



Virginia Freedom of Information Advisory Council

December 2, 2020, at 2:00 p.m.

Electronic Meeting

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The Virginia Freedom of Information Advisory Council (the Council) met electronically with Senator Mamie E. Locke, chair, presiding.¹ The meeting began with roll call and welcoming new Council member Chidi I. James, partner with the law firm of Blankingship & Keith, P.C., who was appointed by the Speaker of the House of Delegates to fill the seat for a citizen member that was formerly held by Michael Stern, followed by reports from the Council's three subcommittees, recommendations on the legislative drafts presented by each subcommittee, other business, and updates from staff. Materials presented at the meeting are accessible through the [Council's website](#).

Phishing Study Subcommittee Report and Recommendations

Dr. Sandra Treadway, Phishing Study Subcommittee Chair

Dr. Treadway provided a review of the work of the Phishing Study Subcommittee (the Subcommittee) to date; the Subcommittee began its study last year and met once this year on November 17 to examine the relationship between the Virginia Freedom of Information Act (FOIA) and phishing and related cybersecurity issues. Dr. Treadway informed the Council that because the Subcommittee had only been able to meet once this year a decision had not been made on whether to recommend any legislation, but the Subcommittee had directed staff to prepare two legislative drafts to present for the Council's consideration:

- The first draft (number 21100968D, available on the Council's [website](#)) would amend subdivision 10 of § 2.2-3705.1 of the Code of Virginia to provide that personal contact information provided to a public body or any of its members for the purpose of receiving electronic communications from the public body or any of its members is excluded from the mandatory disclosure provisions of FOIA, unless the recipient of such electronic communications indicates his approval for the public body to disclose such information. Currently, the law provides protections for personal contact information provided to a public body, not to its members; only applies to electronic mail; and requires the electronic mail recipient to request the public body not to disclose his personal contact information in order for the information to be exempt from mandatory disclosure.
- The second draft (number 21100969D, available on the Council's [website](#)) would amend subdivision 10 of § 2.2-3705.1 of the Code of Virginia to provide that personal contact

¹ **Members Present:** Senator Mamie E. Locke (chair), Delegate Marcus B. Simon (vice-chair), Senator Richard H. Stuart, Delegate William C. Wampler, III, Lee Bujakowski, William Coleburn, Matthew Conrad, Chidi James, Shawri King-Casey, Bruce Potter, Sterling Rives, Cullen Seltzer, Sandra Treadway, and Amigo Wade. Mr. Coleburn and Mr. Seltzer joined shortly after the meeting began, before any votes were taken. NOTE: All members participated by electronic means, and the meeting was live-streamed on the Senate's website pursuant to [§ 4-0.01 \(g\)](#) of the 2020–2022 State Budget. A video recording of the meeting is available on the [Council's website](#).

Members Absent: None

information provided to a public body or any of its members or employees during general correspondence is excluded from the mandatory disclosure provisions of FOIA. Currently, the law provides protections for personal contact information provided to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information.

The Subcommittee then heard public comments. Milissa Spring, Senior Deputy County Attorney for Loudoun County, spoke in support of the proposed amendments. Joshua Heslinga, Director of Legal and Legislative Services for the Virginia Information Technologies Agency (VITA), submitted written comments (posted on the Council's [website](#)) and said that the bills could cause an increased number of redactions, which may increase the time and costs involved in responding to requests. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), said that VCOG did not oppose the proposed concept, but she said that draft number 21100969D was too broad and shielded too much information and that VCOG opposed switching the "opt out" provision in draft number 21100968D to an "opt in" provision. Mark Hickman, speaking on behalf of the Virginia Press Association (VPA), said that VPA was not opposed to adding "members" in draft number 21100968D but opposed changing the "opt out" provision to an "opt in" provision and that VPA was opposed to draft number 21100969D as being too broad. Sherri Neil, Intergovernmental Affairs Manager for the City of Portsmouth, spoke in support of the proposed changes but expressed a concern that citizens need to be made aware of the requirement to either "opt out" or "opt in," as there is currently no provision requiring that citizens be notified of that element of the exemption. Delegate Steve E. Heretick, patron of HJ 628 (2019), thanked the Subcommittee for its work and spoke to the background facts for the phishing study, which stemmed from a phishing attack on the City of Portsmouth. After further discussion of both drafts, the Subcommittee voted 11-3 to amend line 66 of draft number 21100968D to strike "provided that" and insert "unless," then voted 11-3 to recommend the draft as amended to the 2021 Session of the General Assembly.² A motion to recommend draft number 21100969D failed by a vote of 3-10.³

Electronic Meetings Subcommittee Report and Recommendations

Cullen Seltzer, Electronic Meetings Subcommittee Chair

Mr. Seltzer reported that the Electronic Meetings Subcommittee (the Subcommittee) had two different legislative draft proposals to present for the Council's consideration, both of which would amend the current law on electronic meetings, but in different ways. The first draft (number 21100964D) is an amended substitute version of HB 321 (Levine, 2020) that would allow for members of public bodies to participate remotely when caring for a family member with a serious illness, and allow members who participate remotely due to a personal matter that prevents physical attendance to do so twice per year or 25 percent of the meetings held per calendar year, rounded up, whichever is greater. The second draft (number 21100997D) concerns electronic meetings held due to states of emergency such as the COVID-19 pandemic; the Council decided to consider each draft separately. Mr. Seltzer said that although the Subcommittee generally expressed a preference for in-person meetings, this legislation would make public service more accessible and was supported by the overwhelming majority of public

² All Council members voted in favor of both motions, except Mr. Coleburn, Mr. James, and Mr. Potter voted against both the motion to amend and the motion to recommend.

³ Senator Locke, Senator Stuart, Mr. Conrad, and Mr. Rives voted in favor; all other Council members voted against.



comments received. Delegate Mark H. Levine discussed the background for the original version of HB 321, described how the amended draft would allow greater options for public service but would retain protections to prevent abuse, and expressed his support for the amended bill. The Council then heard public comment. Elizabeth Bennett-Parker, Vice-Mayor of the City of Alexandria, expressed her support for both drafts recommended by the Subcommittee, provided several examples of how they would allow for increased flexibility in public service, and suggested striking the word "serious" that appears before the term "medical condition" on lines 12 and 25 of the draft. Melanie Meren, a member of the Fairfax County School Board, expressed support for expanding flexibility for electronic participation, especially as a matter of parity for public bodies that hold a greater number of meetings than others. Phyllis Errico, speaking on behalf of the Virginia Association of Counties and the Virginia Municipal League, also expressed support for the amended version of HB 321. Libby Garvey, Chair of the Arlington County Board of Supervisors, also expressed support for the draft legislation, noting that while the goals of FOIA to provide access to government remain the same, technology has changed over time and the law needs to change accordingly to meet the goals of FOIA. Debbie Borato, speaking as a citizen who lost a family member in the Virginia Beach shooting in May 2019, said greater access was necessary, not only to the public in general, but to family members and victims as well. Dr. Lorita Copeland Daniels, a member of the Spotsylvania County School Board, expressed support for both proposed drafts, gave examples of how they would enable greater flexibility in participation, and also recommended striking the word "serious" from draft number 21100964D. Vic Nicholls, a citizen from Chesapeake, expressed support for the draft, stating that a member of her City Council was in the military reserves and that this legislation would enable him to participate even if he was called away for military service. Amy Perron Seibert, speaking on behalf of a coalition of interested parties, expressed support for an amended version of draft number 21100997D (the suggested line amendments are available on the Council's [website](#)). Ms. Neil (City of Portsmouth) expressed support for both of the drafts. Ms. Rhyne (VCOG) said that while she had spoken against HB 321 and the expansion of electronic meetings in the past, she had been persuaded that more flexibility is needed and no longer opposed the bill. She expressed a concern that, following the policy of FOIA, technology should be used to afford greater opportunities for the public to witness the operation of government, not only for the convenience of government officials. Mr. Hickman (VPA) said that VPA believes that there should be a comprehensive study of electronic meetings in 2021 rather than taking a piecemeal approach. He said VPA does not oppose adding language to allow members to participate remotely when caring for sick family members but does oppose increasing the number of times a member may call in due to other personal matters. After further discussion, the Council voted unanimously (13–0)⁴ to amend draft number 21100964D to strike the word "serious" from lines 12 and 25. The Council then discussed the amended bill and voted to recommend draft number 21100964D as amended to the 2021 Session of the General Assembly by vote of 10–2 (all members were in favor, except William Coleburn and Bruce Potter voted against).⁵

Mr. Seltzer then presented draft number 21100997D, which would amend the current provisions allowing for electronic meetings during a state of emergency declared by the Governor by allowing for such meetings due to a local state of emergency, by removing the limitation on the

⁴ Note that Senator Stuart had to leave the meeting and was not present for this vote or subsequent votes.

⁵ Note that Mr. Bujakowski had to leave the meeting and was not present for this vote or subsequent votes.



purpose of such meetings (currently limited to addressing the emergency), and make other changes regarding the availability of videoconferencing and public comment. Mr. Seltzer and Delegate Marcus B. Simon then described the line amendments that had been proposed and mentioned previously by Ms. Seibert (available on the Council's [website](#)). The Council then voted 10–0–2 to adopt the line amendments (Delegate William C. Wampler, III, and Mr. Coleburn abstained). After further discussion, the Council voted to recommend draft number 21100997D as amended to the 2021 Session of the General Assembly by a vote of 10–2 (Delegate Wampler and Mr. Coleburn voted against).

Criminal Incident Information Subcommittee Report and Recommendations

Delegate Marcus B. Simon, Criminal Incident Information Subcommittee Chair

Delegate Simon reported that the Criminal Incident Information Subcommittee (the Subcommittee) had met twice, heard from Delegate Chris L. Hurst as patron of HB 5090 (2021 Special Session) and other interested parties, and unanimously recommended an amended version of HB 5090 to the Council (number 21100966D). Delegate Hurst then presented the amended draft and described how it was modeled on language used by other states and the federal government. The Council then heard public comment. Beth Powers, State Policy Advocate at the Innocence Project, said that the Virginia Innocence Coalition (composed of the Innocence Project at the University of Virginia School of Law, the Mid-Atlantic Innocence Project, and the National Innocence Project) strongly supports this legislation because it may help exonerate persons wrongfully convicted, provide information to crime victims and their families, and ensure fair investigations of police-involved killings. Jason Nixon, whose wife was killed in the shooting in Virginia Beach in May 2019, described his inability to get police records concerning the shooting under current law and spoke in support of the bill. First Sergeant David Ostwinkle of the Virginia State Police stated that VSP took no position on the bill but was concerned about the potential increased demand for records, the volume of records at issue, and the time and costs involved in redacting and producing records concerning older cases. Ms. Rhyme said that VCOG supports the bill and reminded the Council that while the focus of the discussion had been on high-profile cases, the legislation would apply to all criminal investigative records. She also noted that there are tools in existing law to address time and cost concerns. After further discussion, the Council voted unanimously (11–0)⁶ to recommend draft number 21100966D to the 2021 Session of the General Assembly.

Legislative Preview; Other Business and Updates; Current FOIA Training

Council Staff

Staff reported that no one had brought forth any other legislation for the annual legislative preview this year. Staff also reported that in a general district court case a judge had ruled that the phrase "official public government website" as used in FOIA could only refer to ".gov" addresses, but that in practice public bodies use several types of web addresses; Senator Locke stated that the Council would address the issue in 2021. Staff also reported on FOIA training, including increased use of online training programs and live virtual presentations due to the COVID-19 pandemic. Staff also noted that the format of the statistics for formal and informal inquiries to the Council reported in the annual report would look different this year because it was the first full year that such statistics were tracked using Google Sheets.

⁶ Note that Delegate Wampler was muted and did not vote.



Public Comment and Next Meeting

Written public comments are posted to the [Council's website](#); there were no additional live public comments. Senator Locke stated that the next meeting of the Council would be scheduled after the adjournment of the 2021 Session of the General Assembly. The meeting was then adjourned.

For more information, see the [Council's website](#) or contact the Division of Legislative Services staff:

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