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## Virginia Freedom of Information Advisory Council

December 4, 2019, at 2:00 p.m.

Pocahontas Building, Senate Committee Room A

[foiacouncil.dls.virginia.gov](http://foiacouncil.dls.virginia.gov)

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The Virginia Freedom of Information Advisory Council (the Council) met in Richmond with Delegate Luke E. Torian, vice-chair, presiding.<sup>1</sup> The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting are accessible through the [Council's website](#).

### Presentation: Subcommittee Reports

#### *Council Staff*

##### Phishing Study Subcommittee

In addition to studying HJ 628 regarding phishing attacks, the Council had directed the Subcommittee to consider adding a tolling provision to the records production procedure to toll the time from when a public body provides an estimate of costs until the requester agrees to pay. Because there is no such provision in current law, confusion and disputes over charges have occurred at times when a public body has provided an estimate, then sent records along with a bill for charges within the five working day response deadline, but the requester did not agree with those charges. Staff reported that at the Subcommittee's meeting on October 8, 2019, it had considered multiple drafts and recommend one (LD 20100558D) that would toll the time from when notice of an estimate was sent to a request until payment was received, would provide that if there was no response within 30 days the request would be deemed to be withdrawn, and would clarify that actual payment is required in situations where the estimate exceeds \$200 and the public body requires an advance deposit. The Virginia Press Association (VPA) submitted written comments in opposition to this draft, which are posted on the Council's website. Betsy Edwards, Executive Director of the VPA, testified to the Council that the VPA opposed the draft because by requiring advance payment even for requests under the \$200 threshold in current law, the draft would introduce new burdens on requesters and could act as a deterrent, especially if costs were overestimated. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government, noted that a requirement to prepay went beyond the original issue she had raised concerning the response timing when a requester asks for an estimate in advance, and therefore, she also urged the Council to reject the recommended draft. In response to inquiry from the Council, staff noted that at least one circuit court has held that the current language in subsection H of § 2.2-3704 "means a public body may require actual payment of a deposit prior to processing a FOIA request."<sup>2</sup> After further discussion of the drafts that had been presented to the Subcommittee, the Council voted 6-2 to recommend to the 2020 Session of the General Assembly a new draft that used some language from two of the

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<sup>1</sup> **Members Present:** Delegate Luke E. Torian (vice chair), Senator Mamie E. Locke, William Coleburn, Bruce Potter, Sterling Rives, Cullen Seltzer, Michael Stern, Sandra Treadway, Mark Vucci

**Members Absent:** Senator Richard H. Stuart (chair), Delegate Glenn R. Davis, Lee Bujakowski, Matthew A. Conrad, Shawri King-Casey

<sup>2</sup> *Fairfax County School Board v. Judicial Watch*, 91 Va. Cir. 443, 448 (Circuit Court of Fairfax County, 2016).

prior drafts (LD 20100544D, lines 56–59, and LD 20100558D, line 79). The new draft would toll the time from when notice of an estimate was sent until a response was received (but would not require payment in advance if the estimate is less than \$200), would provide that if there was no response within 30 days the request would be deemed to be withdrawn, and would clarify that actual payment is required in situations where the estimate exceeds \$200 and the public body requires an advance deposit.

### **Annual Legislative Preview**

#### *Council Staff*

Staff shared an email message and attached letter received from Elizabeth Bennett-Parker, Vice Mayor of the City of Alexandria, concerning issues the City may choose to include in a future legislative package. The email addresses concerns over access to constituents' contact information; the letter suggests allowing expanded participation in meetings conducted using electronic communications. Both the email and the letter are posted on the Council's website.

### **Public Comment and Next Meeting**

There were no public comments. The meeting schedule for 2020 will be determined after the 2020 Session of the General Assembly has adjourned.

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

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