

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
1:30 PM, August 19, 2014
General Assembly Building
Richmond, Virginia
Meeting Summary

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its third meeting of the 2014 interim on August 19, 2014. Subcommittee members Whitehurst (Chair), Dooley, Landon, Oksman, and Selph were present. The purpose of the meeting was to continue the study of meetings exemptions under House Joint Resolution No. 96 (HJR 96).

The meeting began with the consideration of two drafts the Subcommittee had requested at its previous meeting. The first draft concerned the legal matters and litigation exemption currently codified as subdivision A 7 of § 2.2-3711. The second addressed the personnel exemption currently codified as subdivision A 1 of § 2.2-3711.

The first draft separates the legal matters and litigation open meeting exemption into two distinct exemptions in order to clarify the current exemption without making any substantive changes. In the course of discussing this exemption, the Subcommittee members and Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), discussed the concepts of attorney-client privilege and various hypothetical examples of what would be legally protected and what would not. Delegate Richard L. Morris, who attended the meeting out of personal interest in the subject matter, stated that he liked the language regarding litigation but was concerned that the term "reasonable basis" could be construed too broadly, and that he would prefer if a specific basis were required instead. Ms. Dooley noted that if the requirement were for litigation to be specifically threatened before it could be discussed, that would hand power to the plaintiff. It was also noted that "probable litigation" is defined in the exemption and must be by or against a known party; a vague concern that "we might get sued for that" would not be enough to hold a closed meeting. Roger Wiley, a former FOIA Council member representing local government interests, provided an example of a rezoning application where an adjacent landowner spoke against the application at the rezoning hearings as the type of "probable litigation" the exemption would cover. He noted that if he, as the attorney for the public body, discussed the matter with the public body openly at a public meeting, it would make him a witness rather than a defender in the suit. After some further discussion, the Subcommittee voted unanimously to recommend the draft splitting the current exemption into two separate exemptions for clarity, without any substantive changes.

The second draft considered by the Subcommittee would clarify that the personnel exemption as applied to local governing bodies includes all officers, appointees, or employees of a governing body of a locality and is not limited to those whom a local governing body directly hires or fires. The draft defines "locality" and overrules prior opinions of the Office of the Attorney General (OAG) as to the applicability of this exemption to local governing bodies. Mr. Merritt submitted a written statement opposing the draft on behalf of VPA and spoke to VPA's concerns about public access and how this draft, by treating non-employees as employees, would be contrary to laws outside of FOIA establishing who is an employee. Mr. Wiley agreed that it is not the FOIA

Council's business to change the relationship of local governments to employees, but that he believed the OAG opinions at issue misstated that relationship. He indicated that in practice it always applied to all employees of a locality, that in reality all local government employees are under the governing body, and the change is to recognize that reality, not to change the relationship. Mark Flynn of the Virginia Municipal League (VML) concurred and noted that most local government attorneys disagreed with the OAG opinions. Mr. Oksman observed that the public holds members of the governing body accountable for the performance of the government as a whole, including all employees, and that the governing body cannot do its job if it cannot discuss the performance of lower- and middle-level employees. He further observed that those discussions could involve serious problems and criminal activity, for which open discussion would be impossible. Delegate Morris stated his view that there is a responsibility to discuss complaints about government employees in public. Mr. Whitehurst observed from his experience as a former reporter that local governing bodies generally did not discuss low- to mid-level employees, but dealt with administrators in closed meetings. Mr. Wiley related that such discussions usually were trying to inform the governing body, not to ask the governing body to decide the fate of lower-level employees. After further discussion without reaching agreement on any changes, the Subcommittee decided to defer consideration of this exemption until a later date.

The Subcommittee then proceeded with the rest of its agenda, beginning with consideration of subdivision A 8 of § 2.2-3711, which provides an exemption to boards of visitors of public institutions of higher education for the discussion of certain gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed. Staff provided a brief legislative history of the exemption, which was enacted in 1979, and Mr. Landon noted that 1979 was also when universities were first brought under FOIA. After inquiry by the Subcommittee, representatives of Virginia Commonwealth University and George Mason University both indicated that they were comfortable with the existing exemption, but they would need to consult with their respective university counsel to answer specific questions about the use of the exemption. The Subcommittee deferred further consideration of this exemption for that reason.

The Subcommittee next considered subdivision A 10 of § 2.2-3711, which provides an exemption for the discussion of honorary degrees or special awards. Ms. Dooley noted that it would matter to persons who were considered but not chosen if such discussions were public. Laura Fornash, on behalf of the University of Virginia (UVA), noted that UVA used the exemption for special awards, but UVA does not award honorary degrees. Without objection, the Subcommittee decided to leave the exemption as is.

Staff informed the Subcommittee that subdivision A 11 of § 2.2-3711, which provides an exemption for the discussion of tests, exams, and certain other records corresponding to the exemption at subdivision 4 of § 2.2-3705.1, was also enacted in 1979. Without objection, the Subcommittee decided to leave the exemption as is.

Subdivision A 13 of § 2.2-3711 provides an exemption for the discussion of certain matters concerning hazardous waste siting agreements. Cindy Berndt, on behalf of the Department of Environmental Quality (DEQ), stated that part of the authorization to DEQ involved certifications, that local governments would negotiate with facility operators, and that the

negotiations would remain confidential. She observed that the process has not been used, but there is the opportunity to do so. The process also would require filing notice of intent to site hazardous waste, with public notice and a public hearing process. Mr. Wiley observed that there is no such facility in the Commonwealth. Mr. Merritt asked whether the exemption was mere surplusage. Ms. Berndt, Mr. Wiley, and Ms. Dooley replied that the exemption would be helpful if anyone actually wanted to establish a hazardous waste site, and that it was driven by a process established elsewhere in the Code. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 15 of § 2.2-3711 provides an exemption for the discussion of medical and mental health records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.5. Staff informed the Subcommittee that the exemption was passed in 1989, with only minor amendments since then. Ms. Dooley noted that both state and federal laws made health records exempt from disclosure. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 17 of § 2.2-3711 provides an exemption for those portions of meetings by local government crime commissions where the identity of, or information tending to identify, individuals providing information about crimes or criminal activities under a promise of anonymity is discussed or disclosed. Staff related that the exemption was passed in 1989 and that on the records side there is a prohibition on the release of the identities of confidential informants. Mr. Wiley asked if there was a comparable exemption for the State Crime Commission; staff stated that the State Crime Commission is not subject to FOIA.¹ After further inquiry from the Subcommittee, it appeared that no one present could recall this exemption ever being used or could think of an example of a local government crime commission. The Subcommittee asked that local government representatives and staff look into the matter and suggested that if there are in fact no local government crime commissions in existence, then this exemption should be eliminated.

Staff informed the Subcommittee that subdivision A 19 of § 2.2-3711 provides an exemption for the discussion of certain public safety and security matters; it was enacted in 1991 and amended in 2002 and 2007. Ms. Dooley observed that the 2007 amendment came about after the Fredericksburg City Council needed a briefing on the safety and security of a courthouse built in 1858 that would have revealed security vulnerabilities, but it was not covered under the exemption at that time because it did not concern terrorist activity. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 28 of § 2.2-3711 provides an exemption for the discussion of certain records of transactions conducted under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002. Staff observed the public policy basis of the exemption was to protect the public purse and bargaining position, as well as proprietary information of vendors. Jackie Cromwell, of the Virginia Office of Public-Private Partnerships (VAP3), stated that VAP3 only uses the exemption during independent review panel discussions of confidential documents, and then it reopens the meeting to the public. She stated that protecting cost estimates, financial models, and other records, it allows the private sector comfort

¹ Subdivision A 4 of § 2.2-3703.

in doing business with the public sector, and allows the public sector to get the best value. Mr. Oksman asked for the opinion of VPA; Mr. Merritt and Ginger Stanley, Executive Director of VPA, indicated they felt both the meetings exemption and the corresponding records exemption were overbroad. As an example, Mr. Merritt described Virginia Department of Transportation (VDOT) projects done in increments and phases where records and meetings were not open to the public for many years. He indicated that the practice described by Ms. Cromwell was not problematic, but the statute itself is much broader. Ms. Dooley noted that the meetings exemption is driven by the records exemption, which matches the practice in her experience. Ms. Cromwell stated that the private sector generally wants to exempt everything, but VAP3 does not agree to do so in practice and only exempts things that may damage the private company after reviewing the material with representatives of OAG. Mr. Wiley and Ms. Dooley observed that it is common for boilerplate contracts and even cover letters to be claimed as exempt. After further discussion, the Subcommittee agreed without objection to wait until the Records Subcommittee had a chance to review the corresponding records exemption, and then reconsider the meetings exemption.

Subdivision A 29 of § 2.2-3711 provides an exemption for the discussion of certain matters related to the award of public contracts. Staff related that it was enacted in 2003 as a FOIA Council recommendation along with a records exemption, and it had been the subject of a Virginia Supreme Court case in 2006.² A representative of the Virginia Department of Transportation (VDOT) stated that VDOT would want the exemption kept as it is, because panel members and committees sign confidentiality agreements, and that there is transparency once the contracts are awarded. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 33 of § 2.2-3711 provides an exemption for the discussion of certain proprietary records and trade secrets of a local governing body that provides telecommunication or cable television services. Subdivision A 34 of § 2.2-3711 provides an exemption for the discussion of certain proprietary records and trade secrets of a local authority created in accordance with the Virginia Wireless Service Authorities Act. Subdivision A 40 of § 2.2-3711 provides an exemption for the discussion of certain economic development and retention records. There were no comments regarding subdivisions A 33 and A 34. A representative of the Virginia Economic Development Partnership (VEDP) stated that VEDP finds subdivision A 40 to be very effective as it is. As all three of these exemptions reference corresponding records exemptions, the Subcommittee decided without objection to wait until the Records Subcommittee had a chance to review the corresponding records exemptions, and then come back to reconsider the meetings exemptions.

Mr. Whitehurst opened the floor to any further comments from the public or Subcommittee members; there were none. The Subcommittee then discussed scheduling future meetings and decided to hold its next meeting at 10:00 a.m. on September 16, 2014, prior to the full FOIA Council meeting that afternoon.³ The meeting was then adjourned.

² *White Dog Publishing, Inc. v. Culpeper County Bd. of Supervisors*, 272 Va. 377, 634 S.E.2d 334 (2006).

³ Please note that the meeting of the Subcommittee scheduled for September 16, 2014, was subsequently cancelled; the next meeting of the Subcommittee was then scheduled to be held at 1:30 PM on November 5, 2014.