

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
July 18, 2016
10:30 AM
House Room C
General Assembly Building
Richmond, Virginia
Meeting Summary

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its fourth meeting of the 2016 Interim on July 18, 2016. All current 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, the Subcommittee to date has completed review of §§:

- 2.2-3711(open meeting exemptions),
- 2.2-3712 (closed meeting procedures),
- 2.2-3707 (notice of meetings, etc.),
- 2.2-3707.1 (posting of minutes for state boards and commissions),
- 2.2-3707.01 (meeting of the General Assembly),
- 2.2-3708 (electronic communication meetings),
- 2.2-3708.1 (participation in meetings in event of emergency or personal matter, etc.)

and

- 2.2-3710 (voting).

The Subcommittee began this meeting with further review of the context draft. At previous meetings, the Subcommittee discussed whether the current meeting exemptions that reference existing FOIA record exemptions should be amended 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 draft was prepared by staff, discussed and edited several times by the Subcommittee, and each version posted on the Council website to receive further comment. Chairman Dooley expressed her surprise that this draft could actually be accomplished; resulting in being more user friendly despite her earlier concern that such an attempt would not reach fruition due to unintended consequences. Noting that there had been more than sufficient time for public review and comment on the context draft, the Subcommittee voted unanimously to recommend the context draft to the Council. The Subcommittee directed staff that the final report for the study should note that it was not to expand or contract any authority granted pursuant to corollary FOIA record exclusions, but merely to provide context to the reader of generally what and to whom the exclusion applied.

¹ Dooley (Chair), King-Casey, and Porto, who participated telephonically in accordance with § 2.2-3708.1.

The Subcommittee next turned its attention to a matter unresolved from the June 6, 2016 meeting. The issue was the website posting of minutes under § 2.2-3707.1 by public bodies. By way of background, at its May 4, and June 6, 2016 meetings, the Subcommittee directed staff to prepare a draft amending § 2.2-3707.1 to require posting of meeting minutes for all state public bodies and local governing bodies, including school boards; however, for such local governing bodies, posting is required only for approved minutes. This limitation for local governing bodies and school boards was acknowledgment of the fact that such local governing bodies and school boards meet monthly and as a practical matter, draft minutes are prepared in time for approval at the next meeting. The discussion at today's meeting again included the potential difficulty for legislative branch agencies to comply with posting minutes within the statutory time frame due to the substantial difference in staffing levels for legislative branch agencies as compared to executive branch agencies, as well as the fact that minutes are generally not approved by legislative agencies. The Subcommittee called for public comment on this issue. Phyllis Errico for the Virginia Association of Counties (VACo) and the Virginia Municipal League (VML) renewed her concerns for the ability of local public bodies to comply with such a requirement. Ms. Errico stated that in many cases for local bodies, there is no in-house staff. She noted that ultimately, minutes are posted on available websites. Ms. Errico stated that FOIA already provides a right of public access to documents and indicated that citizens could make a FOIA request for minutes before they are posted. Essentially, the imposition of a requirement for posting of minutes was an unfunded mandate by requiring local public bodies to invest in technology they did not have or had decided was not a good allocation of its funds given the totality of circumstances facing them.

Donna Sayegh, a citizen from Portsmouth, told the Subcommittee that liaisons from Portsmouth City Council to other Portsmouth public bodies do not report on their activities. She also noted that there is too much secrecy in Portsmouth that does not comport with FOIA. As an example, she indicated that the procurement official would not tell city council why two vendors were denied contracts. She also questioned the hefty charges imposed by the City for FOIA requests.

Dave Ress, Daily Press, pointed out that the proposed draft would not require the investment in technology if a local public body had not already done so. He stated that the draft contained the phrase "...on it public website, if any." As it relates to state public bodies, Mr. Ress stated he liked the current draft.

Megan Ryne, Executive Director of the Virginia Coalition for Open Government, suggested addressing the stated deficiencies by requiring website posting, but without a time limit or alternatively, a longer time limit, in which to post minutes.

Subcommittee member King-Casey stated that she had concerns for localities because in many cases they do not have the resources to comply. She said she wasn't sure that additional time posting would solve the problem.

Roger Wiley, Esq., told the Subcommittee that the posting of approved minutes wasn't the problem--it was the imposition of a specific time limit in which to do it.

Alan Gernhardt, Council staff, advised the Subcommittee that at previous meetings where this issue had been discussed the Virginia State Bar (VSB), an agency in the judicial branch of government, had many, many committees and the expansion of website posting of minutes to other branches of state government would pose burdens on these myriad VSB committees. Mr. Gernhardt also told the Subcommittee that by striking the words "in the executive branch of state government," there is a question of this section's application to the judicial branch and interpretation of such a change would not add clarity to FOIA; but would result in less clarity.

Chairman Dooley proposed leaving § 2.2-3707.1 limited only to public bodies in the executive branch of state government because she was concerned about setting up more opportunity for violations of FOIA and that given Del Morris' HB 61 (2015 and 2016), which attempted to make violations of FOIA a criminal penalty, this was not a preferred path. She stated that she believed that the suggested expansion beyond the executive branch of state government would create a problem where no problem currently existed. She noted that minutes in most cases are ultimately posted and that under FOIA a specific request can be made for these minutes. She suggested a better approach was "best practice" advice offered by the Council rather than a statutory change. Ms. King-Casey stated that she shared Ms. Dooley's concerns. Ms. Porto said that there should be an opportunity for compromise, although she was unsure of what that compromise might look like.

Megan Rhyne, VCOG, again spoke and requested the Subcommittee to keep the website posting of notices for meetings parallel with such posting for meeting minutes. She reminded that Subcommittee that it had recommended website posting for meeting notices. She stated that in 2016, people expect these things to be online.

At the conclusion of the public comment and extensive Subcommittee discussion on this issue, the Subcommittee agreed to defer further consideration of website posting of meeting minutes until new Subcommittee members are appointed. Ms. Dooley noted that with the expiration of Messrs. Selph and Landon's terms on the Council and the Subcommittee, it would be better to have more Subcommittee members to weigh in on the discussion. The Subcommittee requested staff to contact Chairman LeMunyon with a request that he appoint two new members to the Subcommittee to fill the vacancies left by Messrs. Selph and Landon.

The Subcommittee next reviewed its proposed amendments relating to §§ 2.2-3708 and 2.2-3708.1 (electronic communication meetings) agreed to at the June 6, 2016 meeting. Staff reminded the Subcommittee of its recommended amendment from the previous meeting and indicated where those amendments could be found in the proposed draft. Namely, (i) the elimination of the redundancy of the terminology "emergency or personal matters," as personal matters subsumes emergency, (ii) the elimination of the requirement that public bodies conducting electronic communications meetings (e-meetings) pursuant to § 2.2-3708 file an annual report to the Joint Commission on Technology and Science because the

FOIA Council already receives them and the filing of two reports is unnecessary; (iii) the revision of the definition of "regional public body;" (iv) the limitation on the number of e-meetings a member could participate in in any calendar year (two or 25 percent of the meetings, whichever is less), which was difficult to apply numerically and (v) that continued e-meetings be noticed in the same way as any other meeting². Roger Wiley, Esq., commented that the revised definition of "regional public body" in the draft was workable. Dave Ress suggested that limitation for remote participation in a meeting by a member under § 2.2-3708.1 be kept at 25 percent of the meetings annually. Mr. Wiley responded that the Fairfax County Board of Supervisors meets 50 times per year and Mr. Ress' suggestion would lead to expansion of the ability of members to participate in a meeting remotely--something Mr. Wiley didn't believe would be the result Mr. Ress sought. The Subcommittee discussed the staff-prepared drafts at length and voted 2 to 0³ to recommend the draft to the FOIA Council.

The next meeting of the Subcommittee is scheduled for Thursday, August 11, 2016, in Richmond. There being no further business, the meeting was adjourned.

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² The Subcommittee had previously recommended that required notice under § 2.2-3707 should apply to continued meetings and therefore directed staff to make the corollary changes to the e-meeting provisions in § 2.2-3708.

³ Ms. Porto did not vote on this issue as she had terminated her participation in the meeting due to a scheduling conflict.