

Criminal Investigative Records Subcommittee  
of the Virginia Freedom of Information Advisory Council  
Meeting Summary  
Thursday, August 21, 2012  
2:00 PM  
General Assembly Building  
Richmond, Virginia

The Criminal Investigative Records Subcommittee held its second meeting of the 2012 interim on August 21, 2012.<sup>1</sup> The purpose of this meeting was to continue the work of the Subcommittee which began in 2010, studying SB 711 (Edwards), and continued into 2011, studying SB 1467 (Edwards), both of which would have opened access to criminal investigative files once the investigation or prosecution was final or otherwise terminated.

After the meeting was called to order and the members and interested parties introduced themselves, the first order of business for the Subcommittee was to elect a new Chair. The former Chair, Craig Fifer, was term-limited as of July 1, 2012 and is no longer a member of the FOIA Council. John Selph was elected Chair by unanimous vote.

Mr. Selph then reviewed briefly the work of the Subcommittee to date. He observed that the Subcommittee began by studying Senator Edwards' bills that were referred to the Council in 2010 and 2011 that would have opened access to criminal investigative files once any investigation or prosecution was over, but there was no forward movement on those bills. As various other issues were brought up while considering the bills, the Subcommittee began to study additional items regarding access to criminal and other law enforcement records. As Chair, he suggested that the Subcommittee should begin today's meeting by hearing from the interested parties, holding a general discussion, and then considering the specific items listed on today's agenda, with the overall goal of reaching a consensus to give staff direction to prepare a draft and to finish the Subcommittee's work before the December meeting of the FOIA Council. He then opened the meeting to public comment and general discussion.

Dan Wilson of the Virginia Department of State Police (VSP) asked whether the "2011 Consensus Draft" was really a consensus to which law enforcement had agreed. Staff clarified that the bold points were agreed to by the stakeholders' group in 2011, but that there were still many issues that were unresolved, which is why the stakeholders' group did not feel the draft was ready to be recommended to the FOIA Council in 2011. The term "consensus draft" was carried over from 2011 and used to distinguish that draft from the one prepared in 2010.

Dana Schrad of the Virginia Association of Chiefs of Police indicated that she had preliminary results from surveying her constituents, but would need more time to put them into proper form. She indicated she had surveyed both police and sheriffs. She then discussed some of the survey questions and results. In response to the question of what "upon request" means in the context of releasing criminal incident information, she indicated that the most respondents indicated it meant to reply within five business days; other choices were to respond immediately, promptly, after the information was confirmed or "other." The next question was what was a reasonable timeframe for the release of criminal incident information. She stated that most felt five business days was

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<sup>1</sup> Subcommittee members Schliessmann, Selph, and Treadway were present (all members).

reasonable, some agreed with three days, none agreed with "within 24 hours," some agreed with "as soon as possible," and there were some "other" responses. Ms. Schrad indicated the overall gist from these questions was that five business days was generally understood to be the requirement, depending on the complexity of the case and whether it was determined to be a felony (since criminal incident information is only required to be released in felony cases). After further discussion among the Subcommittee, Ms. Schrad, and Ginger Stanley of the Virginia Press Association, there was a general consensus that specifying "five working days" as a response time for criminal incident information might have unintended consequences, such as agencies holding records for five days when they might respond immediately now, and that adding the word "promptly" might generate more confusion. Staff recalled that when the law was changed in 1999, the words "upon request" were used to make clear that there was not an affirmative duty to release criminal incident information unless a request was made, but there was no intent to have a different response time than the rest of FOIA. Staff also suggested that changing the structure of the law might alleviate confusion regarding the response time for criminal incident information. Dale Mullen, County Attorney for the County of Louisa, observed that savvy law enforcement agencies will issue press releases containing criminal incident information as soon as possible. He also noted that dealing with these requests on a daily basis, his experience was that the majority of requesters were not news media representatives, but were citizens, such as disgruntled litigants in domestic and criminal matters. He stated further that due to the way the information is kept, a one-day response time was not enough, as the equipment usually worked on a five-day cycle. The Subcommittee next discussed the possibility of changing the current definition of criminal incident information to reflect the condition that criminal incident information applies only in felony cases. The Subcommittee also discussed the use of the term "law-enforcement agency," because there is no definition of "law enforcement agency" in the Code and some Sheriffs have argued they are constitutional officers, not agencies. The Subcommittee agreed without objection to allow staff to make the appropriate changes to address these issues in a draft that will then be given further consideration by the Subcommittee. The Subcommittee also agreed that there was no consensus to change five working days as the time limit to respond to a request for criminal incident information.

Turning to the issue of whether to release criminal incident information in misdemeanor cases, Ms. Schrad indicated that of those surveyed, 39% said they do release criminal incident information for felony, misdemeanor, and traffic offenses; 29% said they release criminal incident information for felonies and misdemeanors; 17% said they release criminal incident information for felonies only; and the rest had other responses. Ms. Schrad said that it seems that agencies with automated systems release more than agencies that do not have automation. Mr. Selph observed that current law requires release of criminal incident information in felony cases, and does not prohibit release in misdemeanor cases. Ms. Schrad indicated there may be some misunderstanding of current law that could be corrected with training. Mr. Wilson indicated it would be incredibly burdensome on VSP to be required to release criminal incident information on traffic offenses, as that would include hundreds of thousands of speeding tickets. After additional discussion in which the Subcommittee noted opposition from law enforcement and a failure to reach agreement at prior meetings, it was decided not to pursue this issue further.

The Subcommittee next discussed whether a verbal response to a request for criminal incident information is sufficient, or whether the response must be in the form of a record. Staff noted that under current law, any response other than providing the requested records must be a written response. Staff noted that the term "information" was used in many places in current FOIA but it is still understood generally that FOIA applies to records, not to questions that do not ask for records. However, a requester may agree to accept a verbal response in lieu of records under current law.

During the discussion it was noted that it is confusing to have the definition of "criminal investigative file" in the same section as the definition of "criminal incident information," especially because the actual exemptions for each are in other subsections. The Subcommittee agreed that it would be helpful to separate the definitions by incorporating them into their respective subsections instead. It was noted that these changes had been proposed in the 2011 draft. The discussion turned then to whether the Subcommittee preferred the structure of the 2011 draft or the 2010 draft. The Subcommittee indicated that it appreciated the work that went into preparing the prior drafts, but preferred to work from current law. Ms. Schrad indicated that some of the police chiefs she had surveyed had suggested a different approach, using different statutory sections to address criminal incident information and criminal investigative files. The Subcommittee agreed to move forward using current law as a basis, to delete the separate definition section in existing law,<sup>2</sup> and to incorporate the definitions of "criminal incident information" and "criminal investigative file" into the appropriate subsections for each. The Subcommittee agreed to take no action on the issue of whether a request for criminal incident information requires a record to be created if none already exists.

The Subcommittee next discussed the release of information about victims and witnesses as part of the criminal incident information to be released in felony cases. Ms. Stanley recalled there had been agreement among the stakeholders in 2011 to release age and gender information. The Subcommittee, Ms. Stanley, and Ms. Schrad proceeded to discuss what records were released under current law regarding warrants and other court records. Ms. Treadway noted that this issue had sparked heated commentary and appeared to be the furthest from reaching a middle ground. The Subcommittee concurred, and decided it was not ready to mandate the release of any victim or witness information as part of criminal incident information.

Turning to 911 records, staff noted that 911 records were addressed in the 2011 draft. Staff noted further that under current law, one would first have to determine whether a matter was criminal or noncriminal before deciding what, if any, exemption(s) might apply to the record. In further discussion it was agreed that there should be a separate section addressing 911 records, and that staff should prepare a draft for further consideration by the Subcommittee.

The Subcommittee next considered adult arrestee photographs (a.k.a. "mug shots" or "booking photos"). Staff related that Senator McDougle had asked the FOIA Council to consider the issues involved with the release of adult arrestee photographs, apparently in response to a number of constituent inquiries. Ms. Stanley observed that the topic raises the issue of the purpose of a request, which is something that has been consistently avoided in FOIA. She further related that she had spoken to a sheriff who had requested that adult arrestee photographs be exempted from FOIA, and she had spoken at the Sheriffs' Association convention. As a result, she indicated most of those she spoke with considered adult arrestee photographs to be part of a routine release, especially once they understood that FOIA allows them to charge for producing adult arrestee photographs, just as with any other public record. Mr. Mullen indicated that some of the media outlets requesting adult arrestee photographs were using them for profit and to ridicule the individuals depicted, not using them in a respectful and informative manner, and that many individuals pictured were later found not guilty. He noted that these requests were especially burdensome on smaller agencies, and recovering cost was not an acceptable balance. He stated that how the records are used is a factor to consider when setting policy. He also noted that one never knows when someone might be put into a photo spread, and distribution of adult arrestee photographs could cause long-term harm to investigations in

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<sup>2</sup> Subsection A of § 2.2-3706.

the future. Megan Rhyne, of the Virginia Coalition for Open Government (VCOG), noted that the "for-profit" issue has come up before, such as with maps produced by public bodies using geographic information systems that may be requested and subsequently re-sold for profit by others. She stated that most FOIA requests are made by businesses and attorneys, and that while she was sensitive to the issue of adult arrestee photographs being used to ridicule individuals, there is nothing in FOIA about how requesters use public records. Staff noted that many of the concerns raised were really administration of justice issues, rather than FOIA issues, and that there are provisions in current law to protect the investigative process. After further discussion the Subcommittee agreed to have staff work with the current language for clarity, but not to change existing law.

The Subcommittee then turned to consider the structure of the draft. Mr. Selph asked if there was any preference for the 2010 draft, the 2011 draft, current law, or whether there were other suggestions. Staff suggested a draft that incorporates elements of each prior draft and current law to reflect today's discussions. Ms. Schrad indicated that 93% of those surveyed supported restructuring the law, noting that they would prefer if the law were structured in the same fashion that staff presents FOIA training for law enforcement. There was unanimous consensus to have staff proceed as discussed with a draft that incorporates elements from prior drafts and current law, and to have the draft posted on the FOIA Council website and distributed by electronic mail as soon as possible. The Subcommittee did not set its next meeting date, but instead directed staff to poll the members at the next full FOIA Council meeting on September 5, 2012. The meeting was then adjourned.

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