

Freedom of Information Advisory Council
Richmond, Virginia
December 15, 2006

The Freedom of Information Advisory Council (the Council) held its final meeting of 2006¹ on December 15, 2006. This meeting included the annual legislative preview for the upcoming Session of the General Assembly. The Council heard progress reports from its four subcommittees; reviewed legislative proposals, including those from non-Council sources as part of the legislative preview; and were briefed on recent judicial decisions concerning FOIA. The Council also set its first meeting for 2007 to be held at 1:00PM, Monday, March 19, 2007.

Subcommittee Reports

PPEA/PPTA Subcommittee: The PPEA/PPTA Subcommittee reported that it met on August 9, 2006, and on August 23, 2006. The main topic for consideration was SB 5011, which passed during the 2006 Special Session with a sunset provision such that it expires on July 1, 2007. The Virginia Department of Transportation (VDOT) had requested that the sunset provision of SB 5011 be removed so that its provisions will not expire. Bill Axselle, Chairman of the Subcommittee, reported that the Subcommittee had agreed on draft legislation to submit for the Council's consideration. Mr. Axselle indicated that the draft reflected a compromise position between VDOT's desired removal of the sunset provision and the opposition to that position expressed by members of the press and public-access advocates. The compromise proposed would not have a sunset provision, but would be more limited in scope than SB 5011. Specifically, the draft exemption would (i) be limited in application to records prepared exclusively for use in evaluating or negotiating PPEA/PPTA proposals and only if release of the records would adversely affect the public body's negotiating position, (ii) require an affirmative statement from the public body that those specific records would be protected, and (iii) contain a corresponding meetings exemption. Mr. Axselle indicated that the Subcommittee voted 3-0 to recommend this draft, as amended, to the Council.

Senator Houck then requested any comments on the draft. Craig Merritt, representing the Virginia Press Association (VPA), indicated that the VPA was not fully persuaded that the draft legislation is the best option to pursue at this time. The VPA submitted written comments in opposition to the draft, including alternative draft language. Frosty Landon of the Virginia Coalition for Open Government (VCOG) indicated that VCOG shared VPA's concerns about the draft legislation. Rick Walton, representing VDOT, indicated that VDOT supports the draft as proposed with the technical changes to be made by staff. To address the concerns of VPA and VCOG, Mr. Axselle briefly reiterated how the limitations and conditions in the draft would affect the use of the exemption, and expressed his belief that the proposed draft strikes a balance between the opposing concerns. Mr. Axselle moved that the Council recommend the draft, with the

¹ Council members Axselle, Bryan, Edwards, Fifer, Griffith, Hopkins, Houck, Miller, Spencer and Wiley were present. Council members Malveaux and Yelich were absent.

technical amendments to be made by staff, to the General Assembly for its 2007 Session, and the motion passed by unanimous vote of the Council (10-0).

Electronic Meetings Subcommittee: The Electronic Meetings Subcommittee reported that it met on August 9, 2006, August 23, 2006, October 11, 2006, November 8, 2006, and December 15, 2006. John Edwards, Chairman of the Subcommittee, reported that after extensive deliberations the Subcommittee members had agreed to propose draft legislation that would define a "regional public body" to include bodies comprised by two or more counties or cities; would define the ability of political subdivisions to hold electronic meetings depending on whether they were state-level or local-level in character; would reduce the current requirement that notice be given seven working days in advance down to three working days; and would allow three other instances where individual members of public bodies could participate in meetings by electronic means: (1) if an emergency occurs on the day of a meeting, (2) if the member has a disability or other medical condition that prevents physical attendance, and (3) if a member of a regional public body lives 60 miles or more from the meeting place. The first and third such instances (i.e. emergencies and participation by members of regional public bodies) would require approval by the public body before the member could participate through electronic means. All three instances would still require that a quorum of the public body be physically assembled in one central location, and that the voice of the individual participating by electronic means be heard by those at the central location. Mr. Edwards indicated that the draft passed as a unanimous recommendation of the Subcommittee.

In response to questions from Senator Houck, Delegate Griffith, and Mr. Bryan, it was agreed that the draft should be changed to clarify that members of regional public bodies living more than 60 miles from the meeting location who wish to participate by electronic means must call in and get approval on a per-meeting basis (no "standing" approval may be given). It was also acknowledged that there was the possibility that individual members might attempt to abuse the provisions allowing individual electronic participation, but that it was up to each public body to monitor for such abuse through the approval process. Mr. Edwards then moved that the draft legislation be recommended to the General Assembly for its 2007 Session, and the motion passed by unanimous vote of the Council (10-0).

"Fifth Response" Subcommittee: The Fifth Response Subcommittee reported that it met on July 27, 2006, and November 8, 2006. Craig Fifer, Chairman of the Subcommittee, reported that the Subcommittee had agreed to propose a draft that made four primary changes to existing law: (1) the draft removes the term "custodian" from the existing law; (2) the draft changes the presentation format of the responses to clarify unequivocally that if the public body is going to provide records in response to a request, it must do so within five working days of receipt of the request; (3) the draft adds a fifth response allowing public bodies to indicate that the requested records do not exist or cannot be found, and also provides that if a public body has knowledge of where the records may be found (i.e., they are held by a different public body), it shall so inform the requester; and (4) the draft allows

a public body to invoke additional time to respond if the request requires an extraordinarily lengthy search for records.

Mr. Fifer indicated that the Subcommittee had met and considered two concerns expressed by the Council at its October meeting: (1) concerns regarding multiple requests to an elected official during the election period; and (2) concerns about whether the draft language could be seen as attributing knowledge to the public body itself and the consequences of such attribution. In the first instance, it was noted that requesters can currently make requests to elected officials during the election period, and the language of the draft does nothing to change that. Mr. Fifer indicated that the Subcommittee felt that the real substance of the question concerned the use of FOIA as a tool for political harassment, something that was outside the scope of the Subcommittee's charge. Therefore the Subcommittee did not recommend any changes to the draft to address such harassment. The second issue was whether the phrase in the draft "if the public body that receives the request knows that another public body has the requested records" places a responsibility on the receiving public body to poll all of its employees before making the response that it knows the records are in the possession of another public body. In response, staff pointed out that FOIA is replete with references to the public body itself and not employees of the public body. Additionally, it was noted that common sense dictates that the phrase does not require the polling of all employees. After a brief discussion, the subcommittee decided that the draft language was sufficient as drafted. There was no comment from the Council or the public regarding the proposed draft. Mr. Fifer moved that the draft legislation be recommended to the General Assembly for its 2007 Session, and the motion passed by unanimous vote of the Council (10-0).

VRS Workgroup: The VRS Workgroup, consisting of Council members Spencer and Malveaux, was created at the October 11, 2006, meeting of the Council following a presentation by VRS. VRS indicated that it intends to seek a FOIA exemption during the 2007 Session of the General Assembly to protect certain investment records. Ms. Spencer reported that on November 29, 2006, the subcommittee met with VRS personnel and other interested persons to discuss the exemption requested by VRS. Consensus was reached to the extent that the exemption, if approved, should be placed within FOIA rather than in VRS's basic law, that the exemption should be specific to VRS and local retirement systems, and that there should also be a corresponding meetings exemption. The VRS Subcommittee did not make any policy recommendations or endorsements. The proposed draft is the exemption requested by the VRS, but in a form agreed to by all parties at the meeting. The draft was presented as a vehicle to facilitate further discussion and comment.

Robert Schultze was scheduled to present the draft exemption on behalf of VRS during the "Other Business" section of today's agenda. The Council moved his presentation up to coincide with the VRS Workgroup's report since both concern the same subject matter. Mr. Schultze stated that VRS had two concerns that would be addressed by the proposed exemption: (1) protection of investment plans and strategies going forward, and (2) protection of information regarding alternative investment programs, such as trade secrets provided by investment managers. As examples of the consequences of not having such an exemption, Mr. Schultze indicated that VRS was recently terminated from a fund

that gave a tenfold return on the investment, and VRS was denied the opportunity to invest with another fund manager because of concerns over possible FOIA disclosures.

Mr. Fifer asked whether the Council was to take any action on the proposed VRS exemption today. Senator Houck indicated that no action was expected, given how recently the exemption had been presented to the Council. Mr. Edwards indicated he would not be comfortable taking action on this proposal; in particular, he agreed that short-term investment plans should be protected but expressed concerns with the breadth and duration of the proposed exemption. Mr. Bryan asked whether other states were taking the same or a similar approach. Mr. Schultze replied that many states already have or are in the process of developing similar legislation. In response to further questions from Mr. Fifer, Mr. Bryan, and Mr. Wiley, Mr. Schultze indicated that some types of protected investments would include hedge funds, private equity funds, and other funds that are generally not publicly traded and tend to be longer-term investments, around 7-8 years in duration. Furthermore, the public could get records and information from the Joint Legislative Audit and Review Committee (JLARC), because JLARC oversees VRS and publishes a semi-annual report about VRS that is publicly available. Additionally, Mr. Schultze indicated that the public could find out about asset groups or sub-groups, and could find out about the existence of a relationship with a particular manager and the amount invested with a particular manager, but that other information concerning particular managers would be protected under the proposed exemption. Senator Houck then indicated that if any Council member wanted to make a motion concerning the draft, such motion would be entertained. Mr. Miller indicated he had considered making a motion to adopt the concept of the proposed exemption, but was unsure if it would be appropriate at this time. No motion was made.

Other Council Legislative Proposals

Venue: At the June meeting of the Council, staff briefed the case of Shaw v. Casteen, which highlighted confusion regarding the venue provisions of subsections A and B of § 2.2-3713. The Council then directed staff to prepare draft legislation that would clarify these venue provisions. Staff presented an initial draft that clarified the venue provisions applicable to state and local public bodies at the October 11, 2006, meeting of the Council. At that meeting the Council directed staff to incorporate additional language to address venue against regional public bodies. Staff presented the amended draft today, which contains three separate provisions to address venue against local public bodies, regional public bodies, and state public bodies. The draft also makes technical changes to clarify the existing law. At the suggestion of Mr. Wiley, the term "institution" used in the draft was changed without objection to read "public institution of higher education," so that there could be no confusion as to which provision would apply to the University of Virginia. Mr. Shaw spoke to express his support for the draft legislation when Senator Houck asked for any public comment. Mr. Shaw also suggested that an emergency enactment clause be added to the draft because the underlying request for records was still unanswered and the

substance of that request is still a controversial topic.² After explaining that adding an emergency enactment clause would make the legislation more difficult to pass by requiring a supermajority vote of the General Assembly, the Council voted unanimously to recommend the draft legislation to the General Assembly for its 2007 Session, with the change in language from "institution" to "public institution of higher education," but without an emergency enactment clause.

Annual Legislative Preview

Access to Court Records: Mr. John G. "Chip" Dicks presented a draft bill that would exempt from FOIA land records available online through the circuit courts' secure remote access system, as provided under other laws. Mr. Dicks indicated that the General Assembly had passed laws concerning secure remote access to land records held by the circuit courts that enabled access to these records via the Internet, but protected the records by limiting access to paid subscribers who signed a confidentiality agreement. Additionally, FOIA and another law³ specifically make these and other court records open to the public. In the past, these laws ensured that people could access necessary records (deeds and other land records, marriage and divorce records, etc.) by physically going to the courthouse; Mr. Dicks indicated that such traditional, physical access has not posed any problems. However, Mr. Dicks indicated that a problem arose as the records were made available online because certain offshore companies would request entire databases of information through FOIA, including records containing social security numbers and other personal information about individual citizens. These offshore companies would then use the information for commercial purposes, including posting the information online, without any of the safeguards the General Assembly had put into place through the secure remote access laws. Mr. Dicks indicated that the proposed exemption would protect these online databases from such misuse.

Mr. Fifer inquired as to the penalties if a company violated the secure remote access agreement. Mr. Dicks indicated that that was a problem, and that interested parties were currently seeking legislation to provide an enforcement mechanism. Mr. Dicks further stated that a federal court case has established that there cannot be criminal penalties imposed for dissemination of public records, as such penalties would violate the Constitution of the United States. Mr. Fifer then asked whether the proposed FOIA exemption would have an actual effect on the offshore companies, and indicated that he agreed with the idea behind the proposal but was unsure whether it would work in practice. Mr. Dicks indicated that the proposed legislation would discourage attempts to get entire databases and force companies to actually pay for the subscription rather than making their requests through FOIA, which would further discourage abuse of the secure remote access

² If the draft legislation is introduced, passes both houses of the General Assembly, and is signed by the Governor in 2007, then without such an emergency enactment clause it would take effect on July 1, 2007, whereas with such an emergency enactment clause it would take effect immediately upon signature by the Governor.

³ § 17.1-208, which states in part: *Except as otherwise provided by law, the records and papers of every circuit court shall be open to inspection by any person and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specially provided.*

system. Mr. Dicks stated that the proposed exemption strikes a balance between necessary access to public records and abusive access to large volumes of public records that could then be misused. Mr. Fifer then suggested having a means by which individuals could access their own records without having to purchase expensive subscriptions, perhaps on a per-record or per-day basis. Mr. Dicks stated that the difficulty with such a proposal lies in judging a requester's motive and purpose for a request, but that some similar provisions had been made, such as § 2.2-3808.2, which provides that any litigant has a right to his own records. Mr. Dicks also stated that the Technology Trust Fund was being used to help keep the subscription costs low. Mr. Edwards asked about the availability of software to redact social security numbers from existing records. Mr. Dicks stated that such software does exist now, but still has problems with false positive results when searching for number strings, so manual checking is still required. Mr. Edwards then expressed concern that this exemption might lead to less availability of court records than has been the case ever before, and suggested including a sunset provision on any proposed exemption. Mr. Dicks indicated that there would be no opposition to including a sunset provision, and that the exemption should be repealed if the problem is solved in the future. Senator Houck then moved the discussion to the next topic, as today's presentations are intended as legislative previews rather than work sessions to refine drafts of particular legislation. The Council took no action regarding this matter at this time.

Wireless Service Franchise Agreements: Mr. Fifer was scheduled to present this proposal for legislation, but indicated that in the interest of saving time, and because he was unsure whether the idea was developed fully enough for presentation, that the Council should move on to the next agenda item. The Council took no action regarding this matter at this time.

Security of Public Buildings: Kathleen Dooley, City Attorney for the City of Fredericksburg, proposed that a closed meeting exemption be added for discussions concerning vulnerability assessments and other matters concerning the security of public buildings. Ms. Dooley pointed out that there currently exist records exemptions concerning various building security topics, but that the only current meetings exemption is limited to matters involving terrorist activity. Ms. Dooley indicated that most security threats are criminal in nature rather than related to terrorist activity, and that these concerns drive budget decisions. Mr. Wiley indicated his support for such an exemption, noting that it was a real problem with for jail authorities and others. The Council took no action regarding this matter at this time.

Citizenship Requirement: Frosty Landon, Executive Director of VCOG, proposed removal of the requirement in Virginia's FOIA that a requester be a citizen of the Commonwealth or representative of the news media. He indicated that a similar limitation in Delaware law had been found unconstitutional by a federal district court, and that decision was upheld by the Third Circuit Court of Appeals. Additionally, Mr. Landon indicated that as a matter of pragmatism, VCOG had been informed that an effort is under way to find similar litigants in the Fourth Circuit, including Virginia. Mr. Landon stated that another practical consideration is that it is easy for an out-of-state requester to find an in-state proxy to make a request on his or her behalf. Mr. Landon also stated that the language regarding the news

media is out of date as it fails to address technological advancements such as the Internet, podcasts, and "blogs." In conclusion, Mr. Landon indicated he believes any litigation on this matter would be unnecessary, because the result is a foregone conclusion, and therefore the Council should act to remove the citizenship requirement before a federal court finds it unconstitutional. The Council took no action on the matter.

Financial Reports of Taxicab Companies: Dennis P. Gallagher, representing the Virginia Taxi Cab Association, and Ms. Judy Swiston, President of the Black and White Cab Company, presented access-related legislation that would appear in Title 46.2 rather than in FOIA. Currently localities regulate the rates charged by taxicab companies, and get financial information from the companies in order to do so. There is no current exemption for such financial information, and in a recent case, a newspaper made a request to the City of Norfolk and received information about the Black and White Cab Company. This legislation is being proposed in order to protect such private financial data in the future. Mr. Gallagher and Ms. Swiston, indicated that they had met with representatives of the press and other interested parties, and that the proposed legislation had been agreed to by all concerned. Senator Houck indicated that engaging in such a dialogue with other concerned parties was the preferred way to handle such matters. The Council took no action on the matter.

Virginia Office of Protection and Advocacy: Sherry Confer, Policy Director of VOPA, presented a proposal to add a closed meeting exemption that would allow VOPA's Governing Board or a committee of the Board to hear appeals of individual cases in closed meetings. Ms. Confer explained that VOPA works with clients with disabilities, is federally funded, and must meet certain federal requirements that limit the number and type of clients VOPA may serve. As a result VOPA tries to take on cases that will have a systemic impact rather than cases that will only be of limited consequence. Sometimes clients do not want their cases to be closed, or VOPA simply cannot take a type of case, and the persons involved will file an appeal with the Director of VOPA. If the Director upholds the staff decision not to take a case, the person may then appeal to the Board. The Board and its committees do meet in public, and currently there is no exemption allowing the Board to hear such an appeal in closed meeting. As a practical consequence, the Board does not hear such appeals as a body but instead assigns them to individual members who may hear each case privately. Senator Houck and Mr. Fifer presented questions about the complaint and appeals process. Ms. Confer indicated that the complainant in each case is the person who was denied services by VOPA, and the appeal concerns only that decision, not any other underlying dispute with another agency or person. For example, if a disabled child was denied assistive technology by his or her school system, he or she might seek aid from VOPA. If VOPA denied that request, the appeal would concern VOPA's denial, not the underlying decision by the school system; the school system would not be involved in the VOPA appeals process at all. In response to a question from Mr. Bryan, Ms. Confer indicated that VOPA has approximately 500 clients or people seeking aid, and about 50 appeals per year, many from the Department of Corrections. Staff indicated that VOPA currently has a records exemption, but no corresponding meetings exemption. Mr. Wiley expressed his support for such a meetings exemption, finding it analogous to the current

exemption allowing matters involving students to be discussed in closed meeting. The Council took no action.

Other Business

Annual Report: Staff briefly presented the draft of the 2006 Annual Report, noting that it had not yet been reviewed by editorial staff and was incomplete as presented because it did not include appendices or minutes for the meetings held today. Staff requested that Council members review the draft and present any comments, suggestions, or revisions as soon as possible.

Of Note

White Dog Publishing v. Culpeper County Board of Supervisors: Staff briefed the Council regarding this recent decision of the Supreme Court of Virginia.⁴ The Court held that the closed meeting exemption for contract negotiations may only be used for the discussion of the formation or modification of procurement contracts vis-à-vis a vendor. Staff has prepared an Issue Brief published by the Division of Legislative Services that examines the Court's decision in detail. The Court's decision leaves several questions regarding the application of this exemption unresolved, such as whether the Court used the term "procurement" as a limitation or as a description, and if used as a limitation, what practical effects that limitation has; whether the use of "vis-à-vis" means that a vendor must be present for the exemption to apply; and whether the exemption may be used if the contract under negotiation is between two public bodies rather than between a public body and a private vendor. The Council took no action regarding this matter at this time.

Citizenship Requirement: Staff briefed the Council about a recent decision of the Third Circuit Court of Appeals⁵ that upheld a decision of the federal District Court for the District of Delaware,⁶ holding that the limitation of rights under Delaware's FOIA law to Delaware citizens violates the Privileges and Immunities Clause of the Constitution of the United States. The District Court found that the law violated two rights of the requester under the Privileges and Immunities Clause: (1) his right to pursue a "common calling" as a journalist, and (2) his right to participate in the political process. The Circuit Court did not consider the "common calling" ground. Instead, in a three-step analysis the Circuit Court (1) found that participation in the national political process was a fundamental right protected by the Privileges and Immunities Clause, (2) found that Delaware's stated interest in defining its political community and strengthening the bond between its citizens and government was a substantial interest, and (3) found that Delaware's stated interest was not furthered by limiting access to public records to Delaware citizens. Finding that the citizenship limitation did not further a substantial interest and did impair a fundamental right, the Circuit Court held that limitation to be unconstitutional. Staff noted that this decision may be influential but is not binding in Virginia, and that no Virginia court (state or federal) has

⁴ *White Dog Publishing, Inc. v. Culpeper County Board of Supervisors*, 634 S.E.2d 334, 2006 Va. LEXIS 81 (2006).

⁵ *Lee v. Minner* (Case No. 05-3329, 3d Cir., decided August 16, 2006).

⁶ *Lee v. Minner*, 369 F.Supp.2d 527, 2005 U.S. Dist. LEXIS 8892 (D. Del., 2005).

yet addressed⁷ this issue. Additionally, staff noted that the Code of Virginia used to have provisions concerning "citizenship" that were repealed in 2005 (and not replaced), and that several inquiries have been received regarding whether corporations and other entities are "citizens" with rights under Virginia's FOIA. Mr. Fifer, Mr. Edwards, and Senator Houck all indicated interest in this topic as one that should be addressed by the Council next year.

Annual Statistics: Staff presented a year-by-year comparison of the statistics of services rendered by the Council since its inception in 2000. The comparison indicated that requests for formal opinions had been tapering off in the past couple of years. Meanwhile, requests for opinions by e-mail or telephone were increasing dramatically. Staff attributed this shift to the reputation enjoyed by the Council as a credible, neutral arbiter. Staff averred that people no longer felt that they had to have a written opinion to feel that the advice they received was official; but instead could rely on the oral opinions given by Council staff via e-mail or telephone.

Latest Statistics: Staff presented the latest statistics of the services rendered by the Council for the past year. For the period June 1, 2005 through November 30, 2006, Council staff responded to 827 informal requests for assistance-- 402 by government officials, 327 from citizens, and 98 from media representatives. Additionally, the Council issued four formal written opinions--two to citizens and two to government officials.

Public Comment

Mr. Phillip Abraham, Vectre Corporation, expressed concern that the current PPTA exemption and the proposed draft recommended at today's meeting do not address the treatment of records submitted by a private entity after the execution of an interim agreement but before the execution of a comprehensive agreement. Mr. Abraham indicated that this concern had arisen from a transaction involving Transurban Development, which is involved in development in and around the District of Columbia and Northern Virginia. In response to a question from Senator Houck, Mr. Abraham indicated this concern was a new one raised by recent events involving his client. Senator Houck observed that the legislative preview and the use of subcommittees are utility features of the FOIA Council, because it is nearly impossible to perform due diligence regarding such legislative issues during the legislative session due to time constraints. The Council took no action regarding this matter at this time

Future Meetings

The Council set its next meeting to be held at 1:00PM on Monday, March 19, 2007 in the General Assembly Building, Richmond, Virginia. This will be the first Council meeting for 2007.

The Honorable R. Edward Houck, *Chair*

⁷ Due to time constraints, service statistics were not presented at the October 11, 2006, meeting of the Council, and so the statistics presented herein cover the time period since the last presentation, which was at the June 12, 2006, meeting of the Council.

Maria J.K. Everett, *Executive Director*