

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
November 4, 2015
11:00 AM
Speaker's Conference Room, Sixth Floor
General Assembly Building
Richmond, Virginia
Meeting Summary

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its sixth meeting of the 2015 Interim on November 4, 2015. All Subcommittee members were present, with the exception of Frosty Landon.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 continued its review of § 2.2-3712--closed meeting procedures--and discussion concerning the Virginia Press Association (VPA) draft requiring the recording of closed meetings submitted for the Subcommittee's consideration at its meeting on September 30, 2015. The agenda indicated that staff provided research on other states' law that require the recording of closed meetings. This research was provided by the Virginia Coalition for Open Government (VCOG) and was the subject of testimony at the last Subcommittee meeting by Megan Rhyne of VCOG. Phyllis Errico and Roger Wiley, representing local public bodies, objected to having the Virginia Coalition for Open Government do the research for the Subcommittee, stating that it was an incomplete picture of what other states do. They stated that it was important to include the states that don't require the recording of closed meetings. Ms. Dooley, Chair of the Subcommittee, advised that there was no attempt to mislead as the source of the research was properly attributed. David Lacey, representing the VPA indicated that the VCOG research at least showed precedent that other states do require recordings/minutes of a closed meeting. Ginger Stanley, VPA, advised that a more comprehensive list of other states was provided to the Subcommittee earlier and that this list was obtained from the Reporters Committee for Freedom of the Press. Speaking to the VPA draft, Ms. Errico stated that the Virginia Association of Counties (VaCO) opposed the requirement for recording or having minutes of closed meetings. She noted that recordings are not required for any open meeting. Ms. Errico opined that there is no way to ensure the confidentiality of these recordings and believed that any such requirement was tantamount to an opportunity for mischief. Dave Ress, reporter with the Daily Press, advised that he supports the VPA draft and relayed his

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

experiences with getting closed meeting minutes. He gave an example where a public body's attorney was not present at a meeting, but afterward collected notes from the participating members and released those notes after determining that the closed meeting should have been open. Mr. Ress noted that attorneys are not always present, however, and the closed meeting provisions could be abused. Ms. Dooley opened the floor for public comment. Sandi McNinch, Virginia Economic Development Partnership Authority, indicated that they don't record the open meetings, so requiring the recording of a closed meeting presents a practical problem. David Lacey, VPA, indicated that VPA was not opposed to only requiring minutes of closed meetings (as opposed to recording closed meeting discussions). Ms. Errico stated that sometimes discussions in closed meetings involve records that are confidential--student records and real estate deals--and indicated that disclosure of same would hurt the public position. Cindy Berndt, Department of Environmental Quality (DEQ), stated that DEQ used to take minutes of a closed meeting, but that the relevant DEQ board did not approve these minutes. This practice is no longer followed. Roger Wiley indicated that some closed meetings are quasi-judicial. For example, student and public employee disciplinary matters, where the closed meeting is held because the public body is anticipating litigation. Mary Jo Fields, Virginia Municipal League (VML), stated that from a practical perspective who takes the minutes will affect the quality of the minutes, especially when the clerk or other staff is not present at the closed meeting. Chris McGee, Virginia College Savings Plan, stated that trade secrets are sometimes the topic of a closed meeting, which is a whole other aspect to these discussions. He stated that minutes wherein this topic is discussed opens up the public body to liability if the information is leaked or otherwise made public. Roger Wiley pointed to the last sentence in the VPA draft--"[A] recoding made pursuant to this subsection shall not be subject to the disclosure provisions of this chapter, but its production may be compelled , and the recording used as evidence, in a proceeding to enforce the provisions of this chapter"--and stated that this would apply to not only FOIA cases, but other actions, including defamation suits. Ms. McNinch offered that the VPA draft requiring certification by the members of the public body that a recording was made was flawed in that the members would not be privy to whether a recording was being made or not.

Ms. Dooley stated that it was her belief that the VPA draft had been thoroughly vetted and asked for any motions from the Subcommittee. Marisa Porto made a motion to accept the VPA draft. There was no second to this motion, so the motion failed. Mr. Selph then moved to table consideration of the VPA draft. There was no second to this motion, so the motion failed. Ms. Porto moved that the VPA draft be accepted, but that the requirement was only for minutes to be taken at closed meetings. Mr. Selph seconded this motion for purposes of discussion. Ms. Porto stated that the draft as amended by her motion balances the public's right to know against the need of government to function. She stated that she has faith in the judiciary to make the right decision in the event of litigation. Ms. Dooley indicated that she opposed the motion, stating that accountability is the issue and she believed there are already checks in place - namely, the specific requirements for a closed meeting motion, the option to take minutes of closed meetings under current law, and the required certification by the members of the public body holding the closed meeting. Ms. Dooley advised that she believed, in addition to the issues with the VPA draft already raised (i.e. disciplinary matters and trade secrets), that the candor of the discussions would be

compromised. She also indicated with the proliferation of records and how they may impose liability in the above named contexts. Mr. Selph advised that as a member of the Board of Pharmacy, the Board considers disciplinary matters and the minutes of those discussions are not very accurate given the variety in style, content, and detail depending on who takes the minutes. Mr. Selph indicated that closed meeting minutes are not transcripts of the discussions and he was opposed to the VPA draft in either form. Finally, Mr. Selph agreed that accountability measures were already in place. By a vote of 1 to 2, the motion failed to pass.²

The Subcommittee next considered a draft prepared by staff meant to help clarify the requirements to identify the subject and purpose of a closed meeting as required under subsection A of § 2.2-3712. At its last meeting the Subcommittee was informed that in practice, there was considerable confusion in differentiating between subject and purpose in motions to convene closed meetings. In the requirement to identify the purpose of a closed meeting, the draft refers to subsection A of § 2.2-3711, which states that "Public bodies may hold closed meetings only for the following purposes" and then lists the various closed meeting exemptions. The draft also eliminates the current reference to § 2.2-3707 because that section does not contain any closed meeting exemptions. It also adds references to "other provision[s] of law," recognizing that outside of FOIA there are other laws that provide exceptions to open meeting requirements. The draft also contained a provision concerning making recordings of closed meetings under subsection I of § 2.2-3712. The Subcommittee by consensus indicated it favored the draft amendments to subsection A of § 2.2-3712, but not the amendments to subsection I.

With regard to subsection B of § 2.2-3712, which allows interviews of chief executives to be held at undisclosed locations within 15 days after an announcement at an open meeting, staff noted that local government attorneys had asked whether a motion to convene a closed meeting was still necessary. Staff opined that this subsection supersedes need for a closed meeting motion. The Subcommittee agreed there was no need to amend this subsection at this time.

Ms. Dooley invited any additional public comment on § 2.2-3712 and closed meeting procedure. Mr. Ress stated that closed meetings were common, but they should be the exception. He stated that currently certification of a closed meeting is the only accountability, but he knew of instances where the certification was wrong. There was no other comment.

The Subcommittee indicated that it would reconvene in March or April of 2016 to continue its study in accordance with the Council-approved study plan. There being no further business, the meeting was adjourned.

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² Voting aye: Porto; voting nay: Dooley and Selph