

Virginia Freedom of Information Advisory Council

December 1, 2008

1:00 PM

Richmond, Virginia

The Freedom of Information Advisory Council (the Council) held its fourth and final meeting of 2008.¹ The purpose of the meeting was to receive reports from subcommittees, decide on final legislative recommendations to the 2009 Session of the General Assembly, and to hold Part II of the Council's annual legislative preview.

Subcommittee Reports

Personal Identifying Information Subcommittee. Staff reported that the Personal Identifying Information Subcommittee (PII Subcommittee) had met four times, and each meeting included a joint meeting with members of the SSN Subcommittee of the Joint Commission on Technology and Science (JCOTS). The PII Subcommittee, with the concurrence of the JCOTS SSN Subcommittee, recommended to the Council the following legislative proposals:

1. Amendments to the Government Data Collection and Dissemination Practices Act (GDCDPA):
 - Clarification that the recently enacted prohibition on collection social security numbers without authorization² would apply to the collection of all or any portion of a social security number; and
 - Extension of the implementation date of the prohibition to July 1, 2010. Currently, the prohibitions are set to become effective on July 1, 2009. However, due to the response from the social security number surveys and the immense amount of data to process and verify, it was recommended that an additional year might be necessary to thoroughly review and process all of the implementation issues.
2. Protection of Social Security Numbers in Public Records.
 - HB 1096 (Sickles, 2008) would prohibit the release of social security numbers on public records, but would allow the last four digits to be released for purposes of identity verification to certain entities, such as the press, private investigators, and data aggregators. Questions were raised, however, about allowing the last four digits to be released to the press, private investigators, and data aggregators for verification purposes, and not to the general public. Additionally, this provision raised questions about the definition of a news-gathering organization as the proliferation of electronic media makes it difficult to determine. In light of these concerns, the joint subcommittees

¹ All Council members were present except Mr. Wiley.

² Chapters 840 and 843 of the 2008 Acts of Assembly.

recommended reintroduction of HB 1096, but would allow anyone to receive the last four digits of a social security number for verification purposes. Staff presented three approaches to protect the disclosure of SSNs, including the PII Subcommittee recommendation. Staff explained the reason for differing approaches came as a result of questions raised during the drafting of the PII Subcommittee recommendation. Staff reported that there were, however, common threads in each approach. First, protection of SSNs should be a separate statute and not a part of FOIA so as not to harm the underlying policy of FOIA as noted above. Secondly, entire SSNs should be treated as confidential and their release prohibited except under limited circumstances, including to law-enforcement and criminal justice agencies or pursuant to proper judicial order.

- The joint subcommittees voted to table further consideration of HB 1102 (Sickles 2008) that would create a FOIA exemption for social security numbers.

3. HB 529--Concealed Handgun Permits.

The PII Subcommittee voted again to recommend SB 529 as introduced in 2008 because of its belief that it reflects the proper balance between privacy and public access. The draft legislation would require the Department of State Police (DSP) to withhold from public disclosure permittee information submitted to the DSP for purposes of entry into the Virginia Criminal Information Network, with a limited exception for access by law-enforcement agencies. Records of the names and addresses of holders of concealed weapons permits issued by the DSP, however, to out-of-state persons would be publicly available from DSP. Permittee records will still be open to the public at each circuit court where the permits are issued.

Electronic Meetings Subcommittee. Craig Fifer, chair of the Electronic Meetings Subcommittee (EMeetings Subcommittee), reported that the subcommittee had met five times in 2008 and unanimously recommends draft legislation that would allow the Air Board and the Water Board to meet by electronic means provided the meeting is held in compliance with the provisions of the FOIA, specifically § 2.2-3708; except that a quorum of the respective Boards would not be required to be physically assembled at one primary or central meeting location. The draft legislation also required that discussions of the respective Boards held via such electronic communication means must be specifically limited to those matters for which the meeting was called, and no other matter of public business shall be discussed or transacted by the respective Boards.

Database Index Subcommittee. Frosty Landon, chair of the Database Index Subcommittee, reported that the subcommittee had met twice to consider the database index requirement set forth in subsection J of § 2.2-3704, and as a related matter, the statement of rights and responsibilities required under § 2.2-3704.1. The Subcommittee voted unanimously to recommend to the Council a draft that would repeal the database

index requirement as it found that agencies were not complying with the requirement and the public was not inquiring about the indices. The draft would also amend the required rights and responsibilities statement to require agencies to provide a general description, summary, list, or index of the types of records it has and exemptions that may apply to those records. The new requirements would help to increase public oversight without trying to define the term "database." The new provisions could also be used by agencies to help coordinate disclosure with the required retention schedules under the Virginia Public Records Act. Mr. Landon reported that while it may entail a little more work at first, the general reaction from state agencies was supportive, and there was no opposition expressed to the bill.

Meeting Minutes Subcommittee. Staff reported that the subcommittee had met and recommended draft legislation that would require explicitly that meeting minutes be in writing. The recommendation is declaratory of existing law, and makes technical changes. At its October 6, 2008 meeting the Council voted unanimously to approve the recommendation of the subcommittee and include it as part of the Council's legislative recommendations to the 2009 Session of the General Assembly. There was no further discussion of the recommended draft.

Council Action on Subcommittee Recommendations

Personal Identifying Information Subcommittee.

The Council voted unanimously to adopt the PII Subcommittee recommendations to amend the GDCDPA as above described and include the draft legislation as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

With respect to the protection of SSNs, the Council discussed the three approaches presented by staff. Ultimately, the Council voted (8 to 3) to defer action on this issue because none of the approaches appeared to strike the proper balance. The Council felt that the fact that three different legislative proposals were offered to resolve the issue was evidence that a recommendation at this time was premature. The Council remains committed, however, to resolution of the issue.

Electronic Meetings Subcommittee.

Various stakeholders had testified to the Subcommittee of their concerns that any recommendation by the Council to resolve the FOIA conflicts in the law would reopen other issues, unrelated to the electronic meeting provisions, in HB1332/SB423. The Council felt that such concerns, while valid, were not a compelling reason not to address the access issue given that General Assembly Sessions are rife with bills involving numerous stakeholders resulting in legislation that represents uneasy compromises. As a result, the Council voted unanimously to adopt the EMeetings Subcommittee recommendation as above described and include the draft legislation as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

Database Index Subcommittee.

The Council voted unanimously to adopt the Database Index Subcommittee recommendation as described above and include the draft legislation as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

Meeting Minutes Subcommittee.

As noted above, the Council had previously voted unanimously to approve the recommendation of the Subcommittee and include it as part of the Council's legislative recommendations to the 2009 Session of the General Assembly.

Copies of all Council recommended legislation are available on the Council's website.

Legislative Preview (Part II)

Delegate Griffith reminded the Council that Part I of the annual legislative preview was held at the October 6, 2008 meeting where the Council heard from the Virginia Economic Development Partnership Authority and the Virginia Municipal League. Delegate Griffith also reminded the Council that the purpose of the legislative preview was not to take action on any particular proposal, but instead to bring the issues to light so that resolution of them might be achieved before Session.

William Watt, Policy and Planning Specialist, Department of the Treasury, advised the Council of the need for a FOIA exemption for the Commonwealth's agency risk management and internal control standards assessments. Mr. Watt explained that the proposal is a result of the Comptroller's directive to implement an annual assessment of agency internal control systems in order to provide reasonable assurances of the integrity of all fiscal processes related to the submission of transactions to the Commonwealth's general ledger and stewardship over the Commonwealth's assets. The concern was that if internal controls were known, they could be defeated at the risk of the Commonwealth's assets.

The Council then heard from Sandy McNinch of the Virginia Economic Development Authority (VEDP) concerning expansion of the current record exemption for economic development to include certain business retention information. Ms. McNinch reported that there was agreement that business retention information should be protected; however, there was disagreement on how to accomplish it. She advised that VEDP prefers the draft option that does not require the "earmarking" of proprietary documents upon submission as it is impracticable in the fast paced economic development setting. Craig Merritt, representing VPA, reported that VPA favored the earmarking provision and suggested that to address VEDP's concerns that earmarking would slow down the economic development process VEDP would not be required to make a written determination of which records would be protected. VEDP responded that this suggestion did not change their position. All parties agreed to continue to work to find a compromise.

James G. Council on behalf of the Prince William County School Board discussed with the Council the School Board proposed legislation to exempt from FOIA records relating to the school system's electronic visitor identification system. He explained that the system was

capable of taking government identification and scanning it into a database which captures name, address, SSN, date of birth, and other personal information. He stated that the system was beneficial to the schools because they could cross check this information with sexual predator registries, for example. Craig Merritt, representing VPA, advised the Council that FOIA already covered protection of security systems and that the collection of other personal information was not essential to the school security mission. He suggested that this issue be given to the PII Subcommittee for further examination.

The Council then heard from Mark Flynn of the Virginia Municipal League (VML) concerning the expansion of the exemption for complainant information related to zoning violations found at subdivision 10 of § 2.2-3705.3 to also provide protection for individual building code and fire prevention code complaints. He noted that there had been some compromise with the VPA. Craig Merritt on behalf of VPA explained that the compromise made the proposal better, but not good. VPA opposes the exemption on the basis that there should be no anonymous "snitching" on neighbors.

Other Business

Mr. Fifer proposed that the FOIA rights and responsibilities statement currently required for state public bodies under § 2.2-3704.1 be expanded to apply to local public bodies. Mr. Fifer requested the Council to take action on his proposal. After public comment that this issue had not been vetted, the Council by consensus agreed to appoint a subcommittee to work on this issue in 2009.

Staff distributed the executive summary for the Council's 2008 annual report to the Governor and the General Assembly, and requested that any revisions be submitted in a timely fashion.

Public Comment

Except for public comment requested and made during the legislative preview, no additional public comment was made.

The Honorable H. Morgan Griffith, *Chair*
Maria J.K. Everett, *Executive Director*