



Virginia Freedom of Information Advisory Council

Records Issues Subcommittee

May 18, 2021, at 12:00 p.m.

Electronic Meeting

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The Records Issues Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) met electronically with Matthew Conrad, chair, presiding.¹ The meeting began with introductions and opening remarks followed by presentations and discussion. Materials presented at the meeting, as well as all written public comments, are accessible through the [Council's 2021 Subcommittees webpage](#).

Presentation and Public Comment: HB 2000 (Roem, 2021)

Delegate Danica A. Roem

Delegate Roem began by noting that she asked for HB 2000 to be referred to the Council, with the goals being stakeholder input on both sides of the issue and a compromise on legislation that can be recommended by the Council.

She gave a detailed overview of HB 2000, which provides changes to the provisions in the Virginia Freedom of Information Act (FOIA) that allow a public body to charge reasonable fees "not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records."² Delegate Roem said she introduced this bill because she believes the current FOIA fee system is not working and fees are being used as a deterrent to producing records under FOIA.

After remarks by Delegate Roem, the Subcommittee heard comments from members of the public who are in favor of the legislation:

- Mark Hickman, on behalf of the Virginia Press Association (VPA), noted that the VPA supports FOIA fee reform and an in-depth study into the issue and strongly supports making the first two hours of fulfilling a request for records free, but it has concerns with a proposal limiting the number of requests that qualify for the free two hours to four or fewer requests within a period of 31 consecutive days. The VPA supports a straightforward provision allowing the public to be charged after the first two hours spent accessing or searching for the requested records, along with a cap on charges of the lesser of the hourly rate for the lowest-paid employee or \$25 per hour—not \$33 per hour as provided for in the legislation. The VPA also supports posting FOIA fee policies online and believes that the public should not be charged for public records unless a public body has incurred an actual expense. Amigo Wade asked about the process for members of the public who choose to visually inspect public records in person and take their own photographs of the records, and why that has been an issue as it relates to charges. Mr.

¹ **Members Present:** Matthew Conrad (chair), Pamela O'Berry, Bruce Potter, Cullen Seltzer, Dr. Sandra Treadway, and Amigo Wade

Members Absent: None

² See VA. CODE § 2.2-3704

Hickman noted that there have been instances where the public body made records available for inspection and still charged the requester a per-page fee for the records even though no physical copies were made. Alan Gernhardt, Executive Director of the Council, explained those instances violated current FOIA laws, which provide that a public body can only charge a reasonable fee for actual costs incurred. Mr. Conrad inquired about the remedies that currently exist for such a violation. Mr. Gernhardt explained FOIA provides that a requester may file a petition for mandamus or injunction in general district court or circuit court to enforce the provisions of FOIA.

Megan Rhyne, on behalf of the Virginia Coalition for Open Government (VCOG), said that VCOG supports the overall concept of fee reform. She mentioned a memo provided to the Council by VCOG that provides a breakdown of other states' laws regarding fees for the production of records and expressed an interest in requiring a public body to provide a breakdown of fees when someone requests such records, which she said will help determine whether a charge is in fact reasonable. Bruce Potter asked whether it is correct that Virginia is one of only a few states that has no real specific provisions on fees in FOIA and whether VCOG keeps track of citizens who have gone to court to challenge the reasonableness of fees charged pursuant to FOIA. Ms. Rhyne noted that Virginia is one of a handful of states that does not have specificity in its FOIA laws regarding fees and that she has not seen much litigation concerning fees since the *American Tradition Institute v. Rector and Visitors of University of Virginia* case that was heard by the Supreme Court of Virginia in 2014³.

Next, the Subcommittee heard comments from members of the public who are opposed to the legislation or who take a more neutral stance on the topic of the legislation:

- Mark Segal, on behalf of the Hanover County Sheriff's Department, noted that, in the case of police departments and because of certain privacy laws, citizens cannot always have access to the back rooms where files are located and that records may need to be gathered and physically transferred to another room, a task that requires an employee to be pulled away from his normal duties. He mentioned that law-enforcement agencies may only spend 15 minutes to access or search for a requested record, but that search may result in an enormous number of pages that need to be copied. He has concerns that in those cases where a search for records results in a tremendous number of documents, but the total time spend on producing those records is less than two hours, the public body loses money if it is unable to charge for the time because of the high costs of production.
- John Jones, on behalf of the Virginia Sheriffs' Association, expressed an interest in working alongside the Council to reach a compromise, but noted that more information is needed to determine what the cost to public bodies will be if this legislation is enacted.
- Martin Crim, a local government attorney with Vanderpool, Frostick & Nishanian, P.C., expressed his opinion that the effect of this legislation is to invite harassment, abuse, and litigation for public bodies and said the bill would impose a significant financial burden for small jurisdictions that only have a handful of employees and no one person dedicated to responding to FOIA requests full time.

³ American Tradition Institute, et al v. Rector and Visitors of the University of Virginia, et al. [2014] Va. 287 (Supreme Court of Virginia), p.330.



- Sheriff Lane Perry, on behalf of the Henry County Sheriff's Office, mentioned that his agency currently has internal policies on the amount of time and number of copies a requester can get for free, along with a set charge per page for copies after the number of free copies has been exceeded. He noted that there are people who use FOIA to the extreme and said that providing for free two hours at a time up to four times a month for searching and accessing records will result in an employee being pulled away from other duties. Sheriff Perry also noted that charging for records often makes requesters narrow their requests to get to the information that they are actually interested in in an effort to reduce the cost of the records.
- Chief Mac Babb, on behalf of the Virginia Tech Police Department, said that creating an opportunity to get a number of free FOIA requests per month may not be the best avenue to improving records access, as it will create a financial burden on law-enforcement agencies, especially with the passing of HB 2004 (Hurst, 2021 Special Session I), which allows for the release of criminal investigative files. He also noted that the bill does not differentiate between requests from individuals and requests from groups, such as the media. In essence, a media organization could receive unlimited free FOIA requests because a different person could make a request each time.
- First Sergeant David Ostwinkle, on behalf of the Virginia State Police (VSP), noted that more than 90 percent of the FOIA requests the VSP receives require two hours or less of search time but that the number of FOIA requests received each year is growing exponentially. He anticipates that there will continue to be an increase in requests year after year, especially due to the passing of HB 2004. First Sergeant Ostwinkle expressed concern with the potential fiscal impact of HB 2000 to the VSP, given the fact that under this legislation it would not be able to charge for the majority of the requests it receives. He suggested that there be a schedule of costs that differentiates between the different types of records, such as digital, paper, and video records.
- Jim Hingeley, Albemarle County attorney for the Commonwealth, also noted that this legislation, in conjunction with the passing of HB 2004, will have a large financial impact on public bodies. He mentioned that there are a number of different statutes that need to be considered alongside the provisions of FOIA when responding to a request for records. He suggested an exception to the bill's limit of \$33 per hour for attorneys for the Commonwealth, allowing them to charge the actual hourly rate of the attorney assigned to respond to certain requests when they require a higher level of skill and expertise to review.
- Phyllis Errico, speaking on behalf of the Virginia Association of Counties and on behalf of Michelle Gowdy with the Virginia Municipal League, agreed that fee reform is necessary, but said the groups do not agree with the approach taken in HB 2000. She said that it is not always apparent what it takes to search for certain records, especially since, often, older paper records are located off-site in a warehouse and records must be reviewed and often redacted extensively to be in compliance with FOIA and other laws that govern the release of certain types of information.

Delegate Roem wrapped up the conversation by expressing her desire to make sure that FOIA fees are not used as a deterrent, especially for requesters who act in good faith. She noted that a lot of times members of the public cannot afford to take public bodies to court when fees are



unreasonable, and she pointed out that government officials and public bodies should not be determining who is acting in good faith and who is not. She said that public bodies should err on the side of open government and transparency—public documents should be public.

Discussion: HB 2000

The Subcommittee discussed how best to approach the topic of HB 2000 and FOIA fee reform in general. Delegate Roem expressed interest in having a Council recommendation in time to introduce legislation for the 2022 Session of the General Assembly. The Subcommittee asked Council staff to conduct research on how other states approach fees for the production of public records and to compile the different options for the Subcommittee to consider at its next meeting.

Presentation and Public Comment: HB 2196 (Mullin, 2021)

Council Staff

Council staff gave a brief overview of HB 2196⁴, and the Subcommittee heard public comment from those in favor of the bill. Mr. Hickman supports HB 2196. Ms. Rhyne supports HB 2196 in concept but noted that there are some specifics that need to be worked out to ensure that only certain types of disciplinary files can be subject to release.

Next, the Subcommittee heard from members of the public who are either opposed to the bill or who take a neutral stance on the bill:

- Mr. Jones noted that the language in the bill is overly broad and could result in the release of records related to unfounded complaints or complaints that remain unresolved.
- Mr. Crim proposed that the bill disincentivizes law enforcement from conducting disciplinary proceedings and makes it much less likely that law enforcement will conduct a full investigation, especially if the nature of complaint is questionable. He said that the legislation encourages harassment of officers and made a comparison of the concept in HB 2196 to complaints reported to the Virginia State Bar (VSB) regarding attorney misconduct. Those complaints are handled internally at the VSB and only the outcomes of those complaints are made public and only in very limited circumstances. Mr. Crim also noted that the bill treats police differently from other municipal or public employees.
- Chief Craig Branch, on behalf of the Germanna Community College Police Department, agreed that the bill sets a double standard for law-enforcement officers and sends the wrong message to them when other public employees are not held to the same standard. He feared that the legislation may cause harassment and a significant increase in doxing and threats to law enforcement.
- Chief Scott Burke, on behalf of the Portsmouth Police Department, said that the bill is very narrowly targeted at law-enforcement officers and argued that the same level of openness should apply to other public and municipal officials and employees.
- Chief A.J. Panebianco, on behalf of the Middleburg Police Department, expressed his opinion that the effect of this legislation is to change disciplinary action from a redemptive process to a punitive process and that law-enforcement officers will be forced to sacrifice privacy for a desire to protect and serve their communities. Cullen Seltzer asked if Chief

⁴ Delegate Michael P. Mullin was unable to attend the meeting.



Panebianco had a sense of whether there is a category of disciplinary proceedings against law-enforcement officers that should be open to the public. Chief Panebianco noted that once an action by an officer crosses the threshold of becoming a crime, it becomes public information anyway, and for other policy violations by officers, there are avenues of discipline all the way up to firing. He also noted that, with the recent passage of police reform, an officer who is fired for policy violations cannot apply to and be hired by another jurisdiction's law-enforcement agency unless he first consents to the production of his personnel file, and law-enforcement agencies are now required to release that information to other law-enforcement agencies that have requested it.

- Sheriff Perry expressed a concern that the bill may lead to certain law-enforcement agencies refusing to properly conduct disciplinary investigations for fear of creating a record that would then be open to the public.
- Chief Babb noted that there are mechanisms already in place for purpose-driven requests by a plaintiff in a court case (known as Brady requests) and said that, rather than the approach taken by HB 2196, law-enforcement agencies should go through the accreditation process offered by the Virginia Law Enforcement Professional Standards Commission instead.
- Mr. Segal expressed his opinion that the retention of police officers is already difficult and this bill will make recruitment and retention even more difficult.
- First Sergeant Ostwinkle said that the bill runs contrary to the Commonwealth's long-standing policy of protecting personnel records and that it is too broad and does not differentiate between substantiated and unsubstantiated complaints. He, like others, also feared that the bill may further exacerbate the current issues with police retention and recruitment.
- Ms. Errico said that the numerous law-enforcement reform bills that passed in the last year already start to address the issue that this bill is trying to solve. She also mentioned concerns about expanding the bill to include the release of the disciplinary records of all public or municipal employees.
- Ms. Gowdy also objected to expanding the bill to include other public or municipal employees and expressed significant concerns about the release of law-enforcement disciplinary records as well.

Next Meeting

The next meeting of the Subcommittee will be held on June 14, 2021, at 1:00 p.m.



For more information, see the [*Council's website*](#) or contact the Division of Legislative Services staff:

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