

Records Subcommittee
Meeting Summary
May 21, 2018
1:30 PM
House Room 300A
Pocahontas Building, Richmond, VA

The Records Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) held its first meeting of the 2018 interim on May 21, 2018, to begin study of the bills referred to the Subcommittee by the full Council from the 2018 Session of the General Assembly.¹ The two bills on the agenda for study were House Bill 1329 (Tran)² and Senate Bill 730 (DeSteph).³ Both Delegate Tran And Senator DeSteph were in attendance to speak to their bills. Subcommittee members Porto (Chair), King-Casey, Seltzer, Treadway, and Vucci were present. The Subcommittee approved the proposed agenda by unanimous vote.

Staff gave an overview on the background of HB 1329 by first reviewing the Government Data Collection and Dissemination Practices Act (GDCDPA) and explained to the Subcommittee that the GDCDPA is located outside the Freedom of Information Act (FOIA) in the Code of Virginia. Staff also reviewed similar legislation that was passed by California and Washington with the Subcommittee.

Delegate Tran then presented HB 1329, explaining that one of the core tenets of our country's history is the freedom of religion and that current political rhetoric centered around creating a registry of Muslims has created the need for this particular legislation. She stated that Virginia law currently prohibits collection and dissemination of religious affiliation by many state agencies with three notable exceptions that require the consent of the data giver, including institutions of higher education and some corrections facilities. HB 1329 would ensure that entities subject to the GDCDPA could not collect or disseminate to the federal government information concerning the religious preferences or affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity.

¹ The full Council met on April 4, 2018, to assign the 13 bills referred to the Council from the 2018 Session of the General Assembly. Of those 13 bills, nine were referred to the Records Subcommittee.

² **HB 1329 (Tran) Government Data Collection and Dissemination Practices Act; dissemination of information concerning religious preferences and affiliations.** Prohibits any state agency maintaining an information system that includes personal information from disseminating to federal government authorities information concerning the religious preferences and affiliations of data subjects for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity. This prohibition applies even if consent is given to disseminate such information to public institutions of higher education, state facilities under Title 37.2 (Behavioral Health and Developmental Services), and juvenile correctional facilities established pursuant to Title 66 (Juvenile Justice) or Chapter 11 (§ 16.1-226 et seq.) of Title 16.1 (Juvenile and Domestic Relations District Courts).

³ **SB 730 (DeSteph) Virginia Freedom of Information Act.** Clarifies that the definition of "public record" does not include records that are not prepared for or used in the transaction of public business. The bill defines "social media account" and creates a new discretionary exemption for social media records of General Assembly members when such records relate to the use of a social media account by a member in such member's individual capacity. The bill requires the public body to be a necessary party in any enforcement proceeding.

The Subcommittee then discussed the appropriateness of the Council's studying the bill since the bill addresses an Act outside of FOIA and agreed that study of the bill would be appropriate, as the General Assembly sent the bill to the Council and clearly felt that the Council was the appropriate body for such review. The Subcommittee also discussed concerns that the bill could have consequences related to federal funding if particular programs required the information that the bill would limit, such as ethnicity.

The floor was then opened for public comment. Josh Hessler, legislative counsel for the Family Foundation, expressed his support for the bill. He stated that in his view the bill was sufficiently narrowly tailored, as the provision preventing state agencies from sharing information related to an individual's religious beliefs, affiliations, and ethnicity would only take effect if the information were collected for the specific purpose of compiling a list, registry, or database based on religious affiliation, national origin, or ethnicity. Hurunnessa Fariad, Outreach and Interfaith Coordinator for the All Dulles Area Muslim Society, also spoke in support of the bill. She detailed her experiences with racism as a Muslim woman and immigrant and explained that she believed this bill to be necessary in today's political climate.

The Subcommittee then returned to the previous discussion on areas where the legislation may lead to problems. Senator DeSteph explained to the Subcommittee that he has worked on legislation regarding institutions of higher education and that one area that could be problematic involves the Free Application for Federal Student Aid (FAFSA). He also pointed out that there may be other instances in which having a record of someone's religious affiliation is important. For example, National Guard members may want their religious affiliation on record so that in a life-threatening situation they can be treated according to their religion. Delegate Tran agreed with that sentiment. Mr. Seltzer stated that the bill, as currently drafted, seems to limit collection and dissemination only if the purpose is to create a national database based on religious affiliation, national origin, or ethnicity. The examples presented do not involve the creation of such a database, and therefore no such limitation would apply.

The Subcommittee then discussed whether the GDCDPA is the appropriate placement for the language or if a stand-alone Code section would be more appropriate. Staff pointed out that one reason to not create a new, separate statute is that the GDCDPA already specifically addresses the collection and dissemination of data by state agencies. Additionally, the GDCDPA already identifies specific agencies to which it does not apply, for a variety of reasons. If the Subcommittee chose to recommend a separate statute, it would need to carefully consider each currently exempted agency and decide which agencies to subject to a new statute. Additional discussion involved whether and in what instances such information is currently disseminated and, if so, whether there are ways to limit information that has already been given to the federal government. The Subcommittee voted unanimously to recommend the bill to the full Council with the caveat that the bill address information that is currently required to be shared with the federal government.

Senator DeSteph then presented his bill, SB 730, by giving some background on why social media records of members of the General Assembly should be exempt from mandatory disclosure under FOIA. He provided a specific example of how a senator recently had to defend herself against a lawsuit involving her Facebook page. He stated that the senator's legal defense

cost close to \$50,000 and noted that a senator's annual legislative salary is only \$18,000 a year. Senator DeSteph explained that he believed the Office of the Attorney General should defend members of the General Assembly in those instances; otherwise, the costs are functionally prohibitive. Additionally, if the information is not public business, it should not be subject to disclosure by FOIA. Staff then provided background on how other states have dealt with exempting legislators from open records laws and reviewed the bill with the Subcommittee addressing new language and potential issues.

The floor was then opened for public comment. Aimee Perron Seibert, with the Virginia Press Association (VPA), stated that the VPA was opposed to the legislation. She stated that the biggest concern is that only the content, not the form, of the record should matter. Megan Rhyne, with the Virginia Coalition for Open Government (VCOG), addressed the issue of the language added in the definition of "public record." She explained that the phrase added in SB 730 was removed the previous year because it did not include possession of records, so people from local governments, schools, and other public bodies were saying that they did not prepare or own the document and it was therefore not a public record, even though they possessed it. She stated that VCOG is opposed to the legislation and the notion of expanding the working papers exemption. She also does not see any policy reason why members of the General Assembly should receive more protection than that afforded other public officials.

The Subcommittee then discussed the possible ways in which members of the General Assembly would post content on social media. Senator DeSteph stated that members could use a site paid for by a political account and that they would therefore have control of the content, which would therefore also be subject to FOIA. In the context of an account set up by the Senate that the member does not control, he stated that the Senate should be a party to the lawsuit and the Office of the Attorney General should defend against allegations of FOIA violations.

Discussion turned to the term "individual capacity" as it relates to records involving public business. Mr. Seltzer pointed out that, currently, the determination is whether the record involves public business. If, for example, a record consists of pictures of someone's children or food, the record is obviously not subject to FOIA, as such records do not involve public business. Mr. Vucci asked Senator DeSteph if the intent of the bill was for something that is not public business to not be subject to FOIA. Senator DeSteph confirmed that that is correct and that the intent is also to cover new formats and media. He stated that members need the ability to take down inappropriate posts. As an example, he discussed being contacted via Facebook by a woman who provided personal account numbers, social security information, and personal data because she thought it was a private space, when it was in actuality a public post. Megan Rhyne and Ms. Porto pointed out that the Subcommittee needed to separate two issues currently being discussed. The bill involves exemptions under FOIA, whereas some of the examples and discussion being brought up are First Amendment issues that are not addressed by FOIA.

There was then some discussion about whether adding the public body as a party to a suit is technically a separate concept from the social media account issue. Ms. Treadway stated that she would like to look at the specific language added throughout the bill in more detail. Mr. Vucci agreed and suggested adding in line 82 that it is social media that also "does not relate to public business." Staff suggested tying the language to the current definition of public record or that the

language state that "records not in the transaction of public business are not public records." The Subcommittee then discussed the necessity of the language of the bill in relation to the current definition of public records. The Subcommittee unanimously voted to have staff prepare a new draft incorporating the ideas discussed to review at its next meeting on June 27, 2018.

There being no further business before the Subcommittee, the meeting was adjourned.