

Virginia Freedom of Information Advisory Council  
Rights and Remedies Subcommittee  
May 20, 2013  
10:30 AM  
General Assembly Building  
Richmond, Virginia  
Meeting Summary

The Rights and Remedies Subcommittee (the Subcommittee) held its first meeting on Monday, May 20, 2013 to consider legislation referred to the FOIA Council for study by the 2013 Session of the General Assembly: HB 2125 (Keam)(which would provide that FOIA requests may be made by any citizen of the United States and not just citizens of the Commonwealth), HB 2321 (Surovell)(which would make the State Corporation Commission (SCC) subject to FOIA and designates venue for FOIA petitions against the SCC), and SB 1371 (Stuart)(which, among other provisions, would allow a public body to petition the appropriate court for additional time to respond to a request for records when the request is one of a series of requests by the same requester and a response by the public body within the time required by FOIA will prevent the public body from meeting its operational responsibilities).<sup>1</sup>

After the meeting was called to order and the members and interested parties introduced themselves, the first order of business for the Subcommittee was to elect a Chair. The Subcommittee elected Frosty Landon as its Chair by unanimous vote.

### **HB 2125 (Keam)**

The Subcommittee began its work with consideration of Delegate Keam's HB 2125. Staff noted that the Supreme Court of the United States had recently issued an opinion upholding the citizenship limitation in Virginia's FOIA.<sup>2</sup> Delegate Keam<sup>3</sup> stated that the fact that Virginia does not allow other states' citizens to use Virginia's FOIA was an anomaly compared to other states, and that he disagreed with the citizenship limitation as a matter of policy. He stated that the General Laws Committee of the House of Delegates deferred consideration of the bill while awaiting the decision of the Supreme Court. He went on to state that despite the ruling of the Supreme Court upholding the current law, he still believes that as a matter of policy there is no reason not to give the same access to citizens of other states.

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<sup>1</sup> Subcommittee members Stephanie Hamlett, Frosty Landon, James Schliessmann, and David Ogburn were present. Members Ed Jones and Bob Tavenner were absent.

<sup>2</sup> *McBurney v. Young*, No. 12-17 (U.S. April 29, 2013). Subsection A of § 2.2-3704 reads in relevant part as follows: " Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth."

<sup>3</sup> Note that Delegate Keam joined the meeting by speaker phone.

The Subcommittee asked for public comment. Phyllis Errico, Virginia Association of Counties (VACo), and Mark Flynn, Virginia Municipal League (VML), both expressed opposition to the bill due to the increased costs involved and the difficulty of collecting charges from out-of-state. Both also indicated that the current charging provisions in FOIA do not truly capture all of the costs involved in responding to requests, and that taxpayers must make up the difference. Roger Wiley, speaking as an attorney who advises both state and local governments, stated that there is a policy justification for the citizenship limitation, in that FOIA grants wide rights that are sometimes subject to abuse, and the right for citizens to know the workings of their own government trumps the potential danger of abuse, but that does not hold true for those from outside the state. Ginger Stanley, Virginia Press Association (VPA), stated that VPA took no position on the bill during the General Assembly Session, but does oppose the provision in the bill lowering the threshold amount for an advance deposit from the current \$200 to \$100.<sup>4</sup> She opined that lowering the threshold to require prepayment at \$100 would slow down the process. Megan Rhyne, Virginia Coalition for Open Government (VCOG), stated that she supported opening FOIA to out-of-state citizens. As an example, she indicated that she had just returned from a trip to New Orleans, and while there she paid a lot of money into their tax system. She gave a further example of business or property owners who pay taxes in-state but live out-of-state, who would have interests in Virginia but not have rights under FOIA. She stated she felt that current law represents bad public policy. Delegate Keam noted that requiring prepayment was optional, not mandatory, and that the lower threshold was to alleviate some of the difficulty with collecting charges from out-of-state requesters.

Mr. Landon noted several newspaper editorials in opposition to citizenship limitation and the decision of the Supreme Court. Ms. Hamlett indicated she was interested in knowing more about the costs involved; as a state agency employee, she stated that she knew responding to requests can be expensive and time consuming. Mr. Schliessman also stated he would like to see more data on the costs involved. Ms. Hamlett stated she would like to ensure people can get their own records, and Mr. Wiley noted that there are several categories of out-of-state persons who should have access, such as people who lived in Virginia but moved out-of-state, and people who own property or pay taxes here. Mr. Ogburn agreed, and suggested created categories of those who could be required to prepay, as it is very difficult to collect small amounts from out-of-state. In further discussion, there was general agreement that the law should not look to the purpose of a request, but it would make sense to grant access rights to those with some nexus to Virginia. Delegate Keam indicated he would be interested in working on this approach going forward, and noted an economic interest in sharing records, as it can help spur industry. Mr. Landon invited further public comment; there was none. After brief discussion, the Subcommittee agreed it

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<sup>4</sup> Current subsection H of § 2.2-3704 provides as follows: "In any case where a public body determines in advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to agree to payment of a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester."

should continue its consideration of this subject at another meeting (date to be determined by polling).

### **HB 2321 (Surovell)**

Staff briefly summarized the decision of the Supreme Court of Virginia,<sup>5</sup> which held that the State Corporation Commission (SCC) was not subject to FOIA on three grounds: 1) the SCC has its own separate set of laws that address access to SCC records; 2) the SCC is a separate constitutional entity, not a "public body" subject to FOIA; and 3) the remedies provisions of FOIA allowing a petition to be brought in general district or circuit court are unenforceable against the SCC, as the Supreme Court of Virginia holds exclusive jurisdiction over actions against the SCC.

Delegate Surovell stated that the Court's reasoning seemed odd after reading a synopsis of the case in the Virginia's Lawyer Weekly, and then the full opinion. He emphasized the importance of the SCC and how its decisions affect the daily lives of all citizens regarding utilities bills, insurance rates, premiums, and reserves, as well as corporate filings, and stated that this is exactly the type of entity that should be subject to FOIA. Further, having read the materials provided by the SCC about the statutes outside FOIA governing access to SCC records, he noted that 11 of them deal with access, while 17 provide confidentiality. He stated that it made sense that some records would be confidential, but the confidentiality statutes were within the title of the Code addressing the SCC, while the access statutes were scattered in several other titles. He stated he did not read those scattered provisions to be a special system for the SCC, and he observed that nowhere in the Code does it say that the SCC is not subject to FOIA. He stated that if the intent is to exempt the SCC from FOIA, it should say so explicitly.

Brent Archer, speaking on behalf of Columbia Gas of Virginia, stated that safety is the greatest priority in delivering natural gas, and that his company often shared more information with the SCC than it was required to by the Code, in the interest of safety and with an expectation of confidentiality. He stated that if the SCC was fully subject to FOIA and such additional information was not protected from disclosure, his company and others would no longer provide it and would no longer be able to work in the same collaborative manner with the SCC's safety staff.

Scott White, speaking on behalf of the SCC, related that the SCC is historically responsible for regulating various entities and is divided into three main areas: utilities, finance, and the Clerk's office. The SCC holds a wide range of documents, and the statutes that control access to those documents appear not only in the title of the Code dealing with the SCC, but also other parts of the Code dealing with the subjects regulated by the SCC, which the Supreme Court recognized as a separate and parallel structure of laws governing access to SCC records. He noted that the SCC provides documents daily, provides thousands of documents per year, and has done so for decades. Generally, the SCC only excludes sensitive and proprietary information from regulated entities. He noted that HB 2321 would

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<sup>5</sup> *Christian v. State Corporation Commission*, 282 Va. 392, 718 S.E.2d 767 (Va. 2011).

make the SCC subject to FOIA in its entirety, including the meetings provisions of FOIA, which would be incompatible with the way the Commission does its business when acting as a court deciding cases at public hearings. He concluded that the SCC does respond to every request, it does not distinguish between Virginia citizens and others, and generally responds within one or two days.

Delegate Surovell stated that while he appreciated the SCC's position, he could not think of any entity that regulates the daily lives of people more than the SCC. He further stated that right now there is no recourse against the SCC (should it choose not to respond or to deny a records request), but FOIA has a clear remedy, and the bill would provide venue in the Supreme Court. Mr. White observed that Mr. Christian had brought suit against the SCC all the way to the Supreme Court, and stated that the SCC could be challenged on any statute to which it is subject. After some further discussion, Delegate Surovell concluded by stating that when the General Assembly wants to exempt an entity from FOIA, it says so, and the Code should be explicit. He further stated that recent procurement issues at the SCC reported by the news media, and general accountability to taxpayers over how money is spent, are examples of areas where FOIA should apply to the SCC.

Ms. Hamlett noted that this exchange sheds light on the difficulty in applying FOIA to all state and local government entities, and expressed caution regarding proprietary and safety issues. Mr. Ogburn stated that he worked for the communications industry and shared Mr. Archer's concerns regarding whether information voluntarily provided to the SCC could be protected, as well as concerns regarding the application of FOIA's meetings provisions to the SCC's court functions. The Subcommittee and parties then discussed possible options going forward, such as exempting the SCC from the meetings provisions of FOIA, and providing any necessary exemptions for proprietary data or trade secrets. It was agreed that the stakeholders would discuss the matter, and the Subcommittee would give it further consideration at a later meeting.

### **SB 1371 (Stuart)**

Staff presented a brief overview of SB 1371, as Senator Stuart was unable to attend today's meeting. The bill was introduced at the request of a local sheriff who had received 19 requests from the same person, all apparently stemming from a property dispute between neighbors. The sheriff indicated that the time consumed in responding to this series of requests interfered with the operational responsibilities of the office. Based on prior experience with two other bills that concerned a public body's ability to deal with harassment or misuse of FOIA, it was apparent that no one wanted to give government the power to divine a requester's intent or to take a requester to court. SB 1371 was designed to give public bodies an option for a court remedy when a series of requests from the same requester interfere with the operational responsibilities of the public body, without looking to a requester's intent or purpose in making the requests.

The Subcommittee inquired what had happened to the bill during the General Assembly Session. Staff related that it was introduced late in the session by unanimous consent, but

was given little discussion, then passed by indefinitely and referred to the FOIA Council for study. Ms. Stanley stated that VPA had opposed the bill during the Session and Senator Stuart agreed then to have the subject studied by the FOIA Council. She further noted that this bill could have affected VPA, as it had made repeated requests for records from a locality regarding another FOIA bill under consideration during the 2013 Session. Ms. Rhyne agreed, and while noting that the language did a good job of removing consideration of the requester's intent, it could still have potential for abuse.

Mr. Landon requested public comment on the bill; there was none. He then asked if anyone wished to speak in support of the bill; no one spoke. The Subcommittee then voted unanimously to lay the bill on the table.

There being no further business, the meeting was adjourned.

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