

FOIA Council Meeting Summary

August 14, 2017

1:30 PM

House Room 1

Capitol Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its second meeting of the 2017 Interim on August 14, 2017.¹ The meeting was held to welcome new members to the Council,² to consider bills referred by the 2017 Session of the General Assembly to the Council for further study, to receive a progress report from the Proprietary Records and Trade Secrets Subcommittee, to review draft legislation recommended by the subcommittee, and to discuss other issues of interest to the Council. Delegate LeMunyon began the meeting by welcoming new members Senator Locke and Delegate Torian, although Delegate Torian was not in attendance today. Senator Locke is the chair of the Freedom of Information Act (FOIA) Subcommittee of the Senate Committee on General Laws and Technology.

Review of Bills Referred by the 2017 Session of the General Assembly

Delegate Kory was scheduled to present HB 2223,³ concerning public comment periods, but was not able to attend today. Senator Bill DeSteph was scheduled to participate by teleconference to present SB 972,⁴ concerning requests for information made by members of the General Assembly, but was unable to do so due to technical difficulties.⁵ Because neither Delegate Kory nor Senator DeSteph was able to appear today, both bills will be on the agenda for the Council's next meeting.

Proprietary Records and Trade Secrets Subcommittee Report

Staff reported that the Proprietary Records and Trade Secrets Subcommittee met four times this year, on April 4, May 1, July 11, and August 1, and that a work group of the subcommittee met on April 25, 2017. During these meetings, the subcommittee reviewed work to date on the topic

¹ Council members Delegate LeMunyon (Chair), Senator Locke, Dooley, Hamlett, Porto, Seltzer, Stern, Treadway, and Vucci were present; members Senator Stuart (Vice Chair), Delegate Torian, Coleburn, Jones, and King-Casey were absent.

² **HB 2144** LeMunyon increased the membership of the Council from 12 members to 14 members by adding one additional member from the House of Delegates and one additional member from the Senate. (2017 Acts of Assembly, c. 644.)

³ **HB 2223** Kory - Bill Summary: Requires that every public body afford an opportunity for public comment during any open meeting and requires that the public comment periods be noticed on the public body's agenda. The bill permits the public body to have discretion in where it places the public comment period on its agenda and permits the public body to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill requires that for meetings of all public bodies, not just those state public bodies on which there is at least one member appointed by the Governor as in current law, the notice provided for any such meeting include a statement as to approximately at what point during the meeting public comment will be received.

⁴ **SB 972** DeSteph - Bill Summary: Requires all departments, agencies, and institutions of the Commonwealth and staff and employees thereof to respond to a request for information made by a member of the General Assembly. The bill further provides that notwithstanding the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), a response to a request for information made by a member of the General Assembly shall not be subject to redaction.

⁵ The nature of the problem was not known at the time of the meeting, but afterward it was discovered that the phone service provider had been having technical difficulties throughout the area.

of proprietary records and trade secrets under HJR No. 96 (2014–2016) and considered a new draft of legislation that would create a general exclusion for trade secrets submitted to a public body. The trade secrets draft presented to the Council today (LD 18100101D) is the sixth version considered this year, and it incorporates amendments recommended by the Council at its last meeting. Staff reminded the Council that one of the outstanding issues to be considered is the proposed liability shifting provision, which would permit a judge to apportion liability for costs and fees between a public body and the entity designating records as trade secrets, if such designation were challenged and the court determined that the records should not have been withheld as trade secrets. One suggestion was to separate the liability shifting provision into a separate bill. In addition to trade secrets, the subcommittee had considered the concern about the definition of "proprietary" as used in FOIA raised by Justice Mims in the case *American Tradition Institute v. Rector and Bd. of Visitors of the University of Virginia* (2014). Justice Mims noted in his concurrence that FOIA does not define the term "proprietary" but uses it in many different exemptions that all have different language, making it susceptible to multiple interpretations and increasing confusion. The subcommittee considered various approaches to this issue, including adopting a statutory definition or using different terminology, but it rejected these approaches. Instead, the subcommittee reported to the Council without recommendation a second version of its "deletion draft," which would eliminate most appearances of the terms "proprietary" and "confidential" from § 2.2-3705.6. The subcommittee also considered language taken from procurement manuals used by the Department of General Services (DGS) that would amend the provision of the Virginia Public Procurement Act (§ 2.2-4300 et seq.) that addresses trade secrets, § 2.2-4342. Staff presented a draft based on this language (LD 18100175D) to the Council but noted that the subcommittee had not considered or made a recommendation on the draft. Regarding all of the drafts, staff noted that while these drafts would address certain concerns in § 2.2-3705.6 and in the Virginia Public Procurement Act, they would not address the use of the terms "trade secrets," "proprietary," or "confidential" elsewhere in FOIA or in other laws. Staff further noted that several exemptions within FOIA cross-reference laws outside of FOIA that use these terms and that these draft proposals would not change those laws.

Review of Trade Secrets Drafts Recommended by the Proprietary Records and Trade Secrets Subcommittee (LD 18100101D)

Staff then presented the newest version of the trade secrets draft (trade secrets draft #6). Lines 12–20 of the draft create a new, general exemption for "trade secrets" and cross-reference the definition of "trade secrets" in the Uniform Trade Secrets Act (§ 59.1-336 et seq.). Lines 601–609 of the draft address the "liability shifting" issue of payment of costs and attorney fees, which the Council had flagged for further discussion. The draft also strikes references to "trade secrets" in other, existing exemptions in § 2.2-3705.6, and makes other technical changes. Delegate LeMunyon presented the policy question of whether an entity doing business with a public body should be made party to a suit if the entity designates too much information as trade secrets. He related that the DGS language allowed the agency to "push back" by disqualifying a bid or proposal in a procurement transaction if the agency and the submitting entity could not agree on what was to be protected as trade secrets. Mr. Seltzer stated that in representing local government bodies, the difficulty is assessing whether an item is a trade secret, and that because designation of trade secrets protects the private entity's interests, it should be the private entity's burden to defend the designation. He indicated support for the trade secrets draft #6 and stated that he was not opposed to the draft based on DGS' policy language but that he felt it was

insufficient because it still placed the burden on government to make an assessment of what is a trade secret. Mr. Stern asked whether notice must be given to the private entity beforehand. Ms. Hamlett stated that in her experience it is often part of the deal to notify a company if the public body plans to release any items designated as trade secrets. Ms. Porto suggested considering both the trade secrets draft #6 and the draft based on DGS' policy language.

Public comment was invited. Phil Abraham of the Vectre Corporation indicated he had no problems with trade secrets draft #6 except for the language concerning fees and costs at lines 605–609. He indicated a concern that competitors might try to use these provisions against each other by requesting protected documents, then challenging their designation as trade secrets, in order to require their competitors to incur costs defending their designations. He also noted that because the exemption is discretionary, the public body could always choose to release records. He stated he felt that the draft based on DGS' policy language needs additional work and that the liability shifting provisions in trade secrets draft #6 should be removed and put into a separate bill. Craig Merritt, Esq., representing the Virginia Press Association (VPA), agreed with Ms. Porto that both drafts should be considered. He stated that the draft based on DGS' policy language did not attempt to deal with what is a trade secret or proprietary language in FOIA but would be freestanding legislation that would do no harm and probably would add clarity. He also stated that the point about giving notice to the company that designated trade secrets was well taken, and that the liability shifting issue in the trade secrets draft presents the policy question of whether someone who designates trade secrets should be able to be brought before a court and, as a corollary, whether one trusts our judges.

After further discussion of the bills, the Council voted unanimously to recommend trade secret draft #6 after amending it to remove the liability shifting provision (lines 605–609). The Council then discussed whether to recommend the liability shifting provision as a separate bill. The Council voted to amend the language to include that an award would lie if the court determined that the designation of a trade secret was unreasonable. The Council then voted 8–1 (all in favor except for Delegate LeMunyon, who voted against) to recommend the language as amended, with directions to staff to draft it as a standalone bill. Further considering the draft based on DGS' policy language, the Council amended the draft by deleting the last two sentences on lines 33–36, then voted unanimously to recommend the draft as amended.

The Council next opened the floor to public comment on the deletion draft. Mr. Merritt expressed the difficulty in addressing confidential business information as a result of the way this section of law has developed. He noted that his comments would also apply to the other trade secrets drafts and the combination draft. Mr. Merritt stated that this section mostly addresses information provided to public bodies by private businesses but also processes that public bodies administer by statute and instances when commercial information is developed by public bodies themselves. He provided multiple examples of possible consequences of removing the term "proprietary" where he felt it acts as a limitation, and he expressed concern over possible unintended consequences of removing the term. Mr. Merritt suggested that it would be necessary to go through each exemption one by one to examine the possible consequences of removing the term. Mr. Seltzer stated that the subcommittee had gone through each exemption to consider the consequences of deleting the terms "proprietary" and "confidential" and, to his surprise, had found that the terms really did not act as limiting language. After further discussion by the Council, no motion was made on these bills.

Review of Drafts Amended at the May 15, 2017, FOIA Council Meeting

SARTs-MDTs Exclusion from FOIA Draft (LD18100108)

Staff reminded the Council that Delegate Massie's HB 1971 had been enacted this year and that it created meetings exclusions for sexual assault response teams (SARTs) and multidisciplinary child sexual abuse response teams (MDTs) and added MDTs to an existing records exemption applicable to SARTs. The subject matter was referred to the Council for further study, and the question posed was whether SARTs and MDTs should be subject to FOIA at all. The Council had previously heard from Michael Doucette, Commonwealth's Attorney for the City of Lynchburg, and Nancy Oglesby, Deputy Commonwealth's Attorney for Fluvanna County, both of whom expressed that the work done by SARTs and MDTs was almost entirely exempt under current law because the vast majority of the work concerned individual sexual assault and child abuse cases. However, it appears SARTs do some policy work at a systemic level that may not be entirely related to individual cases. At its last meeting, the Council directed staff to draft a bill that would exempt MDTs and SARTs from FOIA but would still require SARTs to release any information related to policy discussions. Staff presented that bill today, noting that it would add SARTs and MDTs to the list of entities not subject to FOIA in Code § 2.2-3703, except that SARTs records relating to (i) protocols and policies of the SART and (ii) guidelines for the community's response would remain subject to FOIA. The bill would retain the current records exempt as applicable to SARTs but would strike the portion of the current exemption for MDTs because MDTs would no longer be subject to FOIA. Similarly, the bill would strike the meetings exemption for both SARTs and MDTs.

Delegate LeMunyon invited comment from the Council; there was none. Turning to public comment, Mr. Doucette stated that the draft would accomplish what was intended by HB 1971 in a more straightforward way. He also expressed concern over the term "sexual" in "multidisciplinary child sexual abuse response teams," as MDTs address child abuse other than sexual abuse. However, Mr. Doucette also recognized that "multidisciplinary child sexual abuse response teams" is the phrasing used currently in § 15.2-1627.5, to which this draft refers. Mr. Merritt posed several questions about what would happen if the draft were to become law, such as whether the public would be able to determine resources allocated to the teams in terms of money and personnel; whether aggregate and statistical information would be public; what the results of the program and its efficacy were; and who participated. Mr. Vucci noted he was unsure that such information was available currently, as it was unclear whether different jurisdictions collect such information now. Senator Locke moved to amend the draft to strike the word "sexual" on line 31. After the Council debated the merits of the amendment, the motion to amend failed by vote of 7 to 2 (Senator Locke and Mr. Stern voted in favor; all others present voted against). The Council then voted to recommend the draft without amendment. The motion carried by vote of 7 to 2 (Ms. Dooley and Ms. Porto voted against; all others present voted in favor).

Electronic Meetings Draft (LD 1810095D)

Staff reminded the Council that the General Assembly had referred HB 2316 (Marshall, D.W.), which would have allowed the Virginia Tobacco Region Revitalization Commission (the Tobacco Commission) to hold meetings by electronic communication means without having the remote locations open to the public. After discussing the bill at its last meeting, the Council had

directed staff to prepare for the Council's consideration a draft that would make this change generally for all public bodies. After staff presented the draft, Delegate LeMunyon invited comment on it. Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), stated this draft appears to provide another way to take advantage of using electronic communications when a personal matter prevents attending a meeting in person, and renders that section⁶ redundant. She also stated that when the provisions for personal matters were added, it was a balance between the convenience of members and adding public participation, but this draft tips the balance to convenience. Betsy Edwards, Executive Director of the VPA, agreed with Ms. Rhyne and added that allowing such meetings for convenience goes against public access, as it is not the same as an in-person meeting and not easy or convenient for the public. Evan Feinman, Executive Director of the Tobacco Commission, disagreed because meetings would still require a central, public location where a quorum of the public body must be present. After further discussion of the issues involved, the Council decided to form an Electronic Meetings Subcommittee to study the issues in greater detail, with Ms. Dooley serving as chair of the subcommittee. Staff was directed to poll the members to determine who else would like to serve on the subcommittee and for meeting dates.

FOIA Litigation Update

Staff informed the Council that it was aware of three recent FOIA cases. First, the Henrico County Circuit Court, by decision issued June 14, 2017, held that individual members of the General Assembly are not "public bodies" and therefore are not required to respond to FOIA requests. The plaintiff in the case filed a motion for reconsideration, and it has been reported that the judge reversed his decision after a hearing on August 2, 2017, but found no violation of FOIA. However, the circuit court still lists this case as "Active," and a written decision does not appear to have been issued yet. Pursuant to the FOIA Council litigation policy, the Council cannot comment on the case while it is pending before a court. Second, the Accomack County General District Court, by decision issued August 3, 2017, held that judges are neither "public bodies" nor "officers or employees of public bodies" and therefore judges are excluded from the requirements of FOIA. Under the rules of court, this decision is not yet final and may be appealed, and therefore the FOIA Council litigation policy prevents further comment at this time. Finally, the Virginia Supreme Court issued its decision in the case of *Daily Press v. Office of the Executive Secretary of the Supreme Court of Virginia* on June 29, 2017. The Court affirmed the judgment below, holding that under FOIA, a party requesting copies of court records must ask each jurisdiction's clerk of court for certain court records rather than seek to obtain a copy of a database in the Office of the Executive Secretary of the Supreme Court of Virginia. The Court's decision was guided by Code § 17.1-242, which provides that the clerks of court are the designated custodians of court records.

Other Business

FOIA Council policy on individual participation by electronic means

Staff reminded the Council that as required by subdivision B 1 of § 2.2-3708.1, at its meeting on November 18, 2014, the Council adopted a policy on individual members' participation in Council meetings by electronic means. It is recommended that the Council adopt a revised

⁶ Code § 2.2-3708.1(A)(1).

version of the policy to reflect amendments to the law that became effective July 1, 2017. The Council directed that this matter be carried over to its next meeting on November 20, 2017.

Public comment forms

As required by House Bill 2146 (LeMunyon, 2017), the Council has published a public comment form on the "Forms and Sample Letters" page of the Council's website so that requesters may comment on the quality of assistance they received in response to a request. However, the law does not specify where a requester is to send the form or what the Council should do with any such comment forms it receives. The Council directed that copies of such public comment forms be presented at Council meetings, and it decided that if the volume of forms received increases, the Council may decide to handle them in a different way.

Proposal to add declaratory judgment to the remedies section of FOIA

Andrew Bodoh, Esq., presented the idea of adding declaratory judgment to the existing remedies under FOIA. He stated that the current remedies of mandamus and injunction equate to a court's saying "thou shalt" do something, or "thou shalt not" do something. By contrast, he stated, a declaratory judgment would allow a court to state "this is the way it is." As an example, he stated that if one public body said a record did not exist, yet another public body provided that same record, a court could declare that the first public body had violated FOIA. As another example, Mr. Bodoh related a situation where a public body charged 50 cents per page for standard black and white copies, but after questioning this policy, it reduced the charges to 21 cents per page, then four cents per page, then finally to two cents per page, which was determined to be the actual cost. He stated that declaratory judgment would be appropriate in such a situation where there was a disagreement over charges. He also noted that the proposal would differ from current law on declaratory judgment in three ways: (1) currently, only circuit courts may issue declaratory judgments, but the proposal would allow general district courts to do so as well; (2) the proposal would allow for attorney fees and costs just as a FOIA petition does, whereas currently declaratory judgments allow only for an award of costs; (3) the proposal would allow for an expedited hearing, again the same as is provided for a FOIA petition now. After brief discussion, the Council directed staff to prepare a draft that would implement this proposal to be considered at the next Council meeting.

Criminal and law-enforcement records under § 2.2-3706

Staff noted that various issues concerning criminal and law-enforcement records in § 2.2-3706 had been carried over for further study from last year. Staff noted in particular that since the section was last amended, questions had arisen regarding the interpretation of subsections A and B regarding their application to different types of public bodies. Specifically, it was noted that subsection A refers to "all public bodies engaged in criminal law-enforcement activities" but many of its provisions in practice apply to other public bodies. Conversely, due to amendments to subsection B, applicable to noncriminal incident records, it has come to staff's attention that public bodies not involved in law-enforcement have used this subsection as a general exemption for personal records. The Council directed staff to prepare a draft to address these issues for the Council's consideration at its next meeting.

Public Comment

Delegate LeMunyon invited any additional public comment. Ms. Rhyne noted that 2018 would mark the 50th anniversary of the passage of FOIA in Virginia and that March 11 through 17, 2018, would be celebrated as Sunshine Week. She encouraged the Council to hold an event commemorating the occasion.

After reminding those present that the next Council meeting is scheduled to be held at 1:30 p.m. on November 20, 2017, in House Room 1 of the Capitol Building, the meeting was adjourned.