

Criminal Investigative Records Subcommittee
of the Virginia Freedom of Information Advisory Council
Meeting Summary
1:30 PM, Tuesday, October 2, 2012
General Assembly Building
Richmond, Virginia

The Criminal Investigative Records Subcommittee held its third meeting of the 2012 interim on August 21, 2012.¹ 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 calling the meeting to order and making introductions, Mr. Selph reviewed the work of the Subcommittee to date. At its last meeting in August, the Subcommittee directed staff to prepare a new draft of § 2.2-3706 that would reorganize existing law for greater clarity and understanding. Staff summarized the draft, which reorganizes existing law into subsections addressing (A) required and discretionary releases; (B) 911 calls; (C) prohibited release; (D) noncriminal records; and (E) conflict resolution. The only substantive changes intended were to add subsection (B) to address 911 calls explicitly, and to amend the existing exemption for noncriminal records to allow it to be used by all public bodies engaged in law-enforcement activities. Under current law, the noncriminal records exemption applies only to records of sheriffs and local police departments. The Subcommittee then asked for comments on the draft.

Mark Flynn of the Virginia Municipal League indicated that the use of the term "likely" regarding criminal incident information was confusing and could lead to questions regarding the burden of proof required. He recommended using the phrase "reasonably determines" instead because a "reasonable determination" is an established legal standard. Bobbi Jo Alexis, Assistant County Attorney for the County of Prince William, supported this suggestion.

Phyllis Errico, of the Virginia Association of Counties, mentioned a case that is currently on appeal to the Supreme Court of Virginia² where the trial court apparently found that law enforcement agencies could not use the general personnel exemption,³ but could only use the noncriminal incidents records exemption⁴ instead. It appears that there may be some confusion because the noncriminal incidents records exemption refers to a section outside of FOIA that contains definitions of both "noncriminal incidents records" and "personnel records."⁵ Later during the meeting Mr. Flynn suggested adding language to clarify that law enforcement may use the general exemption for personnel records, in order to alleviate this potential confusion. The Subcommittee agreed to have staff develop appropriate language for this clarification.

¹ Subcommittee members Schliessmann, Selph, and Treadway were present (all members).

² *Harmon v. Ewing*, Record No. 121118 (appeal from the Circuit Court for the City of Williamsburg & James City County granted by the Supreme Court of Virginia on September 7, 2012).

³ Subdivision 1 of § 2.2-3705.1.

⁴ Subsection G of § 2.2-3706.

⁵ Subsection G of § 2.2-3706 refers to § 15.2-1722.

Ms. Alexis, Ms. Errico, Dan Wilson of the Virginia State Police, Scott Burke of the Portsmouth Police Department, and Ed Rhodes, representing the Virginia Fire Chiefs Association, all expressed concerns regarding the placement and possible misinterpretation of the new subsection (B) concerning 911 records, particularly that the reference to "this section" would be too limiting and might cause conflict with other laws, such as the federal Health Insurance Portability and Accountability Act (HIPAA), which limits access to health records. It was suggested that moving the language into subsection A instead and eliminating the reference to "this section" might alleviate those concerns. It was also suggested that a reference to text messages might be helpful, as emergency 911 may be contacted by text messaging as well as audio calls.

Warren R. Carmichael, Director Emeritus of Public Information for the Fairfax County Police Department, stated his support for adding the provision which would allow criminal incident information to be provided verbally, rather than in the form of a record, by agreement with the requester. He also indicated that in the context of criminal incident information, the requirement to identify the investigating officer was related to the formerly common practice of having officers provide information about their own cases rather than having a central public information officer. As that practice has changed over time, Mr. Carmichael suggested changing the law to require that when providing criminal incident information, the public body must identify the investigating officer "or a point of contact for further information."

There was further discussion among those present about various concerns over the release of adult arrestee photographs, especially regarding those who use such photographs in humiliating ways or post the records online, then demand a fee to remove them. There were also concerns expressed over the definition of "crime" (which is not defined in the statute) and how much information must be provided when identifying adult arrestees.⁶ Ginger Stanley, Executive Director of the Virginia Press Association (VPA), indicated she felt there may be unintended consequences from the draft language, that the discussion today appeared to lead toward substantive changes, and that the VPA would respond in writing at a later date.

There being no further public comment, Mr. Selph thanked those who spoke then asked the Subcommittee for further discussion. Mr. Schliessmann stated that his understanding was that the intent today was to look at redrafting existing law without substantive changes, and that the draft as presented and amended with minor changes does so. He moved to adopt the draft, amended pursuant to today's discussion. Dr. Treadway agreed and seconded the motion, suggesting that easy fixes are helpful but making more substantive changes would be beyond the scope for this year. Mr. Selph agreed that the intent today was to reorganize current law without substantive changes. He indicated that the Subcommittee does not want any unintended consequences, nor does it want to be dismissive of other substantive concerns that have been raised. The Subcommittee agreed by consensus to have staff post the draft to the FOIA Council website when it was ready, and to recommend the draft as amended to the full FOIA Council at the FOIA Council's next meeting on December 17, 2012. Mr. Selph observed that there was no need to set a date for another Subcommittee meeting this year, but that other concerns that have

⁶ Current subsection C of § 2.2-3706 mandates that *[i]nformation in the custody of law-enforcement agencies relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest shall be released.*

been raised and not addressed in the draft may be taken up another day. There being no further business, the meeting was then adjourned.

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