

Virginia Freedom of Information Advisory Council  
Meetings Subcommittee  
May 12, 2015  
1:30 PM  
Speaker's Conference Room, Sixth Floor  
General Assembly Building  
Richmond, Virginia  
Meeting Summary

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its first meeting of the 2015 Interim on May 12, 2015. Subcommittee members Whitehurst (Chair), Dooley, Landon, and Selph were present; Mr. Oksman was absent. The purpose of the meeting was to continue the study of FOIA meetings exemptions begun in 2014 in accordance with House Joint Resolution No. 96 (HJR 96).

After the call to order and introductions, Mr. Whitehurst asked for nominations to replace him as Chair of the Subcommittee, because his term on the Council ends this year. Having served two full four-year terms, Mr. Whitehurst is not eligible for reappointment to the Council. Ms. Dooley was selected as the new Chair by unanimous vote of the members present.

Staff then provided a brief overview of the Subcommittee's work in 2014, and the Subcommittee proceeded with old business, starting with subdivision A 9 of § 2.2-3711, which provides that the boards of trustees of the Virginia Museum of Fine Arts, the Virginia Museum of Natural History, the Jamestown-Yorktown Foundation, and The Science Museum of Virginia may discuss or consider in closed meeting matters relating to specific gifts, bequests, and grants. Last year there was a proposal to specify that the exemption applied to grants from private sources, not grants from other government entities. Roger Wiley, an attorney representing local government and a former FOIA Council member, and Mark Flynn of the Virginia Municipal League (VML), both suggested there may be times when there might be competition among government entities, such as when a museum closes and other museums compete for its collection. Dave Ress, a reporter with the Daily Press, asked whether the exemption was to protect the privacy of individuals or government bodies. After some discussion, Ms. Dooley stated that the privacy of the donor is one rationale, while the competitive position of the public entity is another. She also noted no one from the affected institutions was present to talk about it. Ginger Stanley of the Virginia Press Association (VPA) noted that the language was a compromise, but VPA had wanted to eliminate mention of grants altogether. The Subcommittee then unanimously voted in favor of amending the exemption to limit its application to grants from private sources.

The Subcommittee next considered subdivision A 17 of § 2.2-3711, which provides a closed meeting exemption for local crime commissions. Staff and Ms. Dooley related that after making many inquiries since last year, there is still no indication that any local crime commissions actually exist. The Subcommittee adopted by consensus a recommendation to eliminate this exemption.

The Subcommittee next addressed subdivision A 20 of § 2.2-3711, which provides a closed meeting exemption for discussions of certain investments by the respective boards of the

Virginia Retirement System (VRS), the University of Virginia (UVA), and the Virginia College Savings Plan (VCSP). The proposal was to add the Local Government Investment Pool (LGIP) to the list of entities that can use the exemption, as LGIP uses the same types and methods of investment. Mr. Ress asked if the exemption covered only investments or also actuarial matters; a VRS representative explained that it only covered certain investments, such as private equity where private equity managers will not do business with government entities if the managers feel their trade secrets and proprietary information might be revealed due to FOIA. After some discussion among Mr. Ress, Mr. Wiley, Ms. Dooley, and the VRS representative, it was questioned whether LGIP was the appropriate entity to add or whether it was a different investment entity. Mr. Wiley agreed to look into the matter, and the Subcommittee agreed to study this exemption further at its next meeting.

The Subcommittee then considered subdivision A 23 of § 2.2-3711, which allows the Virginia Commonwealth University Health System Authority (VCUHSA) to discuss numerous matters in closed meeting. The question previously raised was whether some parts of this exemption were redundant with other closed meeting exemptions that could be used by any public body. Staff and representatives of VCUHSA agreed to work together to try to identify any such redundancies.

Staff noted that subdivision A 32 of § 2.2-3711 had expired, and recommended removing it.

The Subcommittee then continued its ongoing discussion of the closed meeting exemption for personnel matters, subdivision A 1 of § 2.2-3711. Staff reminded those present that the previous discussions stemmed from advisory opinions of the Office of the Attorney General (OAG) that said public bodies may only use the personnel exemption to discuss personnel over whom the public body exercises direct control, which in the case of local governing bodies is usually only three, four, or five people. Mr. Flynn noted there are some exceptions to that general rule. Mr. Wiley stated that the OAG's opinion was internally inconsistent with the remainder of FOIA, largely ignored by local government, and reflects a lack of understanding of local government. Mr. Flynn informed the Subcommittee that a general district court in Hopewell recently ruled in favor of the city on this issue; he stated that the OAG's opinion was argued before the court and rejected. Mr. Wiley indicated that at this point local government is content with the status quo on this exemption, while recognizing there is some ambiguity.

Mr. Ress suggested that the exemption be amended to require that discussions of top level local officials such as chief executives be conducted in open meetings, as they are highly paid employees for whom there is no other accountability. He stated that many other states do require employee performance and discipline to be discussed in open meetings. Mr. Wiley stated that if such discussions are required to be open, members will not be forthcoming and express criticisms in public. He later pointed out that the local governing body has fiscal responsibility for all employees of the locality, and it is untenable to say, for example, that a city attorney or city manager cannot discuss city employees with the city council in closed meeting. He also noted liability concerns regarding defamation and other issues were such discussions made public. Mr. Ress noted that other states successfully have such discussions in public, and agreed to provide examples for the Subcommittee's consideration at its next meeting.

The Subcommittee next considered whether it is good policy to have meeting exemptions that merely reference record exclusions. The issue was raised of whether there should be a general rule allowing closed meetings to discuss any exempt records. Mr. Wiley noted that the reverse is already true, as there is a records exemption for records recorded in or compiled exclusively for use in closed meetings.<sup>1</sup> Staff suggested comparing existing subdivisions A 40 and A 41 of § 2.2-3711, noting that one is little more than a reference that by itself does not inform the reader what the topic is, where the other strikes a middle ground by providing greater context but without repeating the entire records exemption. Ms. Stanley reminded those present that one goal of HJR No. 96 is to make FOIA more citizen-friendly, and adding context helps.

Ms. Dooley then summarized the Subcommittee's work plan: to consider Mr. Ress' proposal regarding the personnel exemption; to further study subdivision A 25 of § 2.2-3711 concerning certain closed meetings of VCSP; to review clean-up items (technical changes) and meetings exemptions that are dependent on corresponding records exemptions. The Subcommittee had previously agreed to defer consideration of proprietary records related exemptions until the Records Subcommittee has completed its study of the same; staff informed the Subcommittee that those exemptions had not yet been considered by the Records Subcommittee.

As public comment, Mr. Ress stated that in his experience public bodies often fail to provide the required three elements of a closed meeting motion (subject, purpose, and cite), and suggested requiring that the three elements be required as part of meeting notices. There was no further public comment.

The Subcommittee agreed to hold its next meeting on Wednesday, June 17, at 1:00 PM. The meeting was then adjourned.

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<sup>1</sup> Subdivision 5 of § 2.2-3705.1.