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Subcommittee looks at loopholes in Freedom of Information Act

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The problem with Virginia's sunshine law is that it has too much shade, say those pushing the General Assembly to tighten the Freedom of Information Act.

"There are those that seize on very ambiguous language . . . and choose to use that opening for needless secrecy," said Forrest Landon, executive director of the Virginia Coalition for Open Government.

Landon's group has joined forces with the Virginia Press Association to urge a General Assembly subcommittee to close what they consider to be loopholes in Virginia's 30-year-old FOIA.

"You have to write the law for the worst case," said John Edwards, editor and publisher of The Smithfield Times and an appointed member of the subcommittee. "It has to be written because of the abuses, not because of the people out there who are making the information available."

Virginia's Freedom of Information Act was born in 1968. Since then, lawmakers and experts said, public access has been limited 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-Hanover, a member of the subcommittee. "All of these exemptions have turned the act into a Freedom of No Information Act."

The act has 97 exemptions: 71 types of records aren't available, and 26 types of meetings are closed. The law had only 12 exemptions at its passage, but new ones were added almost every year. Nine were tacked on during the past two years.

In general, an exemption has been considered justified if disclosure of the information 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 FOI law also is honeycombed with definitional loopholes, such as what amounts to a personnel or real estate matter and what constitutes a public body, Landon said. Legislative debate at times 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?

The subcommittee has not made any recommendations and might study some issues for more than a year. But a few central debates have emerged. One is whether definitions should be narrowed for the three most-cited reasons used by public bodies to go into closed-door meetings: legal, real estate

and personnel matters.

The legal exemption allows for private discussion of legal matters where a public body seeks an attorney's advice. VPA's proposed change would allow the discussions to be private when disclosure would hurt the public body's bargaining or litigation posture.

"You can't discuss everything under the sun just because your lawyers are in the room," said Del. Bernie K. Day, D-Patrick, a subcommittee member.

Attorneys for local governments already have begun vigorous lobbying against changes that would affect their ability to discuss strategy with their clients.

"The government needs to be able to discuss things confidentially in order to best protect the citizens from those who threaten their interests," said Portsmouth City Attorney G. Timothy Oksman.

Landon said government bodies often misuse a real estate exemption clause that allows boards to discuss the "use and condition" of real estate behind closed doors. The exemption is used to close meetings to discuss anything from where to build a high school to how to deal with a rodent problem, he said.

The personnel exemption, which was the FOIA's first exemption for open meetings, is used in the discussion of specific individuals concerning promotion, demotion, disciplinary action and the like. The VPA proposal would allow an individual to waive his right to privacy.

Another major perceived weakness in the state's FOIA is language that has allowed law enforcement agencies to withhold anything that they define as part of an "ongoing criminal investigation."

In a recent statewide survey, only 16 percent of city police and county sheriff's offices provided information requested about crimes.

VPA wants the law to give the public access to police reports except in the case of an active felony investigation when the release of the reports would "cause a suspect to flee or evade detection, result in the destruction of evidence, or would likely jeopardize the success of the investigation."

Edwards said changing that part of the law could be a difficult task because "nobody wants to hurt the police," and law enforcement officials don't want to see any absolutes in the law. Law enforcement agencies oppose VPA's language.

Landon's coalition, an alliance of journalists, librarians, lawyers, educators and other individuals, is pushing for the creation of a state FOI office that could give opinions in access disputes, answer FOI questions and provide resources and education.

Steve Calos, executive director of Common Cause of Virginia, a political watchdog group, said a state FOIA office could accomplish a great deal at a low cost. Maryland, Connecticut, New York and Indiana are among the states that have these.

``We're talking about two people in a small office somewhere. I think the good that it would cause would be worth the price,' ' Calos said.

The subcommittee also has focused on better enforcement and, possibly, larger fines for non-compliance with the law. 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.

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

``The political balance is stacked against it,' ' said Sen. R. Edward Houck, D-Spotsylvania, a subcommittee member. ``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 clarify the law, 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,' ' said Del. Clifton A. Woodrum, D-Roanoke, subcommittee chairman. ``We can't make a law that people won't break.' '

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