

Remedies Subcommittee  
May 21, 2018  
10:00 AM  
House Committee Room 300A  
Pocahontas Building, Richmond, Virginia

The Remedies Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) held its first meeting on May 21, 2018, to consider two bills referred from the 2018 Session of the General Assembly: House Bill 213 (Mullin)<sup>1</sup> and Senate Bill 630 (Surovell).<sup>2</sup> Both Delegate Michael Mullin and Senator Scott Surovell were in attendance to speak to their bills. Subcommittee members Stephanie Hamlett (Chair), Dr. Sandra Treadway, and Mark Vucci were present. The Subcommittee approved the proposed agenda by unanimous vote.

Delegate Mullin presented HB 213, stating that the idea was to give greater weight to the Council's advisory opinions in an effort to streamline the process and avoid litigation for both sides in a FOIA dispute. He noted that, if passed, the bill would likely have a fiscal impact due to required additional staff to handle increased requests for advisory opinions. Delegate Mullin noted that there are relatively few court opinions addressing FOIA and that Council advisory opinions could form a body of precedent much like legal ethics opinions issued by the Virginia State Bar or advisory opinions from the Office of the Attorney General.

The Subcommittee discussed the time needed to produce advisory opinions, the likely fiscal impact if HB 213 were enacted, and how to handle possible disputes of fact and then opened the floor to public comment. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), expressed support for the idea, noting that the Council was modeled on New York's Committee for Open Government that also issues nonbinding advisory opinions.<sup>3</sup> The Subcommittee then discussed with Delegate Mullin how the timing for issuing opinions

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<sup>1</sup> **HB 213 (Mullin) Virginia Freedom of Information Advisory Council; formal advisory opinions; immunity from civil penalty.** Requires that formal advisory opinions issued by the Virginia Freedom of Information Advisory Council (Council) be approved by the Council and, after such approval, be published on the Council's website. The bill also provides that no officer, employee, or member of a public body shall be found to have willfully and knowingly violated certain enumerated provisions of the Freedom of Information Act if the alleged violation resulted from his good faith reliance on a formal advisory opinion of the Council made in response to his written request for such opinion and such opinion was made after a full disclosure of the facts.

<sup>2</sup> **SB 630 (Surovell) Virginia Freedom of Information Act (FOIA); civil penalty.** Provides that in addition to any penalties imposed under FOIA, (i) if a court finds that any officer, employee, or member of a public body failed to provide public records to a requester in accordance with the provisions of FOIA because such officer, employee, or member of a public body intentionally altered or destroyed the requested public records prior to the expiration of the applicable record retention period set by the retention regulations promulgated pursuant to the Virginia Public Records Act (§ 42.1-76 et seq.) by the State Library Board, the court shall impose upon such officer, employee, or member in his individual capacity, whether or not a writ of mandamus or injunctive relief is awarded, a civil penalty of up to \$100 per record altered or destroyed, which amount shall be paid into the Literary Fund, and (ii) if a court finds that a member of a public body voted to certify a closed meeting and at the time of such certification such certification was not in accordance with the requirements of FOIA, the court may impose on each such member voting to certify in his individual capacity, whether or not a writ of mandamus or injunctive relief is awarded, a civil penalty of \$500, which amount shall be paid into the Literary Fund.

<sup>3</sup> <https://www.dos.ny.gov/coog/index.html>

would work in light of the five working day time limit for responding to public records requests. Delegate Mullin stated that HB 213 would not change the deadlines for responding to requests, but the advisory opinions would help build a body of law that could be relied upon. After further discussion, the Subcommittee directed staff to prepare an amended draft with alternative language stating that the Council or its designee could approve advisory opinions and explicitly stating that the time limits to respond to a records request do not change when a public body requests an advisory opinion. The Subcommittee also asked about how other states with ombudsman offices handle advisory opinions, staffing, budget, and other matters. Ms. Rhyne offered to have VCOG's 2018 Summer Intern, Andrew Abraham, research how other states' ombudsman offices operate and report back at the next Subcommittee meeting. The Subcommittee stated that it would consider the amended version of HB 213 and the information provided by VCOG at its next meeting on June 4, 2018.

Senator Surovell then presented SB 630, beginning with the provisions that would impose a penalty for improper certification of a closed meeting. Senator Surovell provided several examples of situations where public bodies at both local and state levels had certified closed meetings that later were alleged to have been in violation of FOIA, and he suggested that the current penalties were not enough to deter such improper conduct.

Turning to the provisions of SB 630 that would impose a penalty for improper destruction of public records in violation of the Virginia Public Records Act (VPRA), Senator Surovell described a Washington Post article that stated that at least one county attorney advises clients that deleted email does not have to be produced under FOIA. Senator Surovell also related that currently there are no penalties for the improper destruction of records under VPRA. In discussion with the Subcommittee, concerns were raised about the potential cost of multiple violations and how it would affect smaller public bodies, inadvertent destruction of records, how and whether the penalties might apply in a situation where a public body strayed off topic during a closed meeting but their attorney brought them back on topic after reminding them of the limitations on closed meeting discussions, and whether the penalties would apply retroactively. Ms. Rhyne asked how it might affect a situation such as the case decided by the Supreme Court of Virginia this week, where a member of a board of supervisors came forward after certifying a closed meeting to state that he felt his board had strayed off topic during the closed meeting (and he had voted in favor of certification at the time). She questioned whether members of public bodies would be so forthcoming if they might be penalized for doing so. After further discussion, the Subcommittee voted unanimously to recommend an amended version of the bill to the full Council. The amendments would change the \$500 penalty for improper certification of a closed meeting to a range from \$100 to \$1,000 and would add a second enactment clause to state that the penalties would not apply retroactively.

The floor was opened to additional public comment; there was none. There being no further business before the Subcommittee, the meeting was adjourned.