

Virginia Freedom of Information Advisory Council
Records Subcommittee
May 14, 2014
10:00 AM
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its first meeting on May 14, 2014. Subcommittee members Ashby, Hamlett, and Oksman were present; Mr. Tavenner was absent. The Subcommittee began the meeting by electing Mr. Tavenner as Chair and Mr. Ashby as Vice Chair by unanimous vote. Staff then presented a brief review of House Joint Resolution No. 96 (HJR 96), which directs the FOIA Council to conduct a three-year study of FOIA, and the study plan adopted by the FOIA Council at its meeting on April 22, 2014. HJR 96 directs the FOIA Council to examine all of the exemptions in FOIA, as well as the organization and structure of FOIA. At its meeting in April the FOIA Council established the Subcommittee with the goal of studying three types of records exemptions in 2014: the exemptions of general application in §§ 2.2-3705.1 and 2.2-3705.8, the proprietary records exemptions in § 2.2-3705.6, and the exemptions for specific public bodies and other limited exemptions in § 2.2-3705.7.

Staff then presented a brief review of HB 339 (Anderson) and SB 387 (Reeves), identical bills concerning certain proprietary records of the Department of Rail and Public Transportation (DRPT) that were referred to the FOIA Council by the 2014 Session of the General Assembly. Staff indicated that there was agreement on these bills during the 2014 Session of the General Assembly, but it turned out that was not the case. Bethany Wolfe spoke on behalf of DRPT to inform the Subcommittee that the goal of the bills was to amend the current state exemption to match existing federal law. She noted that ridership information was of concern to Amtrak due to competition with other vendors, and that federal law exempts information on what is being carried by Norfolk Southern and CSX as freight carriers. Craig Merritt, representing the Virginia Press Association (VPA), observed that fundamentally the bills were an attempt to put Amtrak on the same footing as a private rail company, and to conform Virginia FOIA to federal law. He stated that the Senate substitute version of the bill was acceptable to VPA, but it is not clear what federal law protects. He noted that DRPT interprets the federal exemptions more broadly than VPA does.

The Subcommittee next began discussing how it would implement the study plan. It was suggested that the Subcommittee address one topic per meeting, and give those interested the opportunity to submit written comments before each meeting. Staff suggested that at the state level, letters be sent to advise agencies that would be impacted of the Subcommittee's work plan and schedule. Staff noted that representatives of the Virginia Association of Counties (VACo) and Virginia Municipal League (VML) were present and could notify their constituent member localities directly. It was suggested that proprietary records be addressed later in the year due to the complex issues they present. After further discussion, the Subcommittee decided to hold four additional meetings. The first meeting will address the exemptions of general applicability and exceptions thereto found in §§ 2.2-3705.1 and 2.2-3705.8. The second meeting will address the

exemptions for specific public bodies and other limited exemptions in § 2.2-3705.7. The third meeting will address the proprietary records exemptions in § 2.2-3705.6. The fourth meeting will cover any other remaining topics that need to be addressed.

Mr. Ashby opened the floor to public comment. Mr. Merritt suggested it might be useful to discuss the objectives of FOIA policy before plunging into specific exemptions. As an example, he noted current policies of protecting a business' trade secrets and the negotiating and bargaining positions of both businesses and public bodies, versus the competing policy of protecting only the public body's position in the interest of taxpayers. He expressed the concern that if the study begins with details, there may be no sense of what each exemption is being measured against, what is consistent with policy, and what are the overall objectives of the study. The Subcommittee generally agreed that governing principles would be helpful, and expressed concern over the limits of the language of House Joint Resolution No. 96.

Megan Rhyne of the Virginia Coalition for Open Government (VCOG) noted that three of the four members of the Subcommittee were from state agencies, that local government and the press were well represented at the meeting, but that the biggest problems she hears about are from citizens regarding the application of particular exemptions, particularly those for working papers, personnel, and legal advice. She noted that the Subcommittee might not get an equivalent quantitative input from citizens. She further agreed there should be a discussion of policy and direction, and suggested the use of informal workgroups for more input.

The Subcommittee then discussed concerns over policy and whether further guidance was needed from the FOIA Council as a whole. Ms. Hamlett expressed that she thought the FOIA policy is for government to be as open and responsive as possible while still engaging in cost effective transactions. She noted that it is problematic when private vendors do not want to work with government out of fear their records would be disclosed. She also noted that some exemptions are based on concerns for personal information and privacy. Mr. Oksman suggested deferring decision until a legislative member of the FOIA Council could provide guidance on the underlying principles. Staff observed that the statutory authority of the FOIA Council already gives it the authority to study all of FOIA even without HJR 96, and indicated staff would contact the legislative members of the FOIA Council. In response to Mr. Ashby, Mr. Merritt noted some particular policy concerns such as having measures in place by which to judge exemptions, addressing changes in technology, and weighing the convenience of government against favoring greater access. Staff observed that FOIA was written in 1968 and does not address the consequences of technological changes, such as the cost of retrieving electronic records, but that the definition of "public records" is broad enough to account for changing technology.

The Subcommittee then discussed scheduling future meetings, including the possibility of a full FOIA Council meeting in June to address policy questions and provide further guidance to the Subcommittee. Staff was directed to poll for future meeting dates.