6B/Virginia

Nov. 2, 1998
Dailypress.com
Hampton Roads, Virginia

Freedom of Information means peace of mind to many

BY JENNIFER PETER, The Virginian-Pilot

Professors and watchdog groups have described it as a fundamental freedom, the basis of our democracy, an inalienable right.

But citizens view the need for strong state Freedom of Information laws in a much less complicated way.

The parents of Virginia Beach motorist Bruce Quagliato saw it as a way to find out more information about the shower of police bullets that killed their son.

Stewart Bryan Bouton, a citizen of Appalachia in southwestern Virginia, saw it as a way to find out how much money his town had in the bank.

For the past 30 years, lawmakers have wrestled with the task of translating the lofty premise of open government into the mundane prose of law so that citizens like the Quagliatos and Bouton can review the actions of their elected leaders.

The latest attempt is taking place this year as a subcommittee of lawmakers tries anew to draw the line between the equally American values of public openness and personal privacy.

While government secrecy can be used to hide the misdeeds of public officials, it also can be used to protect the reams of private information that government gathers on each of its citizens: when you were born, when you died, whom you married, whom you divorced, how much you pay in taxes, how much you paid for your house.

Stray too far to one side and the legislature could strip citizens of their right to fully participate in government. Stray too far to the other and the legislature could strip citizens of their privacy and the government of its need to operate efficiently.

``When you talk about opening public meetings and public records to a greater extent, you're not only talking about public scrutiny by the media and the public at large,'' said G. Timothy Oksman, Portsmouth's city attorney. ``You're also talking about taking government records and opening them up to commercial interests who desire to pry a little bit more into the lives of citizens.''

On the other hand, advocats of open government say, government bureaucracies use privacy as an ecuse not to release information the public is entitled to see.

``The trend in Virginia is. . . to sometimes, in the name of privacy, in reality eviscerate the FOIA,'' said Kent Willis, director of the American Civil Liberties Union of Virginia.

And even though FOIA instructs agencies to ``redact'' -- cross out -- private information on public documents so they may be released, ``the state is very reluctant to send out redacted material,'' he said. ``They will usually simply refuse.''

At times, the legislative debate about open government comes down to the addition -- or subtraction -- of a single word. Can a legislative body's discussion of ``possible'' litigation be held privately? Or should it be ``probable'' litigation? Or ``imminently threatened'' litigation?

In making these word-by-word decisions, lawmakers say, they must steer a cautious course between the public's right to know and a government's need to operate efficiently, safely and without destructive public intrusion.

``What's enough, and how much is too much?'' asked state Del. Joe T. May, R-33rd, a member of the subcommittee who represents Clarke County and parts of Fairfax, Fauquier and Loudoun counties.

A.E. Dick Howard, a constitutional law expert at the University of Virginia and the author of the modern state constitution, put it this way: ``Each of these principles -- privacy on one hand, freedom of information on the other -- has come to be viewed as important policy goals.

``I don't think we have been very rigorous in trying to decide just how to balance these sometimes competing principles,'' Howard said. ``We like both ideas, and are not sure how to reconcile them.''

Some argue that the public can never know too much about the government, while others -- particularly government attorneys and officials -- contend that too much information can at times work against the public good.

While the framers of the Constitution did not address the public's right to know, the concept is imbedded within the words of the Declaration of Independence, according to state Del. Clifton A. Woodrum, D-16th, the chairman of the open-government subcommittee and sponsor of the bill that formed it.

``The Declaration said that government derives its right from the consent of the governed,'' Woodrum said. ``Without knowledge, there can be no consent.''

In 1966 -- during a period of high public distrust -- Congress affirmed this principle with passage of the federal Freedom of Information law. Virginia passed its own law in 1968.

Over the years, lawmakers and experts said, Virginia's law has been weakened by the addition of exemptions that shield sections of the public record from disclosure.

``In many ways, I'm not sure the act today is doing what it was intended to do,'' said Sen. William Bolling, R-4th, another subcommittee member. ``All of these exemptions have turned the act into a Freedom of No Information Act.''

As part of its work, the FOI subcommittee is reviewing the 97 current exemptions to the public information laws to determine if they are justified and if they can be tightened.

In general, an exemption has been considered justified if disclosure would invade an individual's privacy, impede a criminal investigation, reveal a corporation's trade secrets or place a government at a disadvantage in contract or legal negotiations.

The subcommittee has not made any recommendations -- and might study some of the issues for one more year -- but a few central debates have emerged.

Among the most controversial issues discussed by the subcommittee are potential changes to the attorney-client exemption, which allows governments to discuss legal issues in private.

While the current law allows for private discussion of ``other special legal matters requiring the provision of legal advice,'' a proposed change would allow it only when the disclosure ``would adversely affect the bargaining or litigation posture of the public body.''

``You can't discuss everything under the sun just because your lawyers are in the room,'' said Del. Barnie K. Day, D-10th, a subcommittee member.

Local government attorneys have already begun vigorous lobbying against changes that would affect their ability to discuss strategy with their clients.

``You need to balance the public's right to know against the government's duty to perform its job in the best interests of its citizens,'' said Portsmouth's Oksman. ``The government needs to be able to discuss things confidentially in order best to protect the citizens from those who threaten their interests.''

Also under discussion by the subcommittee:

What kind of real estate transactions local governments can discuss in executive session.

What kind of database information must be made available to the public and how much can be charged for it.

What criminal investigation information is open for public review.

Whether local governments will be required to take minutes in executive session.

In addition to exemptions, the subcommittee also has focused on better enforcement and, possibly, larger fines for noncompliance. Currently, the penalty for a first offense is not less than $25 nor more than $1,000. On the second offense, the minimum fine rises to $200 while the maximum remains at $1,000.

``There needs to be more than a slap on the wrist,'' Bouton said.

Also key, lawmakers said, is greater education of both local officials and the public.

Woodrum and others support the creation of a small state mediation office that would help citizens with their freedom of information requests.

Subcommittee member Sen. R. Edward Houck, D-17th, said he will propose mandatory training for local officials and department heads.

Any recommendations made by the subcommittee will face stiff opposition in the General Assembly, lawmakers said.

``The political balance is stacked against it,'' Houck said. ``Fighting against it will be local government, law enforcement and special interests. Within the General Assembly, there is a serious lack of regard for the public's right to know.''

Even if the General Assembly unites to strengthen the law, lawmakers said, there are certain problems that cannot be solved by a vote taken in a Richmond building.

``We made laws against murder, but they keep doing it,'' Woodrum said. ``We can't make a law that people won't break.''

Wes Allison of the Richmond Times-Dispatch contributed to this story.

PILOT ONLINE - NEWS