



PPEA Subcommittee
of the
Virginia Freedom of Information Advisory Council
July 2005

A. INTRODUCTION

At its first meeting on June 8, 2005, the Public Private Education Facilities and Infrastructure Act (PPEA) subcommittee discussed the current FOIA records exemption found at § 2.2-3705.6 (11). This subcommittee was created as a result of HB 2672 (Delegate Plum), which was referred to the FOIA Council for study by the 2005 General Assembly. The reason for referral to the FOIA Council (and hence the creation of the subcommittee) was not so much a problem with HB 2672 itself, but the confusion regarding the nature and extent of records covered by the applicable FOIA record exemption. There was also concern that the FOIA record exemption for PPEA and PPTA proposals was used to withhold more records than are authorized under the exemption. As a result of its initial discussions, the PPEA subcommittee agreed that the balance necessary for the development of good public policy was to facilitate competition while ensuring the public confidence in the decisions of government, especially when expending substantial public funds. The subcommittee identified the issues outlined in section B of this document as warranting further examination. In addition, issues relating to public access to PPEA procurement records raised by the PPEA Model Guidelines Workgroup created pursuant to Chapter 865 of the 2005 Acts of Assembly are included in this document as section C. Underscored language used in section C denotes draft language under consideration by the PPEA Model Guidelines Workgroup.

B. ISSUES TO BE CONSIDERED

Issue	Current Law	Options
1. Identification of records actually exempted by FOIA for PPEA and PPTA projects	See § 2.2-3705.6 (11) ¹	Does the universe need to be expanded or contracted or left unchanged?
2. Define "confidential proprietary records."	"Procurement records shall not be interpreted to include proprietary, commercial or financial information, balance sheets, financial statements, or trade secrets that may be provided by the private entity as evidence of its qualifications." See 2.2-3705.6 (11)	PPEA/PPTA only OR as defined term in FOIA (applicable to all proprietary record exemptions) OR as defined term in VPPA OR all of the above.
3. Affirmative declaration and/or agreement by a public entity that certain records will be considered proprietary and thus protected from disclosure.	Nothing to prohibit or require in law.	PPEA/PPTA only OR as defined term in FOIA (applicable to all proprietary record exemptions) OR as defined term in VPPA OR all of the above.
4. Specific time lines for release of records related to PPEA projects.	§§ 55-573.1 and 56-575.16-- "Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, a responsible public entity shall make available, upon request, procurement records in accordance with § 2.2-4342."	Amend PPEA to provide for release of records once an interim agreement has been entered into
5. Interim versus comprehensive	Not specified in the law. SB 1107 (05) eff. 7/1/05	Amend § 56-575.16 to specify time for release of records when interim or comprehensive

agreements, and when records related to each must be made available.		agreement(s) are entered into.
6. Disclosure by school boards to the local governing bodies responsible for approving funding for school construction.	§56-575.16 E--"A responsible public entity that is a school board or a county, city or town may enter into a comprehensive agreement under this chapter only with the approval of the local governing body. "	Specify what records must be made available to local governing body by school board as part of approval process by local governing body.
7. Use of term "working papers" in FOIA PPEA exemption	"Working papers" is a defined term in FOIA; not applicable in this context. See § 2.2-3705.6 (11) ²	Use another term of art to convey same meaning OR Leave unchanged b/c context requires a different meaning.

C. OTHER ISSUES FROM PPEA MODEL GUIDELINES WORKGROUP
(Chapter 865, 2005 Acts of Assembly (SB 1107 (2005))

ISSUE	Current law	Options	Comment
Review of FOIA disclosure under Section II D of PPEA Model Guidelines	Second enactment of chapter 865 of 2005 Acts of Assembly (SB 1107) ³	Recommend revisions to Section II D of Model Guidelines	
Disclosure of records limited to those subject to interim agreement vs. other documents submitted unrelated to interim agreement--status of latter records	No existing provisions in either FOIA or PPEA that address this issue.	Amend FOIA and/or the PPEA to specify what records must be released OR specify what records are exempt.	
If discussions are memorialized, status of those records wrt FOIA	Unless covered by FOIA exemption, records are open	Specify status of these records in FOIA (see also No. 7 above)	
Codify DGS practice			

of publishing unsolicited proposal as well as any other proposals received.			
Clarification of what is exempted from FOIA and what is presumed open.	See also Nos. 1 and 5 above	See also Nos. 1 and 5 above	
Amendment of § 56-575.4 G of PPEA wrt "an agreement."	See also Nos. 1 and 5 above	See also Nos. 1 and 5 above	
Trigger for disclosure of records with interim agreement vs. comprehensive agreement.	See also Nos. 1 and 5 above	See also Nos. 1 and 5 above	
Release of conceptual phase records prior to initiating detailed phase	Ch. 865 2005 Acts of Assembly (SB 1107) and Section IV B 4 of PPEA Model Guidelines ⁴		

Source: Virginia Freedom of Information Advisory Council, June 2005.

1 Confidential proprietary records...(i) voluntarily provided by a private entity pursuant to a proposal filed with a public entity or an affected local jurisdiction under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), pursuant to a promise of confidentiality... , (ii) used by the responsible public entity or affected local jurisdiction for purposes related to the development of a qualifying transportation facility or qualifying project; and (iii) memoranda, working papers or other records related to proposals filed under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, where, if such records were made public, the financial interest of the public or private entity involved with such proposal or the process of competition or bargaining would be adversely affected. (Emphasis added).

2 [A]nd memoranda, working papers or other records related to proposals filed under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, where, if such records were made public, the financial interest of the public or private entity involved with such proposal or the process of competition or bargaining would be adversely affected. (Emphasis added).

3 That the Chairmen of the Senate and House General Laws Committees shall convene a working group of representatives of public and private entities to revise the current model guidelines to incorporate amendments to the Public Private Education Facilities and Infrastructure Act of 2002 in accordance with this act. The group shall make its recommendations available to the responsible public entities by September 30, 2005.

4 After all conceptual solicited proposals or competitive unsolicited proposals have been received, and prior to initiating the detailed phase, copies of all conceptual proposals that

warrant further consideration shall be made available to the public absent any information protected from disclosure under prior agreement between the private entity and the responsible public entity.