

FOIA Council Meeting Summary
December 5, 2016
1:30 PM
House Room 1
Virginia State Capitol Building
Richmond, Virginia

The Virginia Freedom of Information Advisory Council (the Council) held its final meeting of the 2016 Interim on December 5, 2016.¹ This meeting was held to conduct a final review of the two omnibus legislative proposals by the Council as part of concluding the study of FOIA pursuant to House Joint Resolution No. 96.

Staff led the Council in a line-by-line review of two omnibus legislative proposals. Each legislative proposal represents the consolidation of each of the Council's two subcommittees' recommendations made during the course of the HJR 96 Study (2014--2016). Staff noted that each recommendation incorporated in the omnibus drafts had been previously approved by the Council. Staff told the Council that each omnibus draft had been annotated to assist the Council and interested parties in understanding when each specific recommendation was approved, including citing the legislative draft (LD) identification number of the recommended change before incorporation into the omnibus draft, the date when recommendation was adopted by the respective subcommittee, and the date the recommendation was approved by the Council. A legislative tracking document was also made available to assist in this review process; it is attached to this meeting summary as Appendix A and has been made available on the Council's website. Staff noted that there were several changes needed in each document, ranging from merely technical fixes to inclusion of part of a recommendation that was inadvertently left out of the omnibus draft. The Council voted unanimously to amend both drafts as suggested by staff. The Council discussed whether the changes to the working papers exemption should have a second enactment clause clarifying that the changes do not apply retroactively, but no motion was made on this issue. The Council asked for public comment on whether other changes were needed to the drafts. Dave Ress, a reporter with the Daily Press, addressed the amendment to the working papers and correspondence exemption in the records draft (LD 17100968D). He suggested that the words "including correspondence" be stricken from the amended definition of "working papers" because it might be misused by someone claiming that all of his correspondence is a working paper. The Council voted 8-1 to adopt this recommendation (Ms. Hamlett voted against). There was no public comment regarding the meetings draft (LD 17101247D). The Council voted 9 to 0 to recommend each draft, as amended, to the 2017 Session of the General Assembly.

The Council next identified the issues that either were studied without reaching a consensus on how to move forward, or were not able to be examined due to the time constraints

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

imposed by HJR 96, but which issues would be carried over until 2017 for further study. A listing of these issues is attached to this meeting summary as Appendix B and has been made available on the Council's website.

Public Comment

The Council then asked for public comment. Dave Ress with the Daily Press stated that he believed that the suggested revisions for correspondence and working papers, as well as the requirement for notice of continued meetings, were improvements to FOIA. Mr. Ress indicated, however, that there were still several issues that had not been addressed, including access to criminal investigative records and the total exemption from FOIA for the Parole Board and other public bodies. Mr. Ress complained that other states' FOIA laws were generally not considered as part of the study, nor did the chairman's charge of zero-based exemption review ever reach fruition. Dick Hammerstrom, a member of the Virginia Press Association as well as the Virginia Coalition for Open Government, told the Council that while this study and previous FOIA studies in 1989 and 1999 made improvements to FOIA, he was disappointed that study of public access to law-enforcement records (§ 2.2-3706) was not accomplished. Mr. Hammerstrom stated that he did not favor waiting another 10 years to fix FOIA. Katrina Dix, education reporter with the Free Lance Star, encouraged the Council to remember the underlying reason for FOIA. She stated that both the public and the government do not understand it and as a result, the citizens are not served. She opined that citizens do not care about the technicalities of the law, but care about the results of the law.

Other Business

Chairman LeMunyon noted that he believed that two-thirds of all FOIA exemptions protect the personal information of citizens and businesses. He stated that over time, the law has changed to protect the privacy of citizens, but not government processes. Delegate LeMunyon stated that there are many tough calls in enacting FOIA exemptions. For example, information contained in personnel records weighs the privacy of individual employees against the public's right to know. The same is the case with regard to certain law-enforcement records. He reiterated that FOIA is a balancing act of competing interests.

Council member Porto requested staff to distribute a Daily Press editorial critical of the work of the Council. Ms. Porto stated that the editorial says it all.

Council member Jones thanked Delegate LeMunyon and staff for navigating through a complex path. Mr. Jones stated that his take away from the three-year study was that there were improvements to FOIA being recommended, but recognized that it is an ongoing process. Mr. Jones stated that the Council had shown openness to examine the tougher issues and suggested that this dialogue continue.

In closing, Delegate LeMunyon thanked staff for its work and noted that of the several bodies on which he serves, the Council is the most active. He asked staff to advise Council members when the omnibus bills will be heard by Subcommittee No.2 of the House Committee on General Laws.

The first meeting of the Council in 2017 was scheduled for Tuesday, March 7, 2017 at 1:30 p.m. in Richmond, Virginia.

There being no further business, the meeting was adjourned.

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APPENDIX A



**HJR 96 FOIA Study
Legislative Recommendations Tracking Document
Effective December 6, 2016
(After December 5, 2016 FOIA Council meeting)**

I. FINAL LEGISLATIVE RECOMMENDATIONS OF THE FOIA COUNCIL

LD Number	Relating to	Notes
17100698	Omnibus Records draft	Approved 12/5/16, as amended, 9-0
17101247	Omnibus Meetings draft	Approved 12/5/16, as amended, 9-0

II. Legislative Recommendations Approved by FOIA Council by subcommittee and date with vote:

MEETING SUBCOMMITTEE (8):

LD Number	Relating to	Date Approved by Meetings Subc.	Date Approved by FOIA Council	FOIA Council Vote	Notes
1. 16101652	2.2-3712 closed mtg procedures	November 4, 2015	June 23, 2016	8-0	technical fixes
2. 15100276	2.2-3711; legal matters and litigation	August 19, 2014	June 23, 2016 and again on November 21, 2016 b/c action not reflected in June 23, 2016 meeting	8-0	Make 2 separate exclusions; declaratory of existing law

LD Number	Relating to	Date Approved by Meetings Subc.	Date Approved by FOIA Council	FOIA Council Vote	Notes
			minutes		
3. 1610002	2.2-3711; certain museums, local crime commissions, and local postemployment nonpension boards	November 5, 2014 and May 12, 2015	June 23, 2016	8-0	
4. 16100201	2.2-3711; VCUHSA clean up	July 21, 2015	June 23, 2016	8-0	
5. 17100049	2.2-3711; Context draft	September 19, 2016	September 19, 2016	8-0	Previously LD16100064
6. 17100176	2.2-3708 and 2.2-3708.1; Emtgs clarifications, and definition of regional public body	September 19, 2016	September 19, 2016		
7. 17100786	2.2-3707.1; posting minutes	September 19, 2016	October 17, 2016		
8. 17100047	2.2-3707; notice and agenda posting	June 6, 2016	October 17, 2016		Previously LD16106517

RECORDS SUBCOMMITTEE (17):

LD Number	Relating to	Date Approved by Records Subc.	Date Approved by FOIA Council	FOIA Council Vote	Notes
1. 15100327	2.2-3705.1; email subscriptions	November 5, 2014	June 23, 2016	9-0	
2. 15101102	2.2-3705.1;		June 23, 2016	9-0	Excluded

LD Number	Relating to	Date Approved by Records Subc.	Date Approved by FOIA Council	FOIA Council Vote	Notes
	"scholastic record" out of this list	N/A--see notes			under 2.2-3705.4 already; also removed in HB 817 (2016)
3. 15101103	2.2-3705.7; customer acct info	August 25, 2014	June 23, 2016	9-0	
4. 15101104	2.2-3705.7; Wildlife Magazine	November 5, 2014	June 23, 2016	9-0	
5. 16101008	2.2-3705.7; local boards, post employment, nonpension comp.	July 21, 2015	June 23, 2016	9-0	
6. 16100995	2.2-3705.2 and 2.2-3705.3; public safety, admin investigations; and telecommunication service provider terminology fix	October 7, 2015	June 23, 2016	9-0	
7. 17100033	2.2-3705.4; VA College Savings Plan	September 14, 2015	June 23, 2016	9-0	
8. 17100048	2.2-3705.3; DHRM admin investigation	November 18, 2015	June 23, 2016	9-0	Previously LD16106514 Deleted as unnecessary b/c covered under personnel exclusion
9. 17100067	2.2-3705.5;	September	September 19,	8-0	

LD Number	Relating to	Date Approved by Records Subc.	Date Approved by FOIA Council	FOIA Council Vote	Notes
	DHP and DSS consolidations	14, 2016	2016		
10. 17100698	2.2-3701; definition of public record	September 8, 2016	October 17, 2016	8-0	
11. 17100603	2.2-3705.7; working papers	August 18, 2015	October 17, 2016	7-1	LeMunyon's version; includes Subc recommendn
12. 17100035	2.2-3705.2; Public Safety consolidation of 2, 4, 6, and 14	August 18, 2016--Subc. action--to refer to full FOIA Council w/o recommendation	October 17, 2016	7-0-1	First paragraph of Subdivision 2 of 2.2-3705.2 moved to 2.2-3705.6 (proprietary records)
13. 17100765	FOIA requests and responses (2.2-3704)	September 29, 2016	November 21, 2016	6-1	
14. 17100766	Global language change; revert to pre 2016 law (i.e. "Nothing...to prevent/prohibit disclosure...")	November 18, 2015, but reconsidered and current version recommended September 29, 2016	November 21, 2016	5-1-1	
15. 15100326	Personnel records; consolidation of 2.2-3705.1 and 2.2-3705.8	August 25, 2014	November 21, 2016	7-0	
16. 15101105	certain corresp of local officials not a	November 5, 2014	November 21, 2016	7-0	

LD Number	Relating to	Date Approved by Records Subc.	Date Approved by FOIA Council	FOIA Council Vote	Notes
	public record (2.2-3705.7)				
17. 17101306	ABC Authority record exclusion for proprietary records, marketing strategies, etc. (subd 34 of 2.2-3705.7)	November 18, 2015	November 21, 2016	7-0	

APPENDIX B

HJR 96 Study Issues continued to 2017 December 5, 2016

- Proprietary records and trade secrets draft proposed by the Virginia Press Association. *Note: The Record Subcommittee recommended that study of § 2.2-3705.6 (proprietary record exclusions) be carried over to 2017 as efforts were unsuccessful in reaching consensus to create a general exemption for trade secrets and proprietary records.*
- Review of FOIA in light of advancement in technology
 - FOIA policy statement. *At the beginning of the HJR 96 study, staff suggested that FOIA be amended to include a policy statement to the effect that: "Any public body procuring any computer system, equipment or software, shall ensure that the proposed system, equipment or software is capable of producing public records in accordance with this chapter." It is believed that inclusion in FOIA as part of its policy statement would enhance compliance with the redaction rule of FOIA.*
 - Definitions
 - Vendor proprietary software” is exempt from release under FOIA (2.2-3705.1(6)), necessity to continue to include the exemption for software “developed by or for a state agency.....” in 2.2-3705.1(7)? (From Chairman's list of FOIA issues)
 - Website posting of notice and minutes (§§ 2.2-3707 and 2.2-3707.1)
 - Texting among members during public meetings
- Access to law-enforcement records (§ 2.2-3706)
- Personnel records (§ 2.2-3705.1)
- Enforcement of FOIA; penalties for violations.
- Reorganization of FOIA. *Examine the organizational structure of FOIA and make recommendations to improve the readability and clarity.*

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