

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
June 17, 2015
1:00 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 second meeting of the 2015 Interim on June 17, 2015. All Subcommittee members were present.¹ 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, the Subcommittee addressed old business carried over from prior meetings in the form of a revised draft prepared by staff (agenda item #2). The discussion began with subdivision A 9 of § 2.2-3711, which provides that 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 may discuss or consider in closed meeting matters relating to specific gifts, bequests, and grants. The Subcommittee agreed at its previous meeting in May to amend this exemption to specify that the exemption applied to grants from private sources, not grants from other government entities. However, no one was present at that time to speak for the affected institutions. David Bradley of VMFA was present today and said VMFA and the other institutions agreed to the clarification to distinguish between private grants and government grants. He indicated that government grants go through the public appropriations process anyway, so the change would not be a burden.

The Subcommittee next addressed subdivision A 17 of § 2.2-3711, which provides a closed meeting exemption for local crime commissions. Staff reminded the Subcommittee that at the Subcommittee's May meeting it was recommended that this exemption be eliminated because it does not appear that there actually are any local crime commissions; the draft strikes 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). This exemption was also discussed at the May meeting; a proposal was made to amend the exemption to allow local government entities that invest funds for post-retirement benefits other than pensions to also use the exemption. Roger Wiley, an attorney representing local government and former FOIA Council member, indicated he had helped prepare the language used in the draft. The Subcommittee voted unanimously to recommend this amended language for subdivision A 20.

The Subcommittee then turned to subdivision A 23 of § 2.2-3711, which allows the Virginia Commonwealth University Health System Authority (VCUHSA) to discuss numerous matters in

¹ Dooley (Chair), Landon, Oksman, Selph, and Whitehurst.

closed meetings. 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. There was a brief discussion among the subcommittee and Ginger Stanley of the Virginia Press Association (VPA) regarding determining what is redundant and what is different in this exemption, and the basis for the differences. Karah Gunther of Virginia Commonwealth University (VCU) pointed out that VCUHSA runs a hospital, competes with private businesses, and is an authority, and therefore has some important differences from other public bodies and public institutions of higher education. It was agreed that staff and representatives of VCUHSA would work together to try to identify any such redundancies and differences then report back to the Subcommittee.

The Subcommittee then addressed subdivision A 25 of § 2.2-3711, which allows the Board of the Virginia College Savings Plan (VCSP) to discuss personal information, as defined in § 2.2-3801, under certain circumstances. A general issue had been raised regarding the use of the reference to § 2.2-3801 in various exemptions throughout FOIA, as it refers to a definition of "personal information" in the Government Data Collection and Dissemination Practices Act (GDCDPA) that is very broad. Chris McGee, General Counsel for VCSP, stated that VCSP would prefer to keep the reference because the definition of personally identifiable information is not static. He stated that the broad language used in the GDCDPA captures in its first clause the essence of personally identifiable information, then in its second clause provides a non-exclusive list of examples, which accounts for the dynamic nature of personally identifiable information. He also observed that eliminating all references to the GDCDPA definition of personal information would require amending six or seven different statutes, and he stated that the suggested draft language does not cover everything that needs to be protected. He also stated that VCSP is waiting on details of a new program that may require VCSP to hold medical records as well. Dave Ress, a reporter with the Daily Press, asked whether discussions of individuals came up often and whether the VCSP Board would close meetings to discuss aggregate data. Mr. McGee replied that discussing individuals did not come up often, but it could happen, and that discussion of aggregate data would be open to the public. After further discussion, the Subcommittee voted unanimously to reject the proposed amendment to this exemption.

The Subcommittee next noted it had already recommended elimination of the expired exemption found at subdivision A 32 of § 2.2-3711.

The Subcommittee then discussed the personnel exemption, subdivision A 1 of § 2.2-3711. A proposal had been suggested at the last Subcommittee meeting to require the review of higher-level officials to be conducted in open meetings. Mr. Oksman inquired whether a draft was needed for discussion; Ms. Dooley stated that staff would prepare a draft if so directed by the Subcommittee. Mr. Ress, who had suggested this change, stated that it would apply to performance evaluations of high level officials who are not elected such as city managers and school superintendents. Mr. Oksman expressed concern that the proposed change would tie the hands of elected officials. Mr. Wiley asked why the change would apply only to local officials and not state officials. He further stated that there were cases of dismissed officials filing defamation suits against public bodies for public discussion of their performance. Mr. Ress stated that such public reviews do happen in other states, and that the distinction is that the

proposal would only apply to appointed officials who have employment contracts but no other public accountability. He stated the proposal could be changed to include state boards, but noted that the Governor is elected (so there is accountability to voters) while local chief executives are not elected. In response to an inquiry from Mr. Landon, Mr. Ress provided examples of nine states with such provisions as he proposed, noting that some were broader than others. Ms. Stanley observed that VPA has seen this exemption abused regularly over the years, and stated that the proposal is a modest change that would solve one issue. She explained that the abuse to which she referred was the absence of information about matters concerning the highest paid local officials. There was further discussion about specifically limiting the proposal to officials directly appointed by public bodies, to which there was general agreement. Mr. Wiley suggested he was sympathetic to the idea that the terms of a dismissal be public, but still felt that performance reviews should not be public. Ms. Dooley noted that the governing bodies are responsible to voters, but she could not support opening up all evaluations of employees. Phyllis Errico of the Virginia Association of Counties (VACo) expressed concern that there would be a chilling effect, shrinking the pool of persons who would go into public service, if all evaluations were open to the public. After further discussion, the Subcommittee voted in favor of having staff prepare a draft for consideration by the Records Subcommittee that would make the terms of dismissal of a chief executive officer public unless otherwise ordered by a court; all members present voted in favor except Mr. Landon abstained.

Having concluded the discussion of old business, the Subcommittee moved on to consider as a matter of policy whether closed meeting exemptions should be drafted as mere references to corresponding records exemptions, or whether they should have more context to inform readers what topics are covered based on the language used in each exemption (agenda item #3). Staff went through a number of examples of such exemptions in current law and in a proposed draft form that would give them greater context where context was currently lacking. Ms. Dooley expressed support for the concept, noting that some of the current exemptions were so truncated one cannot tell what they say, but also noted that we do not want to create confusion when adding context to the meeting exemptions (i.e., if the language differs from the language of the corresponding records exemption). Staff noted that this concern was why the draft repeatedly used the phrase "certain records" combined with a reference to the appropriate records exemptions, in order to allow some context in the meetings exemptions without having to fully reproduce the corresponding records exemptions. Ms. Stanley observed that adding context fits the purpose of the study and makes the exemptions easier to understand. Several people expressed support for the concept, including Julie Whitlock of the Department of General Services, Mr. Ress, Katya Herndon from the Department of Forensic Science, and Mr. Flynn. The Subcommittee agreed not to act today, but to give additional consideration to this policy matter and its implementation at future meetings.

The Subcommittee then continued with the study of meetings exemptions not previously considered (agenda item #4), beginning with subdivision A 18 of § 2.2-3711, which provides a closed meeting exemption for certain portions of meetings where the Board of Corrections discusses matters which may identify prisoner informants. While the Board of Corrections was notified of today's meeting, no one appeared from the Board to speak to this exemption. There was no comment on this exemption, so the Subcommittee took no action.

The Subcommittee next considered subdivision A 35 of § 2.2-3711, which provides a closed meeting exemption for the discussion or consideration by the State Board of Elections (SBE) or local electoral boards of certain voting security matters. Kristina Stoney of the Office of the Attorney General (OAG) stated that the rationale for this exemption was self-explanatory, that it was seldom used but very important, and that it was narrowly tailored to address voting equipment security. She provided an example where the SBE decertified problematic voting equipment. She stated that the report on the equipment was effectively a roadmap on how to hack into the voting machines, and so it needed to be discussed in closed meeting, but after the machines were decertified SBE voted to make the report public. She said that by doing so SBE maintained the integrity of voting equipment security while also serving the purpose of transparent government. The Subcommittee expressed support for this exemption and moved on to the next without objection.

The Subcommittee next considered subdivision A 36 of § 2.2-3711, which provides a closed meeting exemption for the discussion or consideration by the Forensic Science Board or the Scientific Advisory Committee of exempt criminal investigative files. Ms. Herndon stated that these public bodies sometimes review case files that they do not disclose to the public, that the public can get relevant records in court proceedings, and that she knew of one instance where the Forensic Science Board had used the exemption. There was no further comment and the Subcommittee moved on without objection.

The Subcommittee next considered subdivision A 37 of § 2.2-3711, which provides a closed meeting exemption for the discussion or consideration by the Brown v. Board of Education Scholarship Program Awards Committee of certain exempt records containing personal information and other matters concerning scholarship awards. Brenda Edwards of the Division of Legislative Services, who staffs the Committee, stated that the Committee uses the exemption in the application process to protect various types of personal, medical, and scholastic records and to discuss who will receive scholarships. There were no additional comments; the Subcommittee decided to leave this exemption unchanged without objection.

The Subcommittee next considered subdivision A 41 of § 2.2-3711, which provides a closed meeting exemption for the discussion or consideration by the Board of Education of records relating to the denial, suspension, or revocation of teacher licenses. Staff informed the Subcommittee that the Board of Education had asked that the Subcommittee defer consideration of this exemption; the Subcommittee agreed to do so without objection.

The Subcommittee next considered subdivision A 42 of § 2.2-3711, which provides a closed meeting exemption for certain meetings of the Virginia Military Advisory Council or certain other public bodies concerning federal military and national security base closure, realignment, or relocation. No one was present from an affected public body to speak to this exemption. After observing that the exemption itself provides context, the Subcommittee expressed general support for this exemption and decided to leave it unchanged without objection.

Staff then reminded the Subcommittee of upcoming exemptions to be considered at its next meeting, including subdivisions A 26, A 30, A 31, A 44, and A 45 of § 2.2-3711 (agenda item #5), and more generally of the Subcommittee's work plan (agenda item #6). As per the study

plan adopted by the Council, upon completion of review of open meeting exemptions found in § 2.2-3711, the Subcommittee will review related meeting provisions, including § 2.2-3707 (notice of meetings, etc.), § 2.2-3707.01 (meetings of General Assembly), § 2.2-3707.1 (posting of minutes for state boards, commissions), § 2.2-3710 (voting), § 2.2-3712 (closed meeting procedures), and §§ 2.2-3708 and 2.2-3708.1 (electronic communication meetings).

The Subcommittee scheduled its next meeting to be held on Tuesday, July 21, 2015 at 1:00 PM. The meeting was then adjourned.

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