

FOIA Council
November 14, 2011 Meeting Summary
1:30 p.m., House Room C,
General Assembly Building
Richmond, Virginia

The Freedom on Information Advisory Council (the Council)¹ held its third quarterly meeting in Richmond to continue its deliberation on the bills referred to it for further study by the 2011 General Assembly, receive progress reports from its two subcommittees, and hold its annual legislative preview.

Subcommittee Reports

Personnel Records Subcommittee--

Ed Jones, chair of the Personnel Records Subcommittee, advised the Council that the Subcommittee had met twice in Richmond, on July 18 and October 4, and once in Fredericksburg, on November 8. As a reminder, the Subcommittee was appointed to study SB 812 (Martin), concerning access to names and salary information for public employees and officials, which was referred to the FOIA Council by the 2011 Session of the General Assembly. The Subcommittee decided not to recommend SB 812, which would have excluded employee names from being disclosed along with their salary or rate-of-pay. Under current law, such information does not have to be disclosed if the annual salary or rate of pay is \$10,000 or less.² The Subcommittee looked at the history of this provision, which was enacted in 1978, as well as how other states handle such information. There is no legislative history discussing why the threshold was implemented, or why \$10,000 was the chosen amount. What legislative history is available indicates that the law passed the Senate without any threshold in place, but the \$10,000 threshold was added by the House, and it was the House version with the threshold that was enacted. Research indicated that Virginia is one of only three states that has any restrictions upon name and salary information of public employees. Additionally, there appears to be a current trend toward posting online such name and salary information, as evidenced in states such as New Mexico. Mr. Jones stated he supported leaving the current law unchanged for three reasons: (1) history - there is no legislative history, two prior subcommittees studying FOIA in the last two decades left this provision unchanged, and there is no "escalator clause" or other mechanism in the statute to raise the \$10,000 threshold; (2) national trends - while recognizing that \$10,000 in 1978 is not the same as \$10,000 today, the more compelling trend is for greater transparency and accountability in government; (3) balancing - the current law strikes a balance between the public's right to know and a public employee's interest in privacy. After considering options including eliminating the \$10,000 threshold

¹ Council members Iaquinto, Treadway, Fifer, Landon, Whitehurst, Jones, Schliessmann, Tavenner, and Hamlett were present at the meeting; members Houck, Selph, and Dooley were absent.

² Specifically, among other things, subsection A of § 2.2-3705.8 requires the disclosure of "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" but later provides that "the provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less."

amount, raising the threshold to some higher amount, or leaving the law as it is, the Subcommittee voted 2-1 in favor of leaving the law as it is.³

Mr. Jones further observed that Subcommittee member Dooley could not be at today's meeting, but submitted written remarks on why she favored raising the threshold amount instead (attached below as Appendix A). Mr. Landon also spoke in agreement with Mr. Jones, reiterating that 47 states have no threshold; that since 1978, there has been a growing trend favoring transparency in government; and opining that the question should not be approached as a cost of living issue. Generally, he observed that FOIA strives for balance between the public's right to know and government needs, but stated that such balance is not appropriate here because full disclosure of information on public employee salaries is part of the price of being employed by the public. He opined that if the law was being considered for the first time now, it would likely be passed with no threshold or other limitation on access to public employees' names and salary information.

Having received the Subcommittee's report and recommendation not to change the existing law, Delegate Iaquinto invited comment from the Council and the public. There was none. No motions were made on this matter, and so no further action was taken by the Council.

Criminal Investigative Records Subcommittee--

Craig Fifer, chair of the Criminal Investigative Records Subcommittee, reported that the Subcommittee had met on July 18, 2011. As a reminder, he noted that the gist of the Subcommittee's work is to see if there is any reason to change the existing exemption for criminal investigative records. In July, the Subcommittee decided not to proceed with SB 1467 (Edwards), but to continue to study the issues raised because of the amount of interest in access to criminal investigative files and other law enforcement records. At its July meeting, the Subcommittee directed staff to meet with the interested parties to see if consensus could be reached about any changes to be made to the existing law. Since then, staff has met with interested stakeholders (representing the Virginia Press Association, the Virginia Coalition for Open Government, the Virginia Association of Chiefs of Police, the Virginia State Police, the Virginia Sheriffs' Association, the Virginia Municipal League, the Virginia Association of Counties, as well as law enforcement representatives from the Culpeper County Sheriff's Office and Fairfax County Police Department) three times this year: on August 31, October 12, and today, November 14. The workgroup used a draft prepared by the Virginia Press Association (VPA) as a vehicle for discussion at these meetings. The workgroup has not reached agreement on a legislative proposal at this time, but intends to continue its work next year. The current plan is for VPA representatives to prepare a position paper regarding issues of concern in the current law, which will be posted on the FOIA Council website and shared with the other interested parties. After the stakeholders share the paper with their constituents to get their reactions, the workgroup discussions will resume at a date to be determined after the 2012 Session of the General Assembly.

³ Subcommittee members Jones and Landon voted in favor of leaving the current law as it is; Subcommittee member Dooley voted against.

Annual Legislative Preview

The purpose of the annual legislative preview is to air FOIA and related access issues before the Council and other interested parties, which issues will or may be the subject of legislation in the upcoming Session of the General Assembly. Cherry Evans and Betty Wilson appeared on behalf of the Virginia Department of Aviation. They indicated concern about access to flight manifests and certain grant information. The Department provides air services to the Governor, other elected officials, and other state agencies; the flight manifests reveal information about the Governor's travel schedule, economic development, prisoner transport, and other sensitive matters. The Department also issues grants to promote and enhance air services. Those seeking grants from the Department, such as local airports, are required to provide relevant records, which often contain details about airport operations and ongoing negotiations with other parties. In regard to both grants and flight manifests, there are existing provisions that exempt the records at issue from disclosure when the records are held by other officials or agencies, but the concern is that the records may not be so protected once the records are shared with the Department (i.e., that the relevant existing exemptions are written so narrowly as to exclude the Department from using them). Ms. Wilson indicated that the Department intends to look into the matter in the coming year, but does not intend to introduce legislation on the matter during the 2012 Session of the General Assembly. There were no questions or comments from the Council or the public on this matter.

Public Comment

The next item of business was public comment. There was none.

Other Business

Considering that its next meeting is scheduled for January 3, 2012, that the 2012 Session of the General Assembly starts the following week, and that no further business has been presented that requires the Council's attention before the 2012 Session, the Council voted by unanimous voice vote to cancel the scheduled January meeting.

Delegate Iaquinto took a point of personal privilege to commend Senator Houck for his many years of dedicated and thoughtful service to the FOIA Council and the Commonwealth. The Council briefly adjourned, but immediately reconvened to consider a motion by Delegate Iaquinto that the Council pass a resolution so commending Senator Houck. The motion carried by unanimous voice vote. There being no further business, the Council adjourned.

Appendix A Minority Report

Kathleen Dooley, Personnel Records Subcommittee

Issue:

Should the General Assembly amend Virginia Code §2.2-3705.8 to make public employee salary information exempt from the mandatory disclosure requirements of the Virginia Freedom of Information Act?

Recommendation:

The General Assembly should amend Virginia Code §2.2-3705.8 to update the \$10,000 “fulcrum” or balancing point established in 1978. The \$10,000 was intended to provide a balance between a public employee’s interest in the privacy of personnel information and the public’s interest in full disclosure of government expenditures. However, the \$10,000 figure is no longer meaningful or effective.

The proposed amendment, attached, would substitute a public employee salary or rate of pay of \$30,000 per year. The proposed amendment, like current law, would not apply to the salary or rate of pay of an elected official. The name, position, job classification and expenses reimbursed for any public official or employee would continue to be public information.

Rationale:

The Virginia Freedom of Information Act establishes a general policy that all public records shall be open to public inspection. One exception to this rule protects “personnel records” from public inspection. “Personnel records” were originally interpreted to include public employee salary information. However, in 1978, the General Assembly adopted a bill that excluded public employee salary information from the “personnel records” exemption, effectively making this information public. The 1978 law established an annual salary of \$10,000 as the point at which the public interest in disclosure outweighed the individual’s interest in the privacy of personnel information. The salary of any public employee making \$10,000 or more annually has been subject to public inspection since 1978.

In 1978, the federal minimum wage was \$2.30/hour.⁴ A person working full-time, 40 hours/week 52 weeks per year would earn \$4784.00 annually. Thus, the \$10,000 balance point represented wages of approximately 2 x the minimum wage in 1978. Today, the federal minimum wage is \$7.25/hour, so a full time minimum wage earner makes \$15,080.00 annually. The \$10,000 balance point therefore no longer serves to shield any full-time public employee’s salary from public scrutiny.

There is a substantial public interest in access to public employee salary information. Fundamentally, it represents a governmental expenditure of public money, and employee salaries typically make up a significant component of any government agency’s budget.

⁴ United States Department of Labor, Wage and Hour Division, “Changes in Basic Minimum Wages in Non-farm Employment under State Law: Selected Years 1968 to 2011.”

Access to this information assists the public in determining whether compensation is fair – whether public employees are overpaid or underpaid – and how public compensation compares to private sector compensation. Public scrutiny of this information can serve to expose instances of nepotism, corruption, or discrimination. Public employees should be counted on this side of the balance – they share these interests in access to public salary information.

The Internet has transformed the nature of “public information.” In the past, this would have meant that the salaries of the top-earning public employees might have been published in the newspaper. Now, this information is posted on websites for literally the whole world to see.⁵ Public access is not limited to residents of a locality or state, but is now available to people in every country on the planet.

The 1978 legislation recognized a public employee’s privacy interest in salary information. Salary information is personal in nature, and would be classified as “personnel” information except for Va. Code §2.2-3705.8. The employee has a privacy interest, an interest in being free from simple voyeurism, and an interest in personal dignity all at stake. Publication of this information potentially increases the public employee’s exposure to identity theft, as it is a very specific data point linked to the employee’s name which, combined with additional information about the employee, could be used for identity or credit theft. Online publication of salary information is a game-changer from the standpoint of the public employee with respect to all of these interests in privacy.

Virginia is in a minority of states that protect some public employee salary information from public disclosure. Hawaii does not disclose exact salaries of any civil service employees, but does disclose the salary range for the position an individual holds.⁶ South Carolina makes salaries of full time employees of \$50,000 or more public, as are the salaries of all part-time employees. Salaries for employees making less than \$50,000 per year are reported within a range of \$4,000. Salaries of employees making less than \$30,000 per year are reported only as a range of allowable salaries for the position. The other states make all public employee salary information public.⁷

Virginia has established its public policy and precedent through the use of the \$10,000 balancing point. This legislation should be updated in order to implement that public policy for the current era. The legislature should retain the simple structure of a salary benchmark, but update it to reflect current salary levels. A figure of \$30,000 is recommended as a

⁵ See, for example, the website of the Texas Tribune, which publishes annual base salaries of 660,000 public employees, including the largest state agencies, universities, public schools, cities and mass transit agencies. The Kansas City Star website posts a collection of databases of public employee salary information. The Sacramento (California) Bee website posts salary information for state employees. The Alabama Department of Finance publishes monthly payroll information. Chicago Mayor Rahm Emanuel has posted all city employee name and salary information, as has the Empire Center for New York State Policy.

⁶ “State Laws Regarding Disclosure of Public Employee Salaries: A Summary,” Virginia Coalition for Open Government.

⁷ 5 *Id.*

modern equivalent to the public sector jobs, and Virginia law recognizes a privacy interest in salary information. Updating the \$10,000 balancing point would protect the privacy interests of the lowest-paid public employees. The General Assembly and the FOIA Council should continue to monitor the privacy interests implicated by the publication of salary data on the Internet.

Proposed Amendment to Virginia Code § 2.2-3705.8:

A. Neither any provision of this chapter nor any provision of Chapter 38 (§ 2.2-3800 et seq.) of this title shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1; (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; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees.

The provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is ~~\$10,000~~ **\$30,000** or less.

B. Nothing in this chapter shall be construed as denying public access to the nonexempt portions of a report of a consultant hired by or at the request of a local public body or the mayor or chief executive or administrative officer of such public body if (i) the contents of such report have been distributed or disclosed to members of the local public body or (ii) the local public body has scheduled any action on a matter that is the subject of the consultant's report.

#