

Criminal Investigative Records Subcommittee  
of the Virginia Freedom of Information Advisory Council  
Meeting Summary  
Monday, October 4, 2010  
1:30 PM  
General Assembly Building  
Richmond, Virginia

The Criminal Investigative Subcommittee held its second meeting of the interim on October 4, 2010.<sup>1</sup> The purpose of this meeting was to consider two draft bills regarding access to criminal investigative records: one would provide for a requester to petition a court for the release of criminal investigative records, and the other was a redraft of existing § 2.2-3706.

*Draft Petition for Release of Criminal Investigative Records*

After calling the meeting to order and having the Subcommittee members and members of the public introduce themselves, staff presented a draft bill that would provide a mechanism for a requester to petition a court to order the release of criminal investigative records after the request had been denied pursuant to subdivision F 1 of § 2.2-3706 by creating a new section in FOIA. Staff explained that the draft provision does not fit within the existing remedies sections of FOIA because it does not concern violation of a person's FOIA rights, enforcement of those rights, or penalties. It instead presumes that a public body has lawfully withheld records as permitted by § 2.2-3706(F)(1), but there is some overriding reason why the requester should get the records anyway, and gives the requester the chance to prove that before a court. Further, the draft sets forth two options that reflect mirror-image approaches to the same balancing test, one looking at "interests" and the other looking at "harms."

James Conrad, a citizen and former law enforcement officer, indicated that he liked the draft version presented as a balance of interests, and felt that it was a good compromise. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) indicated a concern that the phrasing of the draft presupposes that the public interest is in keeping the records confidential, but that in some cases the public interest might be better served by releasing the records. Craig Merritt, on behalf of the Virginia Press Association, indicated that he felt the draft had technical problems, among them being that the draft should state explicitly that it provides a remedy in addition to the existing remedies in FOIA, that it appears to presume that the public interest is in withholding records, and that instead it should balance the petitioner's interest in releasing the records with the public body's stated reasons for withholding the records. After some discussion by the subcommittee members, it appeared there was no sentiment to move forward with the draft. A motion to end consideration of this draft was made and seconded which carried by unanimous voice vote.

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<sup>1</sup> Members Fifer (Chair), Miller, Selph, and Treadway were present. Delegate Griffith was unable to attend.

*Redraft Of § 2.2-3706*

Staff next presented a redraft of § 2.2-3706 intended to make the section easier to read and understand but without making any substantive changes. The redraft is organized into six subsections: subsection A sets forth definitions; subsection B sets forth exemptions; subsection C sets forth provisions that require the release of information; subsection D addresses access to noncriminal records; subsection E contains the only prohibition on release of information found in FOIA, regarding the identity of confidential informants; and subsection F sets forth the conflict resolution clause. Staff noted certain technical changes that would need to be made to the draft as presented.

Craig Merritt observed that subsection C of the draft, concerning required disclosures, was really about information rather than records. He noted that subsection B dealt with records, but subsection C is really a heightened disclosure requirement (present in existing law, but different from the rest of FOIA, which deals only with existing public records). He suggested that the heading for subsection C should be changed to say "criminal incident and arrest information" to reflect these differences. He also advocated the adoption and use of uniform criminal incident and arrest report forms.

Chairman Fifer expressed interest in the idea of including a standard form in the statute, while noting that it is not something typically done in FOIA. He also suggested that the provision concerning adult arrestee photos be moved from subsection B, regarding exemptions, to subsection C, regarding required disclosures, because it is phrased to require disclosure except under certain limited circumstances. He also indicated support for moving the prohibition on release of information about confidential informants outside of FOIA, as FOIA contains no other prohibitions on release.

Mr. Conrad indicated he believed there was a federal government standard form for reporting criminal incidents already in widespread use that might be suitable for use in this context as well.

The subcommittee then moved that staff move forward with an amended draft as suggested, and that the draft as amended then be considered for recommendation to the full FOIA Council. The motion carried by unanimous voice vote.

The next meeting of the subcommittee will be held at 12:30 PM on November 8, 2010 in the General Assembly Building, Richmond, Virginia (one hour before the next full meeting of the FOIA Council).

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