

Virginia Freedom of Information Advisory Council
Records Subcommittee
November 5, 2014
10:00 AM
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its fourth meeting on November 5, 2014. Subcommittee members Tavenner (Chair), Jones, and Oksman were present (members Ashby and Hamlett were absent). 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. Staff read the language of each exemption considered and gave a brief legislative history of each. The first six exemptions considered are of more general application or refer to prohibitions found outside of FOIA. The 12 that follow apply only to specific types of records and specific agencies. Each exemption is addressed separately below.

Exemptions of general application or that make reference to a prohibition outside of FOIA:

Subdivision 17 of § 2.2-3705.7 was enacted in 2000. It exempts records related to the operation of toll facilities that identify an individual, vehicle, or travel itinerary. There were no comments or recommendations for change.

Subdivision 22 of § 2.2-3705.7 was enacted in 2004 and amended in 2007 and 2013. It exempts certain records of state or local park and recreation departments and local and regional park authorities to the extent such records contain information identifying a person under the age of 18 years. Ginger Stanley of the Virginia Press Association (VPA) said that VPA had opposed the 2013 amendment because it changed the "opt-out" provision to an "opt-in" provision, which goes counter to the FOIA principle that all public records are open to disclosure by default. She stated that VPA had worked with Virginia Beach on this legislation, that it was modeled on Florida law, that it is the only "opt-in" provision in Virginia FOIA, and that VPA still believes the change made in 2013 is not a good rule. Megan Rhyme of the Virginia Coalition for Open Government (VCOG) agreed, stating that VCOG also opposed the 2013 amendment because it changed the basic presumption of FOIA that public records are open. Mark Flynn of the Virginia Municipal League (VML) stated that similar information could be withheld at a library and that it was analogous to taking advantage of a public offering. There were no additional comments or recommendations for change.

Subdivision 24 of § 2.2-3705.7 was enacted in 2005. It exempts records of the Judicial Inquiry and Review Commission made confidential by § 17.1-913. There were no comments or recommendations for change.

Subdivision 26 of § 2.2-3705.7 was enacted in 2007. It exempts records of the Department of Corrections made confidential by § 53.1-233; such records concern the identities of persons who conduct executions. Michele Howell spoke on behalf of the Department of Corrections (DOC), stating that DOC uses this exemption and wants it to remain as it is. There were no additional comments or recommendations for change.

Subdivision 30 of § 2.2-3705.7 was enacted in 2012. It exempts names, physical addresses, telephone numbers, and email addresses contained in correspondence between an individual and a member of a public body of the locality in which the individual is a resident, unless the correspondence relates to the transaction of public business. Roger Wiley, an attorney representing local government and a former FOIA Council member, stated that the exemption as written does nothing and there is no point keeping it. Ms. Stanley agreed. Mr. Flynn observed it may do more mischief than it helps. The Subcommittee members voted unanimously to recommend that this exemption be eliminated.

Subdivision 33 of § 2.2-3705.7 was enacted in 2014. It exempts records created or maintained by or on the behalf of the judicial performance evaluation program related to an evaluation of any individual justice or judge made confidential by § 17.1-100. There were no comments or recommendations for change.

Exemptions specific to particular types of records and specific agencies:

Subdivision 13 of § 2.2-3705.7 was enacted in 1993. It exempts names and addresses of subscribers to Virginia Wildlife magazine published by the Department of Game and Inland Fisheries (DGIF). Mr. Jones inquired whether this level of specificity was needed. Mr. Wiley asked whether there were any other agencies that publish magazines, and why this one was singled out. Phil Smith of DGIF stated that it was probably the result of a complaint about the receipt of solicitations, and that the release of this information may be a disincentive to subscribe to the magazine. He further stated that while the exemption used to be used regularly, there had been no requests for this information in several years. In response to an inquiry from Mr. Tavenner, Mr. Smith indicated he did not know what percentage of subscribers chose to "opt-out" using this exemption. Ms. Stanley indicated VPA had wondered about this exemption, and requested that it be deleted. Mr. Oksman observed there may be right to privacy issues raised, and that a right of access cannot translate into an invasion of privacy. Mr. Smith stated that DGIF gets requests for and releases its entire database of licensing information regularly, and does get complaints from citizens about it. He confirmed for the Subcommittee that hunting and fishing license information is open, while subscriber information for the magazine is exempt. Staff observed that there is no general privacy exemption, but all such exemptions are in the context of specific records. Staff further noted that when citizens interact with government it is still public business, and that generally it is a false idea that such interactions are private. Mr. Smith stated that data aggregators buy the license information, and that 23 out of 50 states release it. The Subcommittee then voted unanimously to recommend that this exemption be eliminated.

Subdivision 14 of § 2.2-3705.7 was enacted in 1995. It exempts financial, medical, rehabilitative and other personal information concerning applicants for or recipients of loan funds submitted to

or maintained by the Assistive Technology Loan Fund Authority (ATLFA). Sandra Prince, Executive Director of ATLFA, had submitted written comments by email expressing ATLFA's desire that the exemption remain as it is currently written. There were no additional comments or recommendations for change.

Subdivision 15 of § 2.2-3705.7 exempts various records of the Virginia Commonwealth University Health System Authority (VCUHSA). It was enacted in 1996, and amended in 2000 to reflect the name change when the Medical College of Virginia Hospitals Authority became VCUHSA. Karah Gunther, representing Virginia Commonwealth University (VCU) and VCUHSA, stated that they wanted to keep the current exemption, but might propose legislation to add VCU to it because of shared governance and management between VCU and VCUHSA. Ms. Gunther stated she had spoken with VPA about the proposal and would bring it before the full Council at its next meeting. Mr. Wiley stated that he recalled that when this exemption was original adopted it was heavily negotiated and all parties were comfortable with it at the time. There were no additional comments or recommendations for change.

Subdivision 19 of § 2.2-3705.7 exempts certain records of the Board for Branch Pilots relating to chemical or drug testing. It was enacted in 2003. Mark Courtney of the Department of Professional Occupational Regulation (DPOR) spoke in favor of keeping this exemption as it is currently written. There were no additional comments or recommendations for change.

Subdivision 20 of § 2.2-3705.7 exempts certain records pertaining to examinations of holder records pursuant to the Uniform Disposition of Unclaimed Property Act. It was enacted in 2003. Vicki Bridgeman, Director of the Division of Unclaimed Property, spoke in favor of keeping the exemption, stating that losing the exemption would take the surprise away from audits. Staff noted that there is also a different confidentiality provision for records required to be furnished to the Division of Unclaimed Property found outside of FOIA at § 55-210.24:2. There were no additional comments or recommendations for change.

Subdivision 21 of § 2.2-3705.7 exempts certain records of the Virginia Department of Emergency Management or a local governing body relating to citizen emergency response teams. It was enacted in 2004. Mr. Flynn stated that the exemption was needed so that response teams would not have to answer phones while responding to emergencies. There were no additional comments or recommendations for change.

Subdivision 23 of § 2.2-3705.7 exempts certain records submitted for inclusion in the Statewide Alert Network administered by the Department of Emergency Management. It was enacted in 2005. There were no comments or recommendations for change.

Subdivision 27 of § 2.2-3705.7 exempts certain records maintained by the Department of the Treasury or participants in the Local Government Investment Pool. It was enacted in 2008. Mr. Wiley observed that a general exemption covering financial account and routing numbers had been passed more recently,¹ and asked whether this more limited exemption was still necessary. Bill Watt of the Department of the Treasury stated that the exemption was meant to protect wire transfers, and that the Department would need time to review the matter to determine if

¹ Subdivision 13 of § 2.2-3705.1 (2010 Acts of Assembly, c. 553).

subdivision 27 was no longer necessary. The Subcommittee agreed by consensus to defer consideration of this exemption until its next meeting.

Subdivision 28 of § 2.2-3705.7 exempts certain personal information concerning residents or patients of the Department of Veterans Services Care Centers. Subdivision 29 of § 2.2-3705.7 exempts certain records maintained in connection with fundraising activities by the Veterans Services Foundation (VSF). Both exemptions were enacted in 2009. Steven Combs, Director of Policy & Planning at the Department of Veterans Services (DVS), spoke in favor of keeping both exemptions, stating that they were used by VSF when it raises funds to support DVS activities. Mr. Wiley asked why VSF is different from private foundations that are not subject to FOIA, such as those that support public institutions of higher education. Mr. Combs stated that VSF is different because it was created in the Code as a state body and its funds go through the state treasury, so it is subject to FOIA even though it operates like a nonprofit organization. There were no additional comments or recommendations for change.

Subdivision 31 of § 2.2-3705.7 exempts certain records of the Commonwealth's Attorneys' Services Council (CASC); it was enacted in 2013. Jane Chambers of the CASC spoke in favor of keeping the current exemption. There were no other comments or recommendations for change.

Subdivision 32 of § 2.2-3705.7 exempts certain records provided to the Department of Aviation by other entities of the Commonwealth in connection with the operation of aircraft, where the records would not be subject to disclosure by the entity providing the records. Mr. Flynn stated that he represented local airports and that this exemption would not apply to them. Staff noted that the exemption concerned records given to the Department of Aviation by other agencies, such as records about the Governor's travel itinerary or transporting prisoners for the Department of Corrections, and allowed the Department of Aviation to maintain the confidentiality of such records. There were no other comments or recommendations for change.

Consideration of draft legislation:

The Subcommittee then returned to the second item on the agenda, the consideration of draft legislation previously requested. Mr. Jones indicated that his draft regarding the exemption for written advice of legal counsel, currently codified as subdivision 2 of § 2.2-3705.1, was not yet ready. At Mr. Jones' request, the Subcommittee chose to defer consideration of this exemption. The Subcommittee next considered whether the draft designed to protect citizens from unsolicited electronic mail (the "anti-spam" exemption, subdivision 10 of § 2.2-3705.1) needed to address other forms of social media such as Facebook and Twitter, but it was pointed out that those are substantively different as they are ultimately controlled by third party private companies, and public bodies do not maintain distribution lists equivalent to those used for electronic mail. The Subcommittee then voted unanimously in favor of recommending the proposed redraft of this "anti-spam" exemption. The next agenda item was subdivision 7 of § 2.2-3705.7, concerning access to public utility customer account information. It was pointed out that the Subcommittee had already agreed at its meeting in August to recommend a draft that would amend the

exemption to require the release of the amount of money charged for utility services as well as the amount of money paid, so no further consideration was needed today.

Another question raised was whether the Subcommittee should recommend that separate legislation be introduced each year as suggestions for changes were made, or instead recommend a single piece of legislation at the end of the three-year study that incorporates all of the suggested changes. Out of concern that bringing legislation piecemeal each year might then require further changes as the study continues, the Subcommittee agreed by consensus that it would be better to bring a single omnibus bill at the end of the three-year study.

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 dates for the next meeting to be held after the 2015 Session of the General Assembly has adjourned sine die. The Subcommittee meeting was then adjourned.

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