



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

Senator Richard H. Stuart, Chair
Delegate James M. LeMunyon, Vice-Chair

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MEMORANDUM

TO: Members, Records Subcommittee and Meetings Subcommittee

FROM: Senator Richard Stuart, Chair, FOIA Council
Delegate Jim LeMunyon, Vice-Chair, FOIA Council

DATE: June 10, 2014

SUBJECT: HJR 96 (2014), Study Plan and Scope; additional direction

Thank you for having already held your first meeting and electing the chairs of the respective subcommittees. This undertaking will necessarily involve a long process of review and it is good to know the subcommittees are off to such a quick start. Following your first meeting on May 14, 2014, staff alerted us about your concerns as to the scope of the FOIA study pursuant to HJR 96. As you will recall, the FOIA Council adopted a study plan as to scope of the study as well as a proposed timetable. A copy of the study plan is attached for your reference. Please note that in addition to HJR 96, the statutory authority of the FOIA Council as found in § 30-179 specifically provides that as part of reporting its annual activities, the FOIA Council include any recommendations for changes in the law. While HJR 96 may lay out more specific goals to be achieved in this study, it must be read in conjunction with the authority of the FOIA Council pursuant to § 30-179 to be the clearinghouse for FOIA and related access issues. While we do not believe that basic policy as expressed in § 2.2-3700 needs any change, the remainder of the Act should be reviewed as part of our work.

We are aware that a specific issue raised was how, when reviewing exemptions, the standard expressed in the HJR 96 for applicability or appropriateness should be measured. While the adopted study plan gives some guidance, we suggest the following measuring sticks. For applicability, review of FOIA exemptions should be from a "zero-based FOIA approach" by assuming that all records are open to the public and requiring justification for any exemptions. For appropriateness, give consideration to the following factors:

- Public good (protection of the public purse or of the public bargaining, negotiating, litigating position) vs private interest (privacy or proprietary interests);

- Attorney/client privilege;
- Application of the narrow construction rule found in FOIA at § 2.2-3700;
- Updating and clarifying nomenclature;
- Impact of court decisions and of opinions of the Attorney General and the FOIA Council;
- Legislative history and intent, to the extent available; and
- Review of comparable provisions in other states' FOIA laws.

It is our belief that this memorandum will provide the necessary guidance for the subcommittees to move forward in their deliberations. As such, no additional meeting of the FOIA Council appears to be necessary. We look forward to hearing your respective progress reports at the next FOIA Council meeting on Tuesday, July 8, 2014.

Sincerely,

A handwritten signature in grey ink, consisting of several overlapping loops and a horizontal line extending to the right.

Senator Richard H. Stuart

A handwritten signature in black ink, featuring a large, stylized initial 'J' followed by a series of loops and a horizontal line extending to the right.

Delegate James M. LeMunyon

Attachment