

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
September 30, 2015
1:00 PM
Speaker's Conference Room, Sixth Floor
General Assembly Building
Richmond, Virginia
Meeting Summary

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its fifth meeting of the 2015 Interim on September 30, 2015. All Subcommittee members were present.¹ The purpose of the meeting was to continue the study of FOIA in accordance with House Joint Resolution No. 96 (HJR 96). As per the study plan adopted by the Council, with the completion on August 19, 2015 of the review of open meeting exemptions found in § 2.2-3711, the Subcommittee undertook the review of related meeting provisions, specifically § 2.2-3712 (closed meeting procedures). Kathleen Dooley, Subcommittee Chair, announced that at future meetings of the Subcommittee, review of §§ 2.2-3707 (notice of meetings, etc.), 2.2-3707.01 (meetings of General Assembly), 2.2-3707.1 (posting of minutes for state boards, commissions), 2.2-3710 (voting), § 2.2-3708 and 2.2-3708.1 (electronic communication meetings) will be conducted.

The Subcommittee began its review of § 2.2-3712--closed meeting procedures. Staff provided the legislative history of this section, noting that it was added to FOIA in 1989 and was amended in 1999, 2001, and 2012. The Subcommittee called for public comment. Dave Ress, a reporter with the Daily Press advised the Subcommittee that on many occasions closed meeting procedures were not followed. Specifically, Mr. Ress indicated that it was his experience that many local public bodies strayed off of the topic for which the closed meeting was authorized. He also stated that many such bodies do not identify the subject matter of closed meetings with enough specificity. David Lacey, representing the Virginia Press Association (VPA) distributed a draft to the Subcommittee that would require any public body holding a closed meeting to make an audio recording of the meeting and preserve the recording for at least one year. The VPA draft would also (i) add another component to the after closed meeting certification now required by FOIA to include certification that the meeting was recorded and (ii) provide that such audio recordings would be exempt from mandatory disclosure, but its production could be compelled and the recording used as evidence in a proceeding to enforce FOIA.² Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), told the Subcommittee that she favored the VPA draft. Ms. Rhyne noted that this concept was initiated by VCOG in 2012. She advised that several states required some form of recording of closed meeting discussions, including Arkansas, Illinois, Kansas, Massachusetts, North Carolina, South Carolina, and Wyoming. Ms. Rhyne also advised the Subcommittee that the clarification of the purpose versus the subject of a closed meeting was needed. John Edwards, publisher of the Smithfield Times and original member of the FOIA Council, advised the Subcommittee

¹ Dooley (Chair), Landon, Selph, Porto, King-Casey.

² The VPA draft is available on the FOIA Council website.

that the concept of recording closed meeting discussions was first considered in 1989 by a joint subcommittee created by the General Assembly to study FOIA. Mr. Edwards indicated that there was no consensus around this idea and that the certification of closed meetings by members of the public body convening the meeting was the compromise that was added to FOIA in 1989. Mark Flynn, representing the Virginia Municipal League (VML), advised that VML was opposed to the idea of requiring closed meetings to be recorded. Mr. Flynn stated that the real issue is compliance and there is already a remedy in FOIA for violations. In addition, the courts have in camera powers for members under oath to state what happened in a closed meeting. He indicated that some localities don't have recording equipment. Phyllis Errico, Virginia Association of Counties next testified and advised that she was in agreement with the comments made by Mr. Flynn. Kathleen Dooley, Chair of the Subcommittee indicated that the VPA draft raised two distinct issues-- the clarity of subsection A of § 2.2-3712 as written and the recording of closed meetings. Council staff was asked to relay its experience with the former. Alan Gernhardt, Council staff, indicated that there is significant confusion with regard to the requirement of a statement of subject and a statement of purpose. Mr. Gernhardt suggested that perhaps only the subject of the closed meeting and the relevant Code citation (§ 2.2-3711, which identified the purposes authorized for closed meetings) would be sufficient. He indicated that the purpose is the "why" and the "subject is the "what" of a closed meeting. Maria Everett, Council staff, indicated that in her experience the "subject" of a closed meeting was frequently missing in closed meeting motions and the minutes of the open meeting memorialize the violation. She indicated that to many people, subject and purpose mean the same. Ms. Everett suggested that perhaps a different word than subject be used that may be clearer. She said she would research other states' law on this issue, especially those several states that have FOIA councils. Ms. Dooley agreed with staff that "subject" and "purpose" may appear to some to have the same meaning. Ms. Dooley, without objection, requested staff to do the suggested research and to prepare a rewrite of A of § 2.2-3712 in light of the discussion. Subcommittee member John Selph stated that with audio recordings, the speaker is not readily identifiable. Ms. Dooley inquired how such minutes/recordings would be approved by the public body holding the closed meeting. Ms. Errico answered that to do so would be a release of those minutes, which under the VPA draft was not required. Ms. Errico added that how minutes are taken may be an issue. She averred that there is only utility if the minutes are a verbatim transcript. Council member Marisa Porto advised that the FOIA already addresses minutes of closed meetings, stating that minutes may be taken but are not required. The Subcommittee by consensus agreed to carry over these deliberations until the next Subcommittee meeting.

Old Business

The Subcommittee again discussed the "context draft," initially suggested by staff, to provide more context in certain open meeting exemptions that merely reference existing FOIA record exclusions. At previous meetings, the Subcommittee discussed the appropriateness of amending such open meeting exemptions to contain more information, to include the identity of the public body(s) to which the exemption applies and a general description of the subject matter of the excluded records/topic for discussion in a closed meeting in addition to the citation to the applicable records exemption. A staff prepared

draft was again reviewed by the Subcommittee. David Dowling, Deputy Director, Department of Conservation and Natural Resources advised the Subcommittee that the context draft as it related to the resource management plan program (subdivision 46 of § 2.2-3711) did not accurately reflect the nature of the records that could be discussed in a closed meeting. Mr. Dowling suggested that the language be changed to read "[D]iscussion or consideration of personal and proprietary records related to the resource management plan program and excluded from this chapter pursuant to (i) subdivision 25 of § 2.2-3705.6 or (ii) subsection E of § 10.1-104.7." No other comment or suggestion was made on the context draft. The Subcommittee directed staff to make the DCR suggested change to the draft and post it on the Council website to receive further comment. The Subcommittee again deferred action on this draft until its next meeting in order to allow ample opportunity for reflection and public comment.

With regard to the following open meeting exemptions, the Subcommittee had recommended no change to existing law unless the Records Subcommittee in its review of the applicable records exemptions recommended that the records exemptions be amended. To date, the Subcommittee has not received any communication from the Records Subcommittee.

- A 28 (PPEA & PPTA records)
- A 33 (telecom or cable TV)
- A 34 (wireless service authorities)
- A 40 (economic development) of records excluded under subdivision 3 of § 2.2-3705.6

The next meeting of the Meetings Subcommittee is scheduled for Wednesday, November 4, 2015 at 11:00 a.m. in Richmond. There being no further business, the meeting was adjourned.

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