



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

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## **FOIA Council Meeting Summary**

### **December 17, 2012**

### **1:30 PM**

### **House Room C**

### **General Assembly Building**

### **Richmond, Virginia**

The Virginia Freedom of Information Advisory Council (the Council) held its fourth meeting of 2012.<sup>1</sup> This meeting was held to hear subcommittee reports, act on subcommittee recommendations, and to hold the annual legislative preview.

### **Subcommittee Reports**

#### **Electronic Meetings Subcommittee**

Ms. Dooley, Chair of the Electronic Meetings Subcommittee, reported that the Subcommittee had met five times in 2012 to consider HB 1105 (Greason) and HB 1149 (Dudenhefer).<sup>2</sup> She reported that in addition to considering the bills, the Subcommittee had heard from staff of the Joint Committee on Technology and Science (JCOTS) regarding virtual audio/visual meetings technology, had considered background on the history of electronic meetings legislation and

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<sup>1</sup> FOIA Council members Sen. Stuart, Del. Iaquinto, Ashby, Dooley, Hamlet, Jones, Schliessmann, Selph, Tavenner, and Treadway were present; members Landon and Whitehurst were absent.

<sup>2</sup> **HB 1105 (Greason) Freedom of Information Act; electronic communication meetings.** Revises the rules for which meetings of state public bodies may be conducted by audio or video means. The bill provides that (i) at least one member of the public body must be physically assembled at the principal meeting location, (ii) the quorum of the public body is determined by members participating in person or by electronic means in the meeting, (iii) a member of the public shall pay for the documented marginal cost that a public body may incur in expanding public participation to the meeting, and (iv) the number of meetings a public body may conduct through electronic communications means is limited to 50 percent of its regular meetings in any calendar year. The bill contains technical amendments.

**HB 1149 (Dudenhefer) Freedom of Information Act; electronic communication meetings by local and regional public bodies.** Expands the authority for the conduct of electronic communication meetings to all public bodies. Currently, local public bodies are prohibited from conducting public meetings in this manner, except when the Governor declares a state of emergency. The bill contains technical amendments.

subcommittee work, as well as the 2008 policy statement of the FOIA Council on electronic meetings, and had reviewed a compilation of the annual electronic meetings reports received by the Council since 2000. Ms. Dooley briefly reviewed the current law on electronic meetings for state public bodies, and observed that state agency representatives had testified about difficulties assembling a quorum in one location for committees, subcommittees, and other subsidiary entities of a larger parent body. As an example, a committee might schedule a 30-minute meeting, but may have difficulty getting members who are dispersed throughout the Commonwealth to attend it in a single location when their travel times are longer than the meeting itself. Ms. Dooley noted concerns that eliminating a physical quorum might affect the quality of meetings, especially when they were conducting using only audio communication (i.e. speaker phone). The Subcommittee recommended draft legislation that would allow state-level advisory public bodies to hold electronic meetings without a physical quorum if audio-visual technology was used. The proposed draft would also have an improved reporting requirement, requiring that public bodies submit copies of their agendas with their annual electronic meetings reports, and that they provide a form for public feedback that the public could use and send directly to the Council or JCOTS. Additionally, due to concerns that the proposed draft might be too broad, it would have a one-year sunset clause.

Senator Stuart requested public comment on the proposed draft. Craig Merritt, on behalf of the Virginia Press Association (VPA), stated that VPA appreciated the thorough opportunity to address the proposal and the productive discussion with Mr. Palmore from the Office of the Governor. He called the Council's attention to the letter from Ginger Stanley, Executive Director of VPA, which proposes a pilot program as an alternative to the subcommittee's proposal. Mr. Merritt stated that VPA is not opposed to using meetings technology moving forward to improve efficiency and facilitate public access, but was concerned that the subcommittee's proposal was too broad. In particular, VPA expressed concern that the definition of "advisory public body" may apply to too many public bodies, and that removing the physical quorum requirement is a significant change. Through question and answer with the Council, Mr. Merritt indicated that VPA's concern was over the quality of the meetings and interaction with the public, and that it was unknown how the quality of such meetings would be affected. Mr. Merritt stated that the unknown was not a reason not to go forward, but it was the reason VPA suggested a pilot program affecting only a limited number of public bodies, so that it could be determined how the quality of meetings would be affected before applying this change broadly.

In response to inquiries from the Council, staff pointed out that the draft provided for recording any such meeting conducted electronically without a quorum, except that closed meetings (if held) would not have to be recorded. Additionally, staff indicated that many other states currently allow electronic meetings with few restrictions.

Mr. Selph stated that as a member of the Subcommittee, he appreciated Mr. Merritt's comments and VPA's work in bringing the pilot proposal, but the problem would be identifying in advance who would use the pilot program. He stated that that was the reason the Subcommittee opted to include a one-year sunset provision in the draft instead. Observing that the proposed draft is limited to public bodies that are advisory only, that the meeting technology used must be both audio and visual, and that the draft has the one-year sunset, he hoped it was an incremental change.

Mr. Jones stated that the Subcommittee did an excellent job trying to find a balance and embrace technology more fully, but he had concerns about the final recommendation. Noting that the vote to recommend was three in favor and one against, he stated he would have voted against the proposed draft. He noted that the requirement for a physically assembled quorum is a core basis of open government in Virginia, and thus he would describe this change as "fundamental" rather than "incremental." He stated that he would favor the pilot program as a way to test the waters, rather than opening the floodgates.

Mr. Ashby asked about whether the state currently has the technology and administrative capability to actually implement the changes in the proposed draft (i.e., whether state agencies already have the equipment and training needed to conduct audio/visual meetings). Staff noted that it would take money, and that as a state, the overwhelming number of electronic meetings reported were conducted as audio-only teleconferences. Mr. Ashby stated his concern that the one-year sunset would not be enough time to implement the changes needed in education and acquisition of technology, and so suggested a two-year sunset might be better.

Delegate Iaquinto inquired whether electronic meeting participants would still be paid a per diem; staff indicated that they would, as they were still doing the people's business.

Jeff Palmore, of the Office of the Governor, observed that a quorum would still be required to conduct business, it just would not have to be a quorum assembled in one physical location. He stated that this change may move more public activity into the public realm. As an example, he noted that some small bodies will have a series of one-on-one conversations rather than holding meetings, but this change might make it easier for them to meet as bodies and give the public opportunities to participate from multiple locations. Mr. Palmore also indicated that he did not know how many public bodies would qualify as "advisory" and be able to use the proposed provisions to hold electronic meetings without a physical quorum.

Ms. Dooley moved to recommend the proposed draft, and the motion was seconded. Mr. Ashby offered a substitute motion to recommend an amended version of the proposed draft with a two-year sunset provision rather than the one-year sunset; the substitute motion failed for lack of a second. Returning to Ms. Dooley's motion, the Council voted to recommend the proposed draft to the 2013 Session of the General Assembly by vote of nine in favor, one against (Mr. Jones voted against).

Ms. Dooley next described the second proposed draft that had been recommended by the Subcommittee, which would include "personal matters" along with "personal emergencies" in the existing provision that allows individuals to participate in a meeting by electronic means when a personal emergency prevents physical attendance.<sup>3</sup> She stated that the problem presented to the Subcommittee was that some localities are akin to state public bodies in that members may have difficulties attending meetings in person due to traffic conditions, length of commute, or distance, and many localities did not feel these conditions qualified as "emergencies." She related that the Subcommittee did not feel that localities should be able to hold electronic meetings generally, but that more flexibility was needed to address the problems presented. She explained that the addition of "personal matters" in the draft would allow electronic participation in situations that were not emergencies, but such participation would still be subject to a vote of the public body, the nature of the personal matter would have to be specified in the meeting minutes, and there would be the same limit on the number of times it could be used (no more than twice annually, or one-quarter of the bodies' meetings, whichever is fewer). In response to a question, Ms. Dooley confirmed that this provision would apply to each member of the public body.

Senator Stuart opened the floor to public comment. Phyllis Errico of the Virginia Association of Counties (VACo) indicated that VACo supported this change and that the draft was a compromise based on responses to a survey conducted by the Virginia Municipal League (VML) and VACo that would give a little flexibility to address these problems. Mark Flynn, speaking on behalf of VML, stated his support for the bill for the same reasons. Patrick Cushing, speaking on behalf of Stafford County, also indicated support for the bill, which had begun as Delegate Dudenhefer's bill that was referred to the Council for study, and stated that the proposal was on Stafford County's legislative agenda for 2013. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), stated her belief that the current language is adequate and that the problems are due to a misinterpretation of what constitutes an "emergency" under current law. She stated that she did not feel any change is necessary.

There being no further public comment, Ms. Dooley moved to recommend the proposed draft to the 2013 Session of the General Assembly. The motion was seconded and carried by unanimous vote. Later in the meeting (following the report of the Parole Board Subcommittee), concerns were expressed about limitations imposed by the House and Senate on the number of bills each General Assembly member may introduce. Staff offered to combine the two drafts recommended by the Electronic Meetings Subcommittee into one, as both were germane to the subject of electronic meetings. The Council voted unanimously in favor of combining both recommended drafts into one.

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<sup>3</sup> Va. Code § 2.2-3708.1.

## **Criminal Investigative Records Subcommittee**

Mr. Selph, Chair of the Criminal Investigative Records Subcommittee, reported that the Subcommittee had met several times over the course of three years. He recognized Subcommittee members Treadway and Schliessmann, as well as former Subcommittee chair Craig Fifer, for their contributions. Mr. Selph stated that the Subcommittee's work began by considering bills introduced by Senator Edwards that would have opened access to criminal investigative files after any investigation or prosecution had ended. The Subcommittee heard from many interested parties over the years, including police, sheriffs, VPA, VCOG, VACo, VML, and many others. After much input and consideration, the Subcommittee had decided not to go forward with Senator Edwards' bills but to recommend a proposed draft that would clarify and reorganize the existing law. The proposed draft is arranged into subsections addressing (A) required, discretionary, and prohibited releases; (B) noncriminal records; (C) 911 calls; and (D) conflict resolution.

Senator Stuart invited public comment on the draft. Dana Schrad of the Virginia Association of Chiefs of Police stated that there is a lot of turnover in law enforcement positions that deal with the media and the public, and that the reorganization would help with training officers in those positions. She thanked the Subcommittee and staff for their work. There was no further public comment. Mr. Selph moved that the Council recommend the draft to the 2013 Session of the General Assembly. The motion was seconded and carried by unanimous vote.

## **Parole Board Subcommittee**

Staff reported that the Subcommittee had met once in 2012 to consider HB 397 (Hope).<sup>4</sup> At that meeting the Subcommittee suggested that the patron and supporters of the bill meet with representatives of the Parole Board, as it was unclear to the Subcommittee what was the purpose of the bill in light of current law requiring certain disclosures from the Parole Board.<sup>5</sup> Delegate Hope and Bill Muse, Chair of the Parole Board, met in August and agreed that they could work together to craft future legislation. In light of that agreement, the Subcommittee took no action and did not meet again. There was no recommendation from the Subcommittee. The Council took no action on this bill.

## **Annual Legislative Preview**

No proposed legislation was brought before the Council.

## **Public Comment**

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<sup>4</sup>**HB 397 (Hope) Virginia Parole Board; exceptions to the Freedom of Information Act.** Requires guidance documents of the Board to be available as public records under the Freedom of Information Act. The bill has a delayed effective date to give the Freedom of Information Advisory Council an opportunity to review the legislation and report on its implementation.

<sup>5</sup> See Va. Code § 53.1-136.

Roger Wiley, Esq., an attorney who has represented local governments and state agencies, and who is a former member of the Council, announced a new (5th) edition of his Local Government Officials' Guide to the Virginia Freedom of Information Act, published by the Weldon-Cooper Center for Public Service of the University of Virginia.

**Other Business**

The Council directed staff to poll for the first meeting date in 2013, to be held in March or April, 2013, after the end of the 2013 Session of the General Assembly. There being no further business, the meeting was adjourned.

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