Virginia Freedom of Information Advisory Council
Proprietary Records Work Group
June 18, 2015
1:30 PM
Speaker's Conference Room, Sixth Floor
General Assembly Building
Richmond, Virginia
Discussion Summary

At its meeting on May 11, 2015, the Records Subcommittee of the FOIA Council (the Subcommittee) directed staff to meet with interested parties to discuss records exemptions for proprietary records and trade secrets.[1] The Subcommittee and others had expressed concern about the proliferation of many different exemptions for specific types of records containing proprietary information and trade secrets, most of which are limited to use by specific public bodies, and many of which use different terminology. Concerns were raised that having so many limited exemptions with different provisions can be confusing, makes FOIA more lengthy and difficult to understand, and still does not cover the full range of proprietary records and trade secrets held by public bodies. It was suggested that these many specific exemptions might be consolidated into one or more exemptions of general application. The work group held its first discussion on June 18, 2015 to consider these issues.

As background, staff presented an overview of issues with reference to a background document (incorporated herein by reference) that sets out the current statutory definition of "trade secrets" from § 59.1-336 of the Uniform Trade Secrets Act (UTSA); the common-usage definition of "proprietary" used by the Virginia Supreme Court in the absence of a statutory definition; the statutory definition of "public records" in § 2.2-3701 of FOIA; sample language of the three step "earmarking" process used in many current exemptions to invoke the exemption, identify what is to be protected, and to state why protection is needed; raises the question of whether there should be a general exemption for "trade secrets;" raises the question of whether there should be one or more exemptions for categories of "proprietary" records; and raises the issue of how to address copyright protected records in the FOIA context. The background document also includes an appendix that quotes many usages of the terms "proprietary" and "trade secrets" in current exemptions as examples.

Julie Whitlock of DGS began the discussion by stating that the Division of Consolidated Laboratory Services (DCLS) at DGS accredits private laboratories and gets trade secrets and proprietary records from the private laboratories as part of the process, but currently does not have a specific exemption for such records. In discussion with Roger Wiley, an attorney representing local government and former FOIA Council member, and Craig Merritt, Ms.

[1] Please note that no members were appointed to the work group, but all interested parties were invited to join in the discussion. Interested parties included Chris McGee of the Virginia College Savings Plan (VCSP), Chris Whyte of the Vector Corporation, Cindy Comer of the Virginia Retirement System (VRS), Craig Merritt of Christian & Barton representing the Virginia Press Association (VPA), David Lacy of Christian & Barton, Ginger Stanley and Jeremy Slayton of VPA, Jonathan Williams of Easter Associates on behalf of the Virginia Association of Broadcasters (VAB), Julie Whitlock of the Department of General Services (DGS), Mark Flynn of the Virginia Municipal League (VML), Phyllis Errico of the Virginia Association of Counties (VACo), and Sandi McNinch of the Virginia Economic Development Partnership (VEDP).

Whitlock indicated the records DCLS holds would fall within the definition of "trade secrets" in the UTSA and would include financial records.

Mr. McGee asked whether there were arguments against a general exemption for trade secrets. Ms. Whitlock indicated concerns with categorical "earmarking" and how records might be treated years later, as well as problems with vendors that use the term "confidential" rather than "trade secret" or "proprietary," vendors that fail to mark anything, and vendors who mark everything. Mr. Merritt proposed making it so that the public body is taken out of the process and the burden remains on the party that submits records to a public body if there is a dispute about whether records are over- or mis-designated. He suggested that the process should be to have the requester make the party submitting information a party to any enforcement action, and that the court could then require the party submitting information to pay attorney fees and court costs if a violation is found, rather than making the public body pay fees and costs. Phil Abraham, speaking on behalf of Transurban USA, Inc., suggested there may be unintended consequences if the public body were taken out of the process, as the party submitting records would have no confidence that the public body will withhold designated records. Ms. Comer shared that concern in the context of private equity managers, stating such a change could have a chilling effect on their willingness to do business with VRS; Mr. McGee concurred on the same point affecting VCSP.

The interested parties then discussed whether public bodies would have to indemnify those who submit information if the submitters over- or mis-designate what is to be protected. There was some disagreement regarding whether submitters would intervene in suits between requesters and public bodies in order to protect records the submitters consider proprietary or trade secrets. The question of whether the public body must notify third parties who submit information was also raised.

Dave Ress, a reporter with the Daily Press, stated that the current earmarking process works fairly well, but suggested that the written statement of why protection is needed should be shared publicly. Staff noted that such statements are not exempt, and should be shared on request under current law.

Mr. Wiley observed that there is a tendency of private parties to designate everything as proprietary and confidential, even when it is not legally correct. He also noted as an example that competing bidders in procurement transaction often ask for their competitors' submissions, including things that the requester may have designated as confidential in his or her own bid. He also noted there is a greater duty to protect records when issuing permits or licenses or the like, rather than in procurement deals. Mr. Flynn noted that those processes often involved the same information that would be submitted to get a business license, but that business licenses are secret pursuant to § 58.1-3.

After some further discussion, Mr. Merritt suggested eliminating the word "proprietary." He suggested that if the goal is to indicate an ownership interest, it should be plainly stated that the submitting party has an ownership interest. Alex Thorpe of VEDP stated there are lots of things that are proprietary but not confidential, and vice-versa. Staff referred to work on subdivision 11 of § 2.2-3705.6, the exemption for certain public-private partnership procurement records, for

categorical examples of the types of records to be protected. Mr. Wiley observed that current exemptions are very inconsistent. As an example, he noted that the second and third clauses in subdivision 23 of § 2.2-3705.6 were already covered under the definition of trade secrets set out in the first clause and did not need to be set out separately. He pointed out that having separate clauses raises the question of why they are separate and how a court would give effect to the separate language as something different than the "trade secrets" already protected in the first clause. Mr. Merritt stated there is a lack of confidence in the definition of "trade secret" as it is a broad concept in commercial law. Mr. Wiley asked why public bodies would need specific language if the information to be protected is already covered by the definition of "trade secret." Mr. Abraham stated that listing specifics helps the public body to know what is covered. Mr. Wiley stated that if specifics are given in some places and not others, it becomes reductive rather than additive. Ms. Stanley agreed. Ms. Whitlock asked regarding subdivision 23 whether only the first clause addressing trade secrets as defined in the UTSA should be kept, to which there was general agreement. Staff noted that if there was a single general exemption for trade secrets as defined in the UTSA, then subdivision 23 (and perhaps others) could be eliminated and the records would still be protected.

The work group then agreed to have staff post a draft regarding trade secrets, based on language prepared by the VPA, for further consideration. It was also suggested that it may be necessary to make clear that any changes would apply prospectively, not retroactively to records already submitted; staff stated an enactment clause could address this issue. The work group also agreed to have staff post a draft that would clarify that in the event of a conflict between FOIA and copyright law, copyright would control. The work group scheduled its next discussion to be held at 10:00 AM on Tuesday, July 21, 2015.

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