

Rights and Remedies Subcommittee  
of the Virginia Freedom of Information Advisory Council  
Meeting Summary  
July 22, 2010  
10:00 AM  
Richmond, Virginia

The Rights and Remedies Subcommittee of the FOIA Council held its first meeting of the interim on July 22, 2010.<sup>1</sup> Staff presented the four bills that were referred to the FOIA Council for review.<sup>2</sup>

- HB 449 (Ware, RL)--remedy for public bodies for requester harassment.
- HB 641 (Armstrong)--extending the right to make FOIA requests in VA to U.S. citizens.
- HB 976/SB147 (Anderson)/ (Puller)--proceedings for enforcement; when notice of suit must be filed by petitioner on public body.

The Subcommittee discussed each bill and asked for public comment. With regard to HB 449, staff advised the Subcommittee that this was not a new issue before the FOIA Council and that in 2002, HB 900 (Purkey) relating to intended harassment of public bodies by FOIA requesters was studied by the Council. Staff advised that harassment is hard to define and required a determination of the intent behind the request. Because of this, the Council in 2002 took another direction and recommended SB 738 (Houck), which provided that before processing a request for records, a public body may require a requester to pay any amounts owed to the public body for previous FOIA requests that remain unpaid 30 days or more after billing. SB 738 was enacted into law by the 2003 Session of the General Assembly (c.275 of the 2003 Acts of Assembly). Roger Wiley noted that intentional harassment by FOIA requesters is a much broader problem than just Powhatan County, although it is an infrequent issue. He suggested the Subcommittee attempt to find a balanced solution taking care not to make it easy for public bodies to stem a citizen's FOIA rights, but taking into account the substantial expenditure of resources, personnel, and time to respond to intended harassment. Mary Yancey Spencer agreed with Mr. Wiley but was likewise concerned about how to structure a remedy that could not be used a weapon against citizens. Mr. Wiley indicated that he believed the courts are the best position to evaluate a given situation. He likened it to court imposed limitations in discovery, but acknowledged that with discovery, both parties are attorneys and that fact makes it different. Frosty Landon remarked that judges are not always well informed about FOIA and tend to side with public bodies. He did agree, however, that in his experience, intended harassment was not a frequent occurrence. Mr. Landon was not in favor of undermining the rights given to citizens under FOIA. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that she is aware of the problem, albeit infrequent, and

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<sup>1</sup> Senator Houck, Mary Yancey Spencer, Frosty Landon, and Roger Wiley were present. Messrs. Gregory, Jones, and Whitehurst were absent.

<sup>2</sup> Summaries of each of the bills referenced above appear as Appendix A to these minutes.

suggested that the remedy may lie in allowing a public body to petition for more time to respond to a FOIA request. Ginger Stanley of the Virginia Press Association (VPA) noted that the situation in Powhatan County that gave rise to HB 449 was a result of the county not availing itself of the remedies afforded under current FOIA law. She suggested that this one case was based on bad facts and changing the law as a result was a position the VPA could not support. Jeff Reynolds of the Department of Environmental Quality (DEQ) noted that his agency handles a huge number of FOIA requests with "persistent requesters." He told the Subcommittee that in these instances, DEQ has gone to court for relief with success. He noted, however, that this took a large amount of resources and effort to get the desired relief. Nonetheless, he agreed that one should be concerned about giving the government too much power to enjoin citizens making FOIA requests. Senator Houck stated that he, like other legislators, was empathetic to public bodies in these instances given the volume of records and costs to them. He agreed, however, that the behavior of a few citizens intent on harassing a public body can cause problems for the rest. It was the consensus of the Subcommittee that it take a look at other states' FOIA laws to ascertain what if any remedies are granted to public bodies when faced with this issue. In addition, staff will look for any relevant court decisions. The Subcommittee also was agreeable to considering any novel approach--like utilizing FOIA charges--as was done in 2003.

The Subcommittee next considered HB 641 (Armstrong) and expanding FOIA rights to citizens of the United States. Current law grants FOIA rights to Virginia citizens and representatives of the media who have circulation or broadcast in or out of Virginia. Staff reminded the Subcommittee that in previous years, the Council had been briefed about a decision of the Third Circuit Court of Appeals<sup>3</sup> that upheld a decision of the federal District Court for the District of Delaware,<sup>4</sup> 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.<sup>5</sup> Staff noted that this decision may be influential but is not binding in Virginia. Staff then discussed a Virginia case on point--the *McBurney* case--with the Subcommittee. In the spring of 2009, the United States District Court for the Eastern District of Virginia heard the case of *McBurney v. McDonnell* (Case No. 3:2009cv44). In this consolidated case, three out-of-state plaintiffs challenged on federal constitutional grounds (privileges and

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<sup>3</sup> *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).

<sup>4</sup> *Lee v. Minner*, 369 F.Supp.2d 527, 2005 U.S. Dist. LEXIS 8892 (D. Del., 2005).

<sup>5</sup> It was noted that the Delaware case, although it received one level of appellate review, was not appealed to the United States Supreme Court.

immunities) the provisions of FOIA granting access rights to Virginia citizens. On April 29, 2009, the Court entered an order dismissing the claims of the three out-of-state plaintiffs on procedural grounds.<sup>6</sup> However, on appeal, the United States Court of Appeals for the Fourth Circuit ruled for two of the three plaintiffs, saying they can proceed with their challenge on the merits to the citizens-only provision of FOIA.

Mr. Wiley stated that he routinely advises his local government clients not to control on the citizenship issue given the ease with which a Virginia requester can be found to make the request. Staff indicated that this is the same advice it has given since the Council was created in 2000. Elaborating on this advice, staff indicated that because FOIA does not apply to out-of-state requesters, a public body may take a reasonable time to provide the requested records and require prepayment of any charges assessed in producing the requested records. Ms. Spencer agreed and stated that she handles numerous out-of-state FOIA requests on behalf of the Virginia State Bar daily. She stated that most of these requests are from data aggregators and she successfully negotiates a deal with them on their requests. The State Bar usually honors out-of-state requests, but if the records requested are voluminous, they charge for their production. Ms. Spencer raised the question about anonymous emails and the best way to handle these requests, which do not provide any indication as to who is making the request. She suggested that there may be a solution that would resolve the issues raised by HB 449 and HB 641. She added that the Subcommittee should hear from state agencies on their experience.<sup>7</sup> Public comment was received on this issue. A representative of the Department of Medical Assistance Services (DMAS) indicated that DMAS never denied a FOIA request based on citizenship. She noted, however, that because the number of requests became overwhelming, DMAS began charging for the production of the requested records. A representative of the Department of Motor Vehicles (DMV) states that DMV usually honors out-of-state requests and it is not a big problem for them. VDOT indicated that they also honor out-of-state requests unless the requested records are voluminous. The VPA stated that it opposed the current form of the bill. VCOG advised that FOIA currently provides tools for public bodies to use; but noted that as drafted, VCOG opposed the reciprocity piece in the bill and did not favor any approach that looked at the underlying purpose for the request. Forty-four states do not have this restriction of who may make FOIA requests and there has been no clamoring for changing the law. It was noted that state agencies do better with out-of-state requests than local agencies. Mr. Wiley stated that states may limit access without it being unconstitutional in all instances. He suggested that the solution may be to link out-of-state requests to the prepayment of charges and/or time lines for responding to a FOIA request. Ms. Spencer indicated that most state agencies are aware of the FOIA Council's advice to that because FOIA does not apply to out-of-state requesters, a public body may take a reasonable time to provide the requested records and require prepayment of any charges assessed in producing the requested records. Senator Houck indicated that his sense of the Subcommittee's position is that it should await the outcome of the *McBurney* case and in

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<sup>6</sup> The Court held that the three-out-of-state plaintiffs lacked standing to bring the claims and improperly named the Attorney General as a party to the action.

<sup>7</sup> By letter, the State Board of Elections submitted comment on the citizenship issue. Specifically, concern was expressed on the effect of HB 641 on the administration of elections in Virginia. The volume of requests (both in-state and out-of-state) can be very time consuming and divert attention away from election preparations at critical times. This is especially the case because many local electoral boards are understaffed.

the meantime, the law can be successfully dealt with following the advice of the FOIA Council. By consensus, the Subcommittee agreed that the bill not go forward as drafted.

The Subcommittee next discussed HB 976/SB 147 concerning when notice of a FOIA petition must be given to a public body. Staff advised that this issue was brought before the FOIA Council in 2009 by Prince William County Public Schools in response to a specific issue there. The FOIA Council had recommended language to resolve the issue of when notice is to be given. However, during the General Assembly Session, Prince William County Public Schools objected to the language. As a result, both bills were again sent to the FOIA Council. The difference between the two bills was that in SB 147 notice was to be *served* on a public body, while in HB 976 notice was to be *received* by the public body. Mr. Wiley noted that the use of the word "served" means by the sheriff or other process server and that unnecessarily delays the process. Mr. Wiley suggested that notice be given to the public body, but that the length of time before the FOIA suit may be filed be specified. By consensus the Subcommittee agreed to recommend the following language.

"Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made-provided the party against whom the writ is brought has received a copy of the petition at least three working days prior to filing."

Under the agenda item of other business, Senator Houck advised the Subcommittee that at the upcoming meeting of the full FOIA Council they would be hearing testimony from a citizen concerning her experience trying to follow the budget conference meetings. He also noted that there were some FOIA issues related to the appointment of a new director by the Joint Legislative Audit and Review Commission at a meeting earlier this summer. Senator Houck suggested that the FOIA Council become more proactive in training legislators and aides, and all legislative commissions, councils, and agencies. It was his intent when discussed at the upcoming FOIA Council meeting, that the matter be added to the charge of the Subcommittee to recommend action. The Subcommittee by consensus agreed with Senator Houck. Senator Houck indicated that he will be speaking with the Speaker, Senator Whipple, and the Clerks of the House and Senate concerning this issue.

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APPENDIX A

***BILLS REFERRED TO COUNCIL FOR STUDY  
BY 2010 SESSION OF GENERAL ASSEMBLY***

**HB 449 (Ware, R.L.)--Freedom of Information Act; injunctive relief for public bodies under certain circumstances.**

Provides that any public body may petition a court for injunctive relief to restrain a requester from harassment or other abuse of the rights or privileges granted under FOIA.

**HB 641 (Armstrong)--Freedom of Information Act; requests for records may be made by any citizen of United States.**

**Freedom of Information Act; requests for records.** Provides that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth and extends the same privilege to representatives of newspapers and magazines. The bill provides that this privilege is limited to those states which give reciprocal rights to make FOIA requests to Virginia citizens. The bill also allows a public body to require prepayment before providing requested records when the amount for so producing is likely to exceed \$100.

**HB 976 (Anderson)/SB 147 (Puller)--FOIA; party whom writ is served must be served a copy of petition prior to filing.**

Clarifies that before a FOIA petition is filed, the party against whom the writ is brought must receive a copy of the petition within a reasonable time prior to the petitioner filing the petition with the court. The bill contains a technical amendment and incorporates HB 689.

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