

Virginia Freedom of Information Advisory Council
Records Subcommittee
August 25, 2014
1:30 PM
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its third meeting on August 25, 2014. Subcommittee members Tavenner (Chair), Ashby, Hamlett, Jones, and Oksman were present. The purpose of the meeting was to continue the study of records exemptions under House Joint Resolution No. 96 (HJR 96).

The meeting began with consideration of a draft that would combine into one subdivision the provisions of the personnel records exemption¹ with the limitations on that exemption found later in FOIA.² The draft also adds "name" to the list of items that must be released.³ The purpose is to put all of the personnel records exemptions into one location for clarity and ease of use, without making any substantive changes. After reading the draft language the Subcommittee voted unanimously to recommend it.

The Subcommittee at its previous meeting requested sample language that would clarify the exemption for written advice of legal counsel and attorney-client privilege. Mr. Jones indicated that language was not ready for consideration today.

The Subcommittee then turned to the exemption for personal information provided to a public body for the purpose of receiving electronic mail from the public body (a.k.a. the "anti-spam" exemption). The draft would eliminate the reference to the definition of "personal information" in § 2.2-3801 and instead exempt "personal contact information." Mark Flynn of the Virginia Municipal League (VML) asked if "personal contact information" would include business contact information as well. Ms. Hamlett asked about contact information for members of public bodies. Staff stated that when the exemption was added, the issue addressed was citizens' contact information, noting that members of public bodies should have public contact information. Roger Wiley, representing local government and speaking as a former FOIA Council member, observed that at the local level an employee's home and personal contact information could be protected as personnel records, and that the same could apply to board and commission members. Ms. Hamlett disagreed based on court precedent, stating that public officers are not employees. After further discussion, the Subcommittee voted to add language to the draft indicating it was intended to apply to personal contact information, including home or private business information, furnished by citizens. The first vote was a tie (Mr. Oksman did not vote initially), but upon a second vote the motion carried 3-2 (members Ashby, Hamlett, and Oksman voted aye; members Jones and Tavenner voted nay).

¹ Subdivision 1 of § 2.2-3705.1.

² Subsection A of § 2.2-3705.8.

³ Names are required to be released under existing law, but that requirement is not explicitly stated.

The Subcommittee then began its consideration of the records exemptions in § 2.2-3705.7, exclusions to application of chapter; records of specific public bodies and certain other limited exemptions. Staff provided a brief legislative history as each exemption was considered.

Subdivision 1 of § 2.2-3705.7 is an exemption enacted as part of the original FOIA in 1968. The original version, which exempted several different types of records, has been amended many times over the years. The current exemption addresses several types of tax records but also mentions scholastic records. Staff noted that the word "scholastic" appears to have been left from the original exemption as an oversight, as there is now a separate exemption for scholastic records.⁴ Staff also noted that given the list of tax items in this exemption, "scholastic" is a non-sequitur. After brief discussion and supporting comments from Craig Merritt on behalf of the Virginia Press Association (VPA) and Mr. Flynn, the Subcommittee voted unanimously to remove the word "scholastic" from this exemption.

Subdivision 2 of § 2.2-3705.7 is also an exemption enacted as part of the original FOIA in 1968. It exempts the working papers and correspondence of certain government officials and employees. Laura Fornash of the University of Virginia (UVA) and Karah Gunther of Virginia Commonwealth University (VCU) both noted the importance of this exemption to university presidents in working through drafts and difficult management decisions. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) noted that at the local level this exemption is used by multiple parties, such as mayors and city managers, or superintendents and school board chairs. She said that at the state level the exemption was given overly-broad interpretation, especially by legislators. Mr. Merritt noted that while "Office of the Governor" is defined in the exemption, there is no equivalent definition for the Lieutenant Governor or Attorney General; he also asked about the breadth of the term "correspondence" given that it is not defined while the term "working papers" is defined. Staff observed there were not as many inquiries regarding the Lieutenant Governor or Attorney General, and that at least one circuit court has used the dictionary definition of "correspondence" as written communications or the exchange of letters.⁵ After further discussion about the breadth of the exemption and its application, Mr. Jones moved to eliminate the word "correspondence" but the motion failed for lack of a second. The Subcommittee agreed to carry over consideration of this exemption.

Subdivision 3 of § 2.2-3705.7 exempts library records that can be used to identify both (i) any library patron who has borrowed material from a library and (ii) the material such patron borrowed. Staff noted that both elements must be present for the exemption to apply. The Subcommittee, Mr. Flynn, Mr. Wiley, and Ginger Stanley of VPA discussed the application of the exemption, noting that it would not protect a computer search but would protect electronic materials borrowed, and that there had been no complaints from libraries about this exemption. There was no further comment.

⁴ Subdivision 1 of § 2.2-3705.4.

⁵ Staff was referring to *Richmond Newspapers, Inc. v. Casteen*, 42 Va. Cir. 505, 506-507 (City of Richmond 1997)(stating that correspondence "has a common meaning. It is unnecessary to resort to principles of statutory construction to determine what is meant. It is defined as the 'Interchange of written communications. The letters written by a person and the answers written by the one to whom they are addressed.' Black's Law Dictionary (6th ed. 1990), p. 344. Also 'communications by exchange of letters; letter writing.' Webster's New Twentieth Century Dictionary, unabridged (2d ed. 1983).").

Subdivision 4 of § 2.2-3705.7 exempts certain contract cost estimates and other records of the Virginia Department of Transportation (VDOT). Staff indicated the exemption was enacted in 1981 to protect the public purse in the procurement setting. A representative from VDOT stated that the agency uses the exemption to withhold engineering analyses and to protect the amounts VDOT is willing to pay, because otherwise bidders could manipulate the bids. Ms. Stanley asked about the monitoring program mentioned in the exemption; the Subcommittee moved on to consider other exemptions so that VDOT staff could check on the answer to this inquiry. At the end of the meeting, the Subcommittee returned to this topic and VDOT indicated the program was to monitor bids and compare them to cost estimates. The Subcommittee did not recommend any changes to this exemption.

Subdivision 5 of § 2.2-3705.7 exempts lists of owners of bonds issued by a political subdivision. The Subcommittee at this time briefly discussed and clarified that if an exemption was considered but there were no comments or suggestions for change, then the recommendation would be to keep the current exemption without amendment. The Subcommittee then returned to consideration of subdivision 5. Mr. Ashby asked what was the public interest in this exemption. Mr. Wiley stated that if the information was not confidential, people would not be as willing to buy bonds. Mr. Merritt indicated most were in brokerage accounts now anyway. Mr. Wiley agreed, stating he was not sure that a locality would even have access to the list. The Subcommittee did not recommend any changes to this exemption.

Subdivision 6 of § 2.2-3705.7 exempts records relating to financial disclosures by members of the General Assembly. Staff stated the exemption was enacted in 1986 and has not been amended. The public policy is to make financial disclosures public, but the records exempted are those submitted when a member is called before an ethics panel. There is a corresponding meetings exemption as well. The Subcommittee and interested parties discussed whether the exemption would need to be amended due to the formation of the new Virginia Conflict of Interest and Ethics Advisory Council.⁶ The Subcommittee decided to carry over consideration of this exemption to gather more information on this topic.

Subdivision 7 of § 2.2-3705.7 exempts public utility customer account information. Staff noted that the current exemption requires the release of the amount "paid" for utility service, but not the amount charged for such service, which has led to some confusion in application regarding unpaid utility bills. After some discussion of the basis of the exemption to protect customer privacy, the Subcommittee agreed without objection to amend the exemption to cover the amount paid or the amount charged.

Subdivision 8 of § 2.2-3705.7 exempts personal information filed with the Virginia Housing Development Authority or a local housing and redevelopment authority. After staff recited the legislative history of the exemptions enactment in 1988 and two subsequent amendments, there were no comments regarding this exemption.

Subdivision 9 of § 2.2-3705.7 exempts hazardous waste facility siting records. Staff noted there is a corresponding meetings exemption, but there is no such facility in Virginia. Cindy Berndt of the Department of Environmental Quality (DEQ) stated that there is a statutory mandate to have

⁶ 2014 Acts of Assembly, cc. 792 and 804 (codified at Va. Code §§ 30-355 through 30-358).

a hazardous waste siting program, and the exemption exists to protect local governments' bargaining positions. She observed there is still a requirement to publish notice of intent, to hold a public hearing, and to obtain all of the necessary environmental permits. She was unsure of the notice period but stated it was at least 30 days. There were no additional comments.

Subdivision 11 of § 2.2-3705.7 exempts certain game-related records of the Virginia Lottery. Staff stated that this exemption was created to protect proprietary records and the public purse; the exemption was enacted in 1989 and had subsequently been amended to reflect the Virginia Lottery's change of name this past Session.⁷ The Subcommittee confirmed that the exemption is limited and records would be disclosed under certain conditions. There was no further comment.

Noting that it had taken up subdivision 11 out of order, the Subcommittee next addressed subdivision 10 of § 2.2-3705.7, which exempts records regarding certain plant and animal species, natural communities, caves, and significant historic and archaeological sites. Representatives of the Department of Game and Inland Fisheries (DGIF) and the Department of Conservation and Recreation (DCR) both expressed the importance of this exemption to their work, stating that it helps with economic development and in protecting both landowners and resources. There was no additional comment.

Subdivision 12 of § 2.2-3705.7 exempts certain investment-related records of the Virginia Retirement System (VRS), the University of Virginia (UVA), and the Virginia College Savings Plan (VCSP). Staff stated that the exemption was added in 1993 to protect the public purse and proprietary records, and that it had been amended three times. Robert Schultze, Director of VRS, stated that this exemption, along with subdivision 25, were meant to help protect aspects of VRS' and the other entities' investment portfolios, especially regarding private equity investments, which give the highest rate of return. Mr. Schultze further stated that VRS had been shut out by their highest performing private investment manager because of a lack of FOIA protections in 2005-2006. Afterward this exemption was amended and subdivision 25 was added to protect information provided by private partners; Mr. Schultze said he worked with VPA on the language for both exemptions. Mr. Schultz informed the Subcommittee that every state that invests in private equity has an exemption like this one, and he noted that VRS is still subject to oversight by the Joint Legislative Audit and Review Committee (JLARC). Ms. Fornash of UVA and Chris McGee, General Counsel for VCSP, agreed that the same concerns applied to their institutions. There were no additional comments.

Subdivision 16 of § 2.2-3705.7 exempts certain records of the Department of Environmental Quality, the State Water Control Board, State Air Pollution Control Board or the Virginia Waste Management Board relating to enforcement actions. Ms. Berndt stated that this exemption concerns DEQ's enforcement strategies regarding regulatory programs, permits, and other things, and the records become public once enforcement is completed. There were no additional comments.

Subdivision 18 of § 2.2-3705.7 exempts certain records of the Virginia Lottery concerning retailers and individual game winners. Amy Dilworth spoke on behalf of the Lottery, stating that this exemption helps strengthen the perception of integrity of the Lottery and shows that real

⁷ 2014 Acts of Assembly, c. 225.

people do win. Ms. Stanley noted that VPA agreed with the state agency about this exemption. There were no further comments.

Subdivision 25 of § 2.2-3705.7 exempts certain records of the Virginia Retirement System, a local retirement system, or the Virginia College Savings Plan relating to certain investment strategies, investment managers, or trade secrets. This exemption was already discussed in conjunction with subdivision 12. Ms. Fornash asked why UVA had not been added to this exemption, since UVA was included with subdivision 12; no one knew the answer. Mr. McGee noted that VCSP was added in 2009. There were no additional comments.

Mr. Tavenner asked if there were any additional comments or questions from the Subcommittee or the public; there were none. The Subcommittee decided to have staff poll members for future meeting dates. The meeting was then adjourned.

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