

FOIA Council Meeting Summary
November 21, 2016
1:30 PM
House Room C
General Assembly Building
Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its fifth meeting of the 2016 Interim on November 21, 2016.¹ This meeting was held to review draft legislation recommended by the Records Subcommittee and the Meetings Subcommittee, which subcommittees were created in 2014 as part of the study of FOIA in accordance with House Joint Resolution No. 96, to receive progress reports from the Subcommittees, to consider bills referred by the 2016 Session of the General Assembly to the Council for further study, and to discuss other issues of interest to the Council. After being called to order and introducing the members present, the Council welcomed a new staff attorney, Jessica L. Budd, who will also staff the House General Laws Committee when the General Assembly is in Session.

Virginia Parole Board and FOIA; Delegate Hope; Review of HB 397 (2012)

Delegate Hope spoke to the Council about access to certain records of the Virginia Parole Board, which he had originally introduced in his House Bill 397 (2012).² He stated the goal of the legislation was to ensure that guidance and policy documents would be posted publicly on the Parole Board's website. He noted that the change was a recommendation of the Governor's Parole Review Commission, and that he would like the Council to recommend language identical to HB 397 (2012) for the 2017 Session of the General Assembly. Ms. Dooley noted that Delegate Hope had spoken at the Council's last meeting, and a representative of the Parole Board had then stated that such records were already made public. Delegate Hope replied that in 2012 he knew that not all such documents were posted publicly, and that his bill would require that every such document be posted. The Council then voted unanimously (7-0) to recommend Delegate Hope's proposal to the 2017 Session of the General Assembly.

Review of Bills Referred by the 2016 Session of the General Assembly

Delegate Robert G. Marshall appeared by teleconference to address his House Bills 280, 281, 282, and 383.³ He stated that the bills' genesis is a proposed data center in Haymarket

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

² This topic was listed on the agenda as item #4 and was taken up out of order. HB 397 (2012) was studied by the Council in 2012, but no action was taken at that time because the interested parties had indicated they would work together to reach a resolution.

³ **HB 280** Marshall RG-- any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under the Virginia Freedom of Information Act. *NOTE: HB 280 would amend § 15.2-2259.*

that would be built in a rural and residential no-growth zone several miles outside of an industrial area. He indicated the plan appears to involve building 110' towers with high voltage power lines near residential areas, and he wanted the affected citizens to be able to find out more information. He also told the Council that it is believed that Amazon is the company that is building the data center, and Delegate Marshall and Senator Black had tried to contact Jeff Bezos, the owner of the company, but had not been able to do so. He further stated that the County of Prince William would not provide certain records or confirm that the company involved is Amazon, citing the economic development exemption (subdivision 3 of § 2.2-3705.6) and a nondisclosure agreement. Delegate Marshall further said that in order to eliminate most opposition to the bills, they could be limited to a data center of greater than 50,000 square feet with a line extension greater than one mile and a power line of 220 or more kilovolts. Mr. Stern asked if the legislation could address only this one instance since it appears to be the concern. Delegate Marshall stated that adding the proposed conditions would have that effect. He also said that otherwise, if nothing is done, this situation would set a precedent for all of Virginia. Ms. Porto asked about HB 282, which would require nondisclosure agreements to be voted on by public bodies in order to be approved and re-approved every three months. Delegate Marshall said that currently nondisclosure agreements are often approved by employees rather than elected officials, but he believes such agreements should be approved by elected officials for greater accountability to the public and because elected officials should not be bound by hired staff.

The Council then asked to hear from Prince William County. Jeff Kaczmarek, Executive Director of the Prince William County Department of Economic Development, stated that from an economic development perspective, these bills would have a broad impact on all of Virginia. He pointed out that the technology sector and data centers particularly are highly sensitive to data disclosure as their data often involves the military, defense industry, or private businesses. He stated that it is a quickly growing industry in Virginia and the key is site selection. He pointed out that companies look at other states and always have alternative sites available, so these bills would have a chilling effect across Virginia. Mr. Stern asked how the legislation proposed would compromise data. Mr. Kaczmarek stated it

HB 281 Marshall, RG--Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of the Freedom of Information Act (FOIA) that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body. *NOTE: HB 281 would amend § 2.2-3705.6.*

HB 282 Marshal, RG--Requires that a nondisclosure agreement by a public body be approved at an open meeting if it is to serve as the basis for an exclusion from the provisions of the Freedom of Information Act (FOIA) of confidential proprietary records of a private business. Such an approval must be renewed at least every three months at further open meetings if it is to continue to supply the basis for the FOIA exclusion. *NOTE: HB 282 would amend §§ 2.2-3705.6 and 2.2-3711.*

HB 383 Marshall, RG--Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of the Freedom of Information Act (FOIA) that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body and provides that any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA. *NOTE: HB 383 would amend §§ 2.2-3705.6 and 15.2-2259.*

was a question of timing regarding how much data was released at what stage in the process, as more data is always released as a project moves further through the processes of planning, zoning, and regulation. Ms. Dooley indicated that Fredericksburg had just made an announcement regarding Strangeways Brewing Company opening a new location in the City. She said that if City Council had to vote publicly to approve "a nondisclosure agreement with Strangeways Brewing" it would have ruined the deal. She also noted that site plans submitted for approval are already public record, and that security plans for a data center would be exempt from disclosure. Mr. Kaczmarek added that they sign nondisclosure agreements with all sorts of companies, not just data centers. Delegate Marshall said that the County took another position and did not disclose requested records, and he again pointed out that if the bills are limited to data centers other objections would no longer apply.

Turning to public comment, Dave Ress, a reporter with the Daily Press, stated how astonishing it is that a senior member of the House of Delegates must put in a bill to say site plans submitted for approval are public, and that it points to underlying FOIA problems. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), pointed out that nondisclosure agreements should be public, much as sealing orders in a court case are public. Kara Hart of the Virginia Economic Development Partnership (VEDP) told the Council that nondisclosure agreements are standard and expected in economic development deals. Additionally, she noted that deals often move quickly and the VEDP Board only meets quarterly, so requiring the Board to vote on nondisclosure agreements is not practical. In reply to a question from Delegate LeMunyon, Ms. Hart also pointed out that the economic development exemption requires a promise of confidentiality from the public body, which takes the form of a nondisclosure agreement. Roger Wiley, Esq., speaking on behalf of Loudoun County, stated that Loudoun also has data centers and also opposes these bills. He suggested the possibility that the request for site plans was denied early in the process before they were submitted for approval. He also pointed out that FOIA's exemptions are discretionary, and nondisclosure agreements are used to commit public bodies to using the exemptions. Delegate Marshall responded that he agreed in principle, but in fact he and others requested site plans at different stages in the process and were all denied. He also noted that if the data center was being built in an industrial area, there would be no objection.

Returning to discussing among the Council members, Ms. Porto expressed concern for a balance between economic development needs and the citizens' right to know. She noted that it sounds like a large group of citizens in this instance were not given information they need to determine how this project will affect their lives. Ms. Dooley moved not to recommend the bills, noting that some of the materials addressed in the bills are already public, some of the materials might include security records, and regarding nondisclosure agreements, it would not help to have public bodies vote to renew "nondisclosure agreements with unidentified companies for undisclosed reasons." Ms. Hamlett seconded the motion. Mr. Stern stated that he was unsure this approach was the right way to address the issue, but that the issue should be addressed. Ms. Porto stated that she understood some of the material was supposed to be public already, but based on Delegate Marshall's testimony that was not happening. She questioned how an ordinary citizen could get such

records when a senior member of the House of Delegates cannot get them. The Council then voted on the motion to take no action. The motion passed 4-3 (Delegate LeMunyon, Ms. Dooley, Ms. Hamlett, and Mr. Vucci voted in favor; Ms. Porto, Mr. Stern, and Dr. Treadway voted against), and so the Council took no action on these bills.

Next, Delegate Pogge addressed her House Bill 336 (2016), which would have protected from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years.⁴ She stated that there had been a request for names and addresses of adults and minors who held library cards that resulted in the release of over 1700 names and addresses of minors. She related that schools would not release the same records because they are exempt as scholastic records. Delegate Pogge also offered an amendment to simplify the bill by striking language concerning access when the subject is over 18 years of age. The stricken language matches language used in the scholastic records exemption, but it is unnecessary here because this change is only meant to address minors' records. Phil Abraham of the Vectre Corporation expressed support for the bill as amended on behalf of the Virginia Library Association. After a discussion of a further technical amendment, the Council voted unanimously (7-0) to recommend the bill as amended.

Delegate Pogge then addressed her House Bill 334 (2016), which would have provided that in an enforcement action, if the court finds the public body violated certain meeting notice requirements, the court may invalidate any action of the public body taken at such meeting. She said she introduced the bill because one of her constituents had important information that affected her life and livelihood discussed in a closed meeting that was supposed to be an open meeting. The Delegate said her goal was to give citizens some redress when public bodies do not follow the rules by allowing a court to invalidate actions of the public body. In response to questions from Mr. Stern regarding what criteria a court should take into account, Delegate Pogge replied that the court should look to whether the notice requirements were met, and agreed there should be a time limit to invalidate actions such as 90 days. Mr. Ress stated that this is a good bill and noted it is only a small step in that if a violation is found, a court "may" invalidate an action but is not required to do so. Mr. Wiley stated that he understood what Delegate Pogge was trying to do but noted that if there is a 90 day waiting period, every lawyer will advise their clients they must wait the 90 days. He also stated that Mr. Stern's concerns were valid because the bill would give the judge discretion without guidance on how to use it. He further observed that the bill would affect state as well as local entities, that it could have huge financial consequences, and that a court already has remedies it can take when it finds that a public body has violated FOIA. Ms. Rhyne stated that VCOG was neither in favor nor opposed, and noted that under opinions of the Attorney General, judges have discretion already. Delegates LeMunyon and Pogge further discussed the proposed time limit and concluded 15 days should be

⁴ **HB336** Pogge--Bill Summary: Protects from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years. The bill provides that access shall not be denied to the parent, including a noncustodial parent, or guardian of such person, unless the parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For records of persons under the age of 18 years who are emancipated, the right of access may be asserted by the subject thereof. Any parent or emancipated person under the age of 18 years who is the subject of the record may waive, in writing, the protections afforded by the bill. If the protections are so waived, the public body shall open such records for inspection and copying.

enough. Ms. Porto moved to recommend the bill with an amendment to add a 15 day time limit to bring an action after a meeting has occurred. Ms. Dooley suggested adding an amendment in concept that the petitioner must identify the action to be invalidated. As an example, she pointed out that if there were 30 agenda items it would raise the issue of whether all parties affected by all the agenda items would have to appear in court. The Subcommittee also discussed further the idea of adding criteria to guide the court's discretion. The Subcommittee then voted on the motion, which failed 4-3 (Delegate LeMunyon, Ms. Porto, and Dr. Treadway voted in favor; Ms. Dooley, Ms. Hamlett, Mr. Stern, and Mr. Vucci voted against).

Next, Delegate Kory presented her House Bill 698 (2016), which would have required that every public body afford an opportunity for public comment during any open meeting. She noted that an amended draft (LD 17101424D) had been prepared and distributed that would require public comment periods at a minimum of two meetings per year, but that draft would need to be amended further. Delegate Kory, Delegate LeMunyon, Mr. Vucci and staff discussed a proposed amendment to the bill to require public comment at a minimum of six meetings held per year by any public body, if it holds that many, but to allow the public body to choose at which public meetings public comment would be heard if the public body has more than six meetings per year. Delegate Kory noted that most public bodies already allow public comment, but some do not, and the bill is trying to find a middle ground. The new draft also did not include language that had been included in the original bill that would have allowed a public body to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The Subcommittee discussed putting this language back in the amended draft as a second amendment. Ms. Porto moved to recommend the bill with both amendments. Ms. Dooley indicated she was concerned about the language of the amendments, whether the bill properly fits within FOIA, and what a body that currently held more than six meetings per year and allowed public comment at all of them would do if the bill passed. For those reasons she stated she would not support the bill as amended at this time. Delegate LeMunyon asked if there was a second on the motion, but there was none and the motion failed. Delegate Kory stated that she would try to work further on the bill, to hear more comments and satisfy concerns regarding the proposal.

HJR No. 96 Study Subcommittee Recommendations

The Council next took up drafts recommended by the Subcommittees. Maria J.K. Everett, Executive Director of the Council, reviewed the draft legislation that has been recommended to date by both Subcommittees.⁵ As a reminder, the Council has previously indicated that rather than introduce individual legislative recommendations as separate bills while the HJR No. 96 study is ongoing, the Council prefers to introduce omnibus legislation at the conclusion of the study. As this is the third and final year of the study, the Council has heard the Subcommittee recommendations throughout this year in an ongoing fashion in order to incorporate those recommendations into the omnibus legislation as the study progresses, rather than trying to consider all of the Subcommittee recommendations at once in a single meeting at the end of the year. Note that both Subcommittees had completed

⁵ Each draft is identified by its Legislative Draft (LD) number for reference and all are posted on the FOIA Council website.

their work and made their final reports to the Council as of the Council's meeting on October 17, 2016, and today's meeting is the last full Council meeting scheduled for 2016.

Records Subcommittee Recommendations

The first draft considered would amend certain provisions of § 2.2-3704 relating to the procedure for making and responding to a records request (LD 17100765D). Changes made by this draft include the following: clarifying that public bodies cannot require citizens to come in to the public bodies' offices to make copies (amending subsection A); stating that a denial of a request in whole or in part must cite the Code section or other provision of law that allows the records to be withheld (amending subsection B), where the current law only says "Code section;" stating that if a requester asks for an estimate, then the time to respond is tolled after the estimate is provided until the requester states whether to proceed (amending subsection F); and clarifying that a public body may require a requester "to pay" an advance deposit if the estimate exceeds \$200, rather than merely "to agree to payment" as written in current law (amending subsection H). David Lacy, Esq., speaking on behalf of VPA, proposed a technical change to the amendment concerning the requester's right to inspect or obtain copies of public records; questioned the need for the amendment that would add a tolling provision when a requester seeks a cost estimate, and opposed the amendment that would require a requester to pay an advance deposit if it was over \$200, rather than to "agree to pay" as stated in current law. Ms. Porto moved to recommend the draft with the amendments suggested by Mr. Lacy.⁶ The motion was seconded and after further discussion it passed 6-1 (Ms. Hamlett voted against).

The Council next considered the draft that would revert the "global language change" effected by HB 817/SB 494 (LD 17100766D), which had been considered but not acted upon at the Council's last meeting. As a reminder, last year the Records Subcommittee recommended replacing language that appears in multiple existing exemptions that states that "nothing ... shall prohibit" disclosure or release of records. Recognizing that FOIA generally does not prohibit release, the Subcommittee recommended replacing that phrasing with language stating that "nothing ... shall authorize withholding" or other language indicating an affirmative duty to disclose. However, it has come to the attention of staff that such a global change may have unintended consequences, and therefore reconsideration of this recommendation was necessary. Staff related that the original language stating that certain records were not prohibited from release at first appeared ambiguous because FOIA does not prohibit release of records, but upon further consideration, that language actually meant that records were still exempt, but could be released. The change made by HB 817/SB 494, which would require release of these records, therefore appeared to be an inadvertent substantive change, and the Subcommittee recommended reverting the language of the affected exemptions. There was no further discussion of the issue, and the Council voted 5-1-1 to recommend (all in favor except Ms. Porto voted against and Ms. Dooley abstained).

⁶ The technical change would be to strike the word "either" and replace the word "or" with "and by" on line 14. The other changes to the draft would be not to make the proposed changes on lines 61-63 and line 82 (i.e., to leave those provisions as they are in current law).

Next, the Council considered the draft that would consolidate the current personnel records exemption (§ 2.2-3705.1(1)) with the exceptions to that exemption currently found in a different section (§ 2.2-3705.8(A)), and add names to the list of items that must be disclosed, corresponding with the longstanding interpretation of current law (LD 15100326D). Mr. Lacy suggested that the monetary terms of settlement agreements settling employment disputes should be open. Staff observed that as written, the draft is only consolidating and expressing current law, and is not meant to make substantive changes. Additionally, under current law public bodies do not have to disclose such settlement agreements, but financial records showing the amounts paid are open. Mr. Wiley added that the Supreme Court of Virginia has stated in dicta that such payment records are open,⁷ but he noted that those payments can include other things such as payments under severance agreements or for accumulated leave. Ms. Dooley commented that the draft makes a real improvement by moving all of the current provisions concerning personnel records into one section where people will find it. After further discussion, the Council voted unanimously (7-0) to recommend the draft.

The Council next addressed the recommendation to strike a current exemption (subdivision 30 of § 2.2-3705.7) that exempts certain correspondence of local officials if that correspondence is not a public record in the transaction of public business (LD 15101105D). It was pointed out that the current exemption does not really do anything, since FOIA only applies to public records anyway, and thus removing the exemption would have minimal practical impact. The Council deferred consideration of this recommendation briefly. When consideration resumed, Mr. Wiley stated that this is a bill that passed even though it does not do anything. The Council took no action at this time, but again brought the matter up for further consideration later in the meeting. The Council then voted unanimously (7-0) to recommend striking this exemption.

The Council then considered the recommendation to strike a proprietary record exclusion for the Alcoholic Beverage Control Authority (subdivision 34 of § 2.2-3705.6) (LD 171001306D). Staff informed the Council that while this exemption is in current law, it does not become effective until July 1, 2018. Staff related that in 2018 the Alcoholic Beverage Control Authority will replace the current Department of Alcoholic Beverage Control, and the Authority will operate more like a private business. The exemption was enacted in anticipation of the future needs of the Authority. The recommendation of the Records Subcommittee was to delete this exclusion because of concern that it covers proprietary records, trade secrets, financial records, cost estimates, marketing and operational strategies that are not yet known for an agency that does not yet exist. The Council voted in favor of this recommendation unanimously (6-0).⁸

Meetings Subcommittee Recommendation

Staff presented a draft that would separate the current "legal matters" exemption into two separate exemptions (LD 15100276D), which had already been approved by the Council in concept. Staff reminded the Council that the recommendation was to separate the two clauses of the current exemption, which address "actual or probable litigation" and "specific

⁷ See *LeMond v. McElroy*, 239 Va. 515, 391 S.E.2d 309 (1990).

⁸ Ms. Dooley did not vote as she was not seated when the vote was taken.

legal matters," respectively, without making substantive changes to what may be discussed in a closed meeting. The Council voted unanimously (7-0) to recommend the draft.

After reviewing the recommendations from both Subcommittees, Ms. Everett informed the Council that the recommendations would be incorporated into two omnibus draft bills, one encompassing the recommendations of the Records Subcommittee and the other for recommendations of the Meetings Subcommittee. She also reminded the Council that in addition to the Annual Report there would also be a report on the HJR No. 96 study that explains the omnibus bills in detail.

Other Business

Staff raised the issue of whether school boards should be included in the requirement to post a statement of FOIA rights and responsibilities (§ 2.2-3704.1). The Council voted unanimously (7-0) to recommend this amendment be added and incorporated into the omnibus legislation.

Staff also raised the issue of whether the policy statement of FOIA (§ 2.2-3700) should include a statement regarding the procurement of technology similar to language in § 2.2-1111, which applies to the Department of General Services (DGS).⁹ Mr. Lacy encouraged the Council to adopt this language, and stated that this is a huge issue because of the speed at which technology has developed since the 1990's. Mr. Wiley said he understood the problem and had had a problem with a state agency where software would not produce records, but suggested it be put off until next year. Ms. Rhyne agreed, and as an example reminded the Council of when a school adopted a security system that checked visitors' identification, then later asked for an exemption for the records it kept. Ms. Porto suggested adding this to the study of technology issues next year, and the Council agreed by consensus.

Staff next proposed a change in the Council's enabling legislation that would state that a member continues to serve until his or her successor is appointed. Ms. Everett pointed out that Mr. Ashby's term expired on July 1, 2016 and the vacancy has not been filled. She also stated that a Code search revealed 41 instances using similar language. After brief discussion the Council voted unanimously (7-0) to recommend this change.

Chairman's List of Issues and Issues Continued to 2017 for Study

Delegate LeMunyon directed staff to add item #3 from his Chairman's FOIA Review Open Issues list, concerning the "vendor proprietary software" exemption (subsection 6 of § 2.2-3705.1) to the technology study next year. He also reminded the Council and those in attendance of other issues to be studied next year (item #10 on today's agenda), particularly that the Council would continue to study the exemptions for trade secrets and proprietary records.

⁹ Subsection 2 of § 2.2-1111 states that the regulations adopted by DGS' Division of Purchase and Supply shall, among other things: "Require that before any public body procures any computer system, equipment or software, it shall consider whether the proposed system, equipment or software is capable of producing products that facilitate the rights of the public to access official records under the Freedom of Information Act (§ 2.2-3700 et seq.) or other applicable law."

Annual Legislative Preview, Part II

At its last meeting, the Council heard from Staci Henshaw, speaking on behalf of the Auditor of Public Accounts (APA), that the APA, the Office of the State Inspector General (OSIG), and the Joint Legislative Audit and Review Commission (JLARC), were still working with interested parties on a draft that would remove these agencies from their current administrative investigation exemption (subdivision 7 of § 2.2-3705.3) and create a new exemption in the same section that better reflects these agencies' actual work and duties. Staff reported that Ms. Henshaw had informed staff that after much discussion and consideration of alternative language, the parties had decided not to move forward with the proposal this year.

Public Comment

Mr. Ress observed that today the Council heard from two legislators regarding patterns of flouting FOIA. He also posed several rhetorical questions: When members of the General Assembly ask what was the vote on the omnibus bills, what is the answer? When asked about the over 100 exemptions in FOIA, what records are protected and what is the interest protected? He asked whether the Council members had read the omnibus bill, and how to reconcile parts that contradict each other such as the treatment of personnel records and administrative investigation records. He also asked how the members of the Council would answer if asked in detail what is the balance between the public purpose served and the public right to know. He suggested the members ask themselves whether they can answer these questions.

Future Meetings

Delegate LeMunyon reminded those present that the bills would be posted on the Council's website and comments were welcome. He then asked if there was any other business or additional public comment. There was no further public comment, but in light of Mr. Ress' concerns, Ms. Dooley suggested the Council meet again solely to vote on the omnibus legislation as amended to include the recommendations made today. That meeting was set for 1:30 PM on Monday, December 5, 2016.

There being no further business, the meeting was adjourned.

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