

Remedies Subcommittee  
June 4, 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 second meeting on June 4, 2018, to consider amended versions of House Bill 213 (Mullin)<sup>1</sup> and Senate Bill 630 (Surovell).<sup>2</sup> Delegate Michael Mullin was in attendance, as were Subcommittee members Stephanie Hamlett (Chair), Ed Jones, Dr. Sandra Treadway, and Mark Vucci.

Delegate Mullin presented HB 213 at the Subcommittee's previous meeting in May, explaining that the bill would give greater weight to the Council's advisory opinions in an effort to help streamline matters and avoid litigation by establishing a body of precedent for the Freedom of Information Act (FOIA). After discussing the bill at that meeting, 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. Staff presented the amended draft for the Subcommittee's consideration today. The amended draft would provide for three types of advice: 1) formal advisory opinions that would be approved by the Council and would grant immunity from liability for a knowing and willful violation of FOIA, 2) staff advisory opinions that would be issued by staff without approval of the Council that could be introduced as evidence in a trial for a knowing and willful violation, but would not grant full immunity; and 3) informal advice. The amended draft further provides that formal advisory opinions and staff advisory opinions would be published on the Council website, that requests for such opinions would be required to be made in writing, that the Council may authorize a designee to furnish formal advisory opinions (that would still be approved by the Council), staff advisory opinions, and informal advice, and that a request for an advisory opinion

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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.

or advice would not alter a public bodies' responsibilities under FOIA. The Subcommittee and Delegate Mullin discussed establishing a policy on when the Council would issue advisory opinions or would decline to do so, the different type of advisory opinions that could be issued, and what protection from liability might be derived from reliance upon an advisory opinion. They also discussed again the issue of time limits for responding to a FOIA request, as well as anticipating potential public meetings issues, and how it would not be possible to draft, edit, and approve formal advisory opinions from the Council inside of those time frames in most instances. Concerns were expressed about granting full protection from liability for knowing and willful violations when the advisory opinion granting such protection would not be complete until after a public body had decided how to act in any given situation (i.e., the public body would have to decide whether to release records, whether to hold a closed meeting, etc., before receiving the advisory opinion). After discussing these issues, the Subcommittee voted unanimously to recommend to the Council an amended version of the draft presented today. The amendments would add that the Council would have statutory authority to set policy on issuing opinions and would have to adopt such a policy by next year if the bill passes. The Subcommittee also directed staff to make technical changes to the draft by replacing the term "agency of state or local government" with "public body," because "public body" is a defined term in FOIA and already used elsewhere in the Council's enabling legislation.

At its May meeting the Subcommittee voted to recommend to the Council an amended version of SB 630. 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. Staff presented the amended version of SB 630 to the Subcommittee today so that it could see how the changes appear in draft form. The Subcommittee invited public comment. Phyllis Errico of the Virginia Association of Counties stated that it seemed odd for a Virginia Public Records Act (VPRA) remedy to appear in FOIA; she questioned what would constitute a "record" for purposes of determining the maximum penalty ("up to \$100 per record"); and she suggested changing a "shall" to a "may" to give a court discretion in imposing the penalty for VPRA violations. Roger Wiley, an attorney representing local government and a former Council member, also questioned the provision stating that a court could impose the penalty whether or not a writ of mandamus or injunctive relief is granted. After a brief discussion, Ms. Hamlett noted that the amended draft had already been recommended by the Subcommittee, so it would be appropriate to raise any other issues before the full Council at its next meeting in August.

The floor was opened to additional public comment. Megan Rhyne of the Virginia Coalition for Open Government noted that traditionally the Council and its subcommittees would incorporate other issues that came up into existing subcommittees. She indicated she would ask the Council for this Subcommittee to continue to stand in order to consider other issues that may come up, such as the declaratory judgment issue raised before the Council last year. There being no further business before the Subcommittee, the meeting was adjourned.