

**Electronic Communication Meetings Subcommittee  
of the Freedom of Information Advisory Council  
September 5, 2012  
10:00 AM  
General Assembly Building  
Richmond, Virginia  
Meeting Summary**

The Electronic Communications Meetings Subcommittee (the Subcommittee)<sup>1</sup> held its third meeting of the interim to continue its deliberations on proposed changes to the electronic communications meetings (e-meetings) provisions of the Freedom of Information Act (FOIA) occasioned by the referral by the 2012 General Assembly of HB 1105 (Greason) and HB 1149 (Dudenhefer).

Staff briefed the Subcommittee on the existing requirements of FOIA, specifically §§ 2.2-3708 and 2.2-3708.1, relating to e-meetings. The draft proposed by the Subcommittee at its last meeting was also reviewed. Ms. Dooley, chair of the Subcommittee then asked for public comment.<sup>2</sup>

First to comment was Frosty Landon, a member of the FOIA Council, who reminded the Subcommittee that FOIA was always the result of balancing competing interests and he noted the difficulty of finding that balance. Mr. Landon stated that he felt strongly that the draft proposed by the Subcommittee would undo the years of work done by the FOIA Council. The intent of FOIA is to maintain to the fullest extent possible face-to-face meetings. He noted that conference calls do not work well given that the person who speaks loudest usually dominates the call. In cases of emergency, FOIA Council-recommended changes to the e-meetings provisions have been enacted into law to allow all public bodies flexibility. Mr. Landon referred to the situation at the University of Virginia concerning the initial firing of the president as an example of how the law can be misused. He urged the Subcommittee to continue its work toward an end of finding consensus.

Megan Rhyne, Executive Director of the Virginia Coalition for Open Government, told the Subcommittee that the Coalition opposed the elimination of the physical quorum and the expansion of e-meetings to local public bodies. She opined that the proposed draft was one sided. The result of the draft proposed by the Subcommittee would mean that there would be no face-to-face interaction among the membership of a public body or with the public they serve. She suggested that the Subcommittee continue its deliberations and identify the real issues and have a real discussion of their solution.

Ken Hutcheson on behalf of Stafford County told the Subcommittee that in bedroom communities like Stafford County, many elected and appointed officials live in Stafford, but work in Washington, D.C. He believes the draft gives localities the needed flexibility and without it, the membership of local governing bodies would not be as diverse. He supported the proposed draft.

---

<sup>1</sup> All Subcommittee members were present (Dooley, Selph, Whitehurst, and Hamlett)

<sup>2</sup> Dick Hammerstrom, Free Lance Star submitted written comments to the Subcommittee.

Jeff Palmore on behalf of the Office of the Governor supported the draft and reminded the Subcommittee that the Governor's Reform Commission had recommended the elimination of the physical quorum in 2010. Mr. Palmore noted that private sector folks use audio/visual meetings in their day-to-day business and the same is desired for governmental entities. He believes that government should move into the 21st century. Mr. Palmore suggested that the proposed draft be revised so that the limitation is on individual members participating remotely and not the total number of meeting held by a public body. He stated that he has spoken with several state agencies and the problem is getting a quorum for meetings that have fewer agenda items. Mr. Palmore told the Subcommittee that the provision eliminating the physical quorum requirement would not be abused as it is an exception and not the rule. Ms. Dooley inquired whether Mr. Palmore favored treating the full public body and its subcommittees the same regarding a physical quorum. He responded that it makes sense for subcommittee meetings where there is a limited agenda. Mr. Palmore told the Subcommittee that he favors elimination of the physical quorum for the full public body as well and suggested perhaps establishing different benchmarks for the whole body versus subcommittees of the whole.

Phyllis Errico on behalf of the Virginia Association of Counties told the Subcommittee that based on the survey of their membership discussed at the Subcommittee's last meeting, it was unfair to assume that loosening the requirements for e-meetings would lead to abuse because the majority of those surveyed expressed a clear preference for face-to-face meetings. Ms. Errico stated that the exceptions found in § 2.2-3708.1 do not help persons who live and serve in one jurisdiction but work in another jurisdiction. She suggested that perhaps advisory bodies should be treated differently and the rules relaxed for them.

Sandi McNinch, General Counsel for the Virginia Economic Development Partnership Authority, advised the Subcommittee that quarterly meetings of the Authority pose no problems in obtaining a physical quorum; however the quorum problem persists with their subcommittees. She noted that current law appears to enforce bad decisions and may lead to the appointment of members based on where they live versus their qualifications to serve.

Gordon Dixon, Director of the Department of Professional and Occupational Regulation (DPOR), told the Subcommittee that DPOR has more than 300,000 regulants, covering 14 professions, and regulated by 17 regulatory boards. There are 180 full regulatory board meetings each year. By way of example, Mr. Dixon mentioned that the Board for Contractors has 15 members and is the largest regulatory board at DPOR. The Board has trouble getting a quorum and finding people to serve who have the statutorily-required qualifications.

Craig Merritt, Esq. on behalf of the Virginia Press Association (VPA) stated that the VPA is not claiming neutrality as others have done. He told the Subcommittee that 12 years ago when the FOIA Council was created, there was a single mindedness that the FOIA Council would work to improve the quality of access. He suggested that adopting legislation that has as its principal goal to provide convenience to governmental entities is the wrong approach. Mr. Merritt stated that historically VPA has acknowledged that technology will impact the manner in which things are done, but again reiterated that while convenience for government as a secondary benefit is laudable, there must be forward progress on the public access front as well. He reminded the Subcommittee that the policy underpinning e-meetings law was a distinction between state and local bodies. The former are geographically far flung, while the latter are locally contained. State public bodies are inherently different animals than local public bodies. Mr. Merritt opined that subcommittees may need relief and he expressed a desire to have that conversation. He

noted that the problem with the proposed draft and the arguments made to support it are misplaced. Much of the discussion has focused on the impact of traffic problems. Mr. Merritt opined these arguments are dubious given that people willingly commute two hours to work and one hour to church, but are unwilling to drive to do the public business for which they are elected or appointed. Mr. Merritt agreed the conference calls are not ideal and suggested that adding a video requirement would help. He suggested that if the proposed draft was approved the price that would be paid would be three folks sitting together with the public facing these three members. He questioned the quality of that meeting. Mr. Merritt stressed that VPA is not anti-technology nor is it anti-problem solving. He told the Subcommittee it should first identify real problems and not make changes to the law based on anecdotes or for the pure convenience of persons serving on governmental bodies. He questioned whether the conduct of the public business deserved less commitment.

Craig Fifer, former FOIA Council member and e-meetings subcommittee chair, told the Subcommittee that he serves as the secretary for VCOG and has 18 years' experience with local government as an e-government manager. Mr. Fifer advised that he was not speaking in any of the above capacities, although he noted that in his daily work, he wants to "e" everything. Mr. Fifer stated that the proposed draft was a bad idea and the biggest substantive and most sweeping change in the history of Virginia FOIA. His substantive concern is that face-to-face meetings are preferred and the FOIA Council has adopted a policy statement to this effect. He noted that the General Assembly is not in favor of e-meetings for themselves because of the specialness of meetings conducted in person. Mr. Fifer pointed out that based on staff research, state public bodies do not use e-meetings, suggesting that these meetings are not useful or preferred. He further noted that the research could also mean that the holding of e-meetings was under-reported or perhaps more e-meetings were conducted not in compliance with FOIA. Mr. Fifer offered that it was premature to open the flood gates to local public bodies. He noted that the FOIA Council has a long history for identifying a problem before attempting to solve it. Mr. Fifer stated that in his opinion no problem had been adequately documented and it is a red herring to say the draft is increasing public participation. There are no legal barriers to increasing public participation in existing law. Finally, Mr. Fifer suggested that protecting access and ensuring quality meetings is the answer.

#### Subcommittee Discussion

Mr. Whitehurst stated that face-to-face meetings are preferred and noted that public meetings need to be as open as possible to the public. He acknowledged that government service is a tremendous commitment of time and energy, but suggested that if that is too high a burden, an individual should step down or not serve. He agrees that government should take advantage of technology, but there needs to be a balance and public access improved. Mr. Whitehurst stated that he is not ready to endorse the proposed draft as too many questions remain unanswered. He did suggest that there may need to be a tighter restriction on the number of meetings that were not face-to-face meetings.

Mr. Selph stated that he agreed with Mr. Whitehurst and opined that the proposed draft was not ready for prime time. He noted that he served on the Board of Pharmacy, which met quarterly, and while it might be OK to allow individual members a limited number of opportunities to participate from a remote location, it was not OK for the entire board.

Ms. Hamlett noted that she believed that the proposed draft was premature and there were many issues to digest that were not fully discussed. Ms. Hamlett told the Subcommittee that she has represented many regional and state public bodies and feels differently about conference calls versus visual meetings. She stated that with certain agencies like VRS and the Virginia Resources Authority with which she has experience, information at meetings usually takes the form of charts, graphs, and numbers. She questioned how well this would translate if there was no physical gathering required.

Ms. Dooley inquired of staff what the FOIA Council's expectation was of what the Subcommittee would do. Staff advised that the only expectation was full discussion of the issues. There was no requirement for a Subcommittee "product" and no recommendation to the FOIA Council was still a recommendation. Additionally, a recommendation that the matter needed more study was acceptable. Ms. Dooley suggested that the Subcommittee, in light of the discussions today, may want to consider relaxing restrictions as they apply to subcommittees of state public bodies. Ms. Hamlett suggested that in connection with subcommittees of state public bodies, a condition precedent would be where there is considerable distance to travel.

At the conclusion of the meeting, there was consensus among the Subcommittee that the proposed draft be abandoned, but that the Subcommittee would continue its work in order to find the appropriate balance. There being no further business, the meeting was adjourned.

#