

Virginia Freedom of Information Advisory Council
Rights and Remedies Subcommittee
August 20, 2013
1:00 PM
General Assembly Building
Richmond, Virginia
Meeting Summary

The Rights and Remedies Subcommittee (the Subcommittee) held its second meeting on Tuesday, August 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) and HB 2321 (Surovell)(which would make the State Corporation Commission (SCC) subject to FOIA and designates venue for FOIA petitions against the SCC).¹

HB 2125 (Keam)

After the meeting was called to order and the members and interested parties introduced themselves, the Subcommittee began consideration of Delegate Keam's HB 2125. Staff presented a brief overview of the bill and the prior discussion by the Subcommittee at its May meeting, noting that the Supreme Court of the United States had recently issued an opinion upholding the citizenship limitation in Virginia's FOIA;² the Subcommittee had heard from Delegate Keam as well as interested parties in support of and in opposition to the bill,³ and the Subcommittee had indicated it wanted to discuss further certain concepts such as expanding FOIA rights to persons with some nexus to Virginia, such as taxpayers, property owners, and people who work in Virginia but live elsewhere.

Mr. Landon asked for comments from those who favor the proposal. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that VCOG supports expanding FOIA rights to out-of-state citizens. She observed that most other states do allow such access. She also pointed out that the term "nexus" would be hard to define and would not capture everyone who might want access, such as persons doing research about matters in Virginia who had no "nexus" to the state.

¹ Subcommittee members Frosty Landon (Chair), Stephanie Hamlett, James Schliessmann, Bob Tavenner, and David Ogburn were present. Member Ed Jones was absent. Note that the Subcommittee initially had three bills referred to it for study, but at its prior meeting, the Subcommittee recommended laying SB 1371 (Stuart) on the table; the FOIA Council voted to do so at its meeting June 6, 2013.

² *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."

³ Note that Delegate Keam spoke to the Subcommittee at its May 20, 2013 meeting but was not present today.

Mr. Landon then asked for comments from those opposed. Phyllis Errico of the Virginia Association of Counties (VACo) stated that VACo opposes changing current law, noting that the Supreme Court of the United States had found the law constitutional. She also observed that localities were already doing more with less, large requests could shut down the operations of small localities with few staff members, and many out-of-state requests were from commercial businesses asking for large amounts of material. Kimberly Pollard of the Virginia Municipal League (VML) agreed with Ms. Errico's comments.

At Mr. Landon's request, staff then presented the FOIA Council's current guidance for out-of-state requests, which recommends responding to out-of-state requests but notes that the procedural rules of FOIA do not apply.⁴

Turning to the Subcommittee, Mr. Landon first expressed his concern that staff was put in a difficult position by having a practical policy that favors openness but is at odds with what the law says. He noted that the policy seems obvious and logical, for example, for those living in Bristol, Tennessee who can simply cross the street and be in Bristol, Virginia. Secondly, Mr. Landon noted that the nature of media has changed radically since the law was written, especially in regard to online "media" such as bloggers and websites associated with traditional media such as television and newspapers. Mr. Landon indicated he felt the current law was not workable given new technology and that the issue would require further study. Mr. Schliessmann stated that the Office of the Attorney General (OAG) took no position on the issue. Mr. Tavenner stated that he felt that the ruling by the Supreme Court did not change anything, but clarified that the current law's limitation of FOIA rights to Virginia citizens is constitutional, without addressing the media issue. He further observed that in regard to charges, it would not be fair and would raise further constitutional issues if the law were changed to allow prepayment from out-of-state requesters but not state citizens. Ms. Hamlett noted that not all costs may be recovered under current law, such as costs for conducting a legal review. Mr. Tavenner stated that he could see it both ways, but did not see a need to change the law at this moment. Ms. Rhyne said she had been contacted numerous times regarding this issue by out-of-state requesters, researchers, and MuckRock, an organization that helps people make FOIA requests nationwide.

Mr. Landon passed the Chairmanship to Mr. Tavenner in order to make a motion. Mr. Landon moved to retain current cost rules, and to ask the General Assembly to strike the current language regarding "newspapers" and "television" to come up with a broader definition of "media" to whom FOIA rights would be granted. Ms. Errico stated that she had not heard of problems in the current law regarding media, and that she felt this action would make things more complex. Ginger Stanley of the Virginia Press Association (VPA) stated that this was the first time she had heard of problems regarding the definition of "media." The motion died for lack of a second. There were no further comments or questions; the Subcommittee took no action in regard to HB 2125.

⁴ The guidance document is available on the FOIA Council website at <http://foiacouncil.dls.virginia.gov/out%20of%20state%20requests.pdf>.

HB 2321 (Surovell)

Mr. Landon invited Delegate Surovell to speak to his bill, and asked whether the Delegate had had a chance to meet with representatives from the SCC since the last meeting of the Subcommittee. Delegate Surovell described the genesis of his bill as the 2011 Virginia Supreme Court decision in *Christian v. State Corporation Commission*, which held that the SCC was not subject to FOIA. Delegate Surovell stated that the decision held that the General Assembly had intended the SCC to be exempt because it had passed twenty-seven other statutes addressing how the SCC would handle records. Delegate Surovell further stated that he felt that the case was wrongly decided, and that if the General Assembly intended for a government entity to be exempt from FOIA, it would state that intent explicitly. He pointed out that the SCC affects most Virginians daily by setting utilities rates, setting insurance premiums, regulating banks, and in other ways. He stated that he had met with representatives from the SCC, and his understanding was that the SCC was not opposed to being open regarding the records of its Clerk's office, administration, and operations, but had serious concerns regarding the application of public meetings requirements to its regulatory aspects. Additionally, he stated that the SCC disagreed regarding the vehicle to make records open; Delegate Surovell would prefer to use FOIA, while the SCC would prefer using statutes outside of FOIA, in conjunction with the current statutes that apply to SCC records. Delegate Surovell presented a new draft version of his bill that would make the SCC subject to FOIA for public records purposes, but would exclude its regulatory records and would state that the SCC is not subject to FOIA's meeting requirements. In response to an inquiry from Mr. Landon, Delegate Surovell indicated he would probably introduce a bill on this topic at the 2014 Session of the General Assembly.

Mr. Landon opened the floor to those in support of the bill. Susan Lewis of the League of Women Voters stated that the League supports making public records accessible to all, that all government should be subject to FOIA with reasonable exceptions, and that citizens are best served when government is as open as possible. Margaret Nelson Fowler, a member of the Saves the James Alliance, read her prepared remarks regarding her own experiences dealing with the SCC and Dominion Virginia Power.⁵ Ms. Rhyne stated that VCOG supported the bill and that it was an appropriate response to the Virginia Supreme Court's decision.

Mr. Landon then opened the floor to those opposed to the bill, after expressing his appreciation to the SCC and Delegate Surovell for their attempts to resolve the issue. Scott White and Arlen Bolstad spoke as representatives of the SCC. Mr. White stated that the SCC agreed with the importance of transparency, noting that most SCC records are provided through the Clerk's office, which handled over 20,000 requests last year. He stated that corporate filings, Uniform Commercial Code filings, case filings, and formal proceedings before the Commission are all public record unless a protective order was entered. He stated that some of the statutes applicable to SCC records make records confidential, others state that the records are public, and that there would be no reason to state that records are "public" if the General Assembly thought the SCC was already subject

⁵ Incorporated herein by reference.

to FOIA. He suggested focusing on operational functions, such as procurement as an example, but to do it in Title 12.1 of the Code, or in titles addressing regulated industries, rather than in FOIA.

Brent Archer of Columbia Gas spoke on behalf of gas utilities, stating that applying FOIA to the SCC would not be good public policy. He told the Subcommittee that the gas utilities informally share information with the SCC that is not required under current law, particularly in regard to safety concerns. He indicated that if FOIA applied to the SCC then that dialogue would likely become a litigated process, which would have a negative impact on customers and limit the utilities' ability to be proactive regarding safety concerns. He stated that the current law works well. Duront Walton spoke on behalf of the Virginia Telecommunications Industry Association and stated that he agreed with Mr. Archer's comments.⁶

Mr. Landon asked for any additional comments. Jamison Shabanowitz, an intern with VCOG, stated his support for the bill, noting that entities in other states that are equivalent to the SCC are subject to those other states' versions of FOIA, to varying degrees. He noted that many have exemptions to cover the situations addressed by those opposing the bill today. He further stated that it is important to simply the law for the public and not have redundant exemptions in multiple places in the Code. Mr. White responded, noting that the various statutes applicable to SCC records refer to specific types of records, and that the SCC is unique, with special abilities and broad functions. He observed that the General Assembly had put laws for the SCC outside of FOIA and expressed support for continuing that approach.

Turning to the Subcommittee, Mr. Schliessman stated that the OAG took no position on the issue. He asked Delegate Surovell and the SCC about their support for today's draft. Delegate Surovell indicated his support for the draft, although his preference would be to make the SCC entirely subject to FOIA. Mr. Bolstad stated that the SCC did not see a need for legislation, but if there was to be legislation, it should be in the titles applicable to the SCC, not FOIA. Mr. Schliessmann asked if there could be a compromise to put all the applicable statutes into one location to aid the public. Mr. Bolstad said that generally, the public does know where to go to find the applicable law, and that the SCC helps those who do not. Mr. Ogburn suggested it might be a better approach to focus on making specific administrative functions open, rather than making the SCC entirely subject to FOIA then carving out exceptions. Mr. Landon related that in the past the distinction had always been for the SCC's judicial function. Mr. White noted that the law itself makes no distinction, but the various statutes relating to SCC records address the SCC's regulatory function. Staff indicated that the language of the new draft was chosen because the SCC does not have formal statutory divisions and it is easier to articulate what you do not want to capture than to list everything you do want to capture. Delegate Surovell agreed and stated it was better to say FOIA applies to the SCC as a whole then except certain matters, following the existing legal construct of FOIA that works well for the rest of government.

⁶ Please note that Mr. Archer later indicated he was speaking to the original version of HB 2321 as referred to the FOIA Council, not the latest draft presented by Delegate Surovell today.

After brief additional discussion, Mr. Landon asked for any final comments or motions. There were none. Mr. Landon then stated that the Subcommittee will report to the FOIA Council that the issues in dispute remain in dispute and that the Subcommittee has no recommendation at this time. There being no further business, the meeting was adjourned.

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