

Virginia Freedom of Information Advisory Council
Records Subcommittee
July 8, 2014
10:00 AM
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its second meeting on July 8, 2014. Subcommittee members Tavenner (Chair), Hamlett, Jones, and Oksman were present. Mr. Ashby monitored the meeting remotely by telephone, but did not participate and was not counted as present.¹ The purpose of the meeting was to continue the study of records exemptions under House Joint Resolution No. 96 (HJR 96).

The meeting began with a brief review by staff of the guidance memo sent by the Chair and Vice-Chair of the FOIA Council dated June 10, 2014, herein incorporated by reference. Staff quoted from the memo, which suggested using the following measures:

For applicability, review of FOIA exemptions should be from a "zero-based FOIA approach" by assuming that all records are open to the public and requiring justification for any exemptions. For appropriateness, give consideration to the following factors:

- *Public good (protection of the public purse or of the public bargaining, negotiating, litigating position) vs private interest (privacy or proprietary interests);*
- *Attorney/client privilege;*
- *Application of the narrow construction rule found in FOIA at § 2.2-3700;*
- *Updating and clarifying nomenclature;*
- *Impact of court decisions and of opinions of the Attorney General and the FOIA Council;*
- *Legislative history and intent, to the extent available; and*
- *Review of comparable provisions in other states' FOIA laws.*

Staff also presented exemption review worksheets that would be used to track these measures and any additional issues for each exemption. There was no comment on the worksheets.²

The Subcommittee next turned to Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), to present the VPA's position paper titled "Virginia Press Association Comments Regarding Principles to be Considered During Study Under HJR 96." After a brief description of the history of FOIA, Mr. Merritt observed that the paper does not address procedural aspects of FOIA but that the VPA would comment if such matters come up. Instead,

¹ As of July 1, 2014, § 2.2-3708.1 requires that public bodies adopt a policy on individual participation by electronic means before such participation will be allowed. As of the date of this meeting, the FOIA Council had not yet adopted such a policy.

² For additionally legislative history, public policy, and other considerations applicable to each exemption, please see the relevant worksheet for that exemption.

the position paper focuses on general principles applicable to any statute in part I, on the scope of FOIA in part II, particularly noting that the definition of "public body" should be broad and include the administrative functions of courts and the State Corporation Commission, and on specific topics and types of exemptions in parts III through IX.

Jonathan Williams, speaking on behalf of the Virginia Association of Broadcasters (VAB), commented that public records should be open with few exceptions, and that the VAB would encourage the Subcommittee to favor openness.

The Subcommittee then began its review of exemptions, starting with § 2.2-3705.1, exemptions of general application to public bodies, and § 2.2-3705.8, limitations on record exclusions. Staff presented a brief review of the legislative history of each exemption as it was brought up for consideration.

The Subcommittee first reviewed the personnel exemption found at subdivision 1 of § 2.2-3705.1 and the exceptions to that exemption found at subsection A of § 2.2-3705.8. Staff suggested that, for clarity, it would be helpful to combine these provisions in one location, since both provisions address the treatment of personnel records. Staff also suggested adding the word "name" to the listed exceptions in clause (ii) of subsection A of § 2.2-3705.8 in order to codify explicitly prior opinions of the Attorney General and FOIA Council that employee names cannot be withheld as personnel records.³ There was some discussion about the use of the phrase "shall open such records for inspection and copying" relating to whether the public body would have to make and send copies on request or merely make the records available so a requester could come to the public body's office and make his or her own copies. The Subcommittee agreed to have staff draft a new version that would incorporate both the exemption and the exceptions to it and that would include "name" in the list of exceptions. Mr. Merritt also suggested that certain records concerning higher-level administrators should be more transparent, such as records of benefits packages and the circumstances of departure when such senior employees leave. The Subcommittee agreed to have Mr. Merritt come up with an appropriate proposal for consideration.

The Subcommittee next considered subdivision 2 of § 2.2-3705.1, which exempts written advice of legal counsel and other records protected by the attorney-client privilege. Peter Easter, on behalf of VAB, stated that this exemption was used too broadly in practice. Mr. Tavenner stated that the exemption itself covers more than just attorney-client privileged records. After some further discussion among the Subcommittee and Mr. Merritt, it was agreed that the attorney-client privilege part of the exemption was fine as it is, but Mr. Jones would draft a proposal to establish clearer boundaries regarding what qualifies as written advice of legal counsel.

Next, the Subcommittee brought up the exemptions for work-product, subdivision 3 of § 2.2-3705.1, and tests or examinations, subdivision 4 of § 2.2-3705.1. There was no comment regarding these exemptions.

³ See 1987-1988 Op. Atty. Gen. Va. 33; 1978-1979 Op. Atty. Gen. Va. 310; Freedom of Information Advisory Opinions 01 (2009), 01 (2002), and 28 (2001).

The Subcommittee moved on to consider subdivision 5 of § 2.2-3705.1, which exempts records prepared exclusively for use in closed meetings. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that she had received many questions regarding whether this exemption would still apply if materials were distributed to members at closed meetings but were not collected from the members afterward (i.e., the members took the documents with them after the closed meeting ended). The matter was discussed among the Subcommittee members, staff, Roger Wiley (a local government attorney and former FOIA Council member), and Mr. Merritt and Ginger Stanley of the VPA. The consensus was that the key to the exemption was whether the records were still exclusively for use in a closed meeting and that once the records were used for some other purpose, the exemption would no longer apply. No change was recommended.

The Subcommittee next considered subdivision 6 of § 2.2-3705.1, which exempts certain "vendor proprietary information software." Mr. Oksman pointed out that the exemption begins by stating it applies to "vendor proprietary information software" but subsequently defines "vendor proprietary software" instead, and the two phrases should be amended to match. Mr. Merritt noted that the Supreme Court of Virginia had recently addressed the meaning of the term "proprietary" in the context of a different exemption,⁴ that the Uniform Trade Secrets Act defines the term "trade secrets,"⁵ and that it might be best to consider creating a single comprehensive exemption for all proprietary information and trade secrets. Eric Link of the Virginia Information Technologies Agency (VITA) pointed out that in addition to commercially purchased software, the exemption could also apply to open-source software, depending on the user agreement and rights. Mark Flynn of the Virginia Municipal League (VML) pointed out that the exemption refers to "processing data" and thus would not apply to operating systems or other software that was not used for data processing. Mr. Tavenner noted that the language used in the exemption is antiquated and needs to be rewritten. The Subcommittee agreed to give this exemption further consideration along with the other exemptions for proprietary records and trade secrets when it considers § 2.2-3705.6 at a later meeting.

There were no comments regarding subdivision 7 of § 2.2-3705.1, which exempts "computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth."

The Subcommittee then discussed subdivision 8 of § 2.2-3705.1, which exempts certain appraisals and cost estimates of real property. Mr. Jones asked what was meant by the word "proposed" in the phrase "subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease." Mr. Wiley observed that government would do an appraisal if it was not considering buying or selling the property, and that eminent domain requires appraisals to be given. Joanne Sherman of the Virginia College Savings Plan noted there are instances where a building is an investment and is appraised, but not for sale. Mr. Easter noted that there can be situations such as a relative of a local board member buying a property where there is no way for the public to know in time to stop the deal. Others pointed out that such a situation is really a conflict of interests law problem rather than a FOIA issue. Mr. Tavenner questioned the need for the exemption; others responded it was to protect the public purse. The Subcommittee also discussed the difficulties involved in large projects where multiple owners may be involved

⁴ *American Tradition Institute v. Rector and Visitors of the University of Virginia*, No. 130934 (Va. April 17, 2014).

⁵ § 59.1-336.

and noted that a corresponding meetings exemption exists. There were no further comments or proposals for changing the existing exemption.

Subdivision 9 of § 2.2-3705.1 provides an exemption for certain records concerning reserves established in specific claims administered by the Division of Risk Management or a locality, and investigative records of claims or potential claims against a public body's insurance. There were no comments regarding this exemption.

Subdivision 10 of § 2.2-3705.1 provides an exemption for personal information provided to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information (i.e., "opts out"). Staff related that this exemption had been the subject of two prior advisory opinions⁶ because it had mistakenly been interpreted as an exemption for all "personal information," as it refers to the definition of "personal information" in § 2.2-3801 of the Government Data Collection and Dissemination Practices Act, while the original intent was to protect citizens from unwanted electronic mail ("email spam"). The Subcommittee members and interested parties debated the reasoning behind the exemption. Ms. Rhyne observed that most exemptions to protect the public are for safety reasons, but this exemption was to protect the public from commerce. Phyllis Errico of the Virginia Association of Counties (VACo) observed there could be a chilling effect on communications with government if citizens knew their email addresses would be released. Ms. Hamlett noted that in addition to commercial interests, there could be concerns regarding cyber-bullying or stalkers as well. Mr. Tavenner observed there are competing policies at issue. Mr. Link stated that there was potential for misuse, as well as an administrative burden in keeping a list of who had "opted-out." After hearing suggestions from Mr. Merritt, Mr. Wiley, and Mr. Flynn, the Subcommittee agreed to have staff draft an amendment to remove from the exemption the reference to the definition of "personal information" in § 2.2-3801.

Noting that subdivision 11 of § 2.2-3705.1 is merely a cross-reference to an exemption outside of FOIA in § 2.2-4119 of the Virginia Administrative Dispute Resolution Act, the Subcommittee agreed to keep it as is. There were no comments regarding subdivisions 12 and 13 of § 2.2-3705.1, which provide exemptions for certain records regarding contract negotiations and financial account numbers, respectively.

As the final matter for consideration, the Subcommittee and interested parties observed that subsection B of § 2.2-3705.8, concerning the release of certain consultants' reports, was merely duplicative of existing law. However, out of concern that removing the provision might be misconstrued, it was decided to keep the provision as is.

Mr. Tavenner opened the floor to any final comments. Mr. Oksman voiced his concerns regarding the many problems involved in producing email records and expressed his wish that the Subcommittee further study that area.

The Subcommittee then discussed scheduling future meetings and decided to have staff poll members for future meeting dates. The meeting was then adjourned.

⁶ Freedom of Information Advisory Opinions 11 (2007) and 07 (2004).

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