



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

Senator Richard H. Stuart, Chair
Delegate James M. LeMunyon, Vice-Chair

Maria J.K. Everett, Esq., Executive Director
Alan Gernhardt, Esq., Staff Attorney
foiacouncil@dls.virginia.gov

General Assembly Building ~ 201 North 9th Street, Second Floor ~ Richmond, Virginia 23219
804-225-3056 ~ (Toll Free) 1-866-448-4100 ~ (Fax) 804-371-0169 ~ <http://foiacouncil.virginia.gov>

FOIA Council Meeting Summary

November 18, 2014

1:30 PM
House Room C
General Assembly Building
Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its third meeting of 2014.¹ The Council received progress reports and recommendations from its two subcommittees, held Part II of the Council's annual legislative preview, discussed the adoption of an electronic communications meeting policy, and also discussed the bills referred to it by the 2014 Session of the General Assembly.

Subcommittee Reports

Records Subcommittee:

Staff reported that the Subcommittee had met four times in the 2014 Interim and considered three sections of FOIA that cover records exemptions of general application, records exemptions of specific public bodies and certain other limited exemptions, and limitations on record exclusions, respectively.² The Subcommittee recommended making six legislative changes to these sections:

- Combine subdivision 1 of § 2.2-3705.1 and subsection A of § 2.2-3705.8, because both apply to personnel records and the law would be clearer if all of the relevant provisions were in one place;
- Amend subdivision 10 of § 2.2-3705.1 to protect only "personal contact information" and to eliminate the current reference to "personal information" as defined in the Government Data Collection and Dissemination Practices Act;³

¹FOIA Council members Senator Stuart, Dooley, Hamlett, Landon, Selph, and Treadway were present from the beginning of the meeting. Delegate LeMunyon arrived later (at approximate 2:15 PM), during the Legislative Preview. Members Ashby, Jones, Landon, Tavenner, and Whitehurst were absent.

² Va. Code §§ 2.2-3705.1, 2.2-3705.7, and 2.2-3705.8.

³ The current language refers to § 2.2-3801.

- Amend subdivision 1 of § 2.2-3705.7 to eliminate the word "scholastic," because scholastic records have a separate exemption at subdivision 1 of § 2.2-3705.4 and the rest of the items listed in this exemption are tax records;
- Amend subdivision 7 of § 2.2-3705.7, concerning access to public utility customer account information, to require the release of the amount of money charged for utility services as well as the amount of money paid;
- Eliminate subdivision 13 of § 2.2-3705.7 which currently exempts the names and addresses of subscribers to *Virginia Wildlife* magazine published by the Department of Game and Inland Fisheries;
- Eliminate subdivision 30 of § 2.2-3705.7 which exempts names, physical addresses, telephone numbers, and email addresses contained in correspondence between an individual and a member of a public body of the locality in which the individual is a resident, unless the correspondence relates to the transaction of public business. Because correspondence that is not in the transaction of public business would not be a public record, this exemption merely restates existing law. In response to an inquiry from Senator Stuart, Roger Wiley, an attorney and former FOIA Council member representing local government, stated that local government representatives agreed that this exemption was redundant and should be eliminated. Mr. Landon asked whether there were other areas besides electronic mail where citizens' contact information should be protected, such as Facebook or other social media. Staff observed that there is no general exemption for contact information. Staff also pointed out that many other forms of social media operate differently from electronic mail in that citizens choose to access public bodies' Facebook pages or Twitter feeds, and public bodies do not necessarily maintain distribution lists for those other social media as they do with electronic mail. Additionally, such social media is often commercially owned and operated and not under control of the public body.

There were no other comments about these recommendations.

Meetings Subcommittee

Ms. Dooley reported that the Subcommittee had met four times during the 2014 Interim and had considered all but nine or ten of the 44 meetings exemptions in FOIA.⁴ As some of these meetings exemptions are driven by corresponding records exemptions, the Subcommittee decided to defer consideration of them until the Records Subcommittee looked at the relevant records exemptions. Of the exemptions considered this year, the Subcommittee recommended leaving all but one as they are currently written. The Subcommittee recommended separating current subdivision A 7 of § 2.2-3711 into two subdivisions, one for the discussion of specific legal matters, and the other for the discussion of probable or actual litigation. Senator Stuart asked whether choosing between two such subdivisions might "give away the public body's hand." Ms. Dooley indicated the Subcommittee did discuss

⁴ Subsection A of § 2.2-3711.

the definition of "probable litigation" in current law, but did not specifically discuss whether choosing one or the other exemption would reveal too much. Staff observed that in many situations a public body could cite both exemptions, and pointed out that FOIA already requires public bodies to identify the subject and purpose of a closed meeting, as well as citing the appropriate exemption(s).

The Council also discussed whether it would be better to introduce separate legislation for the Subcommittee recommendations or to put all of the study recommendations into one omnibus bill once the study was completed. The Council decided not to vote separately on each recommendation at this time, but to take up all of the recommendations as omnibus legislation at the end of the three-year study.

Legislative Preview

Virginia Commonwealth University (VCU) - Karah Gunther spoke on behalf of VCU, stating that VCU sought to amend existing exemptions that apply to the VCU Health System Authority (HSA), subdivision 15 of § 2.2-3705.7 and subdivision A 23 of § 2.2-3711, so that they would also apply to VCU itself. She explained the need for this change was because of the close interaction between VCU and HSA. That interaction involves sharing records that currently would be exempt if held by HSA but not necessarily if held by VCU, discussion of such records and other HSA matters by the VCU Board of Visitors, and having persons who served on the HSA Board who are also officials at VCU. Ms. Hamlett stated that as former counsel to VCU she was aware of the close interaction between VCU and HSA, and the issues that arose because of it. She also noted that the proposed change would not affect what was exempted, only who could use the exemptions. Ms. Gunther indicated that VCU does plan to ask for the legislation to be introduced at the 2015 Session of the General Assembly. There was no public comment on this proposal. The Council voted unanimously to recommend it to the General Assembly.

University of Virginia (UVA) - Lynne Fleming, Esq., and Dr. Tracey Hoke spoke on behalf of UVA about UVA's proposal to add an exemption for records of certain health care committees and entities to the extent they reveal information that may be withheld from discovery as privileged communications pursuant to § 8.01-581.17. Ms. Fleming stated that in 1976, the General Assembly had enacted statutes giving privilege to certain hospital committees, such as peer review and quality committees, so that they could speak freely to discuss and correct problems. The privilege protects such communications from discovery and use in litigation, and because private hospitals are not subject to FOIA, that was sufficient for them. However, because public hospitals are subject to FOIA, they would need the privilege to also apply in the FOIA context. Ms. Fleming stated that the proposal would benefit hospitals run by UVA, VCU, and the Department of Behavioral Health, and that the Virginia Press Association (VPA) had suggested and agreed with the proposal. Ms. Dooley questioned whether the suggested language was vague and might be made clearer, which issue was then discussed by the Council, Ms. Fleming, and Ginger Stanley, Executive Director of VPA. Senator Stuart agreed with Ms. Dooley that the

language was somewhat vague and could be less verbose, but stated that he supported what UVA was trying to do. There was no public comment on this proposal. The Council voted unanimously to recommend it to the General Assembly.

Electronic Communications Meeting Policy

Staff reminded the Council that at its September meeting, the Council considered adoption of an E-meetings policy as required by § 2.2-3708.1 as enacted by the 2014 Session of the General Assembly. Specifically, subsection B 1 of § 2.2-3708.1 provides that "Participation by a member of a public body as authorized under subsection A shall be only under the following conditions: ...The public body has adopted a written policy allowing for and governing participation of its members by electronic communication means, including an approval process for such participation, subject to the express limitations imposed by this section. Once adopted, the policy shall be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting." In September, the Council considered policy options of automatic approval, approval by vote, or approval by the chair or a designee. However, given concerns raised, the Council deferred action on adoption of the policy. Staff pointed out two considerations today: (1) adoption of the policy for the Council's own use and (2) providing guidance to other public bodies.

Senator Stuart believed that approval of remote participation should be a matter of right unless it went against the terms of FOIA, and stated that if a member's participation was challenged, then the matter should be brought to a vote before the public body. He felt it would not be good to allow the chair or any other single member to decide whether to approve participation.

Mr. Wiley, speaking on behalf of Loudoun County, stated that the County Board of Supervisors had requested this legislation with the specific intent of removing discretion on the part of the public body, but there was no problem with voting to resolve a dispute regarding whether a member was eligible to participate. He stated that he advises clients to put in their by-laws that members can use remote participation to the extent the law allows, and that they must notify their clerk so that the clerk, who keeps attendance records, would know who is eligible to participate remotely.

Ms. Stanley stated for informational purposes that she knew of six public bodies who had decided not to allow such remote participation, and that citizens questioned why members would be allowed to participate remotely in the case of "personal matters."

After further discussion, the Council voted unanimously to adopt a policy of automatic approval of remote participation by electronic means so long as such participation complies with what is allowed under FOIA, and to hold a vote of the

Council if there is a challenge to such participation. The Council directed staff to include the policy statement on the Council's website, and state explicitly that the policy also applied to any committees or subcommittees of the Council. That policy would also be the model for other public bodies going forward.

Bills referred to Council for study by 2014 Session of General Assembly

House Bill 788 (LeMunyon) - FOIA; out-of-state requests for records. This bill would have granted access rights to out-of-state requesters, with certain limitations. Currently, Virginia FOIA grants access rights to Virginia citizens and certain media representatives that broadcast or have circulation in Virginia.⁵ The Supreme Court of the United States recently upheld this provision of Virginia's FOIA.⁶ Staff indicated that as a practical matter, public bodies are advised to respond to out-of-state requesters, but with the understanding that they can get advance payment and that FOIA's response time deadlines do not strictly apply (as the typical concerns expressed are about collecting money from out-of-state and the additional workload involved). If a public body does not respond or denies an out-of-state request, the out-of-state requester can simply ask someone in Virginia to make the same request, and then all of the rules of FOIA would apply. Delegate LeMunyon noted that his bill was designed with the interests of local government in mind, to allow out-of-state requests but to give more leeway in response and allow a lower threshold for advance payment than with Virginia citizens. Senator Stuart asked about other states; staff noted that Virginia is one of only five or six states with a citizenship limitation, but that other states have much lower advance payment thresholds, often \$10 or \$20, while Virginia has a \$200 threshold.

Mr. Wiley, Phyllis Errico of the Virginia Association of Counties (VACo), and Mark Flynn of the Virginia Municipal League (VML) all expressed concerns and opposition to this bill on behalf of local governments. They indicated that local governments already do not recoup all of their costs in responding to FOIA requests, and that having to respond to out-of-state requesters would only add to those costs and to their workload. As an example, Mr. Flynn stated that for a small town with a part-time clerk, a \$100 records request could take a full day, preventing the clerk from completing any other work. There was also concern over the venue provisions of FOIA. There was no motion on the bill, but Delegate LeMunyon indicated he would be happy to continue working on it with the interested parties.

House Bill 839 (Brink) - FOIA; applicability to the Office of the Attorney General. Staff reminded the Council that former Delegate Brink had brought this bill after it appeared that the Office of the Attorney General (OAG) had put footnotes in FOIA responses stating that OAG might not be subject to FOIA.⁷ However, former

⁵ Subsection A of § 2.2-3704.

⁶ *McBurney v. Young*, 133 S. Ct. 1709, 185 L. Ed.2d 758 (2013).

⁷ The footnote at issue was based on similar considerations as were applied to the State Corporation Commission (SCC) when the Supreme Court of Virginia held that the SCC is not subject to FOIA. *Christian v. State Corporation Commission*, 282 Va. 392, 718 S.E.2d 767 (2011).

Attorney General Cuccinelli had directed OAG to stop including the footnote, and current Attorney General Herring has not made any assertion that the OAG is not subject to FOIA. The Council expressed concern that if it were to support legislation amending the definition of "public body" to specifically include OAG, it might be misconstrued as excluding other offices and officials that were not listed explicitly in the definition. No action was taken on this bill.

Public Comment and Other Business

The Council called for public comment. There was no comment, nor was any other business brought up for consideration.

Future Meeting

The Council will next meet after the 2015 Session of the General Assembly has adjourned sine die. The Council directed staff to poll for meeting dates in March or April of 2015. The meeting was then adjourned.

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