

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
August 11, 2016
1:30 PM
House Room C
General Assembly Building
Richmond, Virginia
Meeting Summary

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its fifth meeting of the 2016 Interim on August 11, 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).

The first order of business was the consideration of HB 698(Kory, 2016) and HB 757 (R. Bell, 2016) referred by the General Assembly. Both Delegates Kory and Bell were unable to attend this meeting and the Subcommittee deferred consideration of these bills until the Subcommittee's next meeting on September 19, 2016.

The Subcommittee next turned its attention to a matter unresolved from its previous two meetings. 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. Staff advised that FOIA Council Chair, Delegate LeMunyon, had suggested that instead of delineating between branches of government, perhaps looking at the function of the public body would be a better indicator of when minutes should be posted. Staff told the Subcommittee that Delegate LeMunyon had suggested that the public might be most interested in public bodies with regulatory authority that directly affect the public and those public bodies with the authority to spend public money. Staff pointed out that most public bodies have the authority to spend money and suggested that this criterion would not have the desired effect. The Subcommittee called for public comment on this issue. Megan Rhyne, Executive Director, Virginia Coalition for Open Government (VCOG) told the Subcommittee that she had done a survey of the 10 biggest and smallest localities in Virginia and the results indicated that ultimately agenda and minutes are posted and are current. She noted that SB 89 (c. 403, 2016) requires

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

(i) the posting of minutes of the local electoral boards' meetings on the local electoral board's website or the official website of the county or city when such means are available and (ii) that minutes of meetings are required to be posted as soon as possible but no later than one week prior to the following meeting of the electoral board. After further discussion, the Subcommittee deferred action on this draft.

The Subcommittee next took up review of § 2.2-3700, the policy statement of FOIA. Staff advised the Subcommittee of the legislative history of FOIA and that in 1999, the policy statement was significantly revised after a joint subcommittee study of the General Assembly to what appears in the law today. Dave Ress, a reporter with the Daily Press, advised the Subcommittee that Virginia has lost sight of the purpose of FOIA, noting that the public's right to know is a fundamental right and that complying with FOIA is a basic obligation of government. Mr. Ress opined that the policy of FOIA found in § 2.2-3700 should be revised to include these two very important concepts.

Bill Farrah, ACLU, expressed his concern that local governments fail to comply with closed meeting procedures by not including a statement of the subject of the closed meeting as required by FOIA. He noted that citizens have the right to sue a public body for violations of FOIA, but that there is no remedy to fix the action that was taken at the meeting where the violation occurred.

Subcommittee Chair, Kathleen Dooley reminded the Subcommittee that the FOIA Council has prepared a document that outlines in great detail the requirements for a proper motion to close a meeting. She asked the Subcommittee whether, in response to Mr. Ress' comments, whether stronger language is needed in the policy statement of FOIA. Subcommittee member Marisa Porto asked if staff had any recommendations. Staff advised that it did not.

Staff brought to the Subcommittee's attention an issue that was recently reported in the newspaper concerning a subcommittee of a local governing body sending and receiving texts during the course of the subcommittee's meeting. Staff advised that with sidebars that may occur at public meetings, it is visible to those in attendance, but with text messages, sidebars are not visible. Staff noted that technology is frequently ahead of the law and that in this instance, the text messages concerning public business would be public records and subject to FOIA. However, in a meetings context, such messages appear to be meetings within a meeting under certain circumstances. Ms. Dooley asked for comment from the Subcommittee. Ms. Porto indicated that within the last year, when reporters asks for text messages sent and received during public meetings, often times they are told these messages are not retained and/or the text messages were not sent/received on a public phone. Staff interjected that clearly, that response was incorrect under both the Virginia Public Records Act. Staff arrayed several options for the Subcommittee's consideration. These options include (i) requiring public bodies to adopt a policy governing the use of email and/or text messages during meetings, (ii) prohibiting the use of email and/or text messages during meetings, and (iii) requiring that any electronic communication relating to an item of public business before the public body that is sent or received during the course of a meeting be read aloud and included in the minutes of that meeting. The Subcommittee asked for public

comment on this issue. Megan Rhyne, VCOG, stated that the real question was how to address text messages for meetings and records. She suggested that perhaps it is a records management question and covered under the Virginia Public Records Act, which deals with retention of public records. Ms. Dooley suggested that the rule might be that no texting is allowed if the text relates an item of public business before the body. Ms. Porto was curious about how other states address this issue. Ms. Rhyne responded that she had contacted colleagues in other states and that to her knowledge no states have addressed it. Subcommittee member Shawri King-Casey stated that this issue raised a combination of technology and legal questions. Ms. Dooley summarized the problem by noting that FOIA policy is to allow people to observe the workings of government, but as a practical matter people cannot observe text messages during a meeting. The Subcommittee took the matter under advisement and will consider this issue at future meetings.

Staff also discussed with the Subcommittee the definition of "public records" found in § 2.2-3701 of FOIA and noted that some of the terminology appeared obsolete. Specifically, "... photostating, photography, magnetic impulse, optical or magneto-optical form..." and may need to be either updated or deleted. The Subcommittee took no action, but wanted to allow public comment at a future meeting.

Ms. Dooley invited further public comment. Mr. Ress expressed that he had had a problem with § 2.2-3710(B) because it allowed local school boards (and other bodies) to discuss issues and reach decisions by speaking one-by-one with each other outside of public meetings, leading to "rocket docket" meetings where decisions were made with little discussion in public. Ms. Rhyne suggested that a solution might be to adopt language similar to that used in Florida to ban email between members during meetings by stating that the law is to be construed so as to frustrate all evasive devices. Staff informed the subcommittee that there is similar language in Virginia's Alcoholic Beverage Control laws concerning a "shift or device to evade" the restrictions of those laws. The Subcommittee decided to carry this issue over until its next meeting.

The next meeting of the Subcommittee is scheduled for Monday, September 19, 2016, in Richmond. There being no further business, the meeting was adjourned.

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