



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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FOIA Council Meeting Summary

December 5, 2013

1:30 PM

House Room C

General Assembly Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its fourth and final meeting of 2013.¹ This meeting was held to hold the Legislative Preview for proposals to be brought before the 2014 Session of the General Assembly and to present other issues of interest to the Council.

Legislative Preview

Senator Watkins- State Corporation Commission and FOIA

Senator Watkins indicated that he planned to offer a bill to the 2014 Session of the General Assembly that would address access to records of the State Corporation Commission (SCC). He indicated that the bill would be in Title 12.1 rather than FOIA, and that it would describe records that must be made available for public inspection regarding administrative activities of the SCC, but that a draft was not available at this time. He stated that the SCC helps Virginia, and that businesses trust that proprietary information given to the SCC will be kept confidential. He went on to say he was not sure putting a third party into the process would be in the best interest of businesses in Virginia, and that he was concerned there may be evolving interpretations of the law that change over time. He further stated that in 32 years as a legislator he had not heard of any complaints about the SCC from a citizen who could not get information.

Senator Stuart asked whether Senator Watkins' bill would do the same things as Delegate Surovell's bill that had been referred to the Council for study. Senator Watkins replied that his bill would address administrative matters and would do so outside of FOIA. Senator Stuart asked whether there was a concern over unintended consequences; Senator

¹ FOIA Council members Senator Stuart, Delegate LeMunyon, Ashby, Dooley, Hamlett, Jones, Landon, Schliessmann, Selph, Tavenner, and Treadway were present; member Whitehurst was absent.

Watkins replied that there was a lot of proprietary information of businesses that should not be made public. Delegate LeMunyon stated that it appeared to be a difference in form rather than substance, and asked why put the bill in Title 12.1 instead of FOIA. Senator Watkins replied that the Council does not have the experience and understanding of the proprietary side of business in Virginia. Mr. Ashby inquired whether other agencies receive proprietary business information. Senator Watkins responded that the SCC is the primary recipient of proprietary information, but he was unsure what proprietary information businesses divulged to other agencies. Mr. Jones inquired of staff whether there were existing FOIA exemptions for proprietary information. Staff replied that there are currently 27 of them in their own section.² Mr. Jones asked whether staff was aware of a significant number of court cases over the current proprietary records exemptions; staff replied in the negative. Mr. Landon asked whether there was a timing issue here, or whether the matter could be carried over. Senator Watkins replied he did not know of any time pressure, but the sooner the matter was clarified the sooner there would be more transparency. The Council did not take any action on this item.

Delegate Surovell - State Corporation Commission and FOIA

Delegate Surovell's proposal to make the SCC subject to FOIA was referred to the Rights and Responsibilities Subcommittee, which concluded its work without recommendation. Delegate Surovell addressed the Council at its September meeting with a modified proposal. While the Council did not support that proposal as written, it suggested that the Delegate work with other interested parties and staff to come up with a new legislative draft proposal. Delegate Surovell appeared again today with another modification of his draft proposal. He observed that the Council had expressed its support for the concept of making the SCC subject to FOIA, but felt that the language of the prior draft was too vague. He stated that the new draft had clearer language, including an exemption for proprietary information. The Delegated noted that there were two approaches being considered, one in FOIA, the other in Title 12.1. He indicated his preference for FOIA because it has established precedents and authority. He noted that a bill in Title 12.1 would be the opposite of FOIA because the default rule of FOIA is to state that all records must be disclosed unless exempt, whereas the other bill would say what is open and leave the rest exempt by default. Delegate Surovell then discussed the specific changes made in the new draft, and how each part of the proposal addressed concerns raised previously by the opposing parties. In response to questions from Senator Stuart, Delegate Surovell stated that he hoped the Council would vote to recommend the bill, and stated that he did intend to introduce it, or one like it, to the 2014 Session of the General Assembly.

Delegate LeMunyon moved to recommend the bill. The motion was seconded and there was discussion on the motion. Delegate LeMunyon noted that it would have been great to be able to compare the two bills, but he felt the difference was more form than substance and should not slow the process. Mr. Jones agreed and indicated his support for the motion, noting that there would not be "peace in the valley" on the underlying policy question whether to approach the issue in Title 12.1 or in FOIA. Mr. Landon agreed

² § 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

there would be no "peace in the valley," but hoped there would be more agreement on specific language. He also stated that he hoped the SCC would take advantage of technology to broaden its dissemination of information. Ms. Dooley expressed her understanding at the last meeting was that the Council agreed that personnel and procurement records of the SCC would be brought under FOIA, and asked why the bill was not drafted that way. Delegate Surovell stated it was not drafted that way because FOIA mandates disclosure of all public records then exempts certain ones, so the bill follows the standard approach of FOIA. Mr. Ashby indicated he understood the draft was an attempt at compromise to address the concerns of the interested parties, but he felt the exemptions as drafted may be too broad. Mr. Schliessman stated for the record that the Office of the Attorney General (OAG) continued to take no position on the bill and would abstain from any vote on it. Senator Stuart indicated his concern that the new draft had not been fully vetted and may have unintended consequences, so he would not endorse it today but remained in support of the concept that the SCC should be subject to FOIA.

Arlen Bolstad, representing the SCC, expressed several concerns about the draft, particularly that the process of designating proprietary records to be exempted would be cumbersome and voluminous, and that some of language would likely be the source of future litigation. He elaborated in response to inquiry from Senator Stuart that the process of designating proprietary records would be burdensome on businesses and the agency, as it would likely require an in camera proceeding before a hearing officer. Additionally, applying FOIA to the SCC would lead to appeals before the Supreme Court, and questions of the application of FOIA's petition for mandamus versus the SCC's rules of practice and procedure. By contrast, he stated that Senator Watkins' bill in Title 12.1 would codify that budget, personnel, and procurement records would be open, it would not include additional regulatory or legal proceedings, and that records available now would continue to be available. He stated that the two bills were not similar, and that he would request that the Council not recommend Delegate Surovell's draft.

Delegate LeMunyon asked why the draft of Senator Watkins' bill was not available. Mr. Bolstad indicated it was still being discussed internally at the SCC. Delegate LeMunyon asked for assurance that the SCC was working in good faith, not just to slow the process so nothing happens. Mr. Bolstad stated that the SCC provides voluminous records to the public on a daily basis but in the interest of protecting confidential and proprietary information, the SCC must exercise discretion. Ms. Dooley asked whether Senator Watkins' bill would address procedural matters as FOIA does, such as time limits for responses. Mr. Bolstad stated that when requests come in, responses are prompt and thorough, but there is no language like that in the bill. Noting that courts regularly file protective orders for confidential and proprietary business information, Mr. Ashby asked whether there was a difference between that practice and the procedure in Delegate Surovell's draft. Mr. Bolstad replied that there was. As an example, he stated that in a large rate case with voluminous documents and months of work, there would be a protective order at the outset of the case. By contrast, under Delegate Surovell's bill, he felt that businesses would want a new "mini protective order" each and every time the SCC asked for records. Mr. Ashby observed that the Commonwealth has stated a policy

of access in FOIA as a matter of right, and asked whether there is a countervailing public policy from the General Assembly to be considered. Mr. Bolstad stated that the Supreme Court found such a policy in the *Christian* case based on the separate laws covering specific SCC records.

Craig Merritt, on behalf of the Virginia Press Association (VPA), stated that the VPA shares the view that something needs to be done, and applauds the work of Delegate Surovell and the interested parties. However, he expressed concerns over Delegate Surovell's bill, and stated he did not think it was ready. He went on to state the hope that whatever bill goes forward be based on a real-world understanding of the SCC, and that it does not create or conflate problems in matters already covered under the law. He also related the general goal that the SCC have the same transparency as other agencies when it acts as an agency, but not when it acts as a court.

Delegate Surovell addressed the concerns raised, noting that the Supreme Court has repeatedly followed the narrow construction rule for FOIA exemptions. He stated that courts will read exemptions as narrowly as possible and will give independent meaning to each exemption following statutory rules of construction. He also stated how individual clauses in his proposed draft would address specific concerns over the judicial aspects of the SCC, and that the existing laws concerning the SCC outside of FOIA would still apply if his proposal was enacted. He continued by observing that the underlying public policy debate centers around the idea that the SCC is special because it is the only agency that regulates monopolies, that it stands between monopolies and the people, yet it has very little accountability to the people or the General Assembly. He concluded by stating that the SCC should have transparency, that it belongs in FOIA, and he felt the proposal should be approved.

The Council then voted on the motion to recommend the draft; the motion failed to pass by vote of four in favor, five against, and two abstentions. Delegate LeMunyon and members Ashby, Jones, and Landon voted in favor of recommendation. Senator Stuart and members Dooley, Selph, Tavenner, and Treadway voted against recommendation. Members Hamlett and Schliessmann abstained, reiterating that the OAG took no position on the matter.

Roger Wiley; E-meetings, remote participation based on personal matters exception

Roger Wiley, speaking on behalf of the Loudoun County Board of Supervisors, stated that there had been an instance where one Board member's participation by electronic means due to a personal matter had been denied, whereas another members' prior request had been approved. The resulting perception was that the denial in the second instance was due to how the majority felt the member who requested remote participation would vote on a controversial issue. Mr. Wiley stated that such a result was not what was intended by the law allowing such remote participation for personal matters, and that it was not meant to be used to pick and choose participants based on their positions on issues. He indicated that the proposal would require a one-time determination by each public body regarding its policy on approving such participation which would then be

applied equally to all members. He also stated he was open to other fixes. Senator Stuart inquired whether this might be a case of a bad situation making for bad law, and stated that he was hesitant to amend the law due to a single instance. Mr. Wiley indicated he felt the situation would likely be repeated. Craig Merritt, on behalf of the VPA, indicated opposition to the measure as a classic case of amending the Code due to one bad act. He also expressed the VPA's concern that the proposal would allow each local public body to set policy, rather than having a uniform access policy set by the General Assembly. Mr. Wiley offered an alternative proposal to remove the current procedure to approve by majority vote participation by individual members, and leave out the proposed policy determination altogether. Senator Stuart inquired as to what action by the Council was being sought; Mr. Wiley indicated he was bringing the matter up to alert the Council and any potential opponents, and to solicit alternative solutions. The Council took no action on this item.

Tom Moncure; George Mason University, employment promotion letters

Tom Moncure, University Counsel and Assistant Attorney General, George Mason University, stated that Delegate Albo had agreed to introduce legislation in 2014 that would amend the current exemption allowing educational institutions to withhold letters of recommendation for applicants for employment to also cover such letters of recommendation for candidates for promotion.³ Mr. Moncure explained that especially in a higher educational setting, people were extremely reluctant to provide frank appraisals of their colleagues when they knew that the subjects will be privy to those appraisals. The Council voted unanimously in favor of recommending this amendment to the 2014 Session of the General Assembly.

Records exemption for certain rental rates on behalf of the Fort Monroe Authority

Staff reported that James Fiorelli of the OAG had contacted the Council on behalf of the Fort Monroe Authority to request an amendment to the existing exemption for "appraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease."⁴ The amendment would add language to exempt related negotiation records where competition or bargaining was involved and public disclosure would adversely affect the financial interest of the public body. The stated purpose of the exemption is to allow agents of the Commonwealth to negotiate in the best interest of the Commonwealth and to fulfill their fiduciary responsibilities to the citizens and taxpayers of the Commonwealth. The Council took no action on this item.

Other Business

Geographic Information Systems and FOIA

³ Subdivision 2 of § 2.2-3705.4.

⁴ Subdivision 8 of § 2.2-3705.1.

Staff reported that at its September meeting, the Council heard from Dan Widner, Coordinator of the Virginia Geographic Information Network (VGIN) about outdated language in FOIA concerning charges for topographic maps. The Council asked that Mr. Widner meet with interested parties and staff to come up with a legislative draft proposal for the Council's consideration. The workgroup met and decided that a guidance document from the Council concerning providing GIS records and charges therefore was a better alternative than proposing legislation.

FOIA/Records Management guidance for the Governor-Elect Transition Team

Staff reported working with the Library of Virginia to produce a guidance document for the Transition Team to assist them in setting up procedures to make handling FOIA requests easier as well as setting up systems now that will address records management issues over the course of this new administration. Staff thanked Dr. Treadway for her guidance in this project.

Review of Executive Summary for Council 2013 Annual Report

Staff reported that the Council is statutorily required to report annually to the Governor and the General Assembly concerning its activities, and recommendations, if any. The executive summary is in draft form and will be updated following today's meeting. The executive summary and 2013 annual report will be posted on the General Assembly webpage as well as the Council's website.

Viewing of FOIA training video for Boards of Visitors

Staff reported that this FOIA training video was produced by the Virginia State Council of Higher Education pursuant to HB 1952 (2013 Acts of Assembly, c.577) in conjunction with the Council staff and Stephanie Hamlett, Office of Attorney General, in order to provide guidance to Boards of Visitors of public institutions of higher education. Due to time considerations, the video itself was shown after adjournment of the meeting.

Public Comment

Senator Stuart opened the floor to public comment. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that she had heard of additional unintended consequences from the 2011 amendment to the definition of "public records."⁵ Ms. Rhyne indicated that even though all agreed at the time that the amendment was merely a clarification of existing law, it was now being interpreted in other ways. She elaborated that the existing definition included (and still includes) records "in the possession of a public body or its officers, employees or agents in the transaction of public business," but that the new language excepted records "not prepared for or used in the transaction of public business," which has led to conflicting interpretations. For example, she indicated that some public bodies had stated that they

⁵ 2011 Acts of Assembly, c. 242 added a final sentence to the definition in § 2.2-3701: "Records that are not prepared for or used in the transaction of public business are not public records."

were in *possession* of a record, but had not *used* it in the transaction of public business, and therefore it was not a "public record" subject to FOIA. Ms. Rhyne asked that the Council take the matter up for study next year. Senator Stuart inquired whether there had been any litigation on the issue; Ms. Rhyne replied there was none of which she was aware. The Council then voted unanimously to study the issue during the 2014 interim.

Ginger Stanley of the VPA observed that as part of his "Mainstream Project" proposal, Lieutenant Governor Bolling has recommended a comprehensive study of FOIA exemptions. She noted that as a Senator, Mr. Bolling headed the Senate General Laws FOIA Subcommittee and was the patron of the Senate version of the bill that founded the FOIA Council.⁶ She further noted that the General Assembly had not had a FOIA study in 14 years, and that the VPA supported this proposal.

Senator Stuart asked whether anyone else wished to speak; there was no further public comment. The meeting was then adjourned.

Future Meetings

The Council will next meet after adjournment of the 2014 Session of the General Assembly (to be determined).

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⁶Senate Bill 340 (Bolling), enacted as 2000 Acts of Assembly, c. 987. Note there was a corresponding House bill, HB 551 (Woodrum), enacted as 2000 Acts of Assembly, c. 917.