



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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FOIA Council Meeting Summary

September 16, 2014

1:30 PM

House Room C

General Assembly Building

Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its second meeting of 2014.¹ This meeting was Part I of the Council's annual legislative preview, with Part II to be held on November 18, 2014. The Council also discussed the bills referred to it by the 2014 Session of the General Assembly and received progress reports from its two subcommittees.

Subcommittee Reports

Records Subcommittee:

Staff presented a progress report of the work of the Records Subcommittee to date. Staff advised that the Records Subcommittee has met three times (May 14, July 8, and August 25) to study the exemptions of general application and exceptions thereto found in §§ 2.2-3705.1 and 2.2-3705.8 as per the study plan adopted by the Council. The Subcommittee has followed the exemption worksheet prepared by staff to review each exemption. Public comment was asked for and received on a per exemption basis, which comment was thoughtfully considered by the Subcommittee.

The Subcommittee considered all of the 13 exemptions in found § 2.2-3705.1 and 15 of the 33 exemptions found in § 2.2-3705.7. As several of these exemptions concern specific agencies, agency representatives were invited to attend the Subcommittee meeting. For agencies that have additional exemptions in this section, the Subcommittee also considered those exemptions at the same time.

The specific exemptions that have been considered include the following:

¹All FOIA Council members were present, except Messrs. Tavenner, Whitehurst, Landon, Ashby and Jones, who were absent.

- The personnel exemption found at subdivision 1 of § 2.2-3705.1 and the exceptions to that exemption found at subsection A of § 2.2-3705.8.
 - Staff suggested that, for clarity, it would be helpful to combine these provisions in one location, since both provisions address the treatment of personnel records. Staff also suggested adding the word "name" to the listed exceptions in clause (ii) of subsection A of § 2.2-3705.8 in order to codify explicitly prior opinions of the Attorney General and FOIA Council that employee names cannot be withheld as personnel records.² There was some discussion about the use of the phrase "shall open such records for inspection and copying" relating to whether the public body would have to make and send copies on request or merely make the records available so a requester could come to the public body's office and make his or her own copies. The Subcommittee agreed to have staff draft a new version that would incorporate both the exemption and the exceptions to it and that would include "name" in the list of exceptions. Mr. Merritt also suggested that certain records concerning higher-level administrators should be more transparent, such as records of benefits packages and the circumstances of departure when such senior employees leave. The Subcommittee agreed to have Mr. Merritt come up with an appropriate proposal for consideration.
- Written advice of legal counsel and other records protected by the attorney-client privilege under subdivision 2 of § 2.2-3705.1.
 - Peter Easter, on behalf of VAB, stated that this exemption was used too broadly in practice. Mr. Tavenner stated that the exemption itself covers more than just attorney-client privileged records. After some further discussion among the Subcommittee and Mr. Merritt, it was agreed that the attorney-client privilege part of the exemption was fine as it is, but Mr. Jones would draft a proposal to establish clearer boundaries regarding what qualifies as written advice of legal counsel.
- Work-product exemption found in subdivision 3 of § 2.2-3705.1.
- Tests or examinations, subdivision 4 of § 2.2-3705.1.
- Records prepared exclusively for use in closed meetings under subdivision 5 of § 2.2-3705.1.
 - Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that she had received many questions regarding whether this exemption would still apply if materials were distributed to members at closed meetings but were not collected from the members afterward (i.e., the members took the documents with them

² See 1987-1988 Op. Atty. Gen. Va. 33; 1978-1979 Op. Atty. Gen. Va. 310; Freedom of Information Advisory Opinions 01 (2009), 01 (2002), and 28 (2001).

after the closed meeting ended). The matter was discussed among the Subcommittee members, staff, Roger Wiley (a local government attorney and former FOIA Council member), and Mr. Merritt and Ginger Stanley of the VPA. The consensus was that the key to the exemption was whether the records were still exclusively for use in a closed meeting and that once the records were used for some other purpose, the exemption would no longer apply. No change was recommended.

- Certain "vendor proprietary information software" under subdivision 6 of § 2.2-3705.1.
 - Mr. Oksman pointed out that the exemption begins by stating it applies to "vendor proprietary information software" but subsequently defines "vendor proprietary software" instead, and the two phrases should be amended to match. Mr. Merritt noted that the Supreme Court of Virginia had recently addressed the meaning of the term "proprietary" in the context of a different exemption,³ that the Uniform Trade Secrets Act defines the term "trade secrets,"⁴ and that it might be best to consider creating a single comprehensive exemption for all proprietary information and trade secrets. Eric Link of the Virginia Information Technologies Agency (VITA) pointed out that in addition to commercially purchased software, the exemption could also apply to open-source software, depending on the user agreement and rights. Mark Flynn of the Virginia Municipal League (VML) pointed out that the exemption refers to "processing data" and thus would not apply to operating systems or other software that was not used for data processing. Mr. Tavenner noted that the language used in the exemption is antiquated and needs to be rewritten. The Subcommittee agreed to give this exemption further consideration along with the other exemptions for proprietary records and trade secrets when it considers § 2.2-3705.6 at a later meeting.
- "Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth" under subdivision 7 of § 2.2-3705.1.
- Certain appraisals and cost estimates of real property under subdivision 8 of § 2.2-3705.1.
 - Mr. Jones asked what was meant by the word "proposed" in the phrase "subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease." Mr. Wiley observed that generally, government would not do an appraisal if it was not considering buying or selling the property, and that eminent domain requires appraisals to

³ *American Tradition Institute v. Rector and Visitors of the University of Virginia*, No. 130934 (Va. April 17, 2014).

⁴ § 59.1-336.

be given. Joanne Sherman of the Virginia College Savings Plan noted there are instances where a building is an investment and is appraised, but not for sale. Mr. Easter noted that there can be situations such as a relative of a local board member buying a property where there is no way for the public to know in time to stop the deal. Others pointed out that such a situation is really a conflict of interests law problem rather than a FOIA issue. Mr. Tavenner questioned the need for the exemption; others responded it was to protect the public purse. The Subcommittee also discussed the difficulties involved in large projects where multiple owners may be involved and noted that a corresponding meetings exemption exists. There were no further comments or proposals for changing the existing exemption.

- Records concerning reserves established in specific claims administered by the Division of Risk Management or a locality, and investigative records of claims or potential claims against a public body's insurance under subdivision 9 of § 2.2-3705.1.
- Personal information provided to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information (i.e., "opts out") under subdivision 10 of § 2.2-3705.1.
 - Staff related that this exemption had been the subject of two prior advisory opinions⁵ because it had mistakenly been interpreted as an exemption for all "personal information," as it refers to the definition of "personal information" in § 2.2-3801 of the Government Data Collection and Dissemination Practices Act, while the original intent was to protect citizens from unwanted electronic mail ("email spam"). The Subcommittee members and interested parties debated the reasoning behind the exemption. Ms. Rhyne observed that most exemptions to protect the public are for safety reasons, but this exemption was to protect the public from commerce. Phyllis Errico of the Virginia Association of Counties (VACo) observed there could be a chilling effect on communications with government if citizens knew their email addresses would be released. Ms. Hamlett noted that in addition to commercial interests, there could be concerns regarding cyber-bullying or stalkers as well. Mr. Tavenner observed there are competing policies at issue. Mr. Link stated that there was potential for misuse, as well as an administrative burden in keeping a list of who had "opted-out." After hearing suggestions from Mr. Merritt, Mr. Wiley, and Mr. Flynn, the Subcommittee agreed to have staff draft an amendment to remove from the exemption the reference to the definition of "personal information" in § 2.2-3801.

⁵ Freedom of Information Advisory Opinions 11 (2007) and 07 (2004).

- Subdivision 11 of § 2.2-3705.1 is merely a cross-reference to an exemption outside of FOIA in § 2.2-4119 of the Virginia Administrative Dispute Resolution Act.
- Subdivisions 12 and 13 of § 2.2-3705.1, which provide exemptions for certain records regarding contract negotiations and financial account numbers, respectively, both of which were FOIA Council recommendations.
- Tax records exemption referencing § 58.1-3 tax records prohibition (§ 2.2-3705.7(1));
- Working papers and correspondence of certain officials (§ 2.2-3705.7(2))
- Library records (§ 2.2-3705.7(3));
- Certain contract cost estimates and other records of the Department of Transportation (§ 2.2-3705.7(4));
- Lists of owners of bonds issued by a political subdivision (§ 2.2-3705.7(5));
- Records relating to financial disclosures by members of the General Assembly (§ 2.2-3705.7(6));
- Public utility customer account information (§ 2.2-3705.7(7));
- Personal information filed with the Virginia Housing Development Authority or a local housing and redevelopment authority (§ 2.2-3705.7(8));
- Hazardous waste facility siting records (§ 2.2-3705.7(9));
- Records regarding certain plant and animal species, natural communities, caves, and significant historic and archaeological sites (§ 2.2-3705.7(10));
- Certain game-related records of the Virginia Lottery (§ 2.2-3705.7(11));
- Certain investment-related records of the Virginia Retirement System, University of Virginia, and Virginia College Savings Plan (§ 2.2-3705.7(12));
- Certain records of the Department of Environmental Quality, the State Water Control Board, State Air Pollution Control Board or the Virginia Waste Management Board relating to enforcement actions (§ 2.2-3705.7(16));
- Certain records of the Virginia Lottery concerning retailers and individual game winners (§ 2.2-3705.7(18));
- Certain records of the Virginia Retirement System, a local retirement system, or the Virginia College Savings Plan relating to certain investment strategies, investment managers, or trade secrets (§ 2.2-3705.7(25)).

To date, the Subcommittee has requested that new drafts be prepared for the exemptions applicable to the following types of records:

- Personnel exemption (§ 2.2-3705.1(1));
- Written advice of legal counsel (§ 2.2-3705.1(1));
- Personal identifiers used to receive email (§ 2.2-3705.1(10)).

Additionally, the Subcommittee is looking at other states' laws concerning the working papers and correspondence exemption for certain public officials.

Meetings Subcommittee

Staff presented a progress report of the work of the Meetings Subcommittee. Staff advised that the Meetings Subcommittee has met three times (May 14, July 8, and August 25) to study the exemptions found in §§ 2.2-3711 as per the study plan adopted by the Council. The Subcommittee has followed the exemption worksheet prepared by staff to review each exemption. Public comment has been asked for and received on a per exemption basis, which comment has been thoughtfully considered by the Subcommittee.

The following 19 exemptions found in subsection A of § 2.2-3711 have been reviewed by the Subcommittee, which closed meeting exemptions address the following topics:

- Personnel matters;
- Student discipline and scholastic matters;
- Real estate matters;
- Personal matters not related to public business;
- Prospective business or industry;
- Investment of public funds; and
- Legal matters; probable and actual litigation.
- Gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by boards of visitors of public institutions of higher education (§ 2.2-3711(A)(8));
- Honorary degrees or special awards (§ 2.2-3711(A)(10));
- Tests and examinations (§ 2.2-3711(A)(11));
- Hazardous waste siting agreements (§ 2.2-3711(A)(13));
- Medical and mental health records (§ 2.2-3711(A)(15));
- Discussions by local crime commissions involving the identity of anonymous informants (§ 2.2-3711(A)(17));
- Public safety and security plans (§ 2.2-3711(A)(19));
- Records of transactions conducted under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 2.2-3711(A)(28));
- Award of public contracts (§ 2.2-3711(A)(29));
- Proprietary records and trade secrets of a local governing body that provides telecommunication or cable television services (§ 2.2-3711(A)(33));
- Proprietary records and trade secrets of a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 2.2-3711(A)(34)); and
- Economic development and retention records (§ 2.2-3711(A)(40)).

Note that some of these exemptions are not in numerical order. These exemptions are grouped together here because they may be used more broadly than the remaining exemptions, which may only be used by specific, named public bodies.

The Subcommittee requested that new drafts be prepared for the exemptions that allow closed meetings for:

- Personnel matters (§ 2.2-3711(A)(1); and
- Legal matters (§ 2.2-3711(A)(7).

Finally, as an example of the Subcommittee's review, the closed meeting exemption for discussions by local crime commissions involving the identity of anonymous informants (§ 2.2-3711(A)(17)) needs further review given that it appears there are no local crime commission. The Subcommittee will confirm whether local crime commission exist, and if not, will recommend the elimination of this exemption.

Bills referred to Council for study by 2014 Session of General Assembly

House Bill 339 (Anderson) and SB 387 (Reeves)⁶ are identical bills addressing certain proprietary records of the Department of Rail and Public Transportation. At its meeting in April, the Council referred these bills to the Records Subcommittee to be incorporated into its study of FOIA records exemptions, specifically exemptions for proprietary records found in § 2.2-3705.6.

House Bill 788 (LeMunyon)⁷ addressed out-of-state requests for records and House Bill 839 (Brink)⁸ addressed the applicability of FOIA to the Office of the Attorney General (OAG). The Council deferred consideration of these bills until their meeting on November 18, 2014.

Legislative Preview

No proposed legislation was brought to the attention of the Council.

Public Comment

The Council called for public comment. There was none.

Of Note

- **2014 FOIA Workshops.** Staff advised that the workshops this year have been scheduled for the following dates and locations:
October 20 -- Manassas, VA

⁶ **HB 339 (Anderson)/SB 387 (Reeves) - FOIA; certain proprietary records of the Department of Rail and Public Transportation.** Provides an exemption for confidential proprietary information and trade secrets, including commercial or financial information, balance sheets, revenue and cost projections, and detailed freight origin and destination information provided by a private transportation business to the Virginia Department of Transportation and or the Department of Rail and Public Transportation for any purpose authorized or regulated by state law, including obtaining and administering grants or other financial assistance for transportation projects, provided such information is exempt from disclosure under federal laws governing transportation or the federal Freedom of Information Act.

⁷ **HB 788 (LeMunyon) - FOIA; out-of-state requests for records.** Sets out the process for public bodies to respond to record requests made by out-of-state requesters.

⁸ **HB 839 (Brink) - FOIA; applicability to the Office of the Attorney General.** Clarifies that for the purposes of FOIA applicable to access to public records, the Office of the Attorney General shall be considered a public body and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records. The bill contains technical amendments.

October 21 -- Richmond, VA

October 23 -- Norfolk, VA

- **GIS & FOIA Handout.** Staff advised that it worked with staff of the Virginia Information Technologies Agency (VITA) to produce a guidance document on how to handle geographic information systems (GIS) records under FOIA. The "Guide to Geographic Information Systems Records" is available on the Reference Materials page of the FOIA Council website.

Future Meeting

The next meeting of the Council is scheduled for 1:30 PM on November 18, 2014 in House Room C of the General Assembly Building.

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