



HB 270 and SB 219

3 CHANGES REQUESTED

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HB 270 and SB 219 are identical bills that seek reform of the unemployment insurance (UI) benefits administration under the Virginia Employment Commission (the Commission). Part of that reform includes three issues important to VCOG:

1. The creation of an "advisory committee" of stakeholders and subject matter experts in §30-222. (Lines 293-299)
2. The creation in FOIA § 2.2-3705.7 of an exemption for records of the Office of the Appeals Ombudsman. (Lines 261-263)
3. The grant of confidentiality to Appeals Ombudsman. (Lines 373-387)

Advisory Committee

The "advisory committee" noted in #1 would be a public body for purposes of FOIA. The Commission itself (as defined in § 60.2-108) is a public body under FOIA, and FOIA's definition of "public body" includes "(ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body." The advisory committee is defined in 30-222 as one that will make recommendations to "the Commission." Thus, perhaps unwittingly, the bills create a new public body.

While soliciting input from those impacted, interested and with expertise is laudable, a public body made with undefined, amorphous parameters of "stakeholders" and "subject matter experts" only will find it difficult to comply with FOIA's meeting provisions. Serious consideration should be given to other avenues to solicit input from assorted voices without tying their hands by creating a public body in statute.

Confidential records (#2 and #3 are related and will be discussed together)

The FOIA exemption is not needed. Proposed §60.2-121.3 says that "all memoranda, work products and other materials contained in the case files of the Appeals Ombudsman and personnel of the Office shall be confidential." FOIA says in the lead-in language to 2.2-3705.7 (Lines 21-22) that records under an exemption can be released in a custodian's discretion "except where such disclosure is prohibited by law," meaning there is no discretion; it cannot be disclosed. There is no need for both a mandate of confidentiality in one statute and a discretionary exemption in FOIA.



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On the other hand, the declaration in §60.2-121.3 that all case files and correspondence are confidential throws a blanket of obscurity over the ombudsman's work.

An ombudsman is in a unique position to directly assist individuals while also promoting principles of good and open government. The bills tilt the balance too far in favor of the individuals, sacrificing accountability of the ombudsman and the ombudsman's office.

There is no requirement in these bills for the ombudsman to provide information related to final outcomes. There is a requirement in these bills for the ombudsman to maintain data related to the appeals process, but not outcomes. And a carve-out for disclosure when a person receiving assistance files a complaint is dependent on that person, who may have many reasons for not wanting or knowing how to launch a complaint.

Few if any entities with quasi-judicial powers are able to keep their work perpetually under wraps. It should also be noted that an attorney's legal memoranda and work product can already be withheld under FOIA under 2.2-3705.1(3).

VCOG recommends the following:

1. Reword line 293 to avoid creating a public body subject to FOIA's meeting rules:
The Commission shall solicit input from stakeholders and subject matter experts for the following purposes. . .
Continuing on to line 298 after the "needed." Strike the rest of line 298 and 299 and replace it with something along the lines of:
Results and recommendations obtained from stakeholders and subject matter experts shall be reported to the Commission at a public meeting least twice annually.
2. Eliminate the FOIA exemption on lines 261-263. It is unnecessary to include the same records in a discretionary exemption that have already been prohibited from disclosure by another law.
3. Require the disclosure of outcomes. Findings of fact or summaries can be issued without disclosing the name of the person receiving assistance, thus making the overall body of work subject transparent while also protecting the privacy of the individuals.