

Criminal Investigative Records Subcommittee
of the Virginia Freedom of Information Advisory Council
Meeting Summary
Thursday, June 28, 2012
1:30 PM
General Assembly Building
Richmond, Virginia

The Criminal Investigative Records Subcommittee held its first meeting of the 2012 interim on June 28, 2012.¹ The purpose of this meeting was to continue the work of the Subcommittee which began in 2010, studying SB 711 (Edwards), and continued into 2011, studying SB 1467 (Edwards), both of which would have opened access to criminal investigative files once the investigation or prosecution was final or otherwise terminated.

Mr. Fifer presented a brief history of the work of the Subcommittee, noting that there had been significant interest in the topic of access to criminal investigative files and other law enforcement records, but little forward movement. He stated his hope that the Subcommittee would be able to identify the areas where the various interested parties could agree to make changes, and which aspects of the law would remain as problem issues where there was no consensus for change. As no bill had been referred to the FOIA Council from the 2012 Session of the General Assembly,² the Chair suggested starting the discussion with a position paper prepared by the Virginia Press Association (VPA). Craig Merritt, representing VPA, indicated that the position paper did not put forth a new proposal, but it explained the policy positions behind the VPA's draft proposal from last year. He briefly reviewed the history of the Subcommittee's work and indicated that the position paper sought to bring out the high-level policy issues for further discussion, rather than approach them in minute detail as had been done previously. Mr. Fifer noted that the position paper identified four major issues: (1) the reorganization of existing § 2.2-3706; (2) criminal incident information; (3) 911 records; and (4) access to criminal investigative files. Mr. Fifer requested comment on these issues.

Dana Schrad, representing the Virginia Association of Chiefs of Police (VACP), agreed that a reorganization of existing law for clarity would be good. She indicated that VACP sees full compliance with existing law as a training issue, made more difficult because of rapid turnover in the positions dealing with the release of information. Mr. Fifer asked if anyone present would object to reorganizing the existing law for clarity without any policy changes; there were no objections.

The discussion then turned to criminal incident information (CII), particularly the language of subsection B of § 2.2-3706 which states that *[l]aw-enforcement agencies shall make available upon request criminal incident information relating to felony offenses*. Several competing interpretations of this language were identified through further discussion among the subcommittee members and interested parties, including Ms. Schrad, Mr. Merritt, Kim Pollard (on behalf of the Virginia Municipal League), Dan Wilson (representing the Virginia State

¹ Subcommittee members Fifer (Chair), Schliessmann, Selph, and Treadway were present (all members).

² SB 711 (Edwards) and SB 1467 (Edwards) had been referred to the FOIA Council for study during the 2010 and 2011 Sessions, respectively. During the 2012 Session, Senator Edwards introduced SB 107, which contained language identical to SB 1467. SB 107 was passed by indefinitely in the Senate Committee on General Laws and Technology by 7-6 vote, and was not referred for further study.

Police), and Michael Doucette (Commonwealth's Attorney for the City of Lynchburg). Some interpret the quoted language to mean that a request for CII triggers the default five-working day response time as set forth in subsection B of § 2.2-3704. Others have interpreted it to require an immediate response as soon as the request is made, but to allow a verbal response (where FOIA otherwise applies only to public records). Others have interpreted this language to mean there is no specific deadline to respond to a request for CII, because it is different than the standard procedure set forth in § 2.2-3704, but does not explicitly state any deadline. Furthermore, it appears that some agencies do not respond to requests for CII at all unless they have existing records containing CII, whereas other agencies will create CII records or respond verbally if no records already exist at the time a request is made. Mr. Schliessman inquired whether CII is currently released before any charging determination is made; Mr. Merritt indicated it is often released before a charging determination is made. Mr. Schliessmann indicated a need to clarify the deadline for release relative to a charging determination, because the statute only requires the release of CII relating to felony cases. The Subcommittee asked that those present contact their constituents and return to the next Subcommittee meeting with further suggestions for a reasonable timeframe for the release of CII.

The discussion then turned to the issue of requiring the release of CII in misdemeanor cases. Mr. Merritt opined that the release should not be driven by charging decisions subject to prosecutorial discretion. He suggested instead, as proposed by VPA, that CII should be released in misdemeanor cases as well as felonies. If CII was released in all cases, the charging decision of the prosecutor would not affect the release of CII. Mr. Doucette stated that the sheer volume of misdemeanors (as compared to felonies) would make it very onerous to provide CII in misdemeanor cases. Staff stated that when FOIA was rewritten in 1999, CII was limited to felony cases as part of an agreement among the interested parties, due to the volume of misdemeanor cases. After further discussion, Mr. Fifer observed that there did not appear to be common ground among the interested parties present on the issue of whether to require the release of CII in misdemeanor cases. The Subcommittee and interested parties then discussed whether victim information such as name, address, age, and gender, should be released along with CII. Similarly, there was no agreement on this issue.

Mr. Fifer then asked about 911 call records. There was general agreement that it would be helpful to address 911 records directly and explicitly in the law, as understanding the current law regarding 911 records requires one to look through legislative changes and case law since the 1990's. After further discussion, it was agreed that the current law should be reorganized for clarity and to add a section addressing 911 records. It was also noted that the Subcommittee had been asked to add to its agenda consideration of the release of adult arrestee photographs ("mug shots"). The Subcommittee asked that the interested parties contact their constituents regarding the reorganization, specifically looking at the 2010 rewrite of § 2.2-3706 prepared by staff, which had been recommended by the FOIA Council but not introduced to the General Assembly, and the 2011 VPA draft proposal, as possible vehicles.³ The Subcommittee directed staff to poll for a second meeting to be held in the latter half of August, prior to the next meeting of the full FOIA Council on September 5, 2012. The meeting was then adjourned.

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³ Both drafts are posted on the FOIA Council website 2012 Subcommittees page (http://foiacouncil.dls.virginia.gov/subcom_mtgs/2012/subcom12.htm).