



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

AO-07-13

July 30, 2013

Glenn Oder
Executive Director
Fort Monroe Authority
Fort Monroe, Virginia

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based upon the information presented in your letter (undated).

Dear Mr. Oder:

You have asked whether certain committees and advisory groups are public bodies subject to the open meeting requirements of the Virginia Freedom of Information Act (FOIA). As background, you indicated that the Fort Monroe Authority (the Authority) was created by the General Assembly by statute and is governed by a Board of Trustees (the Board). The Authority has adopted by-laws, under which the Board may create standing committees. Members of those committees are appointed by the Chairman of the Board, and at least two members of each standing committee must be Trustees. The by-laws also provide for the creation of *ad hoc* committees by the Chair, the Board, or the Executive Committee of the Board; such *ad hoc* committees must include at least one Trustee. Additionally, the by-laws allow advisory groups to be created by the Board or by the Chairman of the Board (the Chair). You stated that such advisory groups are not considered to be committees of the Board, and do not require any Trustees to be appointed as members. Finally, you stated that in your capacity as Executive Director of the Authority, you have appointed advisory groups consisting solely of citizen volunteers. You stated that the Authority has appointed a Finance Committee, a Planning Advisory Group, and an Economic Advisory Team, each of which is a committee comprised of two Trustees and a number of citizen members. Additional facts will be set forth as appropriate below.

The policy of FOIA set forth in § 2.2-3700 is to ensure *the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted*. The term *public body* is defined in § 2.2-3701 to include in relevant parts

any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; ... and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include ... 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. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members.

Applying that definition to the facts presented, it is clear that the Authority itself is a public body under the first clause quoted because it is an *authority* and a *political subdivision of the Commonwealth* established by statute.¹ The Board would likewise be a public body under the first clause of the definition as the *board...of [a] political subdivision of the Commonwealth*. While the first clause would include the Authority and its Board, it would not include the various committees and advisory groups about which you inquired. In examining those entities, we must turn to the second and third clauses of the definition, as quoted above.

The second clause of the definition includes as public bodies *other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds*. In this instance the facts you have described do not indicate that any of the committees or advisory groups receive public funds. You explicitly stated that the citizen members serve as volunteers only; they are not paid for their participation, nor do they receive reimbursement for expenses. Given this factual background, we can only conclude that the second clause concerning support by public funds does not apply to the committees or advisory groups you have described. However, it appears that the committees and advisory groups may fall within the definition of public body under the third clause, *as 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*.

Before addressing each of the different committees and advisory groups you have described, I note that in describing these entities you explicitly stated the minimum number of Trustees that must be appointed to each body, and that each includes citizen members. The fact that there are citizen members on such committees or advisory groups does not change their status under FOIA because the definition of *public body* specifies that it *shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members*. Once a citizen is appointed as a member of a committee or advisory group, then he or she is a member and must be counted as such, just as a Trustee would be counted.

You also stated that the Authority's by-laws provide that notice of committee meetings must be provided for any committee meeting at which three or more Trustees are present. This notice provision would appear to run counter to the provisions of FOIA. FOIA defines a *meeting* to include

meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or 2.2-3708.1, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body.

This definition does not differentiate between different types or categories of members (whether Trustees or citizen members, voting or non-voting, elected or appointed or ex officio, etc.). Therefore, when applying this definition to meetings of the Authority's various committees, one must count citizen members as well as Trustees when determining whether a sufficient number is present for the gathering to constitute a meeting under FOIA. It is not proper to count only the Trustees and ignore the presence of citizen members. A gathering of any three or more members, or a quorum if less than three - whether Trustees or citizens - of a committee or advisory group would be a meeting subject to FOIA, if the committee or advisory group is a public body subject to FOIA.²

Turning now to the different entities you described, you stated that "standing committees" are established by resolution of the Board, with members appointed by the Chair to include at least two Trustees. You did not explicitly state that such committees carry out a delegated function of the Board, or advise the Board, but presuming that they do, then they would appear to fit squarely within the definition of *public body as a committee ... of the [Board] created to perform delegated functions of the [Board] or to advise the [Board]*. Therefore a standing committee of

the Board is a public body subject to FOIA for both public meetings and public records purposes.

You stated that "*ad hoc* committees" are established by the Chair, the Board, or the Executive Committee, and must include at least one Trustee as a member. For FOIA purposes, an *ad hoc* committee established by the Board to perform a delegated function of the Board or to advise the Board would be a public body subject to FOIA, just as a standing committee would be. Similarly, it appears from the facts described that if the Chair were to establish an *ad hoc* committee, it would be on behalf of the Board, because the Chair would be acting pursuant to the Board's by-laws under the authority of the Board. Again, such an *ad hoc* committee would be a public body of the Board created to perform a delegated function of the Board or to advise the Board, even though it was appointed by the Chair, because ultimately it is performing a delegated function of the Board or advising the Board. Regarding *ad hoc* committees established by the Executive Committee, it was not stated explicitly but it is presumed that the Executive Committee is itself a standing committee, and therefore a public body subject to FOIA as described above. An *ad hoc* committee established by the Executive Committee would therefore be a public body as a committee or subcommittee of the Executive Committee created to perform a delegated function of the Executive Committee or to advise the Executive Committee. In each of these instances, it would appear that an *ad hoc* committee would be a public body subject to FOIA for both public meetings and public records purposes.

However, there is one other possibility, under which an *ad hoc* committee would not be a public body for meetings purposes. Prior advisory opinions from this office and the Office of the Attorney General have determined that similar committees created by a city mayor to advise the mayor was not a *public body* because it was *not created by a public body, does not perform delegated functions of a public body, does not advise a public body, and does not receive public funding*.³ The same reasoning would apply if the Chair were to establish an *ad hoc* committee to act on behalf of the Chair or to advise the Chair, rather than to perform a delegated function of the Board or to advise the Board. In that situation, such an *ad hoc* committee would not be subject to the meetings rules of FOIA, although any records it prepared, owned or possessed in the transaction of public business would be public records.⁴

You also described two different types of advisory groups. The first would be advisory groups created by the Board or the Chair pursuant to the by-laws. You stated that the by-laws specifically provide that such groups are not Board committees and do not require that any Trustees be appointed to them. The same reasoning as applies to *ad hoc* committees would apply to such an advisory group: it would be a public body subject to the meetings rules of FOIA if it performs a delegated function of the Board or advises the Board, but not if it acts solely on behalf of the Chair. Again, records prepared, possessed, or owned by the advisory group in the transaction of public business would be public records subject to FOIA, regardless of whether the advisory group is also subject to the meeting requirements of FOIA.

The second type of advisory group is that which you have appointed in your capacity as Executive Director of the Authority. Such an advisory group created to advise you, rather than to advise the Board, would not be a public body subject to the meeting requirements of FOIA. We have previously considered similar situations. For example, we have stated that generally, a public employee is not a *public body*, and neither is an advisory group appointed by a public employee to advise him or her. To fit within the terms of the definition of *public body*, an entity must be *of the public body created to perform delegated functions of the public body or to advise the public body*. [Emphasis added.] In the prior opinion, the advisory group was an entity of a public employee created to advise the public employee. Those facts do not meet the terms of the definition; given those facts, the group was not a *public body*. However, while it was not a *public body* for FOIA meetings purposes, the group's records would be *public records* subject to FOIA if they are in the transaction of public business.⁵ This reasoning is much the same as when an individual member of a public body, such as the Chair, appoints such a group to act on his or her behalf, rather than on behalf of the public body as a whole, as

described above. This same reasoning that applies to public employees and individual members of public bodies would also apply to appointed public officials. The key distinction is that the group in question was created by an individual to perform a delegated function or to advise the individual, rather than being an entity of a public body created to perform a delegated function or to advise the body.

Finally, you specifically asked about the Finance Committee, the Planning Advisory Group, and the Economic Advisory Team. You mentioned the number of Trustees and uncompensated citizen members; as described above, for FOIA purposes, there is no distinction between different types or categories of members. You also noted that "an area of concern is that these groups and committees are created by a public body to advise it on matters specifically related to the business of that public body." If that is the case for each of these bodies, then all of them would be public bodies subject to FOIA, as described above.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett
Executive Director

¹Va. Code § 2.2-2336.

²See, e.g., Freedom of Information Advisory Opinions 08 (2008), 10 (2005), and 24 (2001) (each considering whether various entities with citizen members are public bodies under FOIA).

³Freedom of Information Advisory Opinion 08 (2008); 1978-1979 Op. Att'y Gen. Va. 316A.

⁴Va. Code § 2.2-3701 (definition of *public records*).

⁵Freedom of Information Advisory Opinion 11 (2009); see also Freedom of Information Advisory Opinion 12 (2009).