

FOIA Council Meeting Summary
September 30, 2015
10:00 AM
House Room D
General Assembly Building
Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its third meeting of the 2015 interim.¹ 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, to begin the Legislative Preview, and to discuss other issues of interest to the Council.

The meeting was called to order and members introduced themselves, including Shawri King-Casey, the new designee of the Attorney General. Ms. King-Casey is the first Compliance and Transparency Counsel for the Office of the Attorney General. Next the Council held elections for Chair and Vice Chair. Delegate LeMunyon was elected Chair and Senator Stuart was elected Vice-Chair, both by unanimous vote.

Delegate LeMunyon then noted that because Delegate Morris was unable to attend today's meeting, agenda item #4 concerning Delegate Morris' House Bill 2223 would be deferred until the Council's next meeting on November 18, 2015.

Subcommittee Reports

The Council next received progress reports from the Records Subcommittee and the Meetings Subcommittee.

Staff advised the Council that the Records Subcommittee had met four times during the 2015 Interim (May 11, June 18, July 22, 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 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 August 18, 2015.

Council member Kathleen Dooley, chair of the Meetings Subcommittee advised the Council that Meetings Subcommittee had met four times during the 2015 Interim (May 12, June 17, July 21, 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. Ms. Dooley announced that the Subcommittee had completed its initial review of the closed meeting exemptions and was moving on to consider procedural matters. 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

¹ All Council members were present, except Ms. Hamlett and Mr. Ashby.

Subcommittee made as of July 22, 2015. The Meetings Subcommittee is scheduled to meet again this afternoon at 1:00 PM, following the full Council meeting.

Review of Subcommittee-recommended legislative proposals

Following the reports of the Subcommittees, 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, it prefers to introduce omnibus legislation at the conclusion of the study.

Legislative Preview

Stephen L. DeVita, Esq., presented three proposals on behalf of the Loudoun County School Board. The full text of the proposals will be posted on the Council web site. A summary of the three proposals follows:

1. To amend the closed meeting exemption for discussion of the acquisition or disposition of real property, subdivision A 3 of § 2.2-3711, to clarify that a local governing body may convene in closed meeting when working collaboratively or consulting with a local school board regarding the acquisition of real property for school sites, even though the local governing body is not contemplated to be a co-purchaser of the property with the school board. Mr. DeVita expressed a concern that under current law, the County Board of Supervisors may not be able to meet with the School Board to discuss the School Board's acquisition of real property when the Board of Supervisors is not a party to the contract, even though the Board of Supervisors provides the budget for the School Board.
2. To amend subsection C of § 2.2-3704 to clarify that a court of competent jurisdiction may exercise discretion in fashioning appropriate relief when a public body is at risk of being unable to meet the time deadlines in responding to a records request, even with the 7-day extension. Mr. DeVita stated that this clarification would allow a court to address mischievous behavior by fashioning a remedy appropriate to the circumstances. As an example, he suggested a court might limit the number of new FOIA requests a requester might make if the requester if the requester already had numerous requests outstanding.
3. To amend subsection C of § 2.2-3704 by incorporating it into § 2.2-3713 so that the proceedings by which the requester seeks enforcement and the proceedings by which the public body seeks relief are together in one section. The language should also state that the public body may file a counterclaim for relief in response to a requester's action for enforcement.

Next to speak was Victoria Nicholls, a citizen of Virginia who suggested changing the exemptions applicable to the Virginia Department of Health Professions (DHP) and the various boards relating to medical professions. She specifically suggested that copies of

DHP reports and decisions to dismiss or proceed with a case against a health care professional be given to the complainant; that correspondence from the health care professional who is the subject of a complaint be given to the complainant; that records of state employees involved in investigations be available so that complainants can see outcomes for patients to compare as to whether state employees are doing their jobs; and that professional curricula vitae for appointed boards be removed from the Governor's exemption for working papers. Ms. Nichols stated that her experiences with such matters dated back to 2009 and that in practice, investigations of health care professionals may involve sharing the same information among multiple state agencies, but that there may be discrepancies in the facts, incomplete investigations, but that complainants cannot find out if the investigations performed are thorough, if board members may have conflicts, or other "back door" issues. She stated that taxpayers currently pay over \$12 million per year for DHP investigations, but under current law cannot even tell if investigations are actually performed. As a further example, Ms. Nicholls indicated that her own medical records had been given to the lawyer who represented the health care professional who was the subject of her complaint without any notification to Ms. Nicholls and without her permission. She stated that her goal is to ensure that state agencies do what taxpayers pay them to do and that there are no conflicts of interest.

Public Comment

Delegate LeMunyon opened the floor to public comment and indicated he would particularly like to hear comments about the work of the Subcommittees on HJR No. 96.

Dave Ress, a reporter with the Daily Press, identified three issues of concern: 1) over use of the working papers exemption, 2) open meetings review, and 3) the recent decision of the Supreme Court of Virginia in *Department of Corrections v. Surovell* (Record No. 141780, decided September 17, 2015). Mr. Ress stated that the working papers exemption is possibly the biggest loophole that allows the affairs of government to be conducted in an atmosphere of secrecy, as cited as an example a report on government waste and duplication of effort by the Office of the State Inspector General that was withheld as a Governor's working paper, among other examples. Regarding closed meetings, he described one local governing body that had not had a meeting without a closed session in at least a year and a half, and another that spent six hours in and out of closed session. He posed the question of whether we really want to have that many closed meetings that last that long. Regarding the *Surovell* decision, he noted the preamble to FOIA states that exemptions are discretionary and narrowly targeted, which keeps the fundamental premise of the public right to know, but the Supreme Court decision focuses on the language of the exemptions rather than the basic procedure and five responses to records requests set out in § 2.2-3704.

Megan Rhyne, Executive Director of the Virginia Coalition for Open Government (VCOG), stated she had received a message from a man in southwest Virginia stating that his local governing body had held a closed meeting at every meeting for the past 20 years and described it as demoralizing to the public and making the citizens feel like trespassers in their own town. She noted that the last FOIA rewrite was in 1999, it involved hard

compromises on controversial exemptions, and it created the Council. She stated that she felt the Council's stature as the authority on open government is waning, that one Governor proposed elimination of the Council and another completely misstated the law. She continued by saying it is a completely different world from 1999, that FOIA needs a radical revamp, that much of FOIA no longer serves the public, and Virginia can and must do better.

Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), commented on the work of the proprietary records study group and the *Surovell* case. He related that the Supreme Court of Virginia's opinion in the *American Tradition Institute* case last year invited the General Assembly to address proprietary records. He further stated that the rule of construction is that the General Assembly acquiesces in the Court's interpretation unless it changes the statutory language, and therefore we will have to follow the Court's interpretation of the word "proprietary" set out in the *American Tradition Institute* case in all of the other exemptions where the word appears. He expressed the VPA's opinion that it is not possible to fix everything involving proprietary records, but is possible to deal with situations where private entities submit trade secrets or confidential financial information to public bodies. Regarding the *Surovell* decision, Mr. Merritt noted two points: 1) FOIA states that the public body bears the burden to establish an exemption by a preponderance of evidence, but the *Surovell* decision sets forth a standard of deference to the public body that may require redrafting, and 2) the *Surovell* decision states the rule that if a record includes material subject to an exclusion, the public body may withhold the entire record, which cuts against the accepted interpretation of FOIA for at least a couple of decades, and will need to be addressed in the Code.

Roger Wiley, an attorney representing local government and a former member of the Council, stated that based on his own experience, in spite of what some might suggest, the sky is not falling on open government in Virginia. He stated that the majority of those in local government comply with the law day in and day out. While acknowledging that violations do occur, he suggested that the answer is not always to rewrite the law, but to seek clarification. He stated that the examples Mr. Ress provided were problems with individual interpretations of the law, not the law itself. He expressed that the public does not appreciate how tedious and time consuming good government can be, in reference to the work of the Subcommittees reviewing every exemption in FOIA one by one. He concluded that through the study process generally there are good reasons for the way the law is now and sweeping revisions are not needed.

Other Business

Delegate LeMunyon indicated he had received a letter from Delegate Surovell regarding the recent Supreme Court decision and that the matter would be taken up at the November 18, 2015 meeting of the Council. He stated the Council would also take stock of the progress of the three-year study under HJR No. 96. He continued by saying he had heard some say the Council is not shrinking exemptions enough, and he would encourage people to come forward to state which exemptions and why, to tell the Council specifically what needs to be changed. He asked that going forward, each Subcommittee have a specific reason for each

recommendation stated in the meeting minutes, particularly as members of the General Assembly will want to know the reasons when considering any legislation produced by the study for the 2017 Session.

Marisa Porto stated that as a new Council member, she had gone back to the original study plan and would like further clarity on the philosophy of the Council, particularly in light of the *Surovell* decision. Delegate LeMunyon stated that he was still working through the *Surovell* decision, but generally his opinion was to ask if FOIA did not exist, what would we keep and why, and which exemptions are necessary?

There being no further public comment, as the next order of business Ms. King-Casey was appointed as a member of both the Records and Meetings Subcommittee.

As a reminder, the next meeting of the Council is scheduled for Wednesday, November 18, 2015 at 10:00 a.m. in House Room C 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.

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 & 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.

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 22, and August 18,	Carry over for further consideration; HB 1722/SB 893 referred by 2015 Session of General Assembly re: college & university presidents - no action	No

	2015	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

§ 2.2-3705.6. 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)	July 22 and	Have staff prepare draft combining similar provisions	No

drawings & plans)	August 18, 2015	from subdivisions 2, 4, 6, and 14 for further consideration	
3 (security/access to data processing or telecommunications systems)	July 22, 2015	No changes	No
4 (terrorism & cybersecurity)	July 22 and August 18, 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 and August 18, 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"	No
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"	No
12 (closure, realignment, or relocation of federal military or national security installations)	July 22 and August 18, 2015	No changes	No
13 (internal controls	July 22	No changes	No

of the Commonwealth's financial processes and systems)	and August 18, 2015		
14 (public safety communications systems)	July 22 and August 18, 2015	Have staff prepare draft combining similar provisions from subdivisions 2, 4, 6, and 14 for further consideration	Yes
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	August 18, 2015	No changes	No

ordinance)			
6 (investigations of lottery agents, lottery crimes, etc.)	August 18, 2015	No changes	No

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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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