

## **FOIA Council Meeting Summary**

**July 22, 2015**

**1:30 PM**

**House Room D**

**General Assembly Building**

**Richmond, Virginia**

The Virginia Freedom of Information Advisory Council (the Council) held its second meeting of the 2015 interim.<sup>1</sup> This meeting was held to receive progress reports from 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, and to discuss other issues of interest to the Council.

Delegate Jim LeMunyon, Vice-chair, called the meeting to order and welcomed the Council's newest member, Marisa Porto. 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. Delegate LeMunyon also noted that Stephanie Hamlett has been reappointed to serve another four-year term on the Council.

### **Subcommittee Reports**

The Council next received progress reports from the Records Subcommittee and the Meetings Subcommittee. Alan Gernhardt, Council staff attorney advised the Council that the Records Subcommittee had 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 meeting summary for 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.

Delegate LeMunyon called for public comment on the work of the Records Subcommittee. Dave Ress, a reporter with the Daily Press, opined that the working papers exemption in Virginia was overly broad and needs to be addressed. Mr. Ress also noted that the use of the personnel meeting exemption was too broadly applied and in contravention of a 1999 Attorney General opinion on the topic. David Ogburn, representing Verizon, advised that the term "telecommunication carriers" contained in the FOIA record exemptions was out-of-date. He suggested that staff contact the State Corporation Commission to ascertain the most current terminology. Craig Merritt, representing the Virginia Press Association, cautioned the Council that Subcommittee recommendations for "no change" were somewhat misleading. In some cases, this recommendation was as a result of heavily debated issues, but other times it came because no challenge was made of the exemption and hence no further discussion. Delegate LeMunyon asked if there were any "no change" recommendations that VPA would like to see changed. Mr. Merritt explained that the VPA

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<sup>1</sup> All Council members were present, except Senator Stuart, Ms. Treadway, and Messrs. Ashby and Oksman.

has picked its battles, but their real concern was when no affected agency comes to a Subcommittee meeting, there is no opportunity to respond. Michael Bogacki and David M. Lindsey, both representing the Unalienable Rights Foundation, did not comment about the work of either Subcommittee, but instead provided general comments about the Virginia Public Records Act, previous FOIA cases decided by the Virginia Supreme Court, and specific advisory opinions of the Council. In addition, Mr. Bogacki served Council staff with a FOIA petition for alleged violations of FOIA and the Virginia Public Records Act committed on the day of this meeting.

Council member Kathleen Dooley, chair of the Meetings Subcommittee advised the Council that Meetings Subcommittee had 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 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.

Delegate LeMunyon requested any comment from the Council regarding the work of the Subcommittees. Mr. Landon expressed concerns about the use of the personnel exemptions (for both records and meetings) and related issues concerning the working papers exemption and determining who is the custodian of records at any given agency. He observed that these issues may cause confusion for the public and raise questions of accountability.

The Council then heard public comment. Mr. Ress reiterated concerns about the use of the personnel exemption for closed meetings and how it may be used more broadly than intended. In response to a question from Delegate LeMunyon, Mr. Ress stated he felt the haphazard and overly broad way in which the exemption is applied suggests that tighter language would help officials and the public know what is covered.

Mr. Lindsey asserted that the Virginia Public Records Act clearly identifies who are the heads of agencies and the custodians of public records. He further asserted that FOIA exemptions violate provisions of the Virginia and United States Constitutions,<sup>2</sup> and expressed his disagreement with the conclusion of Freedom of Information Advisory Opinion 05 (2006). Noting that every advisory opinion begins with a statement that it is based on the facts presented by the person requesting the opinion, he stated that he felt FOIA Council staff was not getting complete information when writing advisory opinions.

Staff noted that the study plan for HJR No. 96 adopted last year was incorporated for reference. The next issue of business was the appointment of a Council member to the Meetings Subcommittee to fill the vacancy created by the expiration on July 1, 2015 of Mr. Whitehurst's term on the FOIA Council. Ms. Porto volunteered to serve on both the Meetings Subcommittee and the Records Subcommittee.

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<sup>2</sup> Specifically, Mr. Lindsey referred to Va. Const. art. I, §§ 2 and 12, and U.S. Const. amend. I and XIV.

The agenda item entitled "Exercise of FOIA Council's statutory duties" was deferred until the next Council meeting in September due to Mr. Oksman absence.

The Council then received additional public comment on FOIA generally or other access issues. Mr. Ress informed the Council that he had been a reporter in Virginia since 1990 and had also reported in New Jersey, Illinois, Quebec, London, and Africa, and that those experiences gave him perspective. He advised that the study of FOIA should be a fundamental look to ensure that the law delivers to Virginia citizens the information they have a right to know. He noted that Virginia exemptions for working papers, criminal investigative files, suicide reports, and public utilities are different from other states' approaches and in these areas Virginia FOIA is not good. Mr. Ress also believed that the cost of producing records under a FOIA request should be carefully examined. Mr. Ress stated that FOIA exemptions are discretionary but are treated as mandatory, and that enforcement of FOIA rights is costly and something many citizens cannot afford. Delegate LeMunyon inquired how best to put teeth in FOIA enforcement. Mr. Ress responded that the Council should enforce the law or alternatively, the Attorney General should bring cases on behalf of citizens. He also suggested examining the level of fines, looking at whether it should be a criminal misdemeanor or civil penalty, and making provisions to get at notes from closed meetings if it is determined that the meeting was closed improperly. Delegate LeMunyon asked about comparison studies with other states. Mr. Ress stated he had looked but did not find any good studies, and that comparing statutes directly was a chore.

Maria Everett, Executive Director, informed the Council that after announcing the discontinuation of the annual FOIA seminars in favor of more individualized training by arrangement, the response was overwhelmingly positive.

The next meeting of the Council is scheduled for Wednesday, September 30, 2015 at 10:00 a.m. in House Room D of the General Assembly Building in Richmond. There being no further business, the meeting was adjourned.

## APPENDIX A

### Summary of the work of the Records Subcommittee

#### I. OLD BUSINESS - Exemptions carried over from 2014

##### § 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 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 & attorney-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.

<b>Code Subsection or Subdivision</b>	<b>Date(s) Reviewed</b>	<b>Recommended Action(s)</b>	<b>Need to consider further? (Yes/No)</b>
2 (working papers & correspondence)	August 25, 2014; June 18 and July 22, 2015	Carry over for further consideration; HB 1722/SB 893 referred by 2015 Session of General Assembly re: college & university presidents - no action	Yes

		on HB 1722/SB 893; asked staff to draft change re: "correspondence" for further consideration	
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 and July 22, 2015	Defer consideration re: whether necessary after § 2.2-3705.1 (13) enacted	Yes (on agenda July 22, but informed Treasury representatives unable to attend)

## II. NEW BUSINESS - 2015

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

NOTE: 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 and July 21, 2015; its work continues. The Subcommittee is waiting for any proposals from the work group before addressing individual exemptions for proprietary records and trade secrets.

### § 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	No changes	No
3 (security/access to data processing)	July 22, 2015	No changes	No

or telecommunications systems)			
4 (terrorism & cybersecurity)	July 22, 2015	Have staff look to determine whether portions redundant with other exemptions	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 look to determine whether portions redundant with other exemptions	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, 2015	No changes	No
11 (subscriber data not otherwise public, collected by a local governing body for 911)	July 22, 2015	No changes	No
12 (closure, realignment, or relocation of federal military or national security installations)	July 22, 2015	Directed staff to find out whether exemption still needed	Yes
13 (internal controls of the Commonwealth's financial processes and systems)	July 22, 2015	Carry over	Yes (on agenda July 22, but informed Treasury representatives unable to attend)
14 (public safety communications)	July 22, 2015	Have staff look to determine whether portions redundant	Yes

systems)		with other exemptions	
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

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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)
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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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