Virginia Freedom of Information Advisory Council
Meeting Summary
Monday, November 9, 2009
3:00 PM
General Assembly Building
Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its final meeting of the 2009 interim on November 9, 2009.[1] The purpose of this meeting was to hold the annual legislative preview to hear about potential FOIA legislation for the upcoming 2010 Session of the General Assembly and to receive subcommittee reports.

Annual Legislative Preview

University of Virginia - Proposed Exemption for Threat Assessment Team Records. The Council heard from Rob Lockridge on behalf of the University of Virginia (UVA). Mr. Lockridge indicated to the Council at its meeting on September 21, 2009 that UVA seeks an exemption for the findings of threat assessment teams created under chapter 450 of the 2008 Acts of Assembly. Chapter 450 requires public institutions of higher education to implement a crisis and emergency management plan to prevent violence on campus, including assessment and intervention with individuals whose behavior poses a threat to the safety of the campus community. Mr. Lockridge brought a proposed draft exemption that would allow the following records to be withheld in the discretion of the custodian: *All records and electronic communications of a threat assessment team established by a public institution of higher education pursuant to § 23-9.2:10 relating to the assessment or intervention of specific individuals.* In discussing the proposed exemption, the Council first clarified that it would apply to records generated by the threat assessment team about specific individuals, not records about the team itself. Next, the Council agreed that referring to both *records* and *electronic communications* would be redundant, as the electronic communications at issue would already be considered public records subject to FOIA. It was also pointed out that other exemptions use the terminology *identifiable individuals*, and it was suggested that for consistency, this terminology be used rather than the reference to *specific individuals* in the draft.

The Council then requested public comment on the proposal. Craig Merritt, on behalf of the Virginia Press Association (VPA), indicated that he agreed with the technical points made and that the draft might further be improved by including a reference to Code § 23-9.2:10(C)(iii).[1] Mr. Merritt made two further suggestions: (i) that the exemption use language of redaction (e.g., *to the extent*) instead of the current language (*All records*) because providing part of a record while redacting other parts provides more information than does withholding records in their entirety, and (ii) that it would be in the public interest for the records to be opened to public disclosure in the event of a tragedy.

Mr. Lockridge indicated he agreed with the technical suggestions, but the idea of opening the records in the event of a tragedy was problematic. It raises the questions of what the

[1] Delegate Griffith, Senator Houck, and Messrs. Axselle, Fifer, Landon, Malveaux, Miller, Whitehurst and Wiley were present. Mr. Selph was absent.

criteria for opening the records would be, such as how severe a tragedy must occur before the records would be opened - a multiple murder such as occurred at Virginia Tech? A fistfight between students downtown? Mr. Lockridge further expressed the concern that such a provision might have a chilling effect on the willingness of team members to be fully candid, knowing the records might be opened someday, and that it would be confusing as to how and when the provision would apply. Mark Hjelm, a citizen of Woodbridge, Virginia, noted that a conceptually similar exemption already exists for school safety audits. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), indicated support for the notion that records be released after a certain time or by a triggering incident, and pointed out that health records and scholastic records exemptions would still apply.

The Council then voted unanimously in favor of a motion to amend the proposed draft in four ways: (i) strike *and electronic communications*; (ii) add a reference to § 23-9.2:10(C)(iii) at the end of the exemption; (iii) strike the word *specific* and replace it with *identifiable*; and (4) strike the word *relating* and replace it with *to the extent they relate*. The final version of the exemption as amended would read as follows: *All records of a threat assessment team established by a public institution of higher education pursuant to § 23-9.2:10 to the extent they relate to the assessment or intervention of identifiable individuals pursuant to § 23.9.2:10(C)(iii).* The Council next debated whether it should recommend the draft exemption as amended to the General Assembly. It was suggested that UVA and VPA might try to work out their differences regarding the proposal before the 2010 Session, but that the Council was not planning to meet again before then. The Council further discussed the possible consequences of releasing records after a time certain has elapsed. For example, what if someone was identified as a potential threat but never committed any crime, and this information was released 10 years later? The Chairman asked for any motions on this draft; hearing none, the Council moved to the next topic.

Anthony Troy, Esq. - Proposed Amendments to FOIA Remedies Provisions. The Council next heard from attorney Anthony Troy regarding two proposed amendments to § 2.2-3713 concerning remedies under FOIA: (1) to make clear that an attorney may bring a petition on behalf of a client; and (2) to allow for the recovery of expert witness fees by a successful petitioner. Mr. Troy related that in order to establish the reasonableness of attorneys' fees, expert testimony is often required. While FOIA allows for the recovery of attorneys' fees currently, it does not allow for the recovery of expert witness fees. Mr. Troy had recently had a FOIA case in which his client won, and was awarded attorneys' fees and court costs, but the judge denied the costs of hiring the expert witness who testified as to the reasonableness of the attorneys' fees. Mr. Troy also pointed out that other statutes have provisions allowing for the recovery of expert witness fees, and that the purpose is allow for reimbursement to a successful petitioner, not as a reward or for profit.

Next, Mr. Troy related how it is common for attorneys to make FOIA requests on behalf of clients, but if the Office of the Attorney General (OAG) has opined that if the attorney makes the request, then the attorney must also be the one to file a petition for mandamus. In other words, the attorney must be named as the petitioner even though the client is the real party in interest. Because the attorney is named as the petitioner, he or she cannot recover attorneys' fees in such a situation. The result is that the attorney is really working

for the client and being paid by the client, but because the attorney is the named petitioner, the client cannot be reimbursed attorneys' fees. In response to questions from the Council, Mr. Troy indicated that the judge in his case had ruled that his client could recover fees for the work performed by associate attorneys, but not for work performed directly by Mr. Troy. Mr. Troy indicated that the ultimate goal of this change would be to make clear that an attorney can make a request and bring a petition on behalf of a client, and the client could still recover attorneys' fees. The Council then discussed the proposed language used in the draft.

The Council agreed with the language amending subsection A of § 2.2-3713 of the draft proposed by Mr. Troy. As to the amendments appearing in subsection D of § 2.2-3713 of Mr. Troy's proposed draft, the Council suggested that the word *reasonable* be inserted before the word *fees*, thereby making the amendment read as follows: "...the petitioner shall be entitled to recover reasonable costs, *including costs and reasonable fees for expert witnesses,* and attorneys' fees from the public body...."

The Council then moved to approve the proposal recommended by Mr. Troy, as amended. The motion carried by vote of 9-1-1 (Mr. Malveaux abstained; Delegate Griffith voted against).

Prince William County Schools - Proposed Amendment to FOIA Remedies Provision. James G. Council, appearing on behalf of Prince William County Schools (PWCS), presented two alternative drafts intended to reverse the effects of SB 1505 (Puller), enacted in 2009, which changed the notice requirements for mandamus actions.[2] Mr. Council noted that the changes wrought by SB 1505 effectively eliminated the requirement for reasonable notice to be given prior to filing a petition for mandamus. The result was to open the door for legal gamesmanship by petitioners who might fail to serve a respondent in a timely fashion, effectively preventing respondents from having any chance to prepare before a hearing. Mr. Council had prepared two draft versions of the exemption. The first simply eliminated the changes made by SB 1505 by striking the language that was added. The second would strike the reference to § 2.2-3713 that appears in § 8.01-644, and add language into § 2.2-3713 so that the provisions of § 8.01-644 would not apply to FOIA mandamus actions provided that the respondent was provided with notice and a copy of the petition a reasonable time before the writ is filed.

Upon a request for background information, staff related that the original bill had not been presented to the Council for consideration, but apparently came from a situation where a citizen filed a petition for mandamus against PWCS during the winter holidays (when school staff was on vacation). It is staff's understanding that because FOIA requires a hearing within seven days of filing the petition, and the timing of the filing, the hearing was scheduled for December 23. However, citing Code § 8.01-644, which required that a copy and notice of the petition be served on the respondent before application for a writ of mandamus is filed, the judge dismissed the case for failure to provide the required notice. SB 1505 changed both FOIA and § 8.01-644 to state that the notice requirements of § 8.01-644 do not apply to FOIA petitions for mandamus filed under § 2.2-3713.

As further background, Mr. Council indicated he had spoken with Senator Puller, and believed she may not have fully understood all of the ramifications of the changes made by SB 1505. Mr. Hjelm, who had brought the petition at issue against PWCS, related that he had asked Senator Puller to introduce the bill in order to help *pro se* petitioners navigate through the court system, and to clarify that the FOIA requirement to hold a hearing within seven days really meant seven days. He also indicated that PWCS was aware of his requests, having denied them repeatedly, and that he had received responses from PWCS' lawyers, not school staff. Ms. Rhyne indicated that she had spoken to Senator Puller about the bill during the 2009 Session, and that VCOG supported it because it helped to simplify the process for citizens filing *pro se*, and because the Virginia Supreme Court has indicated that FOIA mandamus actions are different from common law writs of mandamus. She also indicated that SB 1505 was not intended to eliminate notice, and that all parties are entitled to notice, but that she would object to reverting to the language used prior to SB 1505. Upon question by the Council, Ms. Rhyne agreed that the second alternative draft presented by Mr. Council appeared to satisfy her concerns.

Mr. Merritt indicated that in his experience, when filing a writ of mandamus against a public officer, it was typical to send notice of one's intent to file and a copy of a petition to the officer a couple of days before filing the petition with the court. Mr. Merritt proposed a technical change to the second draft, to which Mr. Council agreed. Mr. Hjelm suggested that it needs to be easy for an average citizen to use, otherwise it would discourage people from enforcing their FOIA rights. The Council then moved to adopt the second draft presented by Mr. Council as amended with Mr. Merritt's suggestions. Discussion ensued as to whether to include a "reasonable time" provision in the draft. After further discussion of the specific language, the Council moved to approve the proposed exemption, as amended. The motion carried by vote of 8-1.[3]

Subcommittee Reports

PII Subcommittee

Staff presented the report of the PII Subcommittee, which had met three times during the interim, most recently on Friday, November 6, 2009. Staff reported that the PII Subcommittee reviewed the four bills referred by the 2009 General Assembly and recommended the following action as to each four bill:

- **HB 2471 (Hugo); Freedom of Information Act; salary records of teachers.** Provides that the disclosure of the names of individual teachers is not required under FOIA in response to a request for the official salary or rate of pay of employees of a local school board.

  Subcommittee Recommendation: No action to be taken. Rationale: Protecting one segment of public employees not deemed advisable.

- **HB 2630 (Crockett-Stark); Law-Enforcement Officers' Privacy Protection Act.** Allows a law-enforcement officer to request that personal information about the officer be withheld from disclosure on public records. For purposes of the Act, "personal information" includes the officer's name, social security number, address, phone number, and any other information that could be used to physically locate the officer.

  Subcommittee Recommendation: No action to be taken. Rationale: While the Subcommittee felt that the overall issue was of some concern, disclosure of this information is required pursuant to other laws and not dictated by FOIA. FOIA does not require the posting of any information on the internet, except for state executive branch meeting notices and minutes.

- **SB 1332 (Cuccinelli); Private entities operating, managing, or supervising any portion of the state highway system**. Provides that a private entity that operates, manages, or supervises any portion of the state highway system and receives funding from the Commonwealth or any of its political subdivisions shall be considered a public body for purposes of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) of the Code of Virginia as it relates to that portion of the private entity's business operations responsible for operating, managing, or supervising the portion of the state highway system.

  Subcommittee Recommendation: No action to be taken.

- **SB 880 (Stuart); Department of Game and Inland Fisheries; disclosure of official records; exceptions.** Provides that records of the Department shall be subject to the disclosure provisions of the Freedom of Information Act, except that personal information, as defined in § 2.2-3801, of individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department shall be withheld from public disclosure, provided that such individuals have requested that the Department not disclose such information. However, statistical summaries, abstracts, or other records containing information in an aggregate form that does not identify individual applicants or licensees shall be disclosed. The bill provides, however, that such information may be released (i) in accordance with a proper judicial order, (ii) to any law-enforcement agency, officer, or authorized agent thereof acting in the performance of official law-enforcement duties, or (iii) to any person who is the subject of the record.

  Subcommittee Recommendation: Given the enactment of the Protection of Social Security Numbers Act (§ 2.2-3815 et seq.) (c. 213 of the Acts of Assembly of 2009), SSNs are now protected and the portion of this bill dealing with SSNs has been resolved. The Subcommittee does, however, recommend an exemption of general application in FOIA that protects the credit card, debit card, other account information with a financial institution,

and routing information of private persons and public bodies. The Subcommittee recommends unanimously the attached draft legislation labeled "#1."

Staff reported that the PII Subcommittee had also discussed the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.). The Council was reminded that an amendment to the Council-recommended bill in 2009 (SB 1318/HB 2426) was recommended to the Governor by the OAG. The intent of the amendment was to clarify the date when SSNs could no longer be collected/required at the state level. Staff reported that it met with several attorneys from the OAG to further clarify the language of the amendment at the direction of the Council. Staff reported that the Subcommittee voted unanimously to recommend the draft legislation worked out by staff and the OAG. The Council, by consensus, agreed to adopt the Subcommittee's recommendations.

The Council continued discussing the language of the proposed exemption for financial information. The Council agreed by unanimous voice vote to strike the second sentence of the proposed draft concerning access by law-enforcement, by court order, and to the subject, and replace it with the following language adopted from other exemptions: *However, access shall not be denied to the person who is the subject of the record*. Also by unanimous voice vote, the Council agreed to add an emergency clause to the proposed exemption (so that it would take immediate effect after being passed by the General Assembly and signed by the Governor, rather than going into effect July 1). The Council further agreed by unanimous voice vote to defer to staff regarding the use of the term *financial institution*, and to recommend the proposed draft, as amended, to the 2010 Session of the General Assembly.

Public Records Subcommittee

Mr. Fifer reported that the subcommittee had met on Friday, November 6, 2009, to consider an exemption proposed by PWCS for certain records entered into PWCS' visitor identification system. After discussing the issues involved and how various current exemptions might apply to the records, the subcommittee recommended that no further action be taken at this time.

Other Business

There was no other business to discuss.

Public Comment

No further public comment was made.

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[1] In full, subsection C of § 23-9.2:10 reads as follows: *Each committee shall be charged with: (i) providing guidance to students, faculty, and staff regarding recognition of threatening or aberrant behavior that may represent a threat to the community; (ii) identification of members of the campus community to whom threatening behavior should be reported; and (iii) policies and procedures for the assessment of individuals whose behavior may present a threat, appropriate means of intervention with such individuals, and sufficient means of action, including interim suspension or medical separation to resolve potential threats.*

[2] SB 1505 added prefatory clauses in §§ 2.2-3713 and 8.01-644 stating that the provisions of § 8.01-644 do not apply to petitions for mandamus filed under § 2.2-3713. Specifically, as amended by SB 1505, subsection C of § 2.2-3713 reads as follows: *Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall*

be heard within seven days of the date when the same is made. However, any petition made outside of the regular terms of the circuit court of a county that is included in a judicial circuit with another county or counties, the hearing on the petition shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law. As amended by SB 1505, § 8.01-644 reads as follows: *Except as provided in § 2.2-3713, application for a writ of mandamus or a writ of prohibition shall be on petition verified by oath, after the party against whom the writ is prayed has been served with a copy of the petition and notice of the intended application a reasonable time before such application is made*.

[3] Mr. Fifer voted against the motion; Delegate Griffith and Ms. Spencer were not present at the time the vote was taken.