



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

Study Plan for 2017

As you will recall, House Joint Resolution 96 (2014) directed the Virginia Freedom of Information Advisory Council (the Council) to study all exemptions contained in the Virginia Freedom of Information Act (FOIA) to determine the continued applicability or appropriateness of such exemptions and whether FOIA should be amended to eliminate any exemption from the FOIA that the Council determines is no longer applicable or appropriate. The HJR 96 study concluded last year and resulted in two omnibus bills recommended to the 2017 Session of the General Assembly incorporating the recommendations of the Council and its Subcommittees on Records (HB 1539) and Meetings (HB 1540), respectively. However, at the conclusion of the HJR 96 study, the Council decided to carry over certain topics for further study in 2017. This year the goal is to provide an opportunity to identify any specific issues that need to be addressed. To further that goal, we ask that interested parties participate in the study by identifying any specific issues they would like to see addressed. Suggesting language for the Council's consideration to address the issues identified is encouraged.

Topics for 2017

Below are listed the five topic areas carried over for further study, with a brief summary of the work done and issues identified previously by the HJR 96 study.

(1) Proprietary records and trade secrets (§ 2.2-3705.6 and other exemptions). A draft was proposed by the Virginia Press Association in 2015 proposing to create a general exemption for trade secrets and proprietary records. The topic was studied extensively by the Records Subcommittee and its Proprietary Records Work Group in 2015 and 2016 using this draft and amended versions of it as a vehicle. Input was solicited and received from agencies that would be affected if their exemptions were amended. Many specific issues were identified (definition of "proprietary," distinguishing between records submitted by third parties and those generated by public bodies, concerns regarding the designation of records as proprietary/trade secrets, etc.), but no consensus was reached. There is a Council-prepared draft that will be used as a vehicle for discussion.

(2) Personnel records (§ 2.2-3705.1). The Records Subcommittee and its Personnel Records Work Group met several times and considered several drafts in 2016 with the goal of creating a statutory definition of "personnel records." This study also revealed issues regarding the

interaction of the personnel records exemption with various administrative investigation exemptions (§ 2.2-3705.3). Drafts were considered that would have defined "personnel records," created a general exemption for administrative investigation records, and distinguished between the two, but no consensus was reached.

(3) Access to law-enforcement records (§ 2.2-3706). This topic was raised in 2016 but only studied in cursory fashion due to time constraints. The main issue of contention raised was regarding the treatment of criminal investigative files. Such files may be withheld under current law even after an investigation or prosecution is concluded or no longer active. Bills introduced in 2010, 2011, 2012, and 2016 would have limited application of the exemption to active or ongoing investigations, but those bills failed to be enacted. There was a Criminal Records Subcommittee of the FOIA Council that met from 2010 through 2012 to study this section and the bills introduced in those years. That study resulted in Council-recommended legislation amending § 2.2-3706 in 2013 to reorganize the section for clarity, to allow verbal responses to requests for criminal incident information, and to clarify that 911 calls and other calls for service are subject to the provisions of FOIA.

(4) Review of FOIA in light of advancement in technology. Several issues were raised concerning the effects of technology regarding access to both records and meetings:

- FOIA policy statement. At the beginning of the HJR 96 study, staff suggested that FOIA be amended to include a policy statement to the effect that: "Any public body procuring any computer system, equipment or software, shall ensure that the proposed system, equipment or software is capable of producing public records in accordance with this chapter." (Language from § 2.2-1111, applicable to the Department of General Services.)
- "Vendor proprietary software" (§ 2.2-3705.1(6)) and "Computer software developed by or for [a public body]" (2.2-3705.1(7)).
- Website posting of notice and minutes (§§ 2.2-3707 and 2.2-3707.1).
- Texting among members during public meetings.
- Technical terminology & definitions
- Access to databases; the Supreme Court of Virginia is scheduled to hear a case concerning access to and custody of databases this year, and so the Council decided to wait until the Court has rendered its decision before studying this issue further.

(5) Reorganization of FOIA. Examine the organizational structure of FOIA and make recommendations to improve the readability and clarity. A draft was presented for consideration that would organize FOIA into articles for further clarity, but no consensus was reached.

2017 Subcommittee

It is anticipated that for 2017, the Council will establish one subcommittee that will study each of the issues above one at a time (i.e. serially), rather than having multiple subcommittees studying multiple issues concurrently. It is expected that the subcommittee will meet two to three times on each issue and make a recommendation to the full Council. Once a decision has been made on a recommendation, the subcommittee will turn to the next issue presented. Subcommittee membership may change as different topics are addressed. All Council members are welcome

and encouraged to serve on the subcommittee as it studies the topic(s) of greatest interest to each member.

2017 Meeting Locations and Scheduling

Due to closure of the General Assembly Building this year, the Division of Legislative Services (including Council staff) is scheduled to move into the Pocahontas Building (Main St. & 9th St.) in June. It is expected that most of the meetings of the Council and its subcommittee will be held in either the Pocahontas Building or the Capitol Building, although it is not required that meetings be held in Richmond.

As you know, the full Council meets quarterly and is required to file its annual report to the General Assembly each December 1. In the interest of time management, it is suggested that the subcommittee address issues on a quarterly basis in between full Council meetings, then present final recommendations to the Council at each quarterly meeting for action by the full Council. The suggested schedule for 2017 is to address proprietary meetings/trade secrets and personnel issues during the second quarter (March - June) of 2017, law-enforcement records and technology issues during the third quarter (July - September), and to finish with examination of the organization of FOIA and any remaining issues in the third quarter.

Contact Information

If you have any questions or need additional information, please contact Maria J.K. Everett, Executive Director, Alan Gernhardt, Senior Attorney, or Jessica L. Budd, Attorney, by electronic mail at foiacouncil@dls.virginia.gov or by telephone at (804) 225-3056 or toll-free at (866)-448-4100.