



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

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Delegate James M. LeMunyon, Vice Chair

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July 22, 2015



### ***VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL***

**Wednesday, July 22, 2015 - 1:30 p.m.  
House Room D, General Assembly Building**

### **SUGGESTED AGENDA \*ANNOTATED\***

- 1. Call to Order, and introduction of members.**
- 2. Welcoming Marisa Porto to the FOIA Council.**

*Ms. Porto, vice president of content for the Daily Press in Newport News was appointed to a four-year term by the Speaker of the House of Delegates as the media representative to the Council.*
- 3. Subcommittee Reports.**
  - **Records Subcommittee.** *The Records Subcommittee has met three times during the 2015 Interim ( May 11, 2015, June 18, 2015, and July 22, 2015) to continue its study of records exemptions as directed by HJR No. 96 and pursuant to the study plan adopted by the Council. Please see Appendix A to this agenda for additional information about what sections of FOIA were reviewed by the Records Subcommittee beginning in 2014 and the*

*recommendations of the Records Subcommittee made as of June 18, 2015. In addition, additional review of record exemptions and any recommendations made on July 22 will be discussed.*

- **Meetings Subcommittee.** *The Meetings Subcommittee has met three times during the 2015 Interim ( May 12, 2015, June 17, 2015, and July 21, 2015) to continue its study of meeting exemptions as directed by HJR No. 96 and pursuant to the study plan adopted by the Council. Please see Appendix B to this agenda for additional information about what sections of FOIA were reviewed by the Meetings Subcommittee beginning in 2014 and the recommendations of the Meetings Subcommittee made as of June 17, 2015. In addition, additional review of remaining meetings exemptions and any recommendations made on July 21 will be discussed.*
- **Study Work plan.** *For reference, the HJR 96 Study work plan is appears as Appendix C to this agenda.*
- **Appointment of Subcommittee member(s) to fill vacancy left by expiration of George Whitehurst's term.** *As you will recall, George Whitehurst's term on the FOIA Council expired on July 1, 2015. Mr. Whitehurst served on the Meetings Subcommittee. It is suggested that the Council appoint a new member(s) to the Meetings Subcommittee to fill this vacancy.*

**4. Exercise of FOIA Council statutory duties.** *Tim Oksman*

**5. Public comment.**

**6. Other Business.**

- **FOIA training.** *You will recall at the last meeting of the Council, the Council deferred to staff the authority to fashion any alternative to the statewide FOIA workshops it deemed advisable. [Background: Staff advised that, while well attended, the annual statewide FOIA Workshops posed considerable administrative burdens in their planning and execution. While staff views FOIA training as its most critical mission, it was considering changing the way FOIA training would be conducted statewide. Essentially, staff proposed that in fulfilling its statutory mission to conduct educational programs about FOIA, it would provide training*

*upon request to interested groups, such as the staff of state and local agencies, members of local governing bodies, media organizations, citizen organizations, and any other group that wishes to learn more about FOIA. Council staff will travel to the location of the group requesting training. The training is and would be tailored to meet the needs of the particular group, can range from 45 minutes to several hours, and can present a general overview of FOIA or focus specifically on particular exemptions or portions of FOIA frequently used by that group or organization. Organizations requesting training are strongly encouraged, but not required, to consolidate training by including other like organizations within a single or neighboring jurisdiction(s) wherever possible.]*

7. **Set future meetings.** (Reminder: Meetings may only be scheduled on Monday, Tuesday, and Wednesday of the first and third full weeks of the month.)
8. **REMINDER: Next Council meeting is September 30, 2015 at 10:00 a.m.**
9. **Adjournment.**

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**Council Members**

**Senator Richard H. Stuart, Chair**  
**Sandra G. Treadway**  
**Forrest M. "Frosty" Landon**  
**Ed Jones**  
**G. Timothy Oksman**  
**Stephanie Hamlett**

**Delegate James M. LeMunyon, Vice Chair**  
**Christopher Ashby**  
**John G. Selph**  
**Kathleen Dooley**  
**Robert L. Tavenner**  
**Marisa Porto**

**Staff**

Maria J.K. Everett, Executive Director  
Alan Gernhardt, Staff Attorney

The FOIA Council's web site is: <http://foiacouncil.dls.virginia.gov>. To assist us in providing Internet dissemination of materials, presenters are requested to submit written comments and handouts in electronic format by (i) e-mail to staff prior to meetings or (ii) diskette furnished to staff at meetings. Presenters are also requested to bring 20 copies of their remarks or handouts to meetings. These copies will be provided to FOIA Council members and the public.  
E-mail: [foiacouncil@dls.virginia.gov](mailto:foiacouncil@dls.virginia.gov).

## APPENDIX A

### Summary of the work of the Records Subcommittee

2014 recap:

- Met four times in 2014 to begin studying record exemptions pursuant to House Joint Resolution No. 96 (2014).
- Addressed exemptions of general application (§§ 2.2-3705.1 and 2.2-3705.) and exemptions to records of specific public bodies (§ 2.2-3705.7).
- Specific recommendations to be included in omnibus legislation at the end of the three-year study.

2015 - First meeting, May 11, 2015:

#### OLD BUSINESS:

- Carried over for further study two exemptions:  
(1) Advice of legal counsel (§ 2.2-3705.1(2)) and  
(2) Working papers and correspondence of certain officials (§ 2.2-3705.7(2)).
- Looked at an exemption for certain records maintained by the Department of the Treasury or participants in the Local Government Investment Pool (§ 2.2-3705.7(27)). Asked that a legislative proposal be drafted to eliminate this specific exemption, and instead expand a more general exemption for financial account and routing numbers to cover the data that needs protection (§ 2.2-3705.1(13)). To be considered at a later meeting.

#### NEW BUSINESS:

- The Subcommittee began looking at exemptions for proprietary records and trade secrets (§ 2.2-3705.6).
- Suggested to consolidate the many specific individual exemptions into one or more broader exemptions in this area. The Subcommittee directed that staff and interested parties form a work group on this issue to develop draft language for the Subcommittee's consideration. The work group held its first meeting on June 18, 2015.

2015 - Second meeting, June 18, 2015:

#### OLD BUSINESS:

- Carried over for further study two exemptions:  
(1) Advice of legal counsel (§ 2.2-3705.1(2)) - after further discussion, decided to make no recommendation.  
(2) Working papers and correspondence of certain officials (§ 2.2-3705.7(2)) - HB 1722/SB 893 referred from 2015 Session of the General Assembly, which would have eliminated this exemption for presidents of public institutions of

higher education. After discussion, the Subcommittee decided to carry this topic over for further consideration.

**§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies.**

<b>Code Subsection or Subdivision</b>	<b>Date(s) Reviewed</b>	<b>Recommended Action(s)</b>	<b>Need to consider further? (Yes/No)</b>
1 (personnel)	July 8, and August 25, 2014	Amend; include language from current § 2.2-3705.8 (A); add "name" as required disclosure	No
2 (legal counsel)	July 8, August 25, and November 5, 2014	No recommendation	No (as of June 18, 2015)
3 (legal work product)	July 8, 2014	No changes	No
4 (tests or exams)	July 8, 2014	No changes	No
5 (closed meeting records)	July 8, 2014	No changes	No
6 (vendor software)	July 8, 2014	Further consideration with other proprietary records when address § 2.2-3705.6	YES (Proprietary Records Workgroup)
7 (custom software)	July 8, 2014	No changes	No
8 (real property appraisals & estimates)	July 8, 2014	No changes	No
9 (risk mgmt.)	July 8, 2014	No changes	No
10 (email spam)	July 8, August 25, and November 5, 2014	Amend to clarify not a general "personal information" exemption	No
11 (dispute resolution)	July 8, 2014	No changes	No
12 (public contracts)	July 8, 2014	No changes	No
13 (account & routing numbers)	July 8, 2014	No changes	No

**§ 2.2-3705.8. Limitation on record exclusions.**

<b>Code Subsection or Subdivision</b>	<b>Date(s) Reviewed</b>	<b>Recommended Action(s)</b>	<b>Need to consider further? (Yes/No)</b>
A (personnel - required disclosures)	July 8, and August 25, 2014	Incorporate language into § 2.2-3705.1.	No
B (consultant's reports)	July 8, 2014	No changes	No

**§ 2.2-3705.7. Exclusions to application of chapter; records of specific public bodies and certain other limited exemptions.**

<b>Code Subsection or Subdivision</b>	<b>Date(s) Reviewed</b>	<b>Recommended Action(s)</b>	<b>Need to consider further? (Yes/No)</b>
1 (tax & scholastic records)	August 25, 2014	Remove "scholastic"	No
2 (working papers & correspondence)	August 25, 2014	Carry over for further consideration	YES (Note: HB 1722/SB893 referred in 2015)
3 (library records)	August 25, 2014	No changes	No
4 (VDOT cost estimates)	August 25, 2014	No changes	No
5 (bond owner lists)	August 25, 2014	No changes	No
6 (General Assembly members)	August 25, and November 5, 2014	No changes	No
7 (utility customer info)	August 25, 2014	Amend for clarity	No
8 (VHDA, rent assistance)	August 25, 2014	No changes	No
9 (hazardous waste siting)	August 25, 2014	No changes	No
10 (endangered species, historic sites)	August 25, 2014	No changes	No
11 (Lottery exemption re: games)	August 25, 2014	No changes	No
12 (VRS, UVA, VCSP investments)	August 25, 2014	No changes	No

13 (Va Wildlife magazine)	November 5, 2014	Eliminate	No
14 (Assistive Technology Loan Fund Authority)	November 5, 2014	No changes	No
15 (VCU Health Systems Authority)	November 5, 2014	No changes <i>NOTE: 2015 Acts, ch. 549 amended this exemption to add VCU.</i>	No
16 (DEQ etc. enforcement)	August 25, 2014	No changes	No
17 (toll facilities)	November 5, 2014	No changes	No
18 (Lottery exemption re: retailers & winners)	August 25, 2014	No changes	No
19 (branch pilots)	November 5, 2014	No changes	No
20 (unclaimed property)	November 5, 2014	No changes	No
21 (citizen emergency response teams)	November 5, 2014	No changes	No
22 (minors - parks & rec)	November 5, 2014	No changes	No
23 (Statewide Alert Network)	November 5, 2014	No changes	No
24 (JIRC)	November 5, 2014	No changes	No
25 (VRS, VCSP investments)	August 25, 2014	No changes	No
26 (DoC - executions)	November 5, 2014	No changes	No
27 (Treasury, Local Gov't Investment Pool)	November 5, 2014	Defer consideration re: whether necessary after § 2.2-3705.1 (13) enacted	YES (Note: Corresponding meetings amendment recommended by Mtgs Subcommittee)
28 (Veterans Services Care Centers)	November 5, 2014	No changes	No
29 (Veterans Services Foundation)	November 5, 2014	No changes	No
30 (constituent)	November	Eliminate	No

correspondence)	5, 2014		
31 (Commonwealth's Atty's Services Council)	November 5, 2014	No changes	No
32 (Department of Aviation)	November 5, 2014	No changes	No
33 (judicial performance evaluation)	November 5, 2014	No changes	No

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## APPENDIX B

### Summary of the work of the Meetings Subcommittee

#### **I. REVIEWED IN 2014 AND RECOMMENDATION MADE:**

#### ***§ 2.2-3711***

A 2 (scholastic)
July 8, 2014
No changes

A 3 (real estate)
July 8, 2014
No changes

A 4 (personal matters)
July 8, 2014
No changes

A 5 (prospective business/no prior announcement)
July 8, 2014
No changes

A 6 (investment of public funds)
July 8, 2014
No changes

A 7 (specific legal matters or litigation)
July 8 and August 19, 2014
Separate into two exemptions

A 8 (boards of visitors/gifts, grants, etc.)
August 19 and November 5, 2014
No changes

A 10 (honorary degrees or special awards)
August 19, 2014
No changes

A 11 (tests & exams)
August 19, 2014
No changes

A 12 (disciplinary action vs. member of General Assembly)
November 5, 2014
No changes

A 13 (hazardous waste siting)
August 19, 2014
No changes

A 14 (Governor and advisory board economic forecasts)
November 5, 2014
No changes

A 15 (medical & mental health records)
August 19, 2014
No changes

A 16 (Lottery Board)
November 5, 2014
No changes

**II. REVIEWED IN 2014; FURTHER REVIEW NEEDED:  
[EITHER DEPENDENT ON RECOMMENDATION OF RECORDS  
SUBCOMMITTEE or OTHER ACTION/REVIEW]**

A 1 (personnel)
July 8 and August 19, 2014; May 12 and June 17, 2015
Further study re: application re: termination of local employees/officials

A 9 (VMFA, Natural History, Jamestown-Yorktown, Science Museum)
November 5, 2014; May 12 and June 17, 2015
Amend "grant" to "grant from private sources"

A 17 (local gov't crime commissions)
August 19 and November 5, 2014; May 12 and June 17, 2015
Recommend elimination; it appears that no local gov't crime commissions actually exist

A 20 (VRS, UVA, VCSP investments)
November 5, 2014; May 12 and June 17, 2015
Recommend adding cross-reference the law in Title 15.2 governing post-retirement benefits other than pensions

A 23 (VCU Health System Authority)
November 5, 2014; May 12 and June 17, 2015
Staff met with VCU representatives re: redundancy with other exemptions on July 9, 2015.
<i>NOTE: 2015 Acts, ch. 549 amended this exemption to add VCU Bd of Visitors.</i>

A 25 (VCSP "personal" info)
November 5, 2014; June 17, 2015
Considered adding definition of "personal information" instead of GDCDPA reference; recommend leaving current language on June 17, 2015.

**Deferrals until Records Subcommittee reviews corresponding records exemption\***

A 28 (PPEA & PPTA records)
August 19, 2014
Defer until Records Subcommittee reviews corresponding records exemptions

A 33 (telecom or cable TV)
August 19, 2014
Defer until Records Subcommittee reviews corresponding records exemption

A 34 (wireless service authorities)
August 19, 2014
Defer until Records Subcommittee reviews corresponding records exemption

A 40 (economic development) of records excluded under #3 of .6
August 19, 2014
Defer until Records Subcommittee reviews corresponding records exemption

*\*The Subcommittee also considered whether the current meeting exemptions that reference existing FOIA record exemptions should be amended to contain more information, to include the identity of the public body(s) to which the exemption applies and a general description of the subject matter of the excluded records/topic for discussion in a closed meeting, in addition to the citation to the applicable records exemption. A draft was prepared; the consensus of the Subcommittee is that the concept is good, but there may be unintended consequences. The Subcommittee decided to wait and give this idea further consideration before making a recommendation.*

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## APPENDIX C

### HJR 96 (2014) Study Plan Adopted by the Council

House Joint Resolution 96 (2014) directs 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.

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