurst, and Wiley. Mr. Wiley participated in this meeting by telephone from the Monroe Room at The Homestead, 7696 Sam Snead Highway, Hot Springs, Virginia 24445. One member of the public was present at his location. Delegate Griffith and Mr. Selph were absent.

<sup>2</sup> Specifically, the court could decline to order the production of requested records if the evidence shows that "the frequency or volume of the record requests made by the petitioner (i) constitutes an unreasonable burden on the resources of the public body; (ii) has been made with the intention of (a) harassing the public body or a public official or (b) preventing the public body from meeting its operational responsibilities; or (iii) has been made to evade the payment of charges assessed in accordance with § 2.2-3704."

that would add persons civilly committed after being acquitted by reason of insanity to the list of those excluded from FOIA rights.<sup>3</sup> However, he decided against it because an entire category of persons should not be locked out of FOIA due to one bad situation.

Mr. Wiley then stated that the reality is that some requesters are unreasonable and cannot be satisfied, that many examples had been given before the subcommittee, and that maybe it was time to decide on the issue. Mr. Fifer noted that as written, the only way for a public body to use the new provisions would be to deny a request in violation of FOIA and get sued. Mr. Gregory noted that at the subcommittee, no one liked the original bill because it allowed the government to initiate suit against a requester, but Mr. Wiley's bill was more defensive, in that the requester would still be the one to bring a suit, but now there was disagreement with that approach as well. He stated that the problem is a problem which occurs often enough that there needs to be some relief through the judicial system, and it has to be one way or the other. Senator Houck stated that it irked him that the law can be used for the purpose of harassing, but trying to translate that into statutory language was problematic. After some further discussion, Senator Houck asked if there was any motion on the proposal. Hearing none, the matter was left on the table.

#### *Criminal Investigative Records Subcommittee*

Chairman Fifer reported that the Criminal Investigative Records Subcommittee had met three times this year, including earlier this same day. The subcommittee considered the issue of policy changes regarding access to criminal investigative records, but could not find common ground for substantive changes. Instead, the subcommittee considered a re-draft of § 2.2-3706 intended to make the section easier to read and understand without introducing any substantive changes. The subcommittee agreed by consensus at its meeting today to present the draft to the full Council for consideration, but because there was not a quorum present, there was no official recommendation from the subcommittee. Staff then presented the latest version of the redraft, noting that while it made no substantive changes, it reorganized the section into separate subsections addressing definitions, discretionary releases, required releases, prohibited release, noncriminal records, and conflict resolution. Staff further noted technical amendments contained in the draft, and that it had a second enactment clause stating that it was declaratory of existing law. After brief discussion expressing concern that introducing the draft might open up the entire topic to re-examination, the Council voted 8-2 in favor of recommending the draft.<sup>4</sup> However, after the vote, there was concern expressed by several members that introducing the draft might open up the entire topic to re-examination and unwanted mischief. Given that 2011 was an election year in the House of Delegates, it was suggested that introduction of the redraft of § 2.2-3706 be delayed until the 2012 Session of the General Assembly.

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<sup>3</sup> Va. Code § 2.2-3703(C).

<sup>4</sup> By voice vote, members Fifer, Gregory, Jones, Landon, Miller, Spencer, Treadway, and Whitehurst voted in favor; Senator Houck and Mr. Wiley voted against.

### *Annual Legislative Preview*

David Blount, representing the Thomas Jefferson Planning District, spoke to inform the Council that legislation would be introduced affecting certain provisions of § 15.2-1418, outside of FOIA, regarding the notice provide to members of public bodies. He noted that the draft had been presented to the Virginia Municipal League, the Virginia Association of Counties, and Mr. Wiley, all without objection, and that it would not affect the public notice requirements of FOIA. There were no questions or comments on this matter.

### *Other Business*

*VITA charges to state agencies for retrieval of public records maintained by the Virginia Information Technologies Agency (VITA); experience of the Department of Environmental Quality (DEQ).*

Staff related that DEQ had received a FOIA request for records maintained by VITA. Under FOIA, DEQ remains the custodian of these records and was initially charged \$14,000 by VITA to make the records available to DEQ in response to the FOIA request. Ultimately, this charge was reduced by VITA to \$3,800. VITA's initial estimate came one month after the records were requested by DEQ, and the last estimate was almost two months after DEQ's request. The question was brought forth whether DEQ can pass on to the requester as part of the actual charges allowed under FOIA this additional charge to retrieve records from VITA, and whether it would be reasonable to do so. After some discussion, the Council agreed by consensus that more information was needed on the extent of this problem, particularly the frequency of occurrences and the costs involved. The Council directed staff to gather more information so that the matter could be taken up and addressed in detail by the Council in 2011.

*Use of the word "archive" in subsection J of § 2.2-3704; implications to the Library of Virginia and the VA Public Records Act.*

As an additional item of business, staff reported that the word "archive" is a term of art as used by the Library of Virginia in respect to its responsibilities under the VA Public Records Act (VPRA) and the archiving of public records. Under the VPRA, the Library becomes the custodian of records archived there. The legislative history of subsection J of § 2.2-3704,<sup>5</sup> which was added in 2010, was to capture VITA and

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<sup>5</sup> In full, the subsection currently reads as follows: "In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or

the Division of Legislative Automated Systems (DLAS), which agencies provide IT support for the executive and legislative branches, respectively. The use of the term "archive" in this section of FOIA was not meant to capture the Library of Virginia within this provision. Staff presented two optional approaches to amend subsection J. After some discussion, the Council voted to recommend adding language to subsection J stating that "Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.)."

#### *Public Comment*

Craig Merritt, on behalf of the Virginia Press Association, suggested taking a hard look at the last matter to make sure that records permanently archived at the Library of Virginia were not inadvertently exempted from FOIA.

Mr. Miller suggested that staff survey local government and state agencies on issues such as harassment and VITA charges in order to provide information to the Council at its next meeting. The Council agreed without objection to examine those issues next year.

Senator Houck noted that Delegate Griffith, Vice-Chair of the Council, would be leaving the Council as he had been elected to the United States Congress. Formal recognition of his service will be recognized at the appropriate time.

#### *Adjournment*

There being no further public comment or other business, the meeting was adjourned. The next meeting of the FOIA Council will be held after the 2011 Session of the General Assembly has adjourned sine die.

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archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester."