Virginia Freedom of Information Advisory Council
Records Subcommittee
June 18, 2015
10:00 AM
Speaker's Conference Room, Sixth Floor
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its second meeting of the 2015 Interim on June 18, 2015, to continue the three-year study of FOIA directed by House Joint Resolution No. 96 (HJR 96). Subcommittee members Ashby (Vice Chair), Hamlett, and Oksman were present; Mr. Tavenner (Chair) and Mr. Jones were absent.

After members were introduced and the meeting was called to order, the Subcommittee began discussing the exemption for written advice of legal counsel and attorney-client privileged records, subdivision 2 of § 2.2-3705.1. Staff presented a brief legislative history of the exemption, which was first enacted in 1982 and subsequently amended in 1989, 1999, 2000, and 2002. Originally the exemption applied to written advice of local government attorneys, but over the years its application was expanded to include state and regional bodies as well; there were also several technical changes. As further background, staff also shared excerpts from two opinions of the Supreme Court of Virginia setting forth the elements of attorney-client privilege at common law, as quoted in Freedom of Information Advisory Opinion 04 (2011). Staff also noted that because Mr. Jones was unable to attend today's meeting, he submitted written comments (incorporated herein by reference) expressing his concerns about misunderstanding and overly broad usage of this exemption. The comments concluded that these concerns would be addressed best through education and enforcement rather than legislative change. The Subcommittee then opened the matter to general discussion.

Dave Ress, a reporter with the Daily Press, and Roger Wiley, an attorney representing local government and former FOIA Council member, discussed how this exemption is really in two parts, one for the written advice of legal counsel, and the other for records deemed attorney-client privileged at common law. Their conversation noted that generally the attorney-client privilege covers communications from client to attorney, while the written advice of counsel aspect of the exemption would cover written communications flowing from attorney to client. They also discussed the public policy merits of keeping such legal advice confidential versus making it public. Ms. Hamlett stated that in her experience representing state agencies, she needed to be able to communicate with the client confidentially, and that such confidential communications helped protect the public purse. She and Mr. Wiley agreed that some communications might come out during litigation, and that completed contracts should be open, but not the discussion of legal matters leading up to a contract. Mr. Ashby observed there is a balance in the policy judgment that having candid, frank legal advice may sometimes override the public's general right to know. Staff noted that generally the client holds the privilege and may waive the privilege, but professional legal ethics requires the attorney to maintain confidentiality. Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), stated that the intention of the 1999 revision was to give public bodies and their attorneys the

same protections others would have. He also said regarding subdivisions 2 and 3 of § 2.2-3705.1, which address attorney-client privileged records and work product records, respectively, that the concepts are well-understood and he does not know why one would change them for the sake of change. Mr. Wiley further observed that in the meetings context, the lawyer does not necessarily have to be present, and written legal advice may avoid the need for a closed meeting. There was no further comment on this matter; as there was no motion, the Subcommittee took no action.

The Subcommittee next considered the working papers and correspondence exemption, subdivision 2 of § 2.2-3705.7. Staff reviewed the legislative history of this exemption, which was part of FOIA when it was first enacted in 1968. The exemption was amended in 1974, 1977, 1991, 1992, 1994, 1999, 2010, 2011, and 2013. The exemptions generally added to the list of officials who could use the exemption, defined certain terms used in the exemption, and made various technical changes. The FOIA Council at its last meeting referred to the Subcommittee HB 1722 (Ramadan) and SB 893 (Petersen) from the 2015 Session of the General Assembly, identical bills which would have eliminated the working papers and correspondence exemption for the president or other chief executive officer of any public institution of higher education in Virginia. Staff observed that presidents and chief executive officers of public institutions of higher education had been added to the exemption with the 1974 amendment.

Mr. Ashby began the discussion by asking if other states had equivalent exemptions. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that there were various versions in different states, but Virginia is the only one with an exemption for university presidents. Mr. Ashby asked if the Subcommittee members had any comments or questions; there were none, so he opened the floor to public comment. Ms. Rhyne related that in the past there was a problem with overuse of a "Governor's Working Papers" stamp and merely sending records to the office of an official named in the exemption, and the 1999 revision was to help address these problems. She stated that under the current version there are still problems with the exemption being used too broadly, for example, by being used to withhold all correspondence of named officials, Governor's calendars, and other records. She further stated that the exemption extends to hundreds of people and effectively removes them all from public accountability. She offered two recommendations for narrowing the exemption: (1) make it apply to correspondence only if it is related to working papers, and (2) have either a timed release or require that once a decision or announcement is made, the records should be released.

Mr. Ashby indicated he did not support the idea of a timed release, and asked whether presidents of public institutions of higher education currently release records once done? Staff reminded the Subcommittee that once a working paper is disseminated beyond a named official's personal or deliberative use, it is no longer exempt from mandatory disclosure. In response to Mr. Ashby's inquiries, a representative of the Library of Virginia stated that working papers would go into the archives at the Library and that is how the public would access them (from the Library).

Mr. Wiley asked why university presidents should be treated differently, and noted that everything Ms. Rhyne said would apply to the Governor and other named officials as well. Kay Heidbreder, University Legal Counsel for Virginia Tech, stated that a modern university is like a small city, and is more complex than many small towns, thus university presidents should be

treated the same as chief executives of localities. She informed the Subcommittee that a president would be involved in bringing in new businesses, expanding businesses, and other economic development matters, strategic partnerships with other universities both within and outside of Virginia, organizational changes, enrollment growth plans, and other matters that require the ability to think through issues before being challenged.

Patrick Wilson, a reporter with the Virginian Pilot, stated that if universities are more complex than localities, then there should be more sunlight and public input to help with considering issues. He set forth an example of Norfolk City Schools, stating that the superintendent withholds all correspondence, that the school system is one of the lowest scoring in the state, and that it missed a deadline for federal money. He asked, given the list of officials who can use the working papers and correspondence exemption, who is left from whom the public can get records? He stated that the broad use of this exemption goes against FOIA principles.

Mr. Ress also provided examples of records he felt should have been disclosed but were withheld: four consultant reports on a Hampton aquatic center, communications from department heads to a city manager regarding capital needs, and a funding request from the Virginia Air and Space Center in Hampton regarding a city-funded venture. He related that there is confusion regarding what qualifies as a working paper, giving the example of withholding student activity funds raised by students (note that both Mr. Wiley and staff indicated that such records would not be working papers). Mr. Ress provided examples from other states: in California, there was an issue regarding access to the Governor's appointment book that resulted in a 2004 amendment requiring its release; in Delaware, the state Supreme Court ruled there was no executive privilege for any official except the Governor; and in Massachusetts, there is no executive privilege, and an exemption for draft records no longer applies once a decision has been reached. Mr. Ress suggested changing the definition of "working papers" to read "by or exclusively for" one of the named public officials.

Mr. Merritt stated that the idea of "working papers and correspondence" was one concept, but that it has been interpreted as two separate things, leaving "correspondence" untethered. He suggested that "correspondence" should be defined just as is "working papers," and provided sample language to that effect. As background, staff noted that the term "working papers" is defined in the exemption, but the term "correspondence" is not. While there does not appear to be any precedent from the Supreme Court of Virginia, the term "correspondence" has been given its common meaning as "the interchange of written communications" in at least two circuit court cases.[1] Mr. Wiley mentioned that former Chief Justice Carrico stated in a prior case[2] that the intent was to protect not only the recipient, but also the sender, such as when a citizen wrote to the Governor or state legislators. He further observed that local governing bodies do not have the same protections, and citizens are often surprised when their letters to local officials are made public.

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[1] *Richmond Newspapers, Inc. v. Casteen*, 42 Va. Cir. 505, 506-507 (Circuit Court of the City of Richmond 1997); *Redinger v. Casteen*, 35 Va. Cir. 380, 385 (Circuit Court of the City of Richmond 1995)(both cases quoting Black's Law Dictionary (6th ed. 1990) at 344).

[2] *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219, 409 S.E.2d 136 (1991)(note that Mr. Wiley was the attorney of record for Mr. Taylor in this case).

After some further discussion, Mr. Merritt suggested eliminating "and correspondence" from the exemption, noting that correspondence that fits the definition of "working papers" would still be protected. Mr. Ashby asked if there were any comments either regarding the bills referred, or more broadly, and stated that he was not prepared to make a motion at this time. Mr. Oksman agreed he was not ready to make a motion, but would like documentation regarding abuses. Ms. Rhyne provided Mr. Oksman with written examples; Mr. Oksman asked if these examples characterized as "abuses" were things not allowed under current law. Ms. Rhyne stated that some were flat-out abuses such as claiming the exemption after sharing records beyond the bounds of persons covered by the exemption, but others were allowed uses as the exemption has been applied and expanded over the years. She gave the example of working papers held by the Governor's Uranium Mining Commission in 2012, which were exempt, but of intense public interest. She stated that the exemption has been used to cover so many important issues it has become a catch-all. Mr. Oksman indicated he would like to hear more examples where the exemption allows something to be withheld that should not be withheld.

Mr. Ashby asked if anyone representing the college and university presidents would like to speak as to why they should be treated the same or differently. Laura Fornash of the University of Virginia stated on behalf of those present that they would like to prepare further and speak to the issue at a future meeting. Mr. Ashby indicated he would like to see more about why the exemption came about, as a matter of policy. He asked if there were any motions on the matter; there were none.

Staff then reminded the Subcommittee that it had directed the formation of a Proprietary Records Work Group consisting of staff and interested parties to study the various exemptions for proprietary records and trade secrets in § 2.2-3705.6 and elsewhere in FOIA. Additionally, following the study plan, staff reminded the Subcommittee that the next set of exemptions to be studied would be the public safety exemptions found in § 2.2-3705.2.

The Subcommittee scheduled its next meeting to be held at 10:00 AM on Wednesday, July 22, 2015, noting that the full FOIA Council is scheduled to meet that afternoon. The Subcommittee meeting was then adjourned.

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