



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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Personnel Records Subcommittee November 8, 2011 Meeting Summary Fredericksburg, Virginia

The Personnel Records Subcommittee held its third and final meeting in Fredericksburg, Virginia.¹ An audio feed from the Fredericksburg meeting site was made available in the Senate Redistricting Room, Division of Legislative Services, in the General Assembly Building. Ed Jones, Chair of the Subcommittee, recapped the discussions held by the Subcommittee at its last meeting in October, noting that it was the consensus of the Subcommittee not to recommend SB 812 (Martin) from the 2011 Session. Mr. Jones told the Subcommittee that the reasons for the introduction of SB 812, as stated by Senator Martin were embarrassment by lowest level employees, adverse impact on the morale of the workforce, and security of individuals against identity theft.

Staff briefed the Subcommittee on information provided by the Sara Wilson, Director of the Department of Human Resource Management concerning the legislative history of the \$10,000 threshold added to the Freedom of Information Act (FOIA) in 1978. Ms. Wilson reported that \$10,000 represented a "professional's" starting salary. Further, in 1988 (when she returned to DHRM), the informal benchmark for professional positions was Grade 10, entry rate \$21,666. Grade 10 is now blended inside Band 4 (grades 9, 10, 11). Ms. Wilson further reported the following information for state salaries in 2011.

Average salary	\$ 41,941
Median Salary	\$ 37,432
Lowest Salary	\$ 15,371
Highest Salary	\$236,086

She noted that only part-time or wage employees would make less than \$10,000 because of the increase in the federal minimum wage. Ms. Wilson added that FOIA covers local, regional, etc. employees, whose salaries may or may not be commensurate with state wages.

¹ All Subcommittees members were present; namely Ed Jones, Chair, Frosty Landon, and Kathleen Dooley.

Public Comment

Ginger Stanley, Executive Director of the Virginia Press Association (VPA) was present in Fredericksburg and told the Subcommittee that FOIA's requirement for the disclosure of salary was not about a particular dollar amount but of government accountability. She pointed to recent newspapers articles relating to the Richmond City sheriff who had employed several family members whose salaries were public information. Ms. Stanley urged the Subcommittee to make no change in existing law.

Megan Rhyne, Executive Director of the Virginia Coalition for Open Government was present at the remote Richmond meeting location and advised the Subcommittee that to change the law would be tantamount to taking a step backward in light of the demand for more accountability of government expenditures.

Subcommittee Discussion

Frosty Landon reported that previously he was in favor of increasing the \$10,000 due to inflation; but now rejected that option given that 47 other states do not have restrictions of the disclosure of public employees' salaries. He recommended striking the \$10,000 threshold from FOIA. Mr. Landon noted that there is a greater expectation of access/transparency in 2011 than in past years. He stated that transparency goes with the privilege of working for the public.

Kathleen Dooley stated that she appreciates the work of all involved. She noted that she considered both individual employees' interests and that of the public. Ms. Dooley averred that with public employees, disclosure of salary allowed the opportunity for equity in public compensation, while sometime adversely affecting morale. She noted that the word "embarrassment" trivialized the issue and said it was the privacy interest of public employees. She mentioned that identity and credit theft may be a potential problem. The balance struck in 1978 is no longer workable and with public employment scrutiny is to be expected. However, Ms. Dooley opined that entry level positions (e.g. sanitation, janitorial, and waste workers) there is no expectation of scrutiny. She recommended that the \$10,000 threshold be increased to \$30,000. In this way, accountability concerns would be met while protecting lower level employees' privacy interest.

Ed Jones stated that this was a tougher issue than expected and he had to reexamine his thoughts due to the competing interests. He recommended, however, that there be no change in the law. His reasons for this conclusion were four-fold. First, the legislative history of the \$10,000 threshold was only anecdotal and this threshold was not in the original bill, but was added in the House of Delegates sometime later in the 1978 Session. He also noted that two separate joint subcommittees of the General Assembly in 1989 and again in 1998 considered this issue and did not recommend increasing the \$10,000 threshold. Additionally, the trends for increased

transparency in government are now part of the collective "DNA" of Americans. Mr. Jones also mentioned the "Sunshine Portal" used in New Mexico that provides access to public employees' salaries and more. Finally, Mr. Jones agreed with Ms. Dooley that characterizing the concerns of public employees as embarrassment was not the appropriate description. It is about the privacy interest of public employees. However, he noted that there has been no pattern of abuse or serious negative impacts due to the disclosure of a public employee's name and salary.

Based on the above discussion, by a 2-1 decision, the Subcommittee would recommend no change in the law to the FOIA Council at its meeting on Monday, November 14, 2011. Ms. Dooley noted that she would be out of the country and would not be at the FOIA Council meeting; but would prepare a summary of her remarks for the record. These remarks appear as Appendix A to this meeting summary.

Appendix A Minority Report

Kathleen Dooley, Personnel Records Subcommittee

Issue:

Should the General Assembly amend Virginia Code §2.2-3705.8 to make public employee salary information exempt from the mandatory disclosure requirements of the Virginia Freedom of Information Act?

Recommendation:

The General Assembly should amend Virginia Code §2.2-3705.8 to update the \$10,000 “fulcrum” or balancing point established in 1978. The \$10,000 was intended to provide a balance between a public employee’s interest in the privacy of personnel information and the public’s interest in full disclosure of government expenditures. However, the \$10,000 figure is no longer meaningful or effective.

The proposed amendment, attached, would substitute a public employee salary or rate of pay of \$30,000 per year. The proposed amendment, like current law, would not apply to the salary or rate of pay of an elected official. The name, position, job classification and expenses reimbursed for any public official or employee would continue to be public information.

Rationale:

The Virginia Freedom of Information Act establishes a general policy that all public records shall be open to public inspection. One exception to this rule protects “personnel records” from public inspection. “Personnel records” were originally interpreted to include public employee salary information. However, in 1978, the General Assembly adopted a bill that excluded public employee salary information from the “personnel records” exemption, effectively making this information public. The 1978 law established an annual salary of \$10,000 as the point at which the public interest in disclosure outweighed the individual’s interest in the privacy of personnel information. The salary of any public employee making \$10,000 or more annually has been subject to public inspection since 1978.

In 1978, the federal minimum wage was \$2.30/hour.² A person working full-time, 40 hours/week 52 weeks per year would earn \$4784.00 annually. Thus, the \$10,000 balance point represented wages of approximately 2 x the minimum wage in 1978. Today, the federal minimum wage is \$7.25/hour, so a full time minimum wage earner makes \$15,080.00 annually. The \$10,000 balance point therefore no longer serves to shield any full-time public employee’s salary from public scrutiny.

There is a substantial public interest in access to public employee salary information. Fundamentally, it represents a governmental expenditure of public money, and

² United States Department of Labor, Wage and Hour Division, “Changes in Basic Minimum Wages in Non-farm Employment under State Law: Selected Years 1968 to 2011.”

employee salaries typically make up a significant component of any government agency's budget. Access to this information assists the public in determining whether compensation is fair – whether public employees are overpaid or underpaid – and how public compensation compares to private sector compensation. Public scrutiny of this information can serve to expose instances of nepotism, corruption, or discrimination. Public employees should be counted on this side of the balance – they share these interests in access to public salary information.

The Internet has transformed the nature of “public information.” In the past, this would have meant that the salaries of the top-earning public employees might have been published in the newspaper. Now, this information is posted on websites for literally the whole world to see.³ Public access is not limited to residents of a locality or state, but is now available to people in every country on the planet.

The 1978 legislation recognized a public employee's privacy interest in salary information. Salary information is personal in nature, and would be classified as “personnel” information except for Va. Code §2.2-3705.8. The employee has a privacy interest, an interest in being free from simple voyeurism, and an interest in personal dignity all at stake. Publication of this information potentially increases the public employee's exposure to identity theft, as it is a very specific data point linked to the employee's name which, combined with additional information about the employee, could be used for identity or credit theft. Online publication of salary information is a game-changer from the standpoint of the public employee with respect to all of these interests in privacy.

Virginia is in a minority of states that protect some public employee salary information from public disclosure. Hawaii does not disclose exact salaries of any civil service employees, but does disclose the salary range for the position an individual holds.⁴ South Carolina makes salaries of full time employees of \$50,000 or more public, as are the salaries of all part-time employees. Salaries for employees making less than \$50,000 per year are reported within a range of \$4,000. Salaries of employees making less than \$30,000 per year are reported only as a range of allowable salaries for the position. The other states make all public employee salary information public.⁵

³ See, for example, the website of the Texas Tribune, which publishes annual base salaries of 660,000 public employees, including the largest state agencies, universities, public schools, cities and mass transit agencies. The Kansas City Star website posts a collection of databases of public employee salary information. The Sacramento (California) Bee website posts salary information for state employees. The Alabama Department of Finance publishes monthly payroll information. Chicago Mayor Rahm Emanuel has posted all city employee name and salary information, as has the Empire Center for New York State Policy.

⁴ “State Laws Regarding Disclosure of Public Employee Salaries: A Summary,” Virginia Coalition for Open Government.

⁵ *Id.*

Virginia has established its public policy and precedent through the use of the \$10,000 balancing point. This legislation should be updated in order to implement that public policy for the current era. The legislature should retain the simple structure of a salary benchmark, but update it to reflect current salary levels. A figure of \$30,000 is recommended as a modern equivalent to the public sector jobs, and Virginia law recognizes a privacy interest in salary information. Updating the \$10,000 balancing point would protect the privacy interests of the lowest-paid public employees. The General Assembly and the FOIA Council should continue to monitor the privacy interests implicated by the publication of salary data on the Internet.

Proposed Amendment to Virginia Code § 2.2-3705.8:

A. Neither any provision of this chapter nor any provision of Chapter 38 (§ 2.2-3800 et seq.) of this title shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1; (ii) records of the position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees.

The provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is ~~\$10,000~~ **\$30,000** or less.

B. Nothing in this chapter shall be construed as denying public access to the nonexempt portions of a report of a consultant hired by or at the request of a local public body or the mayor or chief executive or administrative officer of such public body if (i) the contents of such report have been distributed or disclosed to members of the local public body or (ii) the local public body has scheduled any action on a matter that is the subject of the consultant's report.

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