

Rights and Remedies Subcommittee  
of the Virginia Freedom of Information Advisory Council  
Meeting Summary  
October 4, 2010  
10:00 AM  
Speaker's Conference Room  
General Assembly Building  
Richmond, Virginia

The Rights and Remedies Subcommittee of the FOIA Council held its third meeting of the interim on October 4, 2010.<sup>1</sup> The meeting was held for further consideration of House Bill 449 (Ware, R.L.), which would have provided injunctive relief for public bodies to restrain a requester from harassment or other abuse of the rights or privileges granted under FOIA.

After the meeting was called to order and introductions made, staff did a brief recap of the bill and the subcommittee's prior discussions. Staff noted that at the last meeting of the subcommittee, the laws of other states were presented in summary. The subcommittee had directed staff to contact appropriate parties in Kansas and Kentucky to ask how their respective laws worked in practice. Staff attempted to do so but did not hear back in time to present any information to the subcommittee.<sup>2</sup>

Senator Houck observed that it appears that all parties agree that some requesters do use FOIA as a tool for harassment or other improper purpose, but it does not appear that there is agreement whether this problem requires a legislative fix. He questioned whether there was evidence regarding how extensive the problem really is. Phyllis Errico of the Virginia Association of Counties said she had sent electronic mail inquiries to various county administrators about this issue. She indicated the replies were of four types: (i) that the statute works fine as it is; (ii) problems occur when there is some other dispute between the requester and the locality; (iii) problems occur when the requester is angry at the locality; and (iv) problems occur when the requester is "mad at the world" and otherwise "hounding" the locality, not just using FOIA. One example was a locality that had 353 requests last year from 2 people and was already up to 354 requests from them this year. Several localities indicated that they had spent time searching for records and getting them together in response to a requester, but when the requester was told of the costs, he said he no longer wanted the records. Further examples were discussed of persons using FOIA for harassment, such as use during political campaigns to harass an incumbent in office.

Roger Wiley suggested that if a change is to be made in the law, it should be to allow a public body to say "no" to a request, then allow the requester to challenge that denial in court, and then the public body would bear the burden to prove that it was being harassed. He also suggested that the present remedy of mandamus is an equitable remedy, that in equity both parties must come to the court with "clean hands," and so a judge could deny

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

<sup>2</sup> Note that responses to staff inquiries came from both states after this meeting was held.

the remedy to a party who came before the court with bad motives. However, as there is no precedent for such denial, Mr. Wiley was unsure whether the Supreme Court of Virginia would uphold it.

Craig Merritt, on behalf of the Virginia Press Association, noted that under the current provisions a public body has five working days to respond, can automatically get an additional seven working days if needed, that the parties are to work out an agreement if more time is necessary, and that if no agreement is reached, the public body can petition a court for more time. He suggested that given the current court remedy, it may be possible for a court to issue an order to stop a request or series of requests that are harassing the public body. Furthermore, such an order may be within the inherent equitable power of a court, such that no legislative change is necessary.

Senator Houck indicated he was offended by the idea of persons using the law for destructive or superfluous purposes, and felt that as the law is now silent, it may be helpful to give more specific direction so courts have the tools to address such issues.

Craig Fifer noted that FOIA policy favors the requester, and indicated he felt many well-meaning government officials were actually pushing against the requirements imposed on government by FOIA itself. He said the focus needs to remain on intentional abuse. He observed that the City of Alexandria has a criminal ordinance against obstructing the operation of government, which might provide a remedy against improper use of FOIA in that jurisdiction. He further suggested that perhaps a change in the existing language allowing a public body to petition a court for more time to respond to a request could allow a judge to look at the totality of the circumstances, including all requests from that requester, to grant appropriate time without limiting legitimate requests.

In further discussion Mr. Merritt noted the importance of how FOIA is currently written to focus on the operational responsibilities of government-- an objective standard-- without examining the motive or purpose of the requester. He also noted that at some point a court should be able to order that no further response is required after a public body has already responded to a repeated request.

Mr. Wiley then made a legislative suggestion to add language to the existing remedies provisions of FOIA that would allow a court to decline to order the production of records if (i) such production would be an unjust burden on the resources of the public body; (ii) there were repeated requests for the purpose of harassing the public body; or (iii) there were repeated requests made to avoid the responsibility to pay for the requested records.

Upon further discussion, it was observed that generally it is individual citizens "with an axe to grind" who use FOIA for abusive purposes, rather than the press. The subcommittee also discussed further the existing provisions of FOIA that allow public bodies to charge for requests and to get additional time to respond, and how there may be a question of education so that public employees and officials are aware of how to use those existing tools. The possibility of extending the existing provision allowing a public body to petition a court for more time was also discussed. The subcommittee then directed staff to prepare a

draft based on Mr. Wiley's suggestion that would be a vehicle for further discussion and consideration of the problem.

The subcommittee next turned to the issue of providing FOIA training to the legislative branch. Staff indicated that a list of legislative agencies had been prepared and legislative staff had been contacted, and they expressed a preference to have all trained at the same time; staff is working on scheduling the training. Helen Tansey, a citizen, indicated she had sent a legislative proposal to mandate FOIA training and impose penalties for failure to attend such training. Staff noted that FOIA already requires public officials to receive a copy of FOIA and to read and become familiar with it upon election, reelection, appointment, or reappointment.<sup>3</sup> Mr. Wiley observed it is more useful to give legislators one or two page summaries of the relevant portions of the law, rather than a full copy of FOIA. The subcommittee also discussed the possibility of using new technology to facilitate the training.

In considering whether to schedule another meeting, Mr. Wiley indicated he did not feel additional discussion would change anyone's mind, and therefore suggested that rather than hold another subcommittee meeting, his draft be presented to the full Council without recommendation. Senator Houck agreed, and there was general consensus to proceed that way.<sup>4</sup> The meeting was then adjourned.

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<sup>3</sup> Va. Code § 2.2-3702 provides as follows: "Any person elected, reelected, appointed or reappointed to any body not excepted from this chapter shall (i) be furnished by the public body's administrator or legal counsel with a copy of this chapter within two weeks following election, reelection, appointment or reappointment and (ii) read and become familiar with the provisions of this chapter."

<sup>4</sup> Note that no vote was taken, as the subcommittee was not taking any action or offering any recommendation for or against Mr. Wiley's proposal.