

Rights and Remedies Subcommittee
August 30, 2010 Meeting Summary

The Rights and Remedies Subcommittee (the Subcommittee) held its second meeting on August 30, 2010 at 9:00 a.m. in the Speaker's Conference Room of the General Assembly Building.¹ The first order of business was the review of the Subcommittee's recommended draft for HB 976 (Anderson)/SB 147 (Puller), which clarified the time period within which a party against whom a FOIA writ is brought must receive a copy of the writ before it is filed with the court by the petitioner. Mr. James Council advised the Subcommittee that he had shared the draft with Delegate Anderson and Senator Puller, as well as the Prince William County School Board, and all approved of the draft recommended by the Subcommittee. By a vote of 5-0, the Subcommittee voted to recommend the draft to the FOIA Council for introduction in the 2011 Session of the General Assembly.

The Subcommittee next continued its deliberations on HB 449 (Ware, R.L.). Mr. John Rick, Esq., County Attorney for Powhatan was present and explained why he had sought the introduction of HB 449. Mr. Rick advised that the requester, who is a contractor, had requested records from the County in response to a contract dispute between the requester and the County. He advised that the requestor had made 25 separate FOIA requests to the County with a note indicating that they would not have to provide the requested documents if the County would just settle the contract dispute. Mr. Rick stated that the Committee on House General Laws agreed that this was harassment of the County and referred the matter to the FOIA Council for further examination. Mr. Rick suggested that it was not his intent to have a "heavy handed" remedy in these situations and suggested the Subcommittee consider (i) allowing injunctive relief but if the public body loses, it must pay all of the petitioner's attorney fees and costs or (ii) removing the 30-day limitation in § 2.2-3704 I that allows a public body to refuse a request where the requester is more than 30 days in arrears in the payment of a FOIA charge. Phyllis Errico, Virginia Association of Counties, commented that the problem is infrequent but is no less a problem. She stated that she was opposed to Mr. Rick's first suggestion ((i) above) because localities would be reluctant to seek an injunction if the payment of costs was automatic in the event a public body lost the case. Craig Merritt, representing the Virginia Press Association, stipulated that requests can be harassing, but stated that it appeared that the Powhatan County employee dealing with the FOIA request did not know of all of the tools currently available to a public body under FOIA (e.g. the County could have gotten prepayment from the requester because the request was more than \$200). Mr. Merritt opined that it has not been demonstrated that the current law is inadequate to handle these situations. As a result the Press Association remains in opposition to the HB 449.

Staff reported that Virginia FOIA is silent regarding the number and frequency of requests a single requester may make, and does not have any provisions addressing harassment. There do not appear to be any reported cases or published opinions specifically addressing this issue under Virginia FOIA. As a general rule, a requester cannot violate FOIA by making requests. Staff advised that it had reviewed other states' laws to see if any provided a

¹ Senator Houck, Ms. Spencer and Mssrs. Wiley, Landon, Gregory were present at the Richmond location. Mr. Whitehurst participated through teleconference from his office in Fredericksburg, Virginia. Mr. Jones was absent.

remedy for public bodies in instances where a requester was using FOIA requests to harass the public body or otherwise abuse the rights or privileges granted a requester under open records laws. A summary of the states that have provisions that relate to this issue follows²:

COLORADO--

- o same or similar requests--may charge fee not greater than original charge

CONNECTICUT--

- o denial of administrative appeal:
- o abuse of commission admin. process or
- o further appeal perpetrate an injustice;
- o appeal is frivolous or
- o taken solely for delay
- o bad actor required to pay appeal costs and attorney fee's (\$1,000 max)

ILLINOIS--

- o unduly burdensome to public body and
- o no way to narrow request and
- o burden outweighs public interest info.
- o finding required in writing, specifying reasons why burdensome and the extent to which compliance will burden public body.
- o this response deemed a denial
- o repeated requests from same requester for same records deemed unduly burdensome.

KANSAS--

- o may refuse access if
- o unreasonable burden to produce or
- o custodian has reason to believe that repeated requests intended to disrupt essential functions
- o refusal must be sustained by preponderance of the evidence

KENTUCKY--

- o custodian may refuse access if:
- o unreasonable burden to produce or
- o custodian has reason to believe that repeated requests intended to disrupt essential functions
- o refusal must be sustained by clear and convincing evidence

TENNESSEE--

- o separate policy of office of open records counsel for reasonable charges for multiple **and** frequent requests.
- o may calculate charges differently for multiple and frequent requests
- o public body may reduce or waive charge.
- o more than 4 requests in 1 month, public body may charge for any and all labor after telling requester.

TEXAS--

- o public body shall respond records already provided.

² A more thorough review of other states' laws appears on the Council website.

- public body must certify same
- certification must include
 - description of previously furnished records
 - date original request received
 - date records provided
 - no additions, deletions or corrections to provided records
 - name, title and signature of public information officer.'

UTAH--

- may refuse if
- unreasonably duplicates prior records requests from that person or
- public body unable to produce without unreasonably interfering with its duties and responsibilities.

Mr. Landon asked staff what advice it provided in cases where there repeat requests for the same records. Staff advised that while FOIA is silent, it advised that a public body may charge for repeat requests. Mr. Wiley advised that the remedy for repeat requests is nonproduction and therefore a public body may deny a repeat request for the same records on the basis that the records have already been provided. He noted, however, that the issue is the frequency of requests with intent to harass, and not repeat requests for the same records. Mr. Wiley opined that charging was not an answer to the issue. Mr. Wiley stated that he favored the Kansas and Kentucky approaches and requested staff to check with those states to ascertain whether their respective approaches were successful in addressing the issue. Ms. Spencer indicated that requests intended to harass, while infrequent, take up too much of the public body's time and resources. She stated that it was a fairness issue and the goal was to find a way to make it stop. Mr. Landon said that in the 40 year history of FOIA, a remedy to harassment has not been found. He stated that it was possible to fix the identical and repeated requests, but that a solution for harassing requests was unlikely. Mr. Gregory suggested that instead of "harassment or other abuse..." language found in HB 449, the court would be required to make a finding of fact that the request was "vexatious" or disruptive to the public body. Senator Houck advised that the policy as stated in FOIA rightly puts the burden on the government. He stated that he was uncomfortable in tipping the scale to government. He indicated that the bill presented a sledgehammer approach.

Mr. Gregory stated that before the Subcommittee could move forward, there needed to be some stipulation by all interested parties that harassing requests are a problem. So far, it appears that there is only agreement that it happens. Mr. Wiley shared Mr. Gregory's concern and stated that if there is no recognition by opponents that there is a problem, it appeared to be a waste of time working on a compromise. Representatives of several state agencies advised that such requests are infrequent, but there are individuals who make requests to harass a public body. Megan Rhyne, Virginia Coalition for Open Government, advised that she acknowledges that it happens but was not ready to say it is a problem. Her concern was for a chilling effect on the "good citizen" who doesn't know whether his legitimate requests for documents and subsequent requests may be perceived as harassing, when there is no intent to harass. Mr. Merritt again stated that the correct question is not whether people overuse FOIA--they do. Instead is the Act inadequate to address the situation. He noted that there will always be outliers. Mr. Wiley stated that he agrees with

Ms. Rhyne and believes the threat of being hauled into court by a public body is a bad approach. Mr. Whitehurst interposed that before we rewrite the law, we need to ascertain whether there is widespread abuse of FOIA. Senator Houck directed staff to continue looking at the issue and attempt to quantify how widespread it is. The goal of the Subcommittee is to provide a thorough examination of the issue and the Subcommittee's deliberations will continue.

Senator Houck told the Subcommittee that he had contacted the Speaker, the chair of Senate Rules, several budget conferees, and the Clerks of the House and Senate about the need for annual FOIA training of legislative agencies and commissions. He stated that all contacted were onboard with the intent of the Council to provide the training. Staff advised that it will set a schedule and contact the affected parties to begin the training. The Subcommittee discussed access to budget conferences and Senator Houck noted that the legislative branch is somewhat disadvantaged when compared to the two other branches of government, which have certain exemptions from open meeting rules. He stated that the goal was not leave people out of the process; but that the demands of time and frank conversation lead to "cat and mouse" games among budget conferences and the public. Senator Houck suggested that a way be explored to maintain the integrity of the process while giving relief to budget conferees in certain limited instances. Mr. Wiley agreed with Senator Houck and stated that the public interest is not served when the process locks conferees into public positions. He stated that good government requires compromise.

The next meeting of the Subcommittee is scheduled for Monday, October 4, 2010 at 10:00 a.m. in the Speaker's Conference Room, sixth floor of the General Assembly Building.

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