

FOIA Council Meeting Summary
November 18, 2015
10:00 AM
House Room C
General Assembly Building
Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its fourth meeting of the 2015 Interim on November 18, 2015.¹ 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 continue the Legislative Preview, and to discuss other issues of interest to the Council.

Review of HB 2223 (2015, Delegate Morris)

The meeting was called to order and Delegate LeMunyon asked Delegate Morris to speak to his House Bill 2223, which would have provided that in addition to the civil enforcement provisions of FOIA, any officer, employee, or member of a public body who, without legal excuse or justification, deliberately, willfully, and knowingly violates certain FOIA provisions would be guilty of a Class 1 misdemeanor. The Council had previously reviewed this bill at its May 20, 2015 meeting and voted not to recommend the bill, but Delegate Morris was given another opportunity to speak to the Council about his concerns. Delegate Morris informed the Council today that he intends to introduce three FOIA bills in the 2016 Session of the General Assembly. The first is a modified version of HB 2223. The new version includes the same criminal misdemeanor penalty, but does not allow a citizen to swear out a misdemeanor before a magistrate as can be done for other misdemeanors. Instead, one would have to go to a Commonwealth's Attorney or law enforcement agency before a warrant could be issued, which Delegate Morris indicated is the same level of scrutiny required for felony offenses. He stated that this change was to prevent any potential abuse of the criminal penalty. Delegate Morris' second proposal would require government employees, elected officials, and appointees to use only government-provided email accounts to conduct government business. Any such email that was inadvertently conducted on a non-government account would be required to be forwarded to a government account for record retention purposes. The third proposal would require that a credentialed member of the press be allowed to attend all closed meetings, but not to disclose the contents of the closed meeting unless it was conducted in violation of FOIA. Delegate Morris stated that the second and third proposals were to improve accountability to citizens and increase their confidence in government. In response to questions from the Council, Delegate Morris stated that 24 other states have misdemeanor penalties and one has felony penalties for FOIA violations and that his first bill was tailored to require the highest standards of willful and deliberate conduct before imposing criminal penalties. Regarding the second bill, he told the Council that while private email accounts may be

¹ All Council members were present, except Mr. Jones and Ms. King-Casey.

subject to FOIA now if they are used in the transaction of public business, the problem is retention of private email, especially after the person leaves office or employment. The Council questioned what is a "credentialed" member of the press as the term is used in the third bill. Delegate Morris indicated he did not have a specific definition, but the intent was to improve oversight of closed meetings. The Council and Delegate Morris also discussed the process involved in implementing each of the three bills as practical matters, and how each might be enforced.

Delegate LeMunyon then opened the floor to public comment. Donna Sayegh, a citizen from Portsmouth, described a situation where two local city council members disagreed over what had happened in a closed meeting, and stated that it would have benefitted citizens if there had been a witness there (as suggested in Delegate Morris' third proposal).

Dave Ress, a reporter with the Daily Press, noted that Delegate Morris had referenced dozens of citizens' complaints, not complaints from the media, and stated that all of the proposals were interesting and presented complicated issues. He suggested that there may be other ways to monitor and verify closed meetings, noted that text messages present similar issues to email, and stated that in his experience with current law, a media entity like the Daily Press would go to court to enforce FOIA but ordinary citizens would not. Senator Stuart asked whether Mr. Ress would be willing to sit in a closed meeting as a member of the press under Delegate Morris' third proposal. Mr. Ress indicated that while he would obey the law if it happened, he had a problem with the idea of being sworn to secrecy beforehand.

La Bravia Jenkins, President of the Virginia Association of Commonwealth's Attorneys (VACA), stated that the proposed criminal penalty bill was problematic and that while she understood it was intended to improve accountability, it could lead to any amount of mischief. As an example, she posited that if a receptionist with many duties decides not to respond to a FOIA request in time, the receptionist would be guilty of a misdemeanor and subject to up to one year in jail and up to a \$2,500 fine. She further stated that she had not heard of any attempt to fix the civil penalty or suggest other ways to punish, and that she did not believe a criminal penalty will work because it would have many unintended consequences.

Roger Wiley, speaking on behalf of the Virginia Association of Counties (VACo) and the Virginia Municipal League (VML), informed the Council that both organizations had opposed the bill in the past for many of the same reasons Ms. Jenkins stated. He expressed concern that a criminal penalty might be used as a political weapon, and concern that citizens who volunteer to serve on public bodies would be exposed to criminal penalties, which would have a chilling effect on their willingness to serve. Mr. Wiley stated he felt the bill regarding email accounts was unnecessary and that in practical terms, most people have multiple accounts and often use them interchangeably. On the third bill, Mr. Wiley asserted that if a reporter was invited into a closed meeting, then it was not really closed. Additionally, he noted other potential issues such as credentialing reporters at the local level, and that it was unfair to subject reporters to possible criminal penalties for saying what happened in a closed meeting when members of the public body could speak out about it

without penalty. He also noted that good reporters often find out what happened in closed meetings anyway.

Craig Merritt, speaking on behalf of the Virginia Press Association (VPA) regarding Delegate Morris' third proposal, stated that VPA would not want to institutionalize the role of the press as an actor in government. He agreed with Mr. Wiley that reporters often get information from multiple sources, and expressed concern regarding misattribution of sources if reporters were present in closed meetings. He agreed with Delegate Morris' idea that there is a need for an ombudsman function and more ability to check what goes on in a closed meeting, but expressed that this proposal may not be the right way to do it.

Delegate Morris was given the opportunity to address these comments. Regarding his first proposal, he said that given the high standards involved he did not see how anyone would "stumble" in to a criminal violation. He observed that the General Assembly passes new criminal laws every session, and Commonwealth's Attorneys can adjust to them. Regarding the second, he observed that once an email message on a private account was deleted, there was no practical way to get it under FOIA since the public body would not have a copy. In that case, a subpoena to the email provider would be necessary. He also emphasized that the purpose of his proposals is to provide checks and balances to give citizens confidence that government is open and transparent. Ms. Porto thanked Delegate Morris, noting that the Daily Press has brought a FOIA petition against the Office of the Executive Secretary of the Supreme Court. She stated she was disheartened by hearing excuses from government and complaints from citizens, noting that on a practical level most citizens will not go to court, but FOIA is not about the media, it is about citizens' rights.

Department of Corrections v. Surovell (Supreme Court of Virginia, decided Sept. 17, 2015)

Delegate Surovell was present at the Council meeting to address this case. He stated that the substance of the case was that people interested in better understanding how executions are carried out in Virginia asked the Department of Corrections (DOC) for relevant records. He indicated that DOC denied the request because the majority of the records were exempt because their release would jeopardize public safety. Delegate Surovell was the named petitioner in a mandamus action filed against DOC in Fairfax County Circuit Court. He stated that the judge rejected much of DOC's argument and ordered DOC to turn over most of the requested records, and DOC appealed to the Supreme Court of Virginia. The Supreme Court issued its opinion in favor of DOC. Delegate Surovell identified two problems he found with the Supreme Court's decision. The first was that even though appellate review is conducted *de novo*, the Supreme Court directed the trial court to give agencies deference as to whether they meet the exemption. Delegate Surovell asserted that giving such deference means that the review is not truly *de novo*. The second problem he identified was regarding redaction: the Supreme Court held that redaction of public records is only required if the exemption at issue uses the word "portions." He suggested that the law should be clarified to state that if a document can be redacted and produced, it ought to be, with a provision for *in camera* review by a court. He observed that otherwise, following the Supreme Court's decision, the General Assembly would have to put the word "portions" in every exemption in FOIA.

Senator Stuart agreed with Delegate Surovell regarding the second point regarding redaction, but questioned whether deference to agency expertise might be appropriate. Delegate Surovell noted that in addition to expertise, agencies might have motive to withhold records, and there might be broader problems if deference is given by the courts to public bodies generally.

Delegate LeMunyon then asked for public comment from those who agreed with Delegate Surovell. Mr. Ress expressed agreement and emphasized that § 2.2-3704 of FOIA sets forth the responses to a records request, one of which is to redact and has been understood that way. Mr. Merritt stated that VPA had provided a proposal to address the redaction issue, and observed conflict between a standard of deference to an agency versus the requirement in subsection E of § 2.2-3713 that "the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence." In response to a question from Delegate LeMunyon, Delegate Surovell indicated he would introduce legislation to address these issues at the next Session of the General Assembly, depending on what the FOIA Council does. Delegate LeMunyon stated that he had requested staff to prepare a draft and that the fix would not be trivial. Delegate Surovell indicated he liked the VPA proposal on the issue. Delegate LeMunyon directed staff to prepare a draft and circulate it before the 2016 Session, and if necessary, to hold a meeting to discuss it if problems were identified and possibly to have the Council recommend it.

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 five times during the 2015 Interim (May 11, June 18, July 22, August 18, and October 7, 2015) and would meet a sixth time this afternoon 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 October 7, 2015. In response to Delegate LeMunyon's inquiry, staff went through the Subcommittee's October 7 recommendations one by one (also appearing in Appendix A). Staff also informed the Council that the Proprietary Records Work Group planned to continue its work on exemptions for proprietary records and trade secrets following the 2016 Session of the General Assembly.

Council member Kathleen Dooley, chair of the Meetings Subcommittee advised the Council that Meetings Subcommittee had met six times during the 2015 Interim (May 12, June 17, July 21, August 19, September 30, and November 4, 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, although the "context draft" was still outstanding. She explained that the "context draft" was created to flesh out meetings exemptions that are

mere cross-references to records exemptions by providing additional context without changing the substance of the exemptions. Other than the context draft, the Subcommittee is moving on to consider procedural matters. Please see Appendix B to this summary 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 November 4, 2015. Delegate LeMunyon observed that there were no recommendations made on November 4, 2015 according to the Appendix. Staff responded that that was because the Subcommittee had moved on to consider procedural matters but had not yet made any recommendations on them.

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, Public Comment, and Other Business

Mr. Ress handed out a proposal he described as a new approach to FOIA that would utilize about a dozen general exemptions rather than the many specific exemptions in FOIA currently. He stated that his proposal would require a written explanation when a custodian exercises discretion to withhold records and that closed meetings would be limited and monitored. He asked that the Council consider it and perhaps after the 2016 Session consider it as an alternative approach or use it as a reminder of the issues.

Dena Rosenkrantz of the Virginia Education Association (VEA) stated that VEA was seeking legislation regarding access to records of teachers and school employees. Noting the existing provisions for confidentiality of teacher performance indicators outside of FOIA in Code § 22.1-295.1, she indicated things such as student test scores, growth profiles, and other value-added records should be confidential and are not reliable measures of teacher performance. She also expressed concern that employees are not notified when records are requested and disclosed, and that the personnel exemption in FOIA is not mandatory and employees do not know their information may be public. She also indicated concern over times schools will not share information with employees, such as not sharing disciplinary records when no action is taken.

Maria Montgomery, Managing Editor of the Winchester Star and a member of the VPA Board, provided her perspective based on working as a reporter in Connecticut. She informed the Council that Connecticut has a commission to investigate and enforce its version of FOIA. She said that the process is administrative and civil instead of criminal, and that appeals go to the courts. The commission is composed of members from media, citizens, and agencies, and it takes calls and complaints from the public. Ms. Montgomery stated that in 30 years she had been a complainant and party in many cases, and almost all ruled in favor of release. She stated that Connecticut FOIA Commission lawyers would

argue cases on appeal at no cost to the citizens or media. She also said that approximately three quarters of the cases were brought by citizens and the remaining quarter by media. By contrast, she said that the Winchester Star has never gone to court on a FOIA matter, and that she could provide many examples where the Winchester Star did not get records due to high costs or other reasons. She said it was frustrating working in Virginia after working in Connecticut and New York.

Delegate LeMunyon asked if there was any other business or public comment. There was none. As a reminder, the next meeting of the Council will be scheduled after the 2016 Session of the General Assembly. There being no further business, the meeting was adjourned.

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APPENDIX A

Summary of the work of the Records Subcommittee

<p>RECORDS SUBCOMMITTEE of the FOIA COUNCIL Recap of Meetings Subcommittee Work to Date on Open Meeting Exemptions October 7, 2015</p>

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, 2015	Carry over for further consideration; HB 1722/SB 893 referred by 2015 Session of General Assembly re: college & university presidents - no action on HB 1722/SB 893; recommended moving the term "correspondence" into the definition of "working papers" for clarification of existing language	No
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

§ 2.2-3705.2. 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 &	July 22,	Have staff prepare draft	Yes

construction drawings & plans)	2015	combining similar provisions 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, 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, 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, August 18, and October 7, 2015	Recommend amending to use the term "communication services provider" as defined in Code § 58.1-647 instead of the term "telecommunications carrier"	Yes
11 (subscriber data not otherwise public, collected by a local governing body for 911)	July 22, August 18, and October 7, 2015	Recommend amending to use the term "communication services provider" as defined in Code § 58.1-647 instead of the term "telecommunications carrier"	Yes
12 (closure, realignment, or relocation of federal military or national security	July 22 and August 18, 2015	No changes	No

installations)			
13 (internal controls of the Commonwealth's financial processes and systems)	July 22 and August 18, 2015	No changes	No
14 (public safety communications systems)	July 22, 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	August 18, 2015	No changes	No

Virginia Human Rights Act or local ordinance)			
6 (investigations of lottery agents, lottery crimes, etc.)	August 18, 2015	No changes	No
7 (various audits conducted by JLARC, APA, etc.)	October 7, 2015	Deferred at request of affected parties	Yes
8 (DHRM employment dispute resolution investigations)	October 7, 2015	Asked staff and interested parties to form a work group to consider eliminating if subject already covered by personnel records exemption	Yes
9 (complainant information re: zoning, Building Code, and Fire Code complaints)	October 7, 2015	Deferred for further consideration	Yes
10 (active investigations by DCJS re: private security services, special conservators of the peace, bail bondsmen, and bail enforcement agents)	October 7, 2015	No changes	No
11 (Board of Education investigations of test security, alteration, and administration)	October 7, 2015	Asked staff to prepare draft that does not refer to prohibiting disclosure	Yes
12 (Board of Education active investigations re: teacher licenses)	October 7, 2015	Asked staff to prepare draft that does not refer to prohibiting disclosure	Yes
13 (investigation by the Attorney General regarding the Tobacco Master Settlement	October 7, 2015	No changes	No

Agreement and related matters)			
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§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

NOTE: The 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, July 21, August 18, and November 10, 2015.

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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 on Open Meeting Exemptions 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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APPENDIX C

HJR 96 (2014) Study Plan Adopted by the Council

House Joint Resolution 96 (2014) directs the Council to study all exemptions contained in the Virginia Freedom of Information Act (FOIA) to determine the continued applicability or appropriateness of such exemptions and whether FOIA should be amended to eliminate any exemption from the FOIA that the Council determines is no longer applicable or appropriate. In conducting its study, the Council shall also examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA. The Council shall consider comment from citizens of the Commonwealth; representatives of state and local governmental entities; broadcast, print, and electronic media sources; open government organizations; and other interested parties. The resolution requires the Council to report its findings and recommendations to the General Assembly by December 1, 2016.

2014 Study Plan Overview

It is anticipated that for the remainder of 2014, the Council will establish two subcommittees, one to examine records exemptions and one to examine meetings exemptions. Because there are far more records exemptions than there are meetings exemptions, it is anticipated that the meetings subcommittee will conclude its work this year, but next year the Council will establish one or more additional records subcommittees to continue studying records exemptions during the 2015 and 2016 interim periods.

It is expected that each subcommittee will meet two to three times (or more if necessary), then report its findings to the full Council. Subcommittees may meet at locations other than Richmond, but should coordinate plans to do with the Executive Director in advance. As the full Council meets quarterly and is required to file its annual report to the General Assembly each December 1, the goal is to complete the first phase of the study by November, 2014.

It is not anticipated that the Council will recommend study-related legislation this year, as the study will not be complete. Instead, the study will resume after the 2015 Session of the General Assembly, and again after the 2016 Session of the General Assembly, with the third year goal being to complete all subcommittee work and recommend comprehensive legislation to the 2017 Session of the General Assembly.

2014 Subcommittees

- *Records Subcommittee:* It is suggested that this subcommittee begin its work by studying §§ 2.2-3705.1 (exemptions of general application), 2.2-3705.7 (records of specific public bodies and certain other limited exemptions) and 2.2-3705.8 (limitation on record exclusions). The subcommittee will also study § 2.2-3705.6 (proprietary records and trade secrets) during the 2014 interim. Note that because §

2.2-3706 (concerning criminal and law enforcement records) was the subject of three years of study resulting in legislation passed last year as a recommendation of the Council, further study of this section is not recommended at this time.

- *Meetings Subcommittee*: The goal of this subcommittee is to study all meetings exemptions in § 2.2-3711 during the 2014 interim, as well as procedural or other meetings issues, should any be raised.

2015 Subcommittees

- *Records Subcommittee #1*: It is suggested that this subcommittee study §§ 2.2-3705.2 (records relating to public safety) and 2.2-3705.3 (records relating to administrative investigations).
- *Records Subcommittee #2*: It is suggested that this subcommittee study §§ 2.2-3705.4 (educational records and certain records of educational institutions) and 2.2-3705.5 (health and social services records).

2016 Subcommittees

- *General Provision Subcommittee*: This subcommittee will study other provisions of FOIA as needed.

Guidance to the Subcommittees/Role of the FOIA Council

Bills referred by the General Assembly: It is anticipated that the Council will address the bills referred to it by the General Assembly either by assigning them to the appropriate subcommittee, or handling them directly. Of the four bills referred for study during the 2014 interim, three would be appropriate to send to the Records Subcommittee if the Council does not dispose of them itself: two identical bills (HB 339/SB 387) would modify an existing records exemption, and one (HB 788) addresses out-of-state records requests. The fourth bill (HB 839) addresses the applicability of FOIA to the Office of the Attorney General, an issue the Council may wish to address directly.

Organization of FOIA and policy issues: HJ 96 requires that the council examine the organizational structure of FOIA. This could be accomplished to more clearly differentiate between sections pertaining to records, sections pertaining to meetings, and sections pertaining to both. Staff has prepared a draft that the Council may choose to adopt as a working vehicle for the study that includes these changes. Additionally, the Council will provide guidance on policy issues, while the respective subcommittees focus on addressing specific exemptions in detail. For example, one policy question is whether to have numerous limited exemptions, fewer exemptions that are more broadly applicable, or a combination of both types. As a specific example, § 2.2-3705.6 currently contains many exemptions for trade secrets held in different types of records by different agencies. Does the Council prefer this approach, or would the Council prefer to have one exemption covering trade secrets generally?

Contacting agencies: It is suggested that the study, following the policy statement of FOIA expressed in § 2.2-3700, take the approach that all records and meetings are presumed to be open, and that any exemption must be justified. To facilitate this approach, it is suggested that agencies to which particular exemptions apply be contacted and asked to explain the need for their particular exemption(s). It is further suggested that appearances by agency representatives be scheduled to address all relevant exemptions at once, rather than asking agency representatives to appear multiple times.

Technology issues: The goals of the study will include the elimination of obsolete language within FOIA as well as any additional changes necessitated by technological advances. Electronic mail, geographic information systems (GIS), records management issues as they affect access, and consideration of FOIA in the procurement of technology are areas of particular concern.

Court opinions, FOIA Advisory Opinions and other resources: During the course of work, subcommittees are expected to review relevant court opinions, FOIA Advisory Opinions, and other information relevant to their work, including comparable provisions in open government laws in other states and the federal government. This may be helpful in providing insight into opportunities to clarify the Virginia Code to reduce litigation and the need for Advisory Opinions.

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APPENDIX D

Summary brief

Department of Corrections v. Surovell (Va. Sup. Ct. decided Sept. 17, 2015)

Background:

Delegate Surovell asked DoC for various documents related to executions, including execution manuals. DoC denied the request for execution manuals pursuant to § 2.2-3705.2(6):

"Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure."

Decision:

(1) Standard for jeopardy:

"To the extent that releasing documents would expose a governmental facility to danger, the standard is met. VDOC need not "prove conclusively that, if it responded, some [facility's security] would in fact be compromised or jeopardized.""

(2) Weight given agency expertise:

"We ... hold that the circuit court must make a de novo determination of the propriety of withholding the documents at issue, but in doing so, the circuit court must accord "substantial weight" to VDOC's determinations. ("[D]e novo review in the national security context can be summarized as follows: (1) The government has the burden of establishing an exemption. (2) The court must make a de novo determination. (3) In doing this, it must first 'accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'"). Once satisfied that proper procedures have been followed and that the information logically falls within the exemption clause, courts need go no further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." [Internal citations omitted.]

(3) Redaction:

"The question before us is whether an agency is required to redact an exempt document that may contain non-exempt material. We agree with the Commonwealth that an agency is not required to redact under these circumstances."

"The wording of the statute applies the exclusion to the entire drawing, manual, minutes or record and makes it disclosable only at the discretion of the custodian. Nothing in this section speaks to redaction except for a general reference to the option of disclosure at

the discretion of the custodian. This language creates no requirement of partial disclosure or redaction."

"Where the General Assembly intends to require redaction and production of portions of records, it has specifically so provided.... Had the General Assembly intended to require redaction of documents that fall under the security exemption of subsection (6) of the statute, it would have included the phrase "those portions" or "portions thereof."

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