



***VIRGINIA FREEDOM OF INFORMATION
ADVISORY COUNCIL***
House Joint Resolution 96 (2014)
Study Plan Discussion Draft

House Joint Resolution 96 (2014) directs 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exemptions and whether FOIA should be amended to eliminate any exemption from the FOIA that the Council determines is no longer applicable or appropriate. In conducting its study, the Council shall also examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA. The Council shall consider comment from citizens of the Commonwealth; representatives of state and local governmental entities; broadcast, print, and electronic media sources; open government organizations; and other interested parties. The resolution requires the Council to report its findings and recommendations to the General Assembly by December 1, 2016.

2014 Study Plan Overview

It is anticipated that for the remainder of 2014, the Council will establish two subcommittees, one to examine records exemptions and one to examine meetings exemptions. Because there are far more records exemptions than there are meetings exemptions, it is anticipated that the meetings subcommittee will conclude its work this year, but next year the Council will establish one or more additional records subcommittees to continue studying records exemptions during the 2015 and 2016 interim periods.

It is expected that each subcommittee will meet two to three times (or more if necessary), then report its findings to the full Council. Subcommittees may meet at locations other than Richmond, but should coordinate plans to do with the Executive Director in advance. As the full Council meets quarterly and is required to file its annual report to the General Assembly each December 1, the goal is to complete the first phase of the study by November, 2014.

It is not anticipated that the Council will recommend study-related legislation this year, as the study will not be complete. Instead, the study will resume after the 2015 Session of the General Assembly, and again after the 2016 Session of the General Assembly, with the third year goal being to complete all subcommittee work and recommend comprehensive legislation to the 2017 Session of the General Assembly.

2014 Subcommittees

- *Records Subcommittee*: It is suggested that this subcommittee begin its work by studying §§ 2.2-3705.1 (exemptions of general application), 2.2-3705.7 (records of specific public bodies and certain other limited exemptions) and 2.2-3705.8 (limitation on record exclusions). The subcommittee will also study § 2.2-3705.6 (proprietary records and trade secrets) during the 2014 interim. Note that because § 2.2-3706 (concerning criminal and law enforcement records) was the subject of three years of study resulting in legislation passed last year as a recommendation of the Council, further study of this section is not recommended at this time.
- *Meetings Subcommittee*: The goal of this subcommittee is to study all meetings exemptions in § 2.2-3711 during the 2014 interim, as well as procedural or other meetings issues, should any be raised.

2015 Subcommittees

- *Records Subcommittee #1*: It is suggested that this subcommittee study §§ 2.2-3705.2 (records relating to public safety) and 2.2-3705.3 (records relating to administrative investigations).
- *Records Subcommittee #2*: It is suggested that this subcommittee study §§ 2.2-3705.4 (educational records and certain records of educational institutions) and 2.2-3705.5 (health and social services records).

2016 Subcommittees

- *General Provision Subcommittee*: This subcommittee will study other provisions of FOIA as needed.

Guidance to the Subcommittees/Role of the FOIA Council

Bills referred by the General Assembly: It is anticipated that the Council will address the bills referred to it by the General Assembly either by assigning them to the appropriate subcommittee, or handling them directly. Of the four bills referred for study during the 2014 interim, three would be appropriate to send to the Records Subcommittee if the Council does not dispose of them itself: two identical bills (HB 339/SB 387) would modify an existing records exemption, and one (HB 788) addresses out-of-state records requests. The fourth bill (HB 839) addresses the applicability of FOIA to the Office of the Attorney General, an issue the Council may wish to address directly.

Organization of FOIA and policy issues: HJ 96 requires that the council examine the organizational structure of FOIA. This could be accomplished to more clearly differentiate between sections pertaining to records, sections pertaining to meetings, and sections pertaining to both. Staff has prepared a draft that the Council may choose to adopt as a working vehicle for

the study that includes these changes. Additionally, the Council will provide guidance on policy issues, while the respective subcommittees focus on addressing specific exemptions in detail. For example, one policy question is whether to have numerous limited exemptions, fewer exemptions that are more broadly applicable, or a combination of both types. As a specific example, § 2.2-3705.6 currently contains many exemptions for trade secrets held in different types of records by different agencies. Does the Council prefer this approach, or would the Council prefer to have one exemption covering trade secrets generally?

Contacting agencies: It is suggested that the study, following the policy statement of FOIA expressed in § 2.2-3700, take the approach that all records and meetings are presumed to be open, and that any exemption must be justified. To facilitate this approach, it is suggested that agencies to which particular exemptions apply be contacted and asked to explain the need for their particular exemption(s). It is further suggested that appearances by agency representatives be scheduled to address all relevant exemptions at once, rather than asking agency representatives to appear multiple times.

Technology issues: The goals of the study will include the elimination of obsolete language within FOIA as well as any additional changes necessitated by technological advances. Electronic mail, geographic information systems (GIS), records management issues as they affect access, and consideration of FOIA in the procurement of technology are areas of particular concern.

Court opinions, FOIA Advisory Opinions and other resources: During the course of work, subcommittees are expected to review relevant court opinions, FOIA Advisory Opinions, and other information relevant to their work, including comparable provisions in open government laws in other states and the federal government. This may be helpful in providing insight into opportunities to clarify the Virginia Code to reduce litigation and the need for Advisory Opinions.

Contact Information

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