

Criminal Investigative Records Subcommittee
of the Virginia Freedom of Information Advisory Council
Meeting Summary
Monday, July 18, 2011
11:00 AM
General Assembly Building
Richmond, Virginia

The Criminal Investigative Subcommittee held its first meeting of the interim on July 18, 2011.¹ The purpose of this meeting was to study Senate Bill 1467 (Edwards) regarding access to criminal investigative records, and to consider a separate proposal concerning access to criminal and other law-enforcement records from the Virginia Press Association (VPA).

Senate Bill 1467

After calling the meeting to order and having the members introduce themselves, Chairman Fifer asked staff to summarize SB 1467 (Edwards). Staff explained that the purpose of the bill was to amend the definition of "criminal investigative file" in § 2.2-3706 so that the exemption applies only to records relating to active or ongoing investigations or prosecutions. Other exemptions, such as those protecting victim and witness identities, social security numbers, financial account numbers, etc., would still apply even after an investigation was over. There being no initial remarks from the subcommittee, Mr. Fifer requested public comment.

Phillip Van Cleave of the Virginia Citizens Defense League spoke in support of the bill, giving the example of a person lawfully carrying a gun being harassed or falsely arrested, and how opening the investigative file would help to keep the public informed of what happened. Dana Schrad of the Virginia Association of Chiefs of Police (VACP) stood in opposition to the bill, for the same reasons the VACP had opposed SB 711 (Edwards) last year.² Mark Flynn of the Virginia Municipal League also opposed the bill, stating that the current law strikes a good balance. Danville Police Chief Phillip Broadfoot opposed the bill, giving an example of a murder investigation file which he stated contained photographs, videos, and written descriptions of many private matters, persons posing in line-ups, descriptions of sexual activity, and other items that he felt should not end up posted on the Internet. Paul Henick, speaking on his own behalf as a citizen, noted that under current law that allows information to be withheld pursuant to a promise of confidentiality, police often withhold the information even if no such promise was made. He suggested that documentation of such promises should be required. Williamsburg Police Chief David Sloggie also stated that current law provides a fair balance. Detective Linda Gaddis of the Newport News Police Department indicated that issues with compliance could be addressed through training, but there was no need to change the current law. Roanoke Police Deputy Chief Tim Jones stated that current law strikes an

¹ Subcommittee members Fifer (Chair), Schliessman, Selph, and Treadway were present (all members).

² Those reasons are set forth in detail in the minutes of last years meetings of the Criminal Investigative Records Subcommittee, available on the FOIA Council website.

accurate balance and that the proposed changes would only encumber law enforcement. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that VCOG was neither in favor of nor opposed to this specific bill, but generally favors opening the process, and in doing state-by-state research had found that criminal records are not treated in a uniform fashion. She submitted a summary document showing VCOG's research findings, incorporated herein by reference. George Mason University Police Assistant Chief George Ginovsky urged the subcommittee members to consider why police write the reports, and stated that they are properly confidential under current law.

Senator Edwards³ stated one reason he had brought the bill was because there was inconsistency regarding what will be released by different law-enforcement agencies. While aware of the need for privacy in certain matters, Senator Edwards expressed that his experience was that many law-enforcement agencies would refuse to release records as a matter of policy to avoid improper application of discretion that might be perceived as biased or discriminatory. He further noted that FOIA already contains many other exemptions for information that would need to be protected in criminal investigative files that would still apply even after the investigation was over. He went on to suggest that if more exemptions were needed, more could be added, but otherwise, the files should be opened once the investigation is over.

Mr. Fifer expressed concern that the bill contained no definition of "active or ongoing," and noted that there have not necessarily been exemptions for every specific example of what might be in a criminal investigative file because we have always had the single broad exemption. He suggested that the VPA proposal, being more comprehensive, might be a better vehicle for further discussion. He then asked whether there were any further questions, comments, or motions on SB 1467. There being none, no further action was taken on the bill.

VPA Proposal

Craig Merritt presented the VPA proposal on behalf of the VPA. He explained that the proposal was not directly related to Senator Edwards' bill, but came about as an attempt to simplify and clarify current § 2.2-3706. He described the current law as a "shotgun shack" with provisions continually added over time, making the law difficult to understand and apply. The VPA proposal breaks the current law into two general categories, the first addressing what to do with current cases, and the second addressing administrative activities and issues of a broader scope. Mr. Merritt stated that after clarity, the second goal of the proposal was consistency in application of the law, as different law-enforcement agencies do not apply the current law the same way, and part of the problem is that the law itself is unclear. As a third goal, the VPA proposal seeks to strike a balance between access and the need to protect certain information. It does so by specifically adopting much of the current law, especially regarding administrative

³ Note that the subcommittee began discussing the VPA proposal before Senator Edwards spoke; the Senator had to attend another meeting, and discussion of his bill resumed when he returned. For the sake of continuity and clarity, these minutes present the consideration of SB 1467 as a single section, rather than reproduce the discussion of both the bill and the VPA proposal as they occurred chronologically.

matters, in the second section of the proposal. Mr. Merritt further noted that some changes in the proposal pose policy questions, and debate would be expected, but it was brought forward as a way to frame and open the discussion.

Mr. Schliessmann questioned the VPA's proposed one-day time limit for the release of criminal incident information, and asked whether there was any conflict regarding the release of information concerning juveniles covered by Title 16.1. Mr. Merritt indicated that current § 2.2-3706(B) says criminal incident information must be released "upon request," which could be interpreted as requiring immediately release rather than allowing five working days to respond (the general rule under FOIA). He further indicated he did not believe there was any conflict with the provisions of Title 16.1.

Noting that the testimony from law-enforcement representatives shared a common theme of "if it isn't broken, don't fix it," Mr. Fifer asked if there were material examples showing why a change in the law is needed. Mr. Merritt replied that at least one law-enforcement agency has asserted that if it does not already have a written record containing criminal incident information, it does not have to produce anything, but the current law does require the release of criminal incident information even if there is no record. In further discussion he mentioned journalists, academics, and persons interested in historical records as additional examples of persons who would want and should have access to these records, but may not get it under current law.

Opening the discussion to public comment, Chief Broadfoot presented prepared remarks setting forth his objections to the VPA proposal section-by-section, incorporated herein by reference. Roger Wiley, on behalf of the Virginia Association of Counties, noted the proposal makes some major policy changes, including opening criminal investigative files after three years, which is a problem because many investigations last longer than three years prior to prosecution, and giving the subject access to internal affairs investigation records, which may defeat the purpose of having such investigations. Mark Flynn of the Virginia Municipal League agreed with the prior speakers in opposing the proposal. Chief Sloggie agreed with Chief Broadfoot's remarks, and noted that the Williamsburg police department typically provides criminal incident information within an hour, but some things simply are not appropriate to discuss, such as victim and witness information. Portsmouth Police Lieutenant Scott Burke noted that where current law requires the release of general information, the proposal requires specifics such as the actual location of a crime, the victim's address, and other information that could be used for further scams or to identify targets for burglary and larceny. Additionally, he noted that the Portsmouth 911 system had received 23,218 calls for service and the department only had two staffers to handle any and all FOIA requests for those calls; it would be too much to ask them to sort, redact, and produce 911 tapes by request within a single day.

Mr. Fifer inquired of staff as to the current treatment of 911 calls. Staff noted that generally, there is always some information about 911 calls which is open, but it is the contents of the call itself that determine what is exempt. For example, the time the call was made is generally open, but different exemptions might apply depending on whether the call is criminal or non-criminal in nature.

Returning to public comment, Dan Wilson of the Virginia State Police noted that portions of the VPA proposal may conflict with the prohibitions on release of criminal history information in § 19.2-389. Arlington Police Lieutenant Adrienne Quigley stated that it was unnecessary and unfair to release victims' information; that privacy needs to be protected in order to get people to help the police; that sometimes it would be impossible to meet a one day deadline to produce records; and that some crimes are solved many years afterward. Lynchburg Commonwealth's Attorney Michael Doucette also spoke against the proposal, noting particularly that some aspects of the proposal might require the release of material otherwise protected by the attorney-client privilege or work-product exemptions; that reports investigating false accusations might later be used to harm someone's reputation; that there were situations where cases were not prosecuted for lack of sufficient evidence even though the most likely culprit was known, and release of such "cold case" records could jeopardize any future prosecution; and that certain disclosures might fall contrary to rules governing ethics for prosecuting attorneys. He further noted there was nothing stopping the press from asking questions and performing good investigative journalism. Assistant Chief Ginovsky stated that the VPA proposal is not merely a simplification and clarification of existing law, but is a major policy change. Ms. Schrad related that she began her career as a police beat reporter thirty five years ago, and described an interview with a woman connected to a drug gang. Ms. Schrad promised the woman confidentiality then, and still maintains that promise, as the information could still damage the woman's reputation and relationships today, even though the case is long over. She further noted that "closed" case records may still contain information about ongoing crime, especially in regard to drug trafficking and organized crime. She opined that the current law is fair and balanced, and that if there are compliance problems, they should be addressed through additional training and education, not legislative change.

Dr. Treadway expressed that much of the testimony matched what was heard by the subcommittee last year, and noted that law enforcement representatives had all expressed that the harm from change would outweigh the good. She asked whether there is some change that could add value without causing such harm, noting that so far, she had not heard it. Mr. Fifer noted that there are concerns about the proposal that could be addressed, but other changes represent fundamental policy disagreements. He asked whether there is value in continuing the discussion, perhaps by having law enforcement representatives and the VPA meet and try to work out details where there is some agreement. Mr. Selph noted a lack of consistency in the application of current law, and indicated he would like to continue discussions to see if there are things the parties can agree on. The subcommittee voted unanimously to have staff meet with the interested parties to try to work out details, then continue the discussion of the VPA proposal at the next subcommittee meeting. The next subcommittee meeting date is to be determined after staff meets with the interested parties. Mr. Fifer also made note of comments received from the Alexandria City Attorney, Bernard Caton, also expressing concerns with the VPA proposal, incorporated herein by reference. There being no further comments, the meeting was adjourned.

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