



Virginia Coalition for
Open Government

Position Paper in opposition to recommendation to eliminate the Virginia FOIA Council

Prepared for: The Governor's Commission on Government Reform and Restructuring

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Introduction

In response to the Governor's Commission on Government Reform and Restructuring's invitation for public comment on its recommendations, the Virginia Coalition for Open Government's Board of Directors (VCOG), on behalf of our more than 150 institutional, corporate and individual members, requests that the following statement be accepted for consideration.

VCOG is writing in opposition to a recommendation within the Government Simplification and Operations Committee's Boards and Commission Elimination and Consolidation report. Specifically, VCOG opposes the recommendation (the "Recommendation") to eliminate the Virginia FOIA Council (the "Council").

Governor Bob McDonnell identified four primary goals of the Commission. One was to "identify opportunities for creating efficiencies in state government, including streamlining, consolidating, or eliminating redundant and unnecessary agency services, governing bodies, regulations and programs."

The fourth of the four goals was to "examine ways for state government to be more transparency, user friendly and accountable to the citizens of the Commonwealth." VCOG commends the Commission for recognizing transparency as a cornerstone of good government.

It is VCOG's position, however, that by recommending elimination of the FOIA Council, the goal of transparency, user friendliness and accountability is being undermined by the goal of efficiency. Yet, it is also VCOG's position that elimination of the Council would not be efficient, either.



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I. The FOIA Council promotes the Reform Commission’s goal of government that is “more transparent, user friendly and accountable” to Virginia’s citizens.

A. Purpose behind the Council’s creation

An interim legislative study committee in 1999 completely overhauled the Virginia Freedom of Information Act. Section by section the law was reviewed for coherence and readability as well as to address specific abuses, misunderstandings and outdated concepts.

Part of the FOIA overhaul was the creation of the FOIA Council. The Council was promoted as a mechanism for citizens and government to avoid litigation and to resolve FOIA disputes in a more timely and efficient manner.

VCOG actively supported creation of the Council, arranging for staff from similar agencies in other states (notably New York and Connecticut) to testify before the study committee about the benefits a statewide ombudsman for FOIA could bring to Virginia.

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Then-Senator and now Lt. Governor Bill Bolling carried the Senate version of the bill creating the Council, which passed with only two votes against it. The vote to make to the Council permanent in 2002 was unanimous, with then-Del. Bob McDonnell voting in support.

Since its creation, the Council has served as a model for other states, including Indiana, New Jersey, South Dakota and Tennessee.

B. Staff functions

As provided in Virginia Code §30-178(B), the Council consists of 12 members, including two state legislators, the state librarian, a designee from the Attorney General’s Office and multiple at-large seats to represent citizens, media and local government.

The Council’s functions are enumerated in §30-179 and include issuing advisory opinions “in an expeditious manner,” conducting training for members and staff of public bodies, publishing educational materials and otherwise working with state and local agencies to assist them in carrying out their duties.

Through 2009, the Council had issued 211 formal, written opinions on FOIA and 12,199 informal ones. From 2005 to 2009, an average of 1,700 people a year contacted the Council for help interpreting Virginia’s FOIA laws. Nearly half of those requests have come from government employees (6,125). Members of the public account for nearly 40% of the requests, while the members of the press make up roughly 15% of the requests.



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The public is given the opportunity not only to be heard at the designated times, but also to actively participate in the discussion as it progresses, offering alternative ways to approach a problem or suggesting specific statutory language.

The General Assembly has consistently afforded great deference to recommendations that have come through the FOIA Council study process; the legislators know that the legislation has been thoroughly reviewed by all (or most) interested parties.

D. Benefits to the public

Prior to the Council's creation, if citizens were denied a record or turned away from an open meeting, their only option in challenging the action was to go to court. But, citizens often had to drop their cases if they were appealed past the district court level because they could not afford the process or did not have an attorney. Not surprisingly then, out of 20 or so FOIA cases the Virginia Supreme Court has considered, almost all have been brought by media corporations, that is, corporate entities with deeper pockets and lawyers on-call.

With the advent of the Council, citizens now have a quick and easy way to determine whether they have been wrongly denied their rights under FOIA, or whether the law supports the government's position. The Council gives timely, impartial and easy to understand explanations of the law.

The Council frequently serves as a conduit between citizens and government. Citizens are comforted that someone has taken their question seriously, and government employees respect the advice that they get from a fellow public servant.

II. Elimination of the FOIA Council conflicts with the Commission's goal of creating efficient government operations.

A. Government employee use and Attorney General opinions

As noted above, a near-majority of inquiries made of the FOIA Council over its 10-year history have come from government employees at all levels.

It has been suggested in the Recommendation that the Attorney General can issue opinions in lieu of the Council. In fact, that is the way the system operated prior to the Council's creation.

The Attorney General is tasked with providing legal opinions on any number of government questions. The bright and dedicated lawyers on staff may have areas they specialize in,

but none have FOIA as their primary responsibility. The 900-plus inquiries government employees made to the FOIA Council in 2009 could cripple the Attorney General's office.



When compared to a process where government employees can get an answer in minutes, the alternative is inefficient





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It would also be true, however, that the AG's office would not be asked to opine on 900-plus FOIA problems. That is because by statute, the AG can issue opinions only to certain designated individuals, such as a state legislator, a Commonwealth Attorney or a constitutional officer.

When compared to a process whereby a front-line FOIA officer or records manager can simply pick up the phone and get an answer to a FOIA question in minutes, the alternative is unduly burdensome and inefficient. That process would take days or weeks, requiring that same employee to go up the chain of command to ask a statutorily designated individual to request an AG's opinion, which would then take more time for that opinion to be written.

It should be noted at this point, too, that citizens cannot ask for an AG's opinion. They would be left out of the FOIA-resolution process, which does not promote the Commission's goal of a government that is more user friendly or accountable.

B. Litigation

The Commission's Recommendation also notes that attorneys' fees are available to a plaintiff who wins a FOIA lawsuit.

As noted above, one of the leading arguments for the Council's creation was that it would serve as an alternative to litigation. In a FOIA case, even if the government wins, it still has to pay its own attorneys -- larger localities, of course, have attorneys on staff, but smaller localities frequently rely on outside counsel who have to be paid. If the government loses, it not only has to pay its attorneys, it now also has to pay the other side's attorneys: a recipe for budgetary inefficiency.

With the FOIA Council, some lawsuits can be avoided altogether. Issues can be resolved with the help of the Council's staff at no cost to that government agency or to the citizen.

It should also be noted at this juncture that the Attorney General may be called upon to represent a state agency in a FOIA case, which can undermine a citizen's confidence in the impartiality of the Attorney General opinion process.

III. Conclusion

In conclusion, VCOG urges the Commission to reject the proposal to eliminate the Virginia FOIA Council. This valuable resource promotes government efficiency and helps make the Commonwealth more transparent, user friendly and accountable to its citizens.