

FOIA Council Meeting Summary

May 4, 2016

10:30 AM

House Room C

General Assembly Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its first meeting of the 2016 Interim on May 4, 2016.¹ This meeting was held to hear an update on legislation passed by the 2016 Session of the General Assembly, to review draft legislation recommended by the Records Subcommittee and the Meetings Subcommittee which were created in 2014 as part of the study of FOIA in accordance with House Joint Resolution No. 96, to receive progress reports from the Subcommittees, to consider bills referred by the 2016 Session of the General Assembly to the Council for further study, and to discuss other issues of interest to the Council. No action was taken by the Council at this meeting because a quorum was not present. However, the members who were present did take up the scheduled agenda items for discussion and public comment.

Legislative Update

Staff informed the Council that the 2016 Session of the General Assembly passed a total of 16 bills amending FOIA. Three of the bills create two new sections in FOIA and amend various existing provisions; two bills add three new records exemptions; two bills add two new meetings exemptions; one bill adds a new records exemption and a new meetings exemption; and eight bills amend existing provisions of FOIA. Staff noted that while the Legislative Update document was complete, it was not finalized because the Governor had not yet taken action on some bills and had until May 20, 2016, to do so. The final version will be posted on the Council's website after final action has been taken on all of the bills.

Review of Subcommittee Recommendations

Maria J.K. Everett, Executive Director of the Council, reviewed the draft legislation that has been recommended to date by both Subcommittees. As a reminder, the Council has previously indicated that rather than introduce individual legislative recommendations as separate bills while the HJR No. 96 study is ongoing, the Council prefers to introduce omnibus legislation at the conclusion of the study. As this is the third and final year of the study, the Council will hear the Subcommittee recommendations throughout this year in an ongoing fashion in order to incorporate those recommendations into the omnibus legislation as the study progresses, rather than trying to consider all of the Subcommittee recommendations at once in a single meeting at the end of the year.

Meetings Subcommittee Recommendations

¹ Council members Delegate LeMunyon (Chair), Dooley, Hamlett, Porto, Selph, and Vucci were present; members Senator Stuart (Vice Chair), Ashby, Jones, King-Casey, Landon, and Treadway were absent.

Regarding the draft that makes technical changes to several existing meetings exemptions,² Delegate LeMunyon questioned why the closed meeting exemption for discussion of certain security or ownership interests at subdivision A 20 of § 2.2-3711 applies to the University of Virginia (UVA) but not to other public institutions of higher education. Staff indicated that UVA was the only institution that had such investments at the time. Ms. Hamlett observed that based on her experience as former counsel to Virginia Commonwealth University (VCU), VCU has such investments now. Cindy Wilkinson of the Virginia Retirement System (VRS) stated that George Mason University (GMU), Virginia Tech, UVA, and VCU all offer their own optional retirement plans. Delegate LeMunyon asked to flag this issue for further consideration then opened the floor to public comment on the drafts recommended by the Meetings Subcommittee.

Craig Merritt, Esq., representing the Virginia Press Association (VPA), stated that the draft that separates the legal matters exemption into separate exemptions for (1) probable litigation matters and (2) consultation with legal counsel³ brings clarity without substantive change. Dave Ress, a reporter with the Daily Press, stated that he appreciates the clarity but the phrase "reasonable basis to believe" seems very broad, and he questioned whether the phrase "specific legal matters" could also be narrowed. Staff noted that the term "reasonable" is a legal term of art and that there are many prior opinions, including ones from the Supreme Court of Virginia, interpreting this exemption. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) expressed similar concerns regarding the broad use of the exemption to provide legal updates and discuss general legal issues.

Delegate LeMunyon also asked for an example of the exemption for the discussion of certain personal matters not concerning public business.⁴ Staff provided an example given by former Council member Mr. Oksman of a member of a public body who wishes to tell the other members of the body that his or her spouse has cancer or another serious illness, but prefers not to do so publicly. Delegate LeMunyon also asked about the exemption concerning prospective business or industry, or the expansion of an existing business or industry, where no prior announcement has been made.⁵ Staff provided a brief legislative history of the exemption and used the example of a proposed slavery museum to illustrate whether an announcement has been made by someone with the authority to make such an announcement. Delegate LeMunyon also observed that the exemption for the discussion of certain gifts, bequests, and fund-raising activities⁶ appears to address records as well as meetings. Staff agreed and offered to prepare a draft moving that language over to the records exemptions section of FOIA. Delegate LeMunyon also directed staff to flag the changes made on line 57 of the technical changes draft⁷ concerning discussion by the Virginia Museum of Fine Arts, the Virginia Museum of Natural History, the Jamestown-

² This draft is referred to on the agenda as LD 0002 (amending subdivisions A 9, A 17, A 20, and A 32 of § 2.2-3711).

³ This draft is referred to on the agenda as LD 0276 (amending subdivision A 7 of § 2.2-3711).

⁴ Subdivision A 4 of § 2.2-3711.

⁵ Subdivision A 5 of § 2.2-3711.

⁶ Subdivision A 8 of § 2.2-3711 (which appears as subdivision A 9 in the draft under discussion).

⁷ LD 0002, *supra* n. 2.

Yorktown Foundation, and the Science Museum of Virginia regarding certain gifts, requests, and grants "from private sources" for further consideration.⁸ Ms. Porto asked if there were suggestions from interested parties for specific language to use. Delegate LeMunyon invited those interested to bring specific suggestions to the June Council meeting for consideration.

Records Subcommittee Recommendations

In regard to the recommendation to eliminate the current exemption for certain information in correspondence between an individual and a member of a local public body,⁹ Delegate LeMunyon questioned whether a member of the public would presume privacy in contacting a public official. Staff noted that the public generally does not interact with government in a confidential way. Delegate LeMunyon then opened the floor to public comment.

Ms. Rhyne expressed concerns regarding the drafts relating to the personnel records exemption¹⁰ and the working papers exemption.¹¹ She suggested that there should be a definition of "personnel record" and noted that the current exemption has been used to keep confidential things such as the names of police officers, a Governor's report regarding ABC officers, reports on the death of Jamycheal Mitchell while he was in jail, and body-worn camera footage of officer-involved shootings. Regarding the working papers exemption, she suggested that it be narrowed so it is not used as a catchall for an office. Ms. Rhyne suggested adopting concepts from the executive privilege and deliberative process exemptions in other states, which focus on pre-decisional matters or the adverse effect on government if the records were released. Noting that the exemption is applied inconsistently, she further suggested using some form of time limit or an adverse effect test. Delegate LeMunyon asked that Ms. Rhyne send her preferred text, and she agreed to do so.

Mr. Ress expressed similar concerns about the same exemptions, stating that he had encountered widespread abuse of both exemptions. He noted they were used to withhold information about the actions of public officials, and suggested adding to the working papers exemption a limitation that working papers be for the "exclusive use" of the designated officials.

Mr. Merritt stated that the language in the personnel records exemption referring to "information concerning identifiable individuals" broadened the traditional understanding beyond what is in an employee's personnel folder, and is now used for anything that identifies an individual. He supported the recommendation to add "name" to the list of items that must be disclosed, stating that it has long been understood that personnel information must be associated with a name as a matter of fundamental public policy. He also expressed that given experience with the \$10,000 threshold for salary or rate of pay in

⁸ Subdivision A 9 of § 2.2-3711.

⁹ This draft is referred to on the agenda as LD 1105 (striking subdivision 30 of § 2.2-3705.7).

¹⁰ This draft is referred to on the agenda as LD 0326 (amending subdivision 1 of § 2.2-3705.1 and subsection A of § 2.2-3705.8).

¹¹ This draft is referred to on the agenda as LD 199 (amending subdivision 2 of § 2.2-3705.7).

the current exemption, raising that threshold amount would be ripe for abuse by officials using part-time or temporary employees. Regarding the working papers exemption, Mr. Merritt noted that the recommendation tries to contain the worse current aspect of the exemption, that the term "correspondence" is not limited at all now. He suggested that it may be better to further change the definition of "working papers" by changing the phrase "personal or deliberate use" to "personal, deliberative use." He also noted that there is no explicit language in the current exemption stating that it is for records that are pre-decisional.

Staff related comments received from Craig Fifer regarding the draft amending the exemption for email addresses and other personal information provided in order to receive email from a public body.¹² Mr. Fifer was the original author of the exemption in question and a former FOIA Council member, but he was unable to attend today's meeting in person. He suggested that the term "personal contact information" should include private business as well as home contact information, as citizens use both work and home contact information when interacting with government.

Delegate LeMunyon asked all those present to send specific language they would like the Council to consider regarding any of these recommendations by June 1, 2016.

Public Comment

Mr. Merritt noted that the Proprietary Records Work Group has not been successful in drafting a general exemption for trade secrets, but he felt there was still a need to address the issue. He stated that he would submit a summary for further consideration.

HJR No. 96 Study Work Plan and Subcommittee Reports

Staff discussed the work of the subcommittees to date and the study work plan going forward. The Meetings Subcommittee has finished its study of exemptions and moved on to consider procedural matters. After finishing procedural matters and electronic meetings, the Meetings Subcommittee will move on to more general issues no longer limited to meetings issues, such as definitions, general provisions, remedies, and the legal structure of FOIA. The Records Subcommittee has considered §§ 2.2-3705.1 (exemptions of general application), 2.2-3705.2 (public safety exemptions), 2.2-3705.3 (administrative investigation exemptions), 2.2-3705.4 (exemptions related to education), 2.2-3705.7 (exemptions for specific public bodies and other limited exemptions), and 2.2-3705.8 (limitations on record exclusions). The Records Subcommittee also had the Proprietary Records Work Group consider § 2.2-3705.6 (proprietary records and trade secrets exemptions), but as Mr. Merritt noted, the Work Group returned the subject matter to the Records Subcommittee without a recommendation. Therefore the Records Subcommittee has yet to consider §§ 2.2-3705.5 (health and social services exemptions), 2.2-3705.6 (proprietary records and trade secrets exemptions), and 2.2-3706 (criminal and law-enforcement records). The Records

¹² This draft is referred to on the agenda as LD 0325, which was a typo. The correct reference is LD 0327 (amending subdivision 10 of § 2.2-3705.1).

Subcommittee plans to go through these remaining sections in numerical order, then turn to procedural matters (§§ 2.2-3704 and 2.2-3704.1).

Bills Referred by the 2016 Session of the General Assembly

Delegate LeMunyon deferred consideration of these matters, and suggested that some bills might be referred directly to the Subcommittees to be incorporated into the HJR No. 96 study, while others may be taken up by the full Council.

Other Business

Delegate LeMunyon also deferred Other Business to the June meeting of the Council.

Future Meetings

Delegate LeMunyon asked if there was any other business or public comment. There was none. The Council scheduled its meetings for the rest of 2016 to be held at 1:30 PM on the third Monday of each month except August and December (i.e., on June 22, July 18, September 19, October 17, and November 21). There being no further business, the meeting was adjourned.

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