

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
September 19, 2016
10:00 AM
House Room C
General Assembly Building
Richmond, Virginia
Meeting Summary

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its sixth meeting of the 2016 Interim on September 19, 2016.¹ 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 again unable to attend this meeting and the Subcommittee deferred consideration of these bills until the Subcommittee's next meeting on October 17, 2016.

The Subcommittee next turned its attention to a matter unresolved from its previous three 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, June 6, and August 11, 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 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 branch boards, councils, and commissions. The Subcommittee called for public comment on this issue. Phyllis Errico on behalf of the Virginia Association of Counties and the Virginia Municipal League reiterated local governments' objection to the proposed draft. She stated that the draft presented real problems for localities because many localities have (i) no IT staff, (ii) limited websites that are operated by a third party vendor on a contractual basis, or (iii) no website of their own, but instead the website is hosted on other entities websites, whether public or private. Ms. Errico again told the Subcommittee that the draft was an unfunded mandate on localities and suggested that localities be removed from the purview of the draft. In response to questions that the draft only required posting if a localities had a website, Ms. Errico noted that the draft mandated a certain level of technology and IT staffing. The Subcommittee inquired whether if there was a population threshold in the draft, would local government concerns be alleviated. Ms. Errico responded that such an approach may not be workable.

¹ Dooley (Chair), King-Casey, Porto, and Stern were present. Mr. Coleburn was absent.

Ms. Porto asked whether necessary provisions could be included in such contracts with third party IT vendors. Ms. Errico stated that such an approach would force localities to make difficult choices about allocation of resources. Megan Rhyne, Executive Director, Virginia Coalition for Open Government (VCOG) reminded 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 (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. Staff offered that the issue of requiring a certain level technology and current provisions FOIA is a broader issue than just website posting of minutes and suggested that it may not be best done on a piecemeal basis, but rather a review of the larger technology issues using a more holistic approach. Scott Berg, a citizen from Portsmouth, remarked that FOIA does not define "website" and there is a difference between internet presence like Facebook or Google Plus, and a website. Dave Ress, Daily Press, stated that subsection B of the draft clearly states "...on a website, if available." Ms. Errico responded that without any time limit for posting, the phones at VACo and VML, as well as at the FOIA Council, will ring off the hook by inquiring localities on how to comply with the draft if enacted. After further discussion, the Subcommittee agreed that the preferred language to use was "official public government website" when referring to websites. Staff pointed out that the draft did not address regional public bodies. David Blount, Thomas Jefferson Planning District, spoke on behalf of regional public bodies and indicated that his planning district had a website but that it was maintained by a third party vendor. He indicated that there are 21 planning district commissions (PDC) in Virginia and urged the Subcommittee to be cautious in light of the discussion on this issue and its impact on regional bodies. Mr. Blount also pointed out that while many PDCs meet monthly, the frequency of meetings increases at budget time and the timing of posting minutes becomes more difficult. Ms. Dooley, Chair of the Subcommittee, stated that even with posting after approval of minutes, there still may be a need for flexibility. The Subcommittee sought suggestions from staff as it relates to regional public bodies and staff suggested that consideration of them be deferred to 2017. The Subcommittee agreed with the staff suggestion. Ms. Porto noted that notwithstanding the discussion, minutes are required and are available upon request.

Ultimately, the Subcommittee directed staff to amend the draft (LD 17100057D) as follows:

- Subsection A--keep current law, which requires posting of minutes by state public bodies in the executive branch of state government; but update the "Commonwealth Calendar" language to "a central electronic calendar maintained by the Commonwealth."
- Subsection B--for other state public bodies, require posting of minutes on their respective websites and on a central electronic calendar maintained by the Commonwealth. No requirement for posting draft minutes, only final minutes.
- Subsection C--for local governing bodies and school boards, posting of minutes is required on such bodies' "official public government website, if

available." The Subcommittee asked staff to recommend language in the draft for the timing of posting of these minutes, if feasible.

The Subcommittee next revisited its prior review § 2.2-3700, the policy statement of FOIA. Dave Ress, a reporter with the Daily Press, again 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. Staff noted that in FOIA training, it spends considerable time in talking about the policy of FOIA and how the FOIA gives default rules to apply when a public body is in doubt--i.e. default to openness, and construe exclusions from openness narrowly. When asked, staff opined that the policy statement of FOIA appeared clear on its face and staff could not suggest any language that would clarify FOIA's policy statement.

Staff again brought to the Subcommittee's attention the issue of a member of a public body sending and receiving texts during the course of the public body'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. Given the direction from the Chair of the FOIA Council for Subcommittees to complete their work before the Council's October 17, 2016 meeting, the Subcommittee deferred consideration of this issue until 2017.

The Subcommittee next reconsidered its recommendation to require public notice for continued meetings to include a corresponding amendment to § 15.2-1416, which authorizes local governing bodies to adjourn their meetings from time to time, without further notice to the public, until the work of the body is complete. Given the Subcommittee's prior recommendation for notice of continued meetings be given under FOIA, amendment of § 15.2-1416 is necessary to make this section consistent with the Subcommittee's recommendation (LD17100047D). The Subcommittee agreed to amendment of § 15.2-1416 unanimously.

The next meeting of the Subcommittee is scheduled for Monday, October 17, 2016, in Richmond. There being no further business, the meeting was adjourned.

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