



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

Monday, November 21, 2016 - 1:30 p.m.
House Room C, General Assembly Building

SUGGESTED AGENDA ANNUAL LEGISLATIVE PREVIEW, PART II *ANNOTATED*

- 1. Call to Order, introduction of members.**
- 2. Introduction of new FOIA Council staff, Jessica Budd, Attorney at Law.**
Jessica Budd recently joined the staff of the Division of Legislative Services to work with the FOIA Council. Jessica will also be working with Maria Everett as staff attorney to the House Committee on General Laws.
- 3. Review of bills referred to Council for study by 2016 Session of General Assembly.** *To be considered by the FOIA Council at today's meeting, following presentations by the following patrons concerning their respective bills:*

HB 334 Pogge--Provides that in an enforcement action, if the court finds the public body violated certain meeting notice requirements, the court may invalidate any action of the public body taken at such meeting.

HB 336 Pogge--Protects from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years. The bill provides that access shall not be denied to the parent, including a noncustodial parent, or guardian of such person, unless the parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For records of persons under the age of 18 years who are emancipated,

participated by telephone in that meeting, as did representatives of Prince William County. After hearing the presentations and public comment, the Records Subcommittee decided to return the bills to the Council for further consideration, without a recommendation for action. It is anticipated that Delegate Marshall will participate in today's meeting by telephone.

4. Virginia Parole Board and FOIA; Delegate Hope; Review of HB 397 (2012).

5. Reconsideration of certain drafts recommended by the Records Subcommittee:

- Procedure for requesting records and responding to requests (LD 17100765D). *Note: The Records Subcommittee recommended this draft in concept, but review of a draft was deferred by full FOIA Council until today's meeting based on public comment made at the October 17, 2016 meeting.*
- Global language change (LD 17100766) *Last year the Records Subcommittee recommended replacing language that appears in multiple existing exemptions that states that "nothing ... shall prohibit" disclosure or release of records. Recognizing that FOIA generally does not prohibit release, the Subcommittee recommended replacing that phrasing with language stating that "nothing ... shall authorize withholding" or other language indicating an affirmative duty to disclose. However, it has come to the attention of staff that such a global change may have unintended consequences, and therefore reconsideration of this recommendation is necessary. The Subcommittee at its August meeting asked staff to again contact agencies whose exclusions have been affected by these changes so that the Subcommittee might hear directly from them. Staff has sent a second letter to the affected agencies asking for responses by September 28, 2016. Staff provided a summary of the agency responses at the September 29, 2016 meeting of the Records Subcommittee. At the September 28, 2016 meeting, the Records Subcommittee voted 4 to 1 to restore the language as it existing in FOIA prior to July, 2017 (i.e. "nothing ... shall prohibit" disclosure or release of records...").*
- Personnel record exclusion; consolidating 2.2-3705.1 (1) and 2.2-3705.8 (LD 15100326). *Note: Deferred by Council on June 23, 2016 due to creation of personnel workgroup whose charge was to attempt a definition of "personnel record." No consensus among Personnel workgroup re its charge.*
- Certain correspondence of local officials not public records (LD 151001105). *Note: Deferred by Council on June 23, 2016 because this issue was raised on the Chairman's list.*
- Proprietary record exclusion for the Alcoholic Beverage Control Authority; deletion of subdivision 34 of § 2.2-3705.6 (Eff. July 1, 2018) (LD 171001306). *Note: The recommendation of the Records Subcommittee was to delete this exclusion because of concern that it covers proprietary records, trade secrets, financial records, cost estimates, marketing and operational strategies that are not yet known for an agency that does not yet exist. Staff presented a comparison chart comparing this new ABC exclusion to existing exclusions for proprietary records, trade secrets, financial records, cost estimates, marketing and operational strategies, and other "earmarking" provisions for*

designating which records are to be protected. Considering that the need for this exemption is only speculative at this time, and noting that this exemption or one like it may be added if the need arises, the Subcommittee voted unanimously to strike this exemption in total.

6. Review of remaining Meeting Subcommittee recommendations.

- Subdivision 7 of § 2.2-3711 (open meeting exclusions)--legal matters and litigation. *The Meetings Subcommittee recommended that this exclusion be separated into two exclusions for clarity (LD 15100276).*

6. Disposition of remaining Chairman's List of Issues. See Appendix B.

7. Other Business.

- **§ 2.2-3704.1--Posting of FOIA Rights and Responsibilities Document; inclusion of school boards.** *As enacted, HB 818 required local governing bodies to post a rights and responsibilities document on their respective website. School boards were inadvertently omitted from this requirement. The question is whether school boards should be included.*
- **§ 2.2-3700--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." To date there has been no action on this issue. Note: a similar provision is found in § 2.2-1111, requiring the Division of Purchases and Supply of the Department of General Services to do this by regulation governing public procurement. However, VITA is the agency responsible for the procurement of IT and related equipment. It is believed that inclusion in FOIA as part of its policy statement would enhance compliance with the redaction rule of FOIA.*

8. Review of proposed HJR 96 omnibus bill(s) to be recommended to the 2017 Session of the General Assembly (LD 17100968 (records) and (LD 170111247 (meetings)). (See Appendix A for listing of Council-approved drafts to date by Subcommittee.)

9. Annual Legislative Preview, Part II.

Audit exemption--2.2-3705.3 (7). At prior meetings of the Records Subcommittee, certain interested parties representing the Auditor of Public Accounts, the Office of the State Inspector General, and the Joint Legislative Audit and Review Committee indicated that they were not sure that the language of the current exemption accurately covered the activities of their agencies. Representatives of these agencies have submitted a draft proposal to the Records Subcommittee for consideration. The proposed draft would remove these three agencies from the existing exemption (but leave the exemption in place as it also applies to other public bodies) and create a new, separate exemption to address records of these three agencies. The Records Subcommittee recommended that

the parties continue working on the draft and bring it to the full FOIA Council for review.

10. Informational only: Issues continued to 2017 for study:

- Proprietary records and trade secrets draft proposed by the Virginia Press Association. *Note: The Record Subcommittee has recommended that study of § 2.2-3705.6 (proprietary record exclusions) be carried over to 2017 as the Proprietary Records Workgroup failed to reach consensus on creating a general exemption for trade secrets and proprietary records, despite several meetings.*
- Review of FOIA in light of advancement in technology
 - website posting
 - notice
 - definitions
- Reorganization of FOIA

11. Public Comment.

12. Discussion.

13. Set future meeting dates in 2017. *Note: Because of the move out of the General Assembly Building in 2017, available meeting rooms in 2017 will be limited to meeting rooms located in the Capitol. Therefore it is essential for the FOIA Council to have 2017 meeting dates set as soon as possible. The FOIA Council is mandated to meet quarterly; therefore the first meeting of the FOIA Council should be set for March, 2017.*

14. Adjournment.

Council Members

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|--|--|
| Delegate James M. LeMunyon, Chair | Senator Richard H. Stuart, Vice-Chair |
| Sandra G. Treadway | Christopher Ashby |
| Ed Jones | Stephanie Hamlett |
| Kathleen Dooley | Mark Vucci |
| Shawri King-Casey | Marisa Porto |
| William "Billy" Coleburn | Michael Stern |

Staff

Maria J.K. Everett, Executive Director and Senior Attorney
Alan Gernhardt, Senior 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



**November 21, 2016
HJR 96 FOIA Study
Legislative Recommendations Tracking Document**

I. Legislative Recommendations Approved by FOIA Council by subcommittee and date with vote:

MEETING SUBCOMMITTEE (8):

| LD Number | Relating to | Date Approved by FOIA Council | Vote | Notes |
|------------------|---|--------------------------------------|-------------|---|
| 1. 16101652 | 2.2-3712 closed mtg procedures | June 23, 2016 | 8-0 | technical fixes |
| 2. 15100276 | 2.2-3711; legal matters/litigation | June 23, 2016 | 8-0 | Make 2 separate exclusions; declaratory of existing law |
| 3. 1610002 | 2.2-3711; museums, etc., clarifications | June 23, 2016 | 8-0 | |
| 4. 16100201 | 2.2-3711; VCUHSA clean up | June 23, 2016 | 8-0 | |
| 5. 17100049 | 2.2-3711; Context draft | September 19, 2016 | 8-0 | Previously LD16100064 |
| 6. 17100176 | 2.2-3708 and 2.2-3708.1; Emtgs clarifications | September 19, 2016 | | |

| LD Number | Relating to | Date Approved by FOIA Council | Vote | Notes |
|------------------|-------------------------------------|--------------------------------------|-------------|-----------------------|
| 7. 17100786 | 2.2-3707.1; posting minutes | October 17, 2016 | | |
| 8. 17100047 | 2.2-3707; notice and agenda posting | October 17, 2016 | | Previously LD16106517 |

RECORDS SUBCOMMITTEE (12):

| LD Number | Relating to | Date Approved by FOIA Council | Vote | Notes |
|------------------|--|--------------------------------------|-------------|--|
| 1. 15100327 | 2.2-3705.1; email subscriptions | June 23, 2016 | 9-0 | |
| 2. 15101102 | 2.2-3705.1; "scholastic record" out of this list | June 23, 2016 | 9-0 | Excluded under 2.2-3705.4 already; also removed in HB 817 (2016) |
| 3. 15101103 | 2.2-3705.7; customer acct info | June 23, 2016 | 9-0 | |
| 4. 15101104 | 2.2-3705.7; Wildlife Magazine | June 23, 2016 | 9-0 | |
| 5. 161001008 | 2.2-3705.7; local boards nonpension comp. | June 23, 2016 | 9-0 | |
| 6. 16100995 | 2.2-3705.2 and .3; public safety and admin | June 23, 2016 | 9-0 | |

| LD Number | Relating to | Date Approved by FOIA Council | Vote | Notes |
|------------------|---|--------------------------------------|-------------|---|
| | investigations; terminology fix | | | |
| 7. 17100033 | 2.2-3705.4; VCSP | June 23, 2016 | 9-0 | |
| 8. 17100048 | 2.2-3705.3; DHRM admin investigation | June 23, 2016 | 9-0 | Previously LD16106514 |
| 9. 17100067 | 2.2-3705.5; DHP and DSS consolidations | September 19, 2016 | 8-0 | |
| 10. 17100698 | 2.2-3701; definition of public record | October 17, 2016 | 8-0 | |
| 11. 17100603 | 2.2-3705.7; working papers | October 17, 2016 | 7-1 | LeMunyon's version; includes Subc recommendtn |
| 12. 17100035 | 2.2-305.2; Public Safety consolidation of 2, 4, 6, and 14 | October 17, 2016 | 7-0-1 | |

II. SUBCOMMITTEE RECOMMENDATIONS STILL PENDING BEFORE FOIA COUNCIL (5)

| LD Number | Relating to | Notes |
|------------------|--|--|
| 15100326 | Personnel records; consolidation of 2.2-3705.1 and 2.2-3705.8 | deferred by Council June 23, 2016 (on chairman's list) |
| 15101105 | Del Cole's certain correspondence not a public record (2.2-3705.7) | deferred by Council June 23, 2016 |
| 17100765 | FOIA requests and responses (2.2-3704) | deferred by Council October 17, 2016 |

| LD Number | Relating to | Notes |
|------------------|--|--|
| 17100766 | Global language change; revert to pre 2016 law (i.e. "Nothing...to prevent/prohibit disclosure...") | deferred by Council October 17, 2016 |
| 17101306 | ABC Authority record exclusion for proprietary records, marketing strategies, etc. (subd 34 of 2.2-3705.7) | This exclusion will not become effective until July 1, 2018 when the ABC Authority is created. |
| 15100276 | Meeting exclusion; legal matters and litigation | |

APPENDIX B

Remaining Chairman's FOIA Review Open Issues

1. With respect to personnel records (2.2-3705.1.1), should the reference to “information concerning” or other terminology be narrowed, and if so, in what ways and by how much?
2. Should records of communications (e.g. email, regular mail) initiated by a citizen to elected officials be presumed to be private, e.g. exempt from release under FOIA unless agreed to by the citizen? What about such communications with a government body or staff person generally? Presently, the subcommittee is recommended additional personal contact information, but the exemption from release is only if requested by the citizen. See 2.2-3705.1 (10).
3. Mindful that “vendor proprietary software” is exempt from release under FOIA (2.2-3705.1(6)), is it necessary to continue to include the exemption for software “developed by or for a state agency.....” in 2.2-3705.1(7)?