

FOIA Council Meeting Summary

November 20, 2017

1:30 PM

House Room 1

Capitol Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its fourth meeting of the 2017 Interim on November 20, 2017.¹ The meeting was held to consider bills referred by the 2017 Session of the General Assembly to the Council for further study, to receive a progress report from the Electronic Meetings Subcommittee, to review draft legislation recommended by the Electronic Meetings Subcommittee and the Proprietary Records and Trade Secrets Subcommittee, to hear any proposals for legislation as part of its Annual Legislative Preview, and to discuss other issues of interest to the Council.

Review of Bills Referred by the 2017 Session of the General Assembly

Delegate Kory was scheduled to present HB 2223,² concerning public comment periods, but she was not able to attend today. Senator Bill DeSteph presented SB 972,³ concerning requests for information made by members of the General Assembly. He stated that the bill would require state agencies to provide records to members of the General Assembly acting in their legislative capacity without redaction, except for records that are prohibited from release and records covered under the exemptions for public safety, law-enforcement, and working papers.⁴ Senator Stuart questioned whether this was setting up a special right for legislators. Senator DeSteph indicated the bill was introduced in response to situations where legislators either did not receive records that had been requested or received the records but not in a timely manner. He described an incident in which a citizen received the same records that Senator DeSteph did but the citizen received them a month and a half earlier. He further described another situation where a delegate received only two or three redacted pages of information whereas a citizen who made the same request received about 150 pages. After brief discussion by the Council, the floor was opened to public comment. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), expressed that she shared Senator Stuart's concern about the bill's creating a special carve-out for General Assembly members. Sandy McNinch, representing the Virginia

¹ Council members Delegate LeMunyon (Chair), Senator Stuart (Vice-Chair), Delegate Torian, Hamlett, Jones, King-Casey, Porto, Seltzer, Stern, Treadway, and Vucci were present; members Senator Locke, Coleburn, and Dooley were absent.

² **HB 2223** Kory - Bill Summary: Requires that every public body afford an opportunity for public comment during any open meeting and requires that the public comment periods be noticed on the public body's agenda. The bill permits the public body to have discretion in where it places the public comment period on its agenda and permits the public body to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill requires that for meetings of all public bodies, not just those state public bodies on which there is at least one member appointed by the Governor as in current law, the notice provided for any such meeting include a statement as to approximately at what point during the meeting public comment will be received.

³ **SB 972** DeSteph - Bill Summary: Requires all departments, agencies, and institutions of the Commonwealth and staff and employees thereof to respond to a request for information made by a member of the General Assembly. The bill further provides that notwithstanding the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), a response to a request for information made by a member of the General Assembly shall not be subject to redaction.

⁴ Code §§ 2.2-3705.2, 2.2-3706, and 2.2-3705.7(2), respectively.

Economic Development Partnership (VEDP), expressed concern because VEDP holds confidential information about hundreds of companies and would not want to have to give access to 140 more people. Alyssa Padden of the Office of the Executive Secretary of the Supreme Court of Virginia (OES), stated that while amendments to the original bill did address some concerns, there were still concerns about the treatment of court records, such as work product and privileged communications between judges and justices. She also questioned whether the bill would open confidential judicial records. First Sergeant David Ostwinkle of the Virginia State Police (VSP) stated that VSP uses the same tests for recruitment over and over again, and withholds them from the public under current law,⁵ but he questions how this bill would affect access to these tests. Mr. Jones asked Senator DeSteph to consider keeping the bill with its current timeline for a reply but eliminating the language requiring records to be produced without redaction. Senator DeSteph responded that part of the reason for the bill was that members of the General Assembly had received redacted records that they felt should not have been redacted. He also stated that judge-to-judge communications and police exams could be added to the exceptions from required disclosure, and he asked that the Council recommend the bill to the 2018 Session of the General Assembly. After further discussion, the Council took no action on the bill.

Electronic Meetings Subcommittee Report

Staff reported that the Electronic Meetings Subcommittee met twice, on October 4 and November 1, 2017. As a reminder, the 2017 Session of the General Assembly referred HB 2316 (Marshall, D.W.) to the Council for study. HB 2316 would provide that the remote locations from which additional members of the Tobacco Region Revitalization Commission participate in a Commission meeting that is conducted through electronic communication means shall not be required to be open to the public. After considering HB 2316 at its May meeting, the Council directed staff to prepare a draft that would make this change generally for all public bodies. After considering the draft at its August meeting, the Council directed the subcommittee to further study this proposal, as well as other issues concerning electronic meetings carried over from last year after the conclusion of the three-year study under House Joint Resolution No. 96 (2014). Staff reported that the subcommittee considered and recommended three drafts to the Council for its consideration: (1) a "remote locations draft" based on HB 2316; (2) a draft that would combine the two current sections addressing electronic meetings, §§ 2.2-3708 and 2.2-3708.1, into one section without making substantive changes; and (3) a draft that would amend the definition of "electronic communication." Staff presented and the Council discussed each draft in turn as described below.

Review of Drafts Recommended by the Electronic Meetings Subcommittee

Remote Locations Draft (18100760D)

The first draft considered by the Council was the one based on HB 2316 (Marshall, D.W.), which would have allowed the Virginia Tobacco Region Revitalization Commission (the Tobacco Commission) to hold meetings by electronic communication means without having the remote locations open to the public. Staff presented the draft in detail, noting that the draft would no longer require that remote locations be open to the public unless three or more members of a

⁵ Subdivision 4 of § 2.2-3705.1.

public body are participating from the same remote location and that the bill would (i) require that equivalent access be provided to the public to witness any meeting conducted by electronic communication means, (ii) amend the annual reporting requirements for electronic meetings, and (iii) make additional necessary corresponding changes.

Draft Combining §§ 2.2-3708 and 2.2-3708.1 (18100758D)

Staff presented the draft, noting that it combined the existing provisions for different types of electronic meetings into one section organized as follows: subsection A sets out provisions applicable to all public bodies that allow for individuals to call in to a meeting due to medical reasons or personal matters, or for public bodies to meet electronically in order to respond to a state of emergency as declared by the Governor; subsection B sets out the provision for members of regional public bodies to participate electronically if they live 60 miles or more from the central meeting location; subsection C sets out the procedural requirements applicable to subsections A and B concerning having a participation policy, a physically assembled quorum, and that the voice of any member participating electronically be heard by all present at the main meeting location; and subsection D sets forth the provisions applicable only to state public bodies. Staff noted that the draft was not intended to make any substantive changes to current law but only to consolidate it all into one section in order to make it easier to understand.

Definition of "Electronic Communication" Draft (18100757D)

Staff explained that the subcommittee took up this issue because under current law, the term "electronic communication" is defined in § 2.2-3701 to mean "any audio or combined audio and visual communication method." This definition omits purely visual electronic communications such as electronic mail and text messages. Additionally, the current definition does not specify what is "electronic" as opposed to other communication means. After discussing alternatives, the subcommittee recommended this draft, which combines a definition of "electronic" found elsewhere in current law with a dictionary definition of "communication."

Public Comment and Discussion

Delegate LeMunyon invited comment on all three drafts. Chris Piper, representing the Tobacco Commission, expressed support for all three drafts. Andrew Bodoh, Esq., suggested the Council consider how these drafts might affect voting and whether changes should be made in § 2.2-3710 to clarify what type of voting would be allowed. Mr. Seltzer noted that the point was fairly taken but that the problem is in § 2.2-3710 rather than in the definition. Delegate LeMunyon suggested taking up the issue at another time. The Council then voted unanimously to recommend all three drafts to the 2018 Session of the General Assembly.

Review of Proprietary Records and Trade Secrets Drafts Recommended by the Council

Staff reminded the Council that at its last meeting the Council recommended three drafts brought to it by the Proprietary Records and Trade Secrets Subcommittee, with amendments to each draft. Staff today presented those drafts as amended, as described below.

Trade Secrets Exemption Draft (18100192D)

Staff explained that this draft would create a general record exclusion for trade secrets submitted to a public body and would allow permissive joinder of the entity that submitted the trade secrets

to the public body (the submitting entity) in an action challenging the designation of a trade secret but would not allow for a court to apportion fees and costs between a public body and the submitting entity. The draft provides that a record is eligible for exclusion as a trade secret if the submitted information qualifies as a trade secret of the submitting entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) and requires the submitting entity to make a written request to the public body (i) invoking such exclusion upon submission of the trade secret information for which protection from disclosure is sought, (ii) identifying with specificity the trade secret information for which protection is sought, and (iii) stating the reasons why protection is necessary. The draft permits a requester filing a FOIA petition challenging a record's designation as an excluded trade secret to name the submitting entity or its successor in interest, in addition to the public body, as a defendant. The draft also permits the public body to request that the court add the submitting entity as an additional defendant in the action. The draft provides that the general exclusion for trade secrets shall not be construed to authorize the withholding of such information that no longer meets the definition of a trade secret under the Uniform Trade Secrets Act.

Trade Secrets Remedies Draft (18100193D)

Staff reminded the Council that at its last meeting the Council directed that the fee-shifting provision for fees and costs be separated from the draft creating the general exemption for trade secrets (described above). Specifically, this draft would permit a requester filing a FOIA petition challenging a record's designation as an excluded trade secret to name the submitting entity or its successor in interest, in addition to the public body, as a defendant. The draft also permits the public body to request that the court add the submitting entity as an additional defendant in the action. The draft states that if, as a result of the action, the court requires the public body to produce the requested information because it was unreasonably withheld as a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), any award of reasonable costs and attorney fees to the requester shall be paid by the submitting entity or the public body, or both, in the proportion deemed appropriate by the court.

Public Procurement Act Draft (18100197D)

Staff reminded the Council that this draft amends the Virginia Public Procurement Act (§ 2.2-4300 et seq.) rather than FOIA, and is based on policy language from the Department of General Services. Specifically, the draft would provide that a bidder, offeror, or contractor shall not improperly designate as trade secrets or proprietary information (i) an entire bid, proposal, or prequalification application; (ii) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (iii) line item prices or total bid, proposal, or prequalification application prices.

Public Comment and Discussion

Phil Abraham of the Vectre Corporation reiterated his opposition on behalf of his clients to the fee-shifting provisions in the trade secrets remedies draft, as he had expressed at prior Council and subcommittee meetings. He stated he had no problem with the permissive joinder provisions but that the fee-shifting aspect would discourage competition, could be subject to abuse, and the matter could be addressed by indemnification clauses in contracts rather than by statute. Mr. Abraham and the Council discussed various examples of how a business might misuse such fee-shifting provisions against a competitor, whether it would create an uneven playing field, and

whether it is right that under current law only public bodies are liable for fees and costs, even though third parties are the ones to designate trade secrets and proprietary information. After further discussion, Mr. Seltzer moved to recommend all three drafts. Senator Stuart made a substitute motion to recommend the trade secrets exemption draft and the public procurement act draft that was seconded by Mr. Stern, then approved by unanimous vote. Mr. Seltzer then moved to recommend the trade secrets remedies draft, which was seconded by Ms. Hamlett, then approved by vote of 7-4 (Seltzer, Treadway, Jones, Hamlett, Stern, King-Casey, and Porto voted in favor; Senator Stuart, Delegate LeMunyon, Delegate Torian, and Mr. Vucci voted against).

Declaratory Judgment Draft

At the Council's last meeting, Mr. Bodoh presented the idea of adding declaratory judgment to the existing remedies under FOIA. The Council directed staff to prepare a draft that would implement this proposal to be considered at the next Council meeting. Staff presented that draft today, but noted that because declaratory judgment is a declaration of right rather than a remedy for a violation, it was drafted as a new, separate section rather than incorporated into the provisions for a petition for mandamus or injunction under § 2.2-3713 (which are to remedy denials of the rights and privileges granted under FOIA). As directed by the Council at its last meeting, the draft includes provisions for an expedited hearing, jurisdiction and venue in general district court as well as circuit court, and the recovery of attorney fees and costs, all corresponding to the similar provisions for FOIA petitions for mandamus or injunction in current law. Staff informed the Council that research revealed only two cases on point: (1) a Virginia Supreme Court case mentioned a FOIA declaratory judgment action having been brought by a sheriff,⁶ and (2) a FOIA declaratory judgment action in circuit court was brought by a town.⁷ Senator Stuart questioned whether there was a need for a special declaratory judgment remedy in FOIA rather than the more general declaratory judgment provisions in Title 8.01 (§ 8.01-184 et seq.). He also expressed concerns for the provisions giving docket precedence, due process issues, and whether declaratory judgments should be heard in general district court. Mr. Seltzer questioned whether a declaratory judgment action could be brought for FOIA matters now, and expressed his thought that only a public body would bring such an action anyway. He stated that adding this provision would be confusing and unnecessary. Mr. Bodoh responded by stating that there are three situations where declaratory judgment would be helpful: (1) to declare whether costs are reasonable; (2) to declare the effects of an action taken by a public body without a proper vote; and (3) where there are questions regarding both a public body's policy and its action(s) under that policy. Senator Stuart again questioned whether a person may already bring a declaratory judgment action. Mr. Bodoh stated that a person can bring a declaratory judgment action already but that he would not get attorney fees, there are no expedited proceedings, and the matter could be heard only in circuit court. Mr. Bodoh also suggested that not all of the language from the Declaratory Judgment Act would be needed, and that it could be incorporated into § 2.2-3713. Delegate LeMunyon invited further comment from the Council and the public; there was none. The Council took no action on this proposal.

Criminal and Law-Enforcement Records Draft

⁶ *Tull v. Brown*, 255 Va. 177, 494 S.E.2d 855 (1998) (the procedural history states that the circuit court below granted declaratory judgment for Sheriff Brown).

⁷ *Town of Saltville v. Surber*, 84 Va. Cir. 11 (Circuit Court of Smyth County, 2011) (the town brought a declaratory judgment action to determine whether certain documents should be disclosed).

At the Council's meeting in August, staff noted that various issues concerning criminal and law-enforcement records in § 2.2-3706 had been carried over for further study from last year. Staff noted in particular that questions of the interpretation of subsections A and B regarding how the provisions of each subsection apply to different public bodies had arisen since the section was last amended. Specifically, it was noted that subsection A refers to "all public bodies engaged in criminal law-enforcement activities" but that many of its provisions in practice apply to other public bodies. Conversely, due to amendments to subsection B, applicable to noncriminal incident records, it has come to staff's attention that public bodies not involved in law-enforcement had used this subsection as a general exemption for personal records. The Council then directed staff to prepare a draft to address these issues for the Council's consideration. Staff presented the draft, and noted that one further amendment would be necessary to allow first responders (such as fire departments and emergency medical services) and 911 call centers, as well as law-enforcement bodies, to use the non-criminal incidents exemption in subsection B. There was no additional discussion or public comment. The Council voted unanimously to recommend the draft with an amendment to include first responders and 911 call centers in subsection B.

FOIA Litigation Update

Staff informed the Council that the Henrico County Circuit Court had issued a second letter opinion and a final order in the case of *Davison v. Dunnivant*. By decision issued June 14, 2017, the court had held that individual members of the General Assembly are not "public bodies" and therefore are not required to respond to FOIA requests. The plaintiff in the case filed a motion for reconsideration and the court held a second hearing on August 2, 2017. The court on August 10, 2017, issued a second letter opinion reversing the holding of the June 14 letter opinion and finding that there had been no violation of FOIA, which the court confirmed by its final order on August 25, 2017. The Council directed that staff post these opinions on the Council website.

Other Business

FOIA Council Policy on Individual Participation by Electronic Means

Staff reminded the Council that as required by subdivision B 1 of § 2.2-3708.1, at its meeting on November 18, 2014, the Council adopted a policy on individual members' participation in Council meetings by electronic means. It was recommended that the Council adopt a revised version of the policy to reflect amendments to the law that became effective July 1, 2017. The Council voted unanimously to approve the revised policy (the full policy is available on the Council's website at <http://foiacouncil.dls.virginia.gov/policies.htm>).

Public Comment Forms

As required by House Bill 2146 (LeMunyon, 2017), the Council has published a public comment form on the "Forms and Sample Letters" page of the Council's website so that requesters may comment on the quality of assistance they received in response to a request. The Council directed that such copies of such public comment forms be presented at Council meetings and decided that if the volume of forms received increases, then they might be handled another way. Staff reported that no new public comment forms had been received since the Council's last meeting.

FOIA Training

Staff informed the Council that due to budget considerations, next year staff intends to hold more free seminar-style trainings in Richmond where participants may sign up in advance to attend, and to explore additional technological means to deliver training presentations. The goal is to reduce expenses while still reaching as many people as possible. Training continues to be pre-approved for continuing legal education credit from the Virginia State Bar and in-service credit from the Department of Criminal Justice Services. Credit for attendance is also given by the Virginia School Boards Association, the Virginia Municipal Clerks Association, and other organizations.

Public Comment

Ms. Rhyne informed the Council that VCOG continues to provide FOIA training. She also stated that in consideration of Delegate Kory's proposed HB 2223, Ms. Rhyne had an intern perform a 50-state survey on laws addressing public comment at meetings that she would be happy to share with anyone interested. Ms. Rhyne also noted that HB 1 was filed today for the 2018 Session of the General Assembly, regarding access to certain scholastic records.

The Council will poll for its next meeting date after the 2018 session adjourns. Delegate LeMunyon noted that as his legislative term is ending, today's meeting was his last as chair of the Council. He related the story of Benjamin Franklin's being asked after the Constitutional Convention in 1787, "What have we got - a republic or a monarchy?", to which Franklin replied, "A republic - if you can keep it." Delegate LeMunyon then paraphrased the quote to state that "Virginia has a FOIA, if we can keep it." The meeting was then adjourned.