

Virginia Freedom of Information Advisory Council
Electronic Meetings Subcommittee
November 7, 2012
10:00 AM
General Assembly Building
Richmond, Virginia
Meeting Summary

The Electronic Meetings Subcommittee (the Subcommittee) held its fifth meeting on Wednesday, November 7, 2012 to consider legislation referred to the FOIA Council for study by the 2012 Session of the General Assembly.¹ The FOIA Council reconstituted its Electronic Meetings Subcommittee to examine HB 1105 (Greason) and HB 1149 (Dudenhefer). Today's meeting was held to consider two drafts prepared by staff. The first would allow state-level advisory public bodies to hold electronic meetings without a physical quorum present under certain conditions. The Subcommittee had agreed on the concept of this draft by consensus at its last meeting. The second draft would allow individual members of a public body to participate electronically when personal matters prevented them from attending a meeting in person, with certain limitations. This idea was presented by local government representatives at the last Subcommittee meeting. The Subcommittee did not agree to it at that time, but agreed to consider it further at today's meeting.

After the meeting was called to order and introductions made, staff reviewed the consensus draft that would allow state-level advisory public bodies to hold electronic meetings without a physical quorum present under the following conditions: (1) any such meeting would have to be held using combined audio and visual means; (2) there would have to be a primary or central meeting location; (3) remote locations would have to be noticed and open to the public; (4) all persons attending at any location must be afforded the same opportunity to address the public body; and (5) the meeting must meet all other provisions for electronic meetings (heightened notice, reporting requirement, etc.). Additionally, an audio/visual recording of the meeting must be made, kept for three years, and be available to the public for inspection and copying. The draft would also consolidate into one subsection the current provisions for holding electronic meetings to address an emergency declared by the Governor, which are currently in two separate subsections (one for state public bodies, the other for local public bodies). In order to improve the quality of feedback about public meetings, the draft would also require public bodies that hold electronic meetings to include a copy of the agenda with their annual report to the FOIA Council and the Joint Commission on Technology and Science (JCOTS), and to make available to the public a public comment form that citizens could use to comment directly to the FOIA Council or JCOTS about any electronic meeting held. The public comment form would be developed by the FOIA Council. Staff noted that the draft as presented would need to be amended for consistent use of terminology and other technical changes; the Subcommittee agreed to use

¹ Subcommittee Members Kathleen Dooley (Chair), Stephanie Hamlett, John Selph and George Whitehurst were present (all members).

the term "advisory public bodies." Staff further noted that the requirement to record such meetings could cause practical problems if the public body convened a closed meeting, and that this issue would need to be addressed.

The Subcommittee requested public comment on the draft. Craig Merritt, representing the Virginia Press Association (VPA), inquired regarding the definition of "advisory public bodies" in the draft. Through question and answer, it was stated that the definition covered two types of public bodies: (1) those public bodies in the executive branch classified as "advisory" under § 2.2-2100,² and (2) committees, subcommittees, and other entities that advise a parent public body at the state level. The second clause of the definition uses language based on the definition of "public body" in § 2.2-3701, and intentionally excludes those sub-entities "created to perform delegated functions" of the parent body.³ Mr. Merritt indicated that VPA is not opposed to expanding the use of electronic meetings if it is done in a thoughtful, principled, controlled process with informed feedback, but was concerned that this draft was too broad and applied to too many public bodies. To that end, VPA had prepared an alternative draft that would establish a pilot program that would allow the Governor to designate up to six advisory public bodies to try holding audio/visual meetings without a physical quorum, which Mr. Merritt distributed.

Jeff Palmore, Director of Policy Development and Deputy Counsel, Office of the Governor, observed that the legislation in question had started as a recommendation of the Governor's Reform Commission, and stated that as drafted, it was still an incremental step. The only change as compared to current electronic meetings would be where people are located, and it would be limited by requiring audio/visual technology and by restricting its use to entities whose decisions must be ratified by other public bodies. He spoke in support of the draft, stating that it represented the consensus reached at the last Subcommittee meeting.

Turning to discussion by the Subcommittee members, Mr. Whitehurst indicated that due to the broad definition of "advisory public body" he would prefer to use a pilot program, see how it works, and then if it works, expand it. Ms. Hamlett indicated she understood the concern about the definition and wanted to be sure the language covered only public bodies that serve in an advisory role and will not make final determinations. She indicated that in practice, many state agencies do record their meetings and simply turn the recorder off when they convene in closed meeting. Therefore the law should only require recording for open portions of meetings. Mr. Selph indicated he felt the draft presented an incremental step and needed the broad definition to pick up all the subcommittees that are truly advisory. He concurred with Ms. Hamlett that if the practice is not to record closed

² Subsection A of § 2.2-2100 contains the following definition: "Advisory" - A board, commission or council shall be classified as advisory when its purpose is to provide advice and comment to an executive branch agency or office. An advisory board, commission or council serves as a formal liaison between the agency or office and the public to ensure that the agency or office understands public concerns and that the activities of the agency or office are communicated to the public. An advisory board, commission or council does not serve a regulatory or rule-making purpose. It may participate in the development of public policy by providing comment and advice.

³ The relevant portion of the definition of "public body" in § 2.2-3701 includes *any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body.*

meetings, that would also be the practice for electronic meetings. He also suggested that in addition to a pilot program, another option would be a sunset provision, so that the law would have to be revisited later.

In further discussion, Ginger Stanley, Executive Director of the VPA, indicated that what Mr. Whitehurst had said is in keeping with how the FOIA Council has approached large changes in the past. She further stated that the draft represents a large change because of the importance of the quorum requirement. In response to a question from the Subcommittee, Ms. Stanley indicated that a sunset provision would be an improvement over the draft as presented. Ms. Dooley stated she felt a sunset provision would help because it would be difficult to get the Governor to designate a committee in advance, particularly an ad hoc committee filling a temporary need. Mr. Merritt indicated the proposed pilot program would avoid that problem because the Governor would make the designation on the front end for a group that meets regularly, in order to give meaningful feedback. Mr. Palmore indicated that given the technology involved, he did not expect it to see widespread use, and that it is more of a stop-gap measure for unpredictable situations, not something meant to be used regularly. He indicated that he would support the draft, but if choosing between a pilot program and a sunset provision, he would prefer a sunset provision because one cannot predict which public bodies will need to use this option. Ms. Hamlett stated that she opposed pilot programs generally because they often caused confusion in practice. Mr. Merritt observed that the focus of the FOIA Council is the quality of public access, not questions of technology. He stated that VPA was concerned that a broad application might lead to a sudden drop off in the quality of access, and that the pilot program was better because it would allow for a limited, monitored test. Ms. Dooley indicated she preferred a sunset provision because based on prior testimony from state agencies, the problem being addressed is for committees and subcommittees, not main bodies. She also stated that recording closed portions of electronic meetings should not be required.

After further discussion, Mr. Whitehurst moved to ask staff to prepare a draft that would include a pilot program. The motion failed for lack of a second. Mr. Selph then moved to add a one-year sunset provision to the draft; Ms. Hamlett seconded the motion, which passed by unanimous vote.⁴ The Subcommittee also agreed by consensus to revise the draft to exclude closed meetings from the recording requirement, and to make the additional changes in terminology earlier suggested by staff. The Subcommittee then voted 3-1 to recommend the draft, as amended, to the full FOIA Council.⁵

The Subcommittee next considered the draft which would allow an individual member of a public body to participate by electronic means when personal matters prevented physical attendance. Staff summarized the draft, which would create a new subdivision within § 2.2-3708.1 to allow a member of a public body to participate in a meeting electronically by notifying the chair of a personal matter, if the public body approves such participation by a majority vote at a meeting, and records the remote location from which the member

⁴ Please note that the sunset provision would only apply to the subsection allowing advisory public bodies to meet by audio/visual means without a quorum.

⁵ Ms. Dooley, Ms. Hamlett, and Mr. Selph voted in favor; Mr. Whitehurst voted against.

participated in the meeting minutes. Staff noted that these requirements differ from the personal emergency provision in current law in that the vote to approve participation could occur at any meeting, and that the nature of the personal matter need not be recorded in the minutes.⁶ The draft also limits the use of this personal matters provision to two meetings or 25 percent of the meetings of the public body, whichever is fewer, which is the same amount allowed under the current provision for personal emergencies.

Patrick Cushing, speaking on behalf of Stafford County, indicated that County staff had informed him they had not used the personal emergency provision in current law because they were unclear what exactly qualified as an emergency, and members did not want to specify the nature of the emergency. He stated that he supported the draft. Mark Flynn of the Virginia Municipal League (VML) also spoke in support of the draft, as it would encourage busy people to participate in public service without turning it into a free-for-all, because of the limitation on the number of times the provision could be used. Phyllis Errico of the Virginia Association of Counties (VACo) agreed, and noted that travel time issues affected people in Tidewater and the Eastern Shore as well as Stafford and Northern Virginia.

Megan Rhyne of the Virginia Coalition for Open Government stated she did not think there was a need for this addition, but instead the problem appeared to be with interpretation of the existing language for personal emergencies. She indicated that an emergency need not be catastrophic or an act of God, but is something unexpected, whereas a personal matter equates to a planned absence. She stated that if you cannot attend a meeting, then you cannot attend. Mr. Merritt asked whether the personal matters provision was cumulative with the personal emergencies provision, effectively giving members up to four opportunities per year to call in to meetings. Staff confirmed that as drafted, it was cumulative. Mr. Merritt next asked if "personal matter" was defined; staff confirmed that it was not. Mr. Cushing indicated that the issue takes care of itself because the idea is that the member would not have to identify the personal matter or give a reason for his absence. Mr. Merritt suggested inserting "or personal matter" into the current provision for personal emergencies rather than having a separate subdivision, which would allow such individual electronic participation in a maximum of two meetings per year per member, regardless of the reason. He also suggested requiring the member to specify why he is missing the public meeting, and objected to the idea that a public official be allowed to say "I am not attending and I will not tell you why." Mr. Flynn stated he had no problem with that as long as the

⁶ Current subdivision A 1 of § 2.2-3708.1 provides as follows: *A member of a public body may participate in a meeting governed by this chapter through electronic communication means from a remote location that is not open to the public only as follows and subject to the requirements of subsection B:*

1. If, on the day of a meeting, a member of the public body holding the meeting notifies the chair of the public body that such member is unable to attend the meeting due to an emergency and identifies with specificity the nature of the emergency, and the public body holding the meeting (a) approves such member's participation by a majority vote of the members present and (b) records in its minutes the specific nature of the emergency and the remote location from which the member participated.

Such participation by the member shall be limited each calendar year to two meetings or 25 percent of the meetings of the public body, whichever is fewer.

member could give notice before the day of the meeting. Mr. Merritt had no objection to voting to approve such participation in advance, only that the member must say what is the personal matter.

Mr. Whitehurst indicated he was fine with the changes suggested, but questioned why more localities had not come before the Subcommittee to request this change. He indicated he would be happy to move to recommend the draft language as amended, he just wanted to know that the change was not just for one or two localities. Ms. Errico indicated that VML and VACo had surveyed their constituents and the majority said they had had problems with attendance and participation that could be addressed by this change, and that she and Mr. Flynn were here speaking on their behalf. Mr. Whitehurst further stated that the word "vacation" had been used, and he did not feel that vacations were a good reason to change the law, but that he would move to recommend the draft as amended. Mr. Selph and Ms. Hamlett indicated they supported the draft as amended, and Mr. Selph seconded Mr. Whitehurst's motion to recommend. The Subcommittee then voted unanimously to recommend the draft as amended to the full FOIA Council at the FOIA Council's next meeting on December 17, 2012. Ms. Dooley noted that the business of the Subcommittee was concluded for this year, and there was no need to schedule any additional meetings. There being no further business, the meeting was adjourned.

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