



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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HJR 96 Study Issues continued to 2017

- **Proprietary records and trade secrets**
In 2014 the Virginia Press Association presented a white paper suggesting the creation of a single general exemption rather than continuing to proliferate many specific exemptions using similar language. This topic was studied in detail by the Records Subcommittee, the Proprietary Records Workgroup, and the full Council from 2014 through 2016. Many draft proposals were considered, but there was no consensus to move forward and so the HJR No. 96 study concluded without a recommendation on this topic. The Proprietary Records and Trade Secrets Subcommittee, which consists of Council members Delegate LeMunyon (Chair), King-Casey, Porto, Seltzer and Vucci, has met four times in 2017 and had a workgroup (staff & interested parties) meet once. The Subcommittee has recommended legislation to the FOIA Council that would create a general exemption for trade secrets submitted to a public body. The Subcommittee has also referred without recommendation a bill that would delete the terms "proprietary" and "confidential" from § 2.2-3705.6 for the Council's consideration.
- **Personnel records (§ 2.2-3705.1)**
Personnel records were studied by the Records Subcommittee, two work groups, and the full Council from 2014 through 2016. Amendments to the existing exemption passed the 2017 Session of the General Assembly as part of the omnibus legislation recommended by the Council (HB 1539). Additional issues were identified but not resolved concerning the treatment of letters of recommendation, the lack of a definition of "personnel records," and the interaction of provisions concerning personnel records with administrative investigations. Council members Coleburn, Dooley, Hamlett, King-Casey, Porto,

and Vucci expressed interest in serving on the Subcommittee studying these issues.

- **Technology Issues**

Over the course of the HJR No. 96 study, several issues were raised and studied by both Subcommittees and the Council 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 decided a case concerning access to and custody of databases in June, 2017 (The Daily Press v. Office of the Executive Secretary of the Supreme Court). Previously the Council had decided to wait until the Court had rendered its decision before studying this issue further.*

Council members Coleburn, Hamlett, King-Casey, Porto, and Stern expressed interest in serving on the Subcommittee studying these issues.

- **Law-enforcement records (§ 2.2-3706)**

Access to law-enforcement records was studied by a Criminal Investigative Records Subcommittee of the FOIA Council from 2010 through 2012. 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. The study from 2010 to 2012 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; however the study did not result in any consensus on the issue of access to criminal investigative records. The issue was raised again in 2016 but only studied in cursory fashion due to time constraints. Additional issues of interpretation of the application of subsections A and B of § 2.2-3706, and whether those sections are limited to public bodies engaged in law-enforcement activities, have also arisen. Council members

Coleburn, Porto, Seltzer and Vucci expressed interest in serving on the Subcommittee studying these issues.

- **Reorganization of FOIA.**

HJR No. 96 directed the Council to 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 three articles (one for general provisions, one for records, and one for meetings) for further clarity, but no consensus was reached. Council members Coleburn, Hamlett, King-Casey, Porto, Seltzer, Stern and Vucci expressed interest in serving on the Subcommittee studying these issues.

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