

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
November 5, 2014
1:30 PM
General Assembly Building
Richmond, Virginia
Meeting Summary

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its fourth meeting on November 5, 2014. Subcommittee members Whitehurst (Chair), Dooley, Oksman, and Selph were present at the Richmond location; Mr. Landon participated by telephone from his home in Roanoke, Virginia.¹ The purpose of the meeting was to continue the study of FOIA records exemptions in accordance with House Joint Resolution No. 96 (HJR 96).

After the call to order and introductions, the Subcommittee decided to take up matters on the printed agenda out of order, beginning with item #3 (new business) to continue implementation of the Subcommittee's work plan, and deciding to return to item #2 (old business) at the end. Additionally, some items were taken up out of order when they concerned similar or related subject matter and representatives of the affected agencies were prepared to speak. Staff read the language of each exemption considered and gave a brief legislative history of each. Each exemption is addressed separately below in the order in which they were discussed.

Subdivision A 9 of § 2.2-3711 allows a closed meeting to be held for the purpose of discussing certain gifts, bequests, and grants by the boards of trustees of the Virginia Museum of Fine Arts (VMFA), the Virginia Museum of Natural History, the Jamestown-Yorktown Foundation, and The Science Museum of Virginia. It was enacted in 1981, amended in 2003 to add the Virginia Museum of Natural History, and amended again in 2013 to add the Jamestown-Yorktown Foundation. David Bradley of the VMFA stated that all four of the listed entities rely heavily on contributions and this exemption provides confidentiality for information learned in the negotiating process, such as donors' cash flow, tax strategies, estate planning, and other personal information. He noted that using private foundations for fundraising protects information to a point, because private foundations generally are not subject to FOIA. However, such foundations do not operate in a vacuum and must be able to keep the state-appointed boards aware of the foundations' activities, and the boards are subject to FOIA. In response to a question from Mr. Whitehurst, Mr. Bradley indicated donors want both anonymity and protection of proprietary information, citing as an example safety issues for those who loan a high-value art collection to the museum. Roger Wiley, an attorney representing local government and a former FOIA Council member, stated that he was on the FOIA Council when this exemption was last amended and felt that it was appropriate, but noted there are local governments that operate museums subject to the same considerations, such as the Chrysler Museum in Norfolk. Mr. Oksman suggested that localities should come forward if they wished to be added to the exemption. Ginger Stanley of the Virginia Press Association (VPA) questioned why the exemption included grants; Mr. Bradley indicated it had to do with grants from private foundations, not government grants that go through an appropriations process.

¹ Note that this meeting was noticed as an electronic meeting pursuant to § 2.2-3708. No members of the public participated from Mr. Landon's remote location.

There was further inquiry and discussion among the Subcommittee members, staff, Ms. Stanley, Elizabeth Hooper of Virginia Polytechnic Institute and State University, Frances Bradford of the College of William and Mary, and Matt Conrad of Virginia Commonwealth University (VCU). The initial consensus of the Subcommittee was to add "from private sources" after the word "grants," but there were concerns with how this language might affect other organizations, and how it might be construed in relation to other exemptions such as subdivision A 8 of § 2.2-3711. The Subcommittee agreed without objection to look further at this language before recommending any change.

Subdivision A 12 of § 2.2-3711 was enacted in 1982. It allows a closed meeting to be held for the purpose of discussing possible disciplinary action against a member of the General Assembly arising out of the possible inadequacy of the disclosure statement filed by the member. It was noted that this exemption would not apply to the Virginia Conflict of Interest and Ethics Advisory Council. There were no additional comments or recommendations for change.

The Subcommittee next took up subdivision A 8 of § 2.2-3711, which had been considered at the Subcommittee's last meeting in August. It allows a closed meeting to be held for the purpose of discussing gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by boards of visitors of public institutions of higher education. The Subcommittee had discussed this exemption at its last meeting but deferred decision until representatives from the state institutions of higher education were ready to speak on the matter. Laura Fornash of the University of Virginia (UVA) stated this exemption was important to UVA's Board of Visitors and gave the example of needing to discuss matters such as a new 20-year, \$70 million dining services contract. She noted there were similar considerations regarding donors and fundraising strategies as were expressed regarding the earlier exemption for museums. Ms. Bradford, Ms. Hooper, Mr. Conrad, Sabena Moretz of George Mason University, and Chris White of the University of Mary Washington all agreed. Ms. Stanley indicated she was still unsure why grants were included. After brief discussion, the Subcommittee recommended leaving this exemption unchanged.

Subdivision A 14 of § 2.2-3711 was enacted in 1984. It allows a closed meeting to be held for the purpose of discussing forecasts of economic activity and estimating general and nongeneral fund revenues by the Governor and any economic advisory board. Ms. Stanley asked what would be the harm in knowing the forecasts; staff observed that disclosure is required by December 15 each year, but this exemption covers discussions before that date. The consensus of the Subcommittee was to leave this exemption unchanged.

Subdivision A 16 of § 2.2-3711 was enacted in 1989, and amended in 2003 and 2014. It allows a closed meeting to be held for the purpose of discussing certain licensing appeal actions and other Virginia Lottery matters discussed by the Virginia Lottery Board. In response to questions from the Subcommittee, Amy Dilworth of the Virginia Lottery indicated there was no need to change the exemption. The consensus of the Subcommittee was to leave this exemption unchanged.

Subdivision A 20 of § 2.2-3711 was enacted in 1993, and amended in 1997, 2002, and 2007. It allows a closed meeting to be held for the purpose of discussing certain security or ownership interests discussed by the Virginia Retirement System (VRS), the University of Virginia, or the

Virginia College Savings Plan (VCSP). Robert Schultze, Director of VRS, stated that this is a long-standing exemption to promote an investment program involving a large trust fund used to fund benefits. He noted that two-thirds of benefits are paid through investment gains. He further stated that a small portion of the portfolio is in private equity assets, and that previously VRS lost access to some of these because it lacked an exemption. He observed that the corresponding records exemption is more important, but this exemption preserves options for meetings. Ms. Fornash stated that the UVA endowment shared the same interests. Chris McGee of VCSP agreed, and stated that it was an integral part of the diversity of VCSP's portfolio and ability to attract top investment managers. Mr. Wiley stated that since this exemption was adopted, accounting rules had changed and local governments now have a pooled investment trust worth over \$500 million with some of the same issues, and that it might be worth adding to the exemption. Staff suggested taking this idea up at the first meeting of 2015 by considering adding a cross-reference to the investment pool trust. The consensus of the Subcommittee was to have staff work with Mr. Wiley on appropriate language for consideration next year.

Subdivision A 39 of § 2.2-3711 was enacted in 2007. It allows a closed meeting to be held for the purpose of discussing certain exempt records of VRS, a local retirement system, or VCPS by certain public bodies. Mr. Schultze stated that the exemption was added in 2007 at VRS' request after a bad experience with an investment manager. He said that Wall Street firms made FOIA requests to VRS for investment strategies, and then the firms would sell those strategies, and VRS' best-performing external investment manager dropped VRS as a client as a result. The consensus of the Subcommittee was to leave this exemption unchanged.

Subdivision A 21 of § 2.2-3711 was enacted in 1995 and amended in 1999. It allows a closed meeting to be held for the purpose of discussing individual death cases discussed by child fatality review teams or family violence fatality review teams. Virginia Powell of the Office of the Chief Medical Examiner stated that the goal of the program is to determine how victims die in order to devise preventative strategies. She said that they look at child deaths and domestic violence victims on a case by case basis, and that the exemption helps protect the privacy of victims and families, as well as deliberation on strategies. The consensus of the Subcommittee was to leave this exemption unchanged.

Subdivision A 22 of § 2.2-3711 was enacted in 1996 and amended in 2002. It allows a closed meeting to be held for the purpose of discussing certain proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School (EVMS). Sally Barber of the UVA Medical Center stated that the exemption was added in 1996 to work with other statutory provisions and due to a need to be competitive with private entities. Ms. Barber submitted written remarks, incorporated herein by reference. A representative of EVMS agreed with Ms. Barber's comments. The consensus of the Subcommittee was to leave this exemption unchanged.

Subdivision A 23 of § 2.2-3711 was enacted in 1996 and amended in 2000. It allows a closed meeting to be held for the purpose of discussing various matters by the Virginia Commonwealth University Health System Authority (VCUHSA). The Subcommittee noted that this exemption appears to repeat items from other exemptions, such as personnel matters and real property discussions. Karah Gunther of VCU stated that when it was first created, VCUHSA was not

subject to the Virginia Public Procurement Act, and these items were specifically listed in an abundance of caution. The Subcommittee, Ms. Stanley, and Ms. Gunther discussed whether the redundancy was needed, and the status of VCUHSA employees as public employees, but not state employees. Mark Flynn of the Virginia Municipal League (VML) expressed concern that removing these provisions could be construed as a lack of authority to hold closed meetings on the covered topics. Mr. Wiley and staff indicated that any decision could be explained in the report at the conclusion of the HJR No. 96 study. Ms. Gunther stated that after speaking with VCU's general council, she would want to be very careful before changing this exemption because VCUHSA is an authority, not a state agency. Ms. Dooley indicated she did not feel a great need for change, and Mr. Selph expressed concern over unintended consequences. After some further discussion of the structural differences between UVA, VCUHSA, and EVMS, the Subcommittee agreed to ask staff to examine the matter further and bring it back for reconsideration next year. Ms. Gunther noted that VCU was considering asking for legislation in the 2015 Session of the General Assembly to clarify existing exemptions because VCU and VCUHSA work closely together and need to protect many of the same matters.

Subdivision A 24 of § 2.2-3711 was enacted in 1997 and amended in 2009. It allows a closed meeting to be held for the purpose of discussing certain matters of the Health Practitioners' Monitoring Program Committee within the Department of Health Professions (DHP). Peggy Ward, Manager of the Health Practitioners' Monitoring Program, stated that the Committee meets every other month and discusses individual participants, including their mental health records, substance abuse problems and other issues. After further discussion noting that an order to participate in the program is public, but the reasons for the exemption include not only the privacy of those participating, but the protection of public health as well, the Subcommittee agreed to recommend leaving this exemption unchanged.

Subdivision A 25 of § 2.2-3711 was enacted in 1997 and amended in 1999 and 2000. It allows a closed meeting to be held by the Board of the Virginia College Savings Plan wherein certain personal information is discussed. Staff noted that the Records Subcommittee had recommended a change in the definition of "personal information" used in a corresponding records exemption, rather than a cross-reference to the definition used in the Government Data Collection and Dissemination Practices Act (GDGCPA). Mr. McGee stated that VCSP by law collects lots of personal information including names, ages, and social security numbers of parents, children, and grandchildren, and this exemption allows protection for discussions involving such information. There was discussion among the Subcommittee members about the possibility of adding a definition of "personal information." Mr. McGee stated that VCSP would like the exemption to remain as it is currently written, but that he would look into it and report back to the Subcommittee.

Subdivision A 27 of § 2.2-3711 was enacted in 2002 and amended in 2003. It allows a closed meeting to be held for disciplinary proceedings by any regulatory board within the Department of Professional and Occupational Regulation (DPOR), Department of Health Professions (DHP), or the Board of Accountancy (BoA). A representative of DHP spoke in support of the current exemption and provided a general description of the disciplinary process. She stated that the various boards regulate individual licensees, accept complaints from the public, press, consumers, and others, issue public notice to licensees to come before the appropriate board, and

hold either an informal conference or a hearing, all of which is done publicly. The board would then convene a closed meeting to deliberate, acting like a jury to consider evidence and sanctions, including considerations of mental health issues, substance abuse, patient abuse, and other matters. She stated that if the exemption were changed then the disciplinary process would have to be changed as well. The consensus of the Subcommittee was to recommend leaving this exemption unchanged.

Subdivision A 43 of § 2.2-3711 was enacted in 2009. It allows the Board of Trustees of the Veterans Services Foundation (the Foundation) to hold a closed meeting to discuss certain fundraising records which are exempt pursuant to subdivision 29 of § 2.2-3705.7. Steven Combs of the Department of Veterans Services (DVS) stated that the Records Subcommittee had reviewed the corresponding records exemption and recommended no changes. He explained that the Foundation is a public body created by statute and therefore subject to FOIA, unlike most other fundraising foundations that are private tax-exempt entities not subject to FOIA. He stated that the Foundation had raised about \$400,000 last year used to supplement services by DVS including veterans cemeteries, the Virginia War Memorial, and the Virginia Wounded Warrior Program. The consensus of the Subcommittee was to recommend leaving this exemption unchanged.

Subdivision A 17 allows a closed meeting to be held by local government crime commissions for discussions involving the identity of anonymous informants. At the last meeting of the Subcommittee no one could recall if there actually were any "local government crime commissions" in existence or authorized under the law. The Subcommittee indicated that if there are no entities that would use the exemption, then it could be repealed, but it wanted to give staff and interested parties time to further research the matter. Staff indicated that research had revealed no other mentions of "local government crime commissions" in the Code, and no one staff had spoken with could recall any such entity. Mr. Wiley stated that he would ask others in local government and report back to the Subcommittee.

Mr. Whitehurst asked if there were any additional comments or questions from the Subcommittee or the public. Mr. Oksman thanked staff for their work; there were no other comments. The Subcommittee decided to have staff poll members for dates for the next meeting to be held after the 2015 Session of the General Assembly has adjourned sine die. Ms. Stanley asked whether the Subcommittee was planning to introduce an omnibus bill or individual legislation for each recommendation. Mr. Wiley noted that the Records Subcommittee favored an omnibus approach, but noted one objection could kill the whole bill. Ms. Dooley confirmed with the Chair that the Subcommittee's recommendations would be sent to the full FOIA Council, which would then decide how to proceed. Mr. Wiley suggested a possible approach would be to have one non-controversial bill and another for more controversial items. The Subcommittee meeting was then adjourned.

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