



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

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Delegate James M. LeMunyon, Vice Chair

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September 30, 2015



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

**Wednesday, September 30, 2015 - 10:00 a.m.
House Room D, General Assembly Building**

**SUGGESTED AGENDA
*ANNOTATED***

- 1. Call to Order, and introduction of members.**
- 2. Welcome to Shawri King-Casey, newest member of the FOIA Council.**
Ms. King-Casey is the designee of the Attorney General on the FOIA Council and was appointed on July 28, 2015, replacing Tim Oksman. Ms. King-Casey is the Compliance and Transparency Counsel for the Office of the Attorney General.
- 3. Election of chair and vice chair of the FOIA Council.**
- 4. Review of HB 2223, (Morris) - FOIA; willful violations a misdemeanor; penalty.** *You will recall that the Council previously reviewed this bill at its May 20,*

2015 meeting and voted not to recommend the subject matter of this bill. Delegate Morris will be present to discuss his bill.¹

5. Subcommittee Reports.

- **Records Subcommittee.** *The Records Subcommittee has met four times during the 2015 Interim (May 11, 2015, June 18, 2015, July 22, 2015, and August 18, 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 July 22, 2015. In addition, additional review of record exemptions and any recommendations made on August 18, 2015 will be discussed.*
- **Meetings Subcommittee.** *The Meetings Subcommittee has met four times during the 2015 Interim (May 12, 2015, June 17, 2015, July 21, 2015, and August 19, 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 July 22, 2015. In addition, additional review of remaining meetings exemptions and any recommendations made on August 19 will be discussed.*
- **Study Work plan.** *For reference, the HJR 96 Study work plan is appears as Appendix C to this agenda.*

6. Review of Subcommittee-recommended legislative proposals. *At the midway point in the study of FOIA pursuant to HJR 96 (2014), this segment of the*

¹ **HB 2223 (Morris) - FOIA; willful violations a misdemeanor; penalty.** Provides that in addition to the civil enforcement provisions of FOIA, any officer, employee, or member of a public body who, without legal excuse or justification, deliberately, willfully, and knowingly violates certain FOIA provisions is guilty of a Class 1 misdemeanor.

agenda is for informational purposes only. It is not anticipated that the FOIA Council will act on any legislation at this time.

7. Annual Legislative Preview, Part I.

This is the opportunity for public bodies and interested parties to discuss with the Council any suggested FOIA legislative proposals for the 2016 Session of the General Assembly.

8. Public comment.

9. Other Business.

**10. REMINDER: Next Council meeting is November 18, 2015 at 10:00 a.m.,
House Room C of the General Assembly Building, Richmond.**

11. Adjournment.

Council Members

Senator Richard H. Stuart, Chair
Sandra G. Treadway
Forrest M. "Frosty" Landon
Ed Jones
Robert L. Tavenner
Marisa Porto

Delegate James M. LeMunyon, Vice Chair
Christopher Ashby
John G. Selph
Kathleen Dooley
Stephanie Hamlett
Shawri King-Casey

Staff

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

The FOIA Council's web site is: [http:// foiacouncil.dls.virginia.gov](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.

APPENDIX A

FOIA Study - House Joint Resolution No. 96 (2014)
2015 FOIA Records Subcommittee Work Summary

Last updated: July 22, 2015

I. OLD BUSINESS - Exemptions carried over from 2014

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

Code Subsection or Subdivision	Date(s) Reviewed	Recommended Action(s)	Need to consider further? (Yes/No)
1 (personnel records)	July 8, and August 25, 2014; July 22, 2015	2014 recommended amending to include language from current § 2.2-3705.8 (A); add "name" as required disclosure; 2015 referral by Meetings Subcommittee re: opening records of dismissal of certain high-level appointees - no action	No
2 (advice of legal counsel & atty-client privilege)	July 8, August 25, and November 5, 2014; May 11 and June 18, 2015	No action	No
6 (vendor software)	July 8, 2014	Further consideration with other proprietary records when study § 2.2-3705.6	Yes - with other proprietary records

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

Code Subsection or Subdivision	Date(s) Reviewed	Recommended Action(s)	Need to consider further? (Yes/No)
2 (working papers & correspondence)	August 25, 2014; June 18, July	Carry over for further consideration; HB 1722/SB 893 referred by 2015 Session	No

	22, and August 18, 2015	of General Assembly re: college & university presidents - no action on HB 1722/SB 893; recommended moving the term "correspondence" into the definition of "working papers" for clarification of existing language	
12 ((VRS, UVA, VCSP investments)	August 25, 2014 & July 22, 2015	2014 recommended no changes; Meetings Subcommittee recommended change to meetings exemption that would allow the exemption to be used in the case of local boards that invest funds for post-retirement benefits other than pensions; Records Subcommittee recommended corresponding change to records exemption	No
27 (Treasury, Local Gov't Investment Pool)	November 5, 2014; May 11, July 22, and August 18, 2015	Considered whether necessary after § 2.2-3705.1 (13) enacted; recommended no changes	No

II. NEW BUSINESS - 2015

§ 2.2-3705.2. Exclusions to application of chapter; records relating to public safety.

Code Subsection or Subdivision	Date(s) Reviewed	Recommended Action(s)	Need to consider further? (Yes/No)
1 (rape crisis center or program for battered spouses)	July 22, 2015	No changes	No
2 (engineering & construction drawings & plans)	July 22, 2015	Have staff prepare draft combining similar provisions from subdivisions 2, 4, 6, and 14 for further consideration	Yes
3 (security/access to data processing or telecommunications)	July 22, 2015	No changes	No

systems)			
4 (terrorism & cybersecurity)	July 22, 2015	Have staff prepare draft combining similar provisions from subdivisions 2, 4, 6, and 14 for further consideration	Yes
5 (railway system safety plans; ongoing accident investigations)	July 22, 2015	No changes	No
6 (safety & security of governmental facilities)	July 22, 2015	Have staff prepare draft combining similar provisions from subdivisions 2, 4, 6, and 14 for further consideration	Yes
7 (school safety audits)	July 22, 2015	No changes	No
8 (Expired.)	July 22, 2015	No action needed	No
9 (mental health assessments of sexually violent predators)	July 22, 2015	No changes	No
10 (subscriber data not otherwise public, provided by a telecommunications carrier to a public body for 911)	July 22 and August 18, 2015	No changes; agreed to further consider the use of term "telecommunications carrier"	Yes
11 (subscriber data not otherwise public, collected by a local governing body for 911)	July 22 and August 18, 2015	No changes; agreed to further consider the use of term "telecommunications carrier"	Yes
12 (closure, realignment, or relocation of federal military or national security installations)	July 22 and August 18, 2015	No changes	No
13 (internal controls of the Commonwealth's financial processes and systems)	July 22 and August 18, 2015	No changes	No
14 (public safety communications)	July 22, 2015	Have staff prepare draft combining similar provisions	Yes

systems)		from subdivisions 2, 4, 6, and 14 for further consideration	
15 (Fire/EMS cell phones for official duties)	July 22, 2015	No changes	No
16 (hospital & nursing home disaster recovery & evacuation plans)	July 22, 2015	No changes	No

§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.

Code Subsection or Subdivision	Date(s) Reviewed	Recommended Action(s)	Need to consider further? (Yes/No)
1 (investigations of licenses & permits - ABC, Lottery, Racing Commission, VDACS, DCJS)	August 18, 2015	No changes	No
2 (active investigations by DHP or health regulatory boards)	August 18, 2015	No changes	No
3 (investigations of employment discrimination complaints to DHRM or local public bodies)	August 18, 2015	No changes	No
4 (active investigations by DMAS)	August 18, 2015	No changes	No
5 (investigations of unlawful discriminatory practices under the Virginia Human Rights Act or local ordinance)	August 18, 2015	No changes	No
6 (investigations of lottery agents, lottery crimes, etc.)	August 18, 2015	No changes	No

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

NOTE: The Subcommittee directed staff and interested parties to meet as a proprietary records work group to discuss consolidating the many specific exemptions for proprietary records and trade secrets into one or more exemptions of general application. The work group met on June 18, July 21, and August 18, 2015.

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APPENDIX B

Summary of the work of the Meetings Subcommittee

<p style="text-align: center;">MEETINGS SUBCOMMITTEE of the FOIA COUNCIL Recap of Meetings Subcommittee Work to Date August 19, 2015</p>

I. REVIEWED 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
Amend to 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

A 17 (Local crime commissions)
November 5, 2014 and May 12, 2015
Amend to delete exemption (after research, there are no local crime commissions)

A 18 (Board of Corrections; inmate informants)
June 17, 2015
No changes, unless Board of Corrections says otherwise

A 19 (Public safety; terrorism; cybersecurity)
August 19, 2014 and August 19, 2015
No changes

A 20 (VRS, UVA, VCSP investments)
November 5, 2014 and June 17, 2015
Amend to include cross reference to § 15.2-1544 et seq., including local government entities that invest funds for post-retirement benefits other than pensions.

A 21 (Child and Adult fatality review teams)
November 5, 2014
No changes
A 22 (UVA Medical Ctr and EVMS)
November 5, 2014
No changes
A 23 (VCU Health System Authority)
November 5, 2014, June 17 and August 19, 2015
Amend to eliminate redundancies with other FOIA exemptions
A 24 (Health Practitioners Monitoring Program)
November 5, 2014
No changes
A 25 (VCSP)
November 5, 2014 and June 17, 2015
No changes
A 26 (Wireless Carrier E-911 Cost Recovery Subcommittee)
November 5, 2014 and July 21, 2015
No changes
A 27 (DPOR, DHP, and Bd of Accountancy; disciplinary proceedings)
November 5, 2014
No changes
A 28 (PPEA/PPTA)
November 5, 2014
Deferred; see item No. II below
A 29 (Public contracts; public procurement)
August 19, 2014 and August 19, 2015
No changes
A 30 (Commonwealth Health Research Board or Innovation and Entrepreneurship Investment Authority or the Research and Technology Investment Advisory Committee a; loan and grant applications.)
July 21, 2015
No changes
A 31 (Commitment Review of Committee; individuals subject to commitment as sexually violent predators)
July 21, 2015

No changes; flag b/c contains x-ref to subdivision 9 of § 2.2-3705.2
A 32 (Expired)
May 12, 2015
Amend to delete expired exemption
A 33(Telecom or cable TV)
August 19, 2014
Deferred; see item no. II below
A 34 (Wireless Service Authorities)
August 19, 2014
Deferred; see item no. II below
A 35 (SBE and local electoral boards)
June 17, 2015
No changes
A 36 (Forensic Science Board or the Scientific Advisory Committee; criminal investigative records)
June 17, 2015
No changes
A 37 (Brown v. Board of Education Scholarship Program Awards Committee; scholarship awards)
June 17, 2015
No changes
A 38 (VA Port Authority)
August 19, 2015
No changes
A 39 (VRS, local retirement systems, and VCSP)
November 14, 2014
No changes
A 40 (Economic development discussions; x-ref to subdivision 3 of § 2.2-3705.6)
August 19, 2014
Deferred; see item no. II below
A 41 (VA Board of Education; teacher licensing)
July 21, 2015
No changes; flag for subcommittee; contains x-ref to subdivision 12 of § 2.2-3705.3

A 42 (VA Military Council and commissions created by executive order; BRAC)
June 17, 2015, July 21, 2015, and August 19, 2015
No changes

A 43 (Board of Trustees, Veterans Services Foundation)
November 5, 2014
No changes

A 44 (Tobacco Region Revitalization Commission)
July 21, 2015
No changes; flag for subcommittee; contains x-ref to subdivision 23 of § 2.2-3705.6

A 45 (Commercial Space Flight Authority; rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority)
July 21, 2015
No changes; flag for subcommittee; contains x-ref to subdivision 24 of § 2.2-3705.6

A 46 (DCR; Resource Management Plans)
August 19, 2015
No changes but subject to context draft review and final decision re: records x-ref to subdivision 25 of § 2.2-3705.6 or subsection E of § 10.1-104.7

A 47 (ABC Authority) NOTE: effective July 1, 2018
August 19, 2015
No changes; but subject to context draft review and final decision re: records x-ref to subdivision 1 of § 2.2-3705.3 and subdivision 34 of § 2.2-3705.7. And Record Subcommittee review of subdivision 34 of § 2.2-3705.7.

II. 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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