

Public Records Subcommittee
of the Freedom of Information Advisory Council

Meeting Summary

July 13, 2009

11:00 AM

General Assembly Building

Richmond, Virginia

The Public Records Subcommittee¹ held its first meeting to consider two matters: (1) HB 2421 (May), a bill that would have amended the definition of "public record" to exclude correspondence that did not relate to public business, and which was referred to the FOIA Council for study by the 2009 Session of the General Assembly, and (2) a proposal by FOIA Council member and Subcommittee chair Craig Fifer to extend the requirement to publish a statement of FOIA rights and responsibilities (§ 2.2-3704.1) to apply to local government; the requirement currently applies only to state public bodies in the executive branch that are subject to FOIA.

After Chairman Fifer called the meeting to order, Delegate May, the patron of HB 2421, explained that the bill had been requested on behalf of Loudoun County after several FOIA court cases where the definition of "public records" was at issue.² Delegate May indicated that the intent was not to change existing law, but to clarify it. Jack Roberts, Loudoun County Attorney, then provided further information regarding the records request and subsequent court cases as factual background for the proposed bill. In summary, a citizen sought records of all communications, including all electronic mail messages (email), between several County Supervisors and certain other individuals. The Supervisors provided some records but withheld personal emails, asserting that they were not public records because they were not in the transaction of public business. The citizen brought FOIA petitions seeking all of the Supervisors' records to and from the named individuals regardless of whether the contents were asserted to be personal in nature. At the general district court level, it was held that the Supervisors in question must turn over all of their electronic mail messages, including those that the Supervisors asserted were not in the transaction of public business. On appeal the circuit court indicated that records not in the transaction of public business were not public records subject to FOIA, but the Supervisors would have to create a log indicating what records were being withheld. The log created was to be in sufficient detail that the court could ascertain whether the withheld records were in fact matters in the transaction of public business or not. Mr. Roberts indicated that further appeals and the requests themselves were withdrawn by agreement with the requester, without a final order being issued by the circuit court.

¹ Subcommittee members Fifer (Chair), Malveaux, and Selph were present; no members were absent.

² Va. Code § 2.2-3701 defines "public records" to mean "all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents *in the transaction of public business.*" [Emphasis added.]

Mark Flynn, on behalf of the Virginia Municipal League (VML), indicated his support of the bill as a restatement of existing law intended to clarify any confusion about the definition of "public records." Craig Merritt, on behalf of the Virginia Press Association (VPA), indicated opposition to the bill because it was not clear what problem the bill was trying to solve and because of the potential for unintended consequences. Specifically, Mr. Merritt indicated that the circuit court opinion pointed out that the general district court was wrong in its interpretation, so it does not appear necessary to legislate on that point. Additionally, if the concern is over the circuit court's order to produce a log identifying personal records that are withheld, this bill does not address that issue. Finally, the language of the bill concerning personal records implies an assertion of power over private records by the General Assembly, a power that may not exist. Conley Edwards, of the Library of Virginia, suggested reference to the definition of "private record" in the Virginia Public Records Act (VPRA) as a possible alternative.³ Megan Rhyne, of the Virginia Coalition for Open Government (VCOG), indicated concern that because of the facts involved, the bill perhaps focused too much on email, while changing the definition of "public record" would affect access to all types of public records. Delegate May presented further examples of additional questions that might arise under different social media in addition to email, such as text messaging, Twitter, and Facebook, such as problems determining who is the custodian of such records and differentiating between public and private content in records that mix the two.

After some further discussion, staff indicated that prior advisory opinions from the FOIA Council have already advised that it is the content of a record that matters in determining whether a record is subject to disclosure, not the format or media upon which it is recorded. Staff further observed that regarding the review of records at issue in FOIA cases, the Supreme Court of Virginia has indicated that records should be filed for inspection *in camera* by the trial court and preserved under seal for appellate review as needed.⁴ Subcommittee member Malveaux indicated it seems that given the current definition and Supreme Court precedent, the process is already in place for reviewing records to determine, based on the plain language of the statutory definition, whether a record is in the transaction of public business and subject to FOIA. Further concerns were also raised that this bill is a legislative response to an isolated incident, and given the court opinions below, it does not appear that it would necessarily have changed the results. After further discussion, Delegate May stated that he would withdraw the bill on the condition that the FOIA Council look into other ways to clarify the definition of "public records." The subcommittee then entertained a motion that the bill be withdrawn at the request of the patron and staff be directed to develop guidance materials clarifying what is and is not a public record. The motion carried by unanimous voice vote.

³ Va. Code § 42.1-77 defines "private record" to mean "a record that does not relate to or affect the carrying out of the constitutional, statutory, or other official ceremonial duties of a public official, including the correspondence, diaries, journals, or notes that are not prepared for, utilized for, circulated, or communicated in the course of transacting public business."

⁴ *Bland v. Virginia State University*, 272 Va. 198, 202, 630 S.E.2d 525, 527 (2006)("[W]e cannot 'decide the issue in a vacuum;' we encouraged the filing of allegedly confidential records for in camera inspection by the trial court and, if necessary, by an appellate court. [Internal citation omitted.] Concerns of confidentiality may be met by an order of the trial court directing that the records be kept under seal.").

The subcommittee next considered Chairman Fifer's proposal to extend to localities the requirement to publish a FOIA rights and responsibilities statement, a requirement that currently applies only to state public bodies. Chairman Fifer indicated that conceptually there was no significant difference between local and state public bodies as far as informing the public of their FOIA rights. As presented, the proposal was intended to have localities publish such a statement on their websites if they have one, and otherwise in the same locations where meeting notices are published, in order to accommodate localities that do not have websites.

In response, Phyllis Errico, of the Virginia Association of Counties (VACO), indicated she had asked members of VACO for feedback regarding the proposal, most of which was generally negative. One question that arose was whether the requirement would also apply to constitutional officers. Another concern is that many localities do not have a designated FOIA officer or contact person. Additionally, imposing this requirement would increase administrative duties at a time when localities are cutting staff due to the poor economy. Mr. Flynn indicated that as a practical matter, many small towns are likely to miss or overlook this requirement inadvertently, should it be added. Ms. Rhyne indicated a concern that if a single person is designated as the FOIA contact, it may be treated as if that person is the only person who can handle FOIA requests. She pointed out that in her experience, sometimes citizens received records from one person while being denied the same records by another. Limiting contact to one individual might inadvertently limit access as an unintended consequence. Mr. Malveaux questioned the fiscal impact of the proposal, and wondered whether the notice requirement could be phrased differently to reduce the burden.

Mr. Fifer indicated he did not want to limit localities to a single FOIA contact person, that localities could be given additional time to publish the statement, and that the notice provisions were copied from the meeting notice provisions elsewhere in FOIA. He felt the impact would be minimal because after the initial burden of publishing the statement was met, it would not need to be changed for years. Further, he stated that constitutional officers could be included, but part of the goal was not to include committees, subcommittees, and other subsets of local government in order to avoid being overly burdensome. Furthermore, the proposal could be limited to apply only to those localities above a certain minimum population. Mr. Malveaux and Mr. Merritt both expressed appreciation for the concept of increasing the public's awareness of their FOIA rights. It was suggested that staff might prepare a guidance document or poster to convey simply the basic concepts and then distribute it to localities. Mr. Fifer indicated he would work with the interested parties to improve the proposal for further consideration at a future meeting. The subcommittee meeting was then adjourned.