

Virginia Freedom of Information Advisory Council
Records Subcommittee
May 11, 2015
1:30 PM
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its first meeting of the 2015 Interim on May 11, 2015, to continue the three-year study of FOIA directed by House Joint Resolution No. 96 (HJR 96). Subcommittee members Tavenner (Chair), Ashby (Vice Chair), Hamlett, and Oksman were present; Mr. Jones was absent.

After the meeting was called to order, staff presented a brief review of the Subcommittee's work thus far. HJR No. 96 directs the FOIA Council to conduct a three-year study of FOIA examining all of the exemptions in FOIA, as well as the organization and structure of FOIA. In 2014 the Records Subcommittee began its consideration of the records exemptions in FOIA by considering §§ 2.2-3705.1 (exemptions of general application), 2.2-3705.8 (limitation on record exclusions), and 2.2-3705.7 (records of specific public bodies and certain other limited exemptions).

The Subcommittee then considered old business. It deferred consideration of the exemption for written advice of legal counsel, subdivision 2 of § 2.2-3705.1, as Mr. Jones had expressed particular concern about this exemption last year but was unable to attend today's meeting. The Subcommittee also deferred consideration of the working papers and correspondence exemption, subdivision 2 of § 2.2-3705.7, as it is expected that at its next meeting, the FOIA Council will refer to the Subcommittee two relevant bills from the 2015 Session of the General Assembly.

The Subcommittee next considered subdivision 27 of § 2.2-3705.7, an exemption for certain records maintained by the Department of the Treasury (Treasury) or participants in the Local Government Investment Pool. The Subcommittee deferred consideration of this exemption last year in order to determine whether it was still necessary given the exemption for account and routing numbers enacted in 2010.¹ Treasury representatives pointed out that subdivision 27 covers other sensitive information such as authorized signatories, email and mailing address, tax identification numbers, and other information not covered under the exemption for account and routing numbers, and therefore both exemptions should be kept. Roger Wiley, an attorney representing local government and a former FOIA Council member, and Bill Watt from Treasury agreed that the exemption is not meant to conceal the fact that funds are invested, but only to protect information that is required to be provided. Mr. Wiley suggested the possibility of amending the general exemption for account and routing numbers to include the other sensitive information, as part of the purpose of the study is to eliminate single-entity exemptions. He expressed that such sensitive information would be relevant to any bank or investment account, and should be protected regardless of who holds it. It was agreed that Mr. Wiley would work with Treasury to come up with proposed language for the Subcommittee's consideration.

¹ Subdivision 13 of § 2.2-3705.1.

The Subcommittee then considered subdivision 6 of § 2.2-3705.1, an exemption for certain vendor proprietary information software. The Subcommittee deferred consideration of this exemption in 2014 in order to study it in conjunction with other proprietary records exemptions in § 2.2-3705.6, which is the first section to be considered in 2015. Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), reminded the Subcommittee that VPA had submitted a white paper last year which proposed using a generic proprietary records exclusion rather than the many exemptions in current law that are limited to individual entities. Mr. Wiley stated his agreement, and pointed out that FOIA is criticized by the media for having too many exemptions. Staff noted that the term "trade secrets" is defined under the Uniform Trade Secrets Act (UTSA)(Code § 59.1-336 et seq.), but the term "proprietary" has no statutory definition. The Virginia Supreme Court recently held that "proprietary" should be given its ordinary meaning: "a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls."² Staff noted that the statutory definition of "public record" expresses similar concepts in the part referring to records "prepared or owned by, or in the possession of a public body or its officers, employees or agents."³ Staff also noted that in the procurement context, there are three different types of proprietary records exempted.⁴ Mr. Ashby noted the lack of uniformity in the use of the term. Mr. Merritt recommended that "proprietary" stop being used incorrectly, as it merely refers to an ownership interest, not a confidence. In response to inquiries from Mr. Ashby, Sandi McNinch of the Virginia Economic Development Partnership (VEDP) indicated the idea of having a single generic exemption would be acceptable as long as it covered everything that needs to be protected. She further observed that subdivision 3 of § 2.2-3705.6 works well for VEDP as it is currently written. After some further discussion, the Subcommittee agreed to have staff and interested parties to form a work group to study the issue of proprietary records and trade secrets in depth and come up with a proposal.

The Subcommittee directed staff to poll for future meeting dates. The meeting was then adjourned.

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² *American Tradition Institute v. Rector and Board of Visitors of the University of Virginia*, 287 Va. 330, 341, 756 S.E.2d 435, 441 (2014)(quoting *Green v. Lewis*, 221 Va. 547, 555, 272 S.E.2d 181, 186 (1980)).

³ Code § 2.2-3701.

⁴ See subdivision 11 of § 2.2-3705.6.