

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
July 21, 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 third meeting of the 2015 Interim on July 21, 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 began review of seven exemptions that allow closed meetings for the discussion of the topics that follow below. For each exemption, staff provided the legislative history and policy basis for the exemption to the Subcommittee.

Subdivision A 41 of § 2.2-3711; Board of Education; denial, suspension/revocation of teacher licensing (subdivision 12 of § 2.2-3705.3). Wendell Roberts and Mona Siddique of the Office of the Attorney General and Patty Pitts, Assistant Superintendent at the Department of Education, provided additional information about this exemption and how it was used. Mr. Roberts advised that the Board of Education meets 10 times per year on average and such meetings are open. However, near the conclusion of each meeting, the Board convenes in closed meeting to discuss the denial or suspension of teacher licenses. The exemption references the corollary records exemption (subdivision 12 of § 2.2-3705.3) for teacher licensing records. It is the Board's practice to allow the licensee who is the subject of the closed meeting to attend. If negative action is taken by the Board, the name of the teacher, the underlying facts, and the Board action taken on the license are disclosed. If no action is taken by the Board, nothing is disclosed. After further discussion of the exemption and how it is used, the Subcommittee voted unanimously to leave the exemption as written because it is specific and narrowly drawn. The Subcommittee directed staff to flag this exemption should the Records Subcommittee recommend change to the Board's corollary record exemption.

Subdivision A 42 of § 2.2-3711; Virginia Military Advisory Council or any commission created by executive order; BRAC (subdivision 12 of § 2.2-3705.2). No representative of the Council was present at the meeting and as a result, the Subcommittee deferred consideration until a representative was present to provide specific information to the Subcommittee.

Subdivision A 26 of § 2.2-3711; Wireless Carrier E-911 Cost Recovery Subcommittee; trade secrets. Eric Link, Virginia Information Technologies Agency (VITA) addressed the Subcommittee and advised that the purpose of the Wireless Carrier E-911 Cost Recovery

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

Subcommittee was determine whether the reimbursement for 911 services submitted by wireless carriers is reasonable. Seventy-five cents of everyone's phone bill goes to local governments and wireless carriers. Mr. Link stated that the sole purpose of the Committee was the determination whether a requested reimbursement was reasonable. The Subcommittee voted unanimously to make no changes in the exemption.

Subdivision A 30 of § 2.2-3711; Commonwealth Health Research Board or Innovation and Entrepreneurship Investment Authority or the Research and Technology Investment Advisory Committee appointed to advise the Innovation and Entrepreneurship Investment Authority; loan and grant applications. Anne Pace with the Commonwealth Health Research Board advised that the Board reviews grant applications and awards grants for human health research. She advised that to date, 181 grants totalling \$14.5 million have been awarded. Ms. Pace indicated that there is a 33 percent match by grant recipients and the Health Research Fund is managed by the Virginia Retirement System. She advised that the grant process involves three steps: concept paper, full proposal, and award of grant. She stated that the award rate is seven percent. Once grants are awarded, the grant files become public, and the Board issues a press release for each grant awarded and abstracts of the grant award are available on their website. Nancy Vorona on behalf of the Research and Technology Investment Advisory Committee (RTIAC) of the Innovation and Entrepreneurship Investment Authority provided written comments to the Subcommittee concerning the Advisory Committee's use of the exemption. Ms. Vorona wrote that the RTIAC recommends awards to the CIT Board, which makes final award decisions. Prior to making its recommendations to the Board, the RTIAC holds an in-person meeting to determine those proposals that merit funding by the Commonwealth. Closed meetings allow Committee members to be forthright in their assessments of, for instance, the project's technical and financial feasibility and the management and scientific experience and capabilities of the proposal team. It also allows them to vote which applications to fund without concern about potential resentment or retribution from applicants and/or their associates. The RTIAC has used this opportunity once during each solicitation since the CRCF was established. That is, the RTIAC has used it twice in FY2012 and FY2014, and once in FY2013 and FY2015. The CRCF provides a rigorous, multi-step review process, and the ability to review grant applications in closed session is an important part of that process. The Subcommittee voted unanimously to make no changes in the exemption.

Subdivision A 31 of § 2.2-3711; Commitment Review of Committee; individuals subject to commitment as sexually violent predators (subdivision 9 of § 2.2-3705.2). Eric Madson, Department of Corrections, and Stephen Wolf (program administrator), Department of Behavioral Health and Developmental Services advised the Subcommittee that the Committee makes nonbinding recommendations to the Attorney General for civil commitment. They indicated that the Committee's review include virtually all records of the individual, including health records and records that are sealed by the court. The Committee is composed of three members of the Department of Behavioral Health and Developmental Services, three members of the Department of Corrections, and one representative of the Office of the Attorney General, each member appointed by his respective agency. They told the Subcommittee that while the commitment proceedings in circuit court are open, the deliberations of the Committee are conducted in closed meeting

because of the nature of the records reviewed. The exemption references the corollary records exemption (subdivision 9 of § 2.2-3705.2) for sexually violent predators. The Subcommittee voted unanimously to make no changes in the exemption. The Subcommittee directed staff to flag this exemption should the Records Subcommittee recommend change to the Board's corollary record exemption.

Subdivision A 44 of § 2.2-3711; Virginia Tobacco Region Revitalization Commission; grant applications, including grant applicant's financial records and scholarly study materials (subdivision 23 of § 2.2-3705.6). Elizabeth Myers of the Office of the Attorney General and Ned Stephenson of the Tobacco Region Revitalization Commission advised that Subcommittee that Commission reviews grant applications that contain trade secrets and proprietary information. The exemption references the corollary records exemption (subdivision 23 of § 2.2-3705.6) for such grant applications. They advised that it is not unusual for a grant applicant to be a local government. The Subcommittee questioned why the process is closed when the public body is the grant applicant. The answer provided was that the exemption was needed because the discussions in closed meetings are limited to the trade secrets, scholarly work, financial records, and other proprietary information. The Subcommittee was of the opinion that the rationale for the exemption was clear --the protection of intellectual property, and as a result, the Subcommittee voted unanimously to recommend no change to the exemption. The Subcommittee directed staff to flag this exemption should the Records Subcommittee recommend change to the Board's corollary record exemption.

Subdivision A 45 of § 2.2-3711; Commercial Space Flight Authority; rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority (subdivision 24 of § 2.2-3705.6). Bruce Harper, Williams Mullen, and Zigmond "Zig" Leszczynski with the Commercial Space Flight Authority advised the Subcommittee the Authority's board consists of nine members and one part of the Authority's mission is economic development. The Authority has an agreement with NASA for the operation of two launch pads to service the International Space Station and other orbital launches. They indicated that Virginia is one of four orbital launch sites in the United States, including Florida, California, and Alaska, and that Virginia is in competition with the other space boards for business. They advised that closed meeting discussions are limited to discussions of specified records as written in the exemption. The exemption references the corollary records exemption (subdivision 24 of § 2.2-3705.6) for rate structures, services rendered by the Authority, etc. The Subcommittee voted unanimously to recommend no change to the exemption. The Subcommittee directed staff to flag this exemption should the Records Subcommittee recommend change to the Board's corollary record exemption.

Staff then briefed the Subcommittee on its meeting with Karah Gunther, a representative of the VCU Health System Authority (the Authority) to discuss the open meeting exemption found in A 23 of § 2.2-3711, with an eye toward eliminating any redundancies between the Authority's exemption and other existing open meeting exemptions. Staff advised that the Authority's exemption was enacted to protect the Authority's competitive position vis-a-vis the HCA and Bon Secours hospitals in the Richmond area. Staff provided the Subcommittee with a chart, attached to this meeting summary as Appendix A, which

compared the Authority's meeting exemption to other existing open meeting exemptions to show where redundancies existed. Ms. Gunther told the Subcommittee that the reason for a separate exemption for the Authority as compared to other hospitals affiliated with public institutions of higher education (i.e., UVA Hospitals, EVMS, etc.) was that the Authority was a separate and distinct public body from VCU, which was not the case for other such affiliated hospitals. Noting that the VCU Board of Visitors was added to the exemption, the Subcommittee and others expressed concern about possible misinterpretation of the new language. After review of the chart and further discussion, the Subcommittee directed staff to prepare a draft revising the Authority's exemption to eliminate the redundancies and improve imprecise language contained in the current exemption. The Subcommittee will review the draft at its next meeting on August 19, 2015.

The Subcommittee next discussed open meeting exemptions that it has previously deferred pending review by the Records Subcommittee. These open meeting exemptions contained only a reference to the records exemption. The Subcommittee asked staff to flag these exemptions for it should the Records Subcommittee take action to amend the corresponding records exemption. Otherwise, it would be the recommendation of the Subcommittee to recommend no changes to the following exemptions: A 31, 41, 44, and 45.

The next meeting of the Subcommittee was scheduled for Wednesday, August 19, 2015 at 1:00 p.m. in the Speaker's Conference Room in the General Assembly Building. There being no further business, the meeting was adjourned.

APPENDIX A

**Review of Meeting Exemption for
Virginia Commonwealth University Health System Authority
(Comparison to Other Existing Meeting Exemptions)**

§ 2.2-3711

23. In the case of the Virginia Commonwealth University Health System Authority, discussion or consideration of any of the following:

1. the acquisition or disposition of real or personal property where disclosure would adversely affect the bargaining position or negotiating strategy of the Authority;
2. operational plans that could affect the value of such property, real or personal, owned or desirable for ownership by the Authority;
3. matters relating to gifts, bequests and fund-raising activities;
4. grants and contracts for services or work to be performed by the Authority;
5. marketing or operational strategies where disclosure of such strategies would adversely affect the competitive position of the Authority;
6. members of its medical and teaching staffs and qualifications for appointments thereto; and
7. qualifications or evaluations of other employees.

This exemption shall also apply when the foregoing discussions occur at a meeting of the Virginia Commonwealth University Board of Visitors.

Comparison between VCUHSA Meeting Exemptions and Other Meeting Exemptions

VCUHSA exemption	Related Meeting Exemption 2.2-3711	NOTES
No. 1 above: acquisition or disposition of real or personal property where disclosure would adversely affect the bargaining position or negotiating strategy of the Authority	3. the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.	This portion of VCUHSA exemption appears duplicative as to real property. No existing FOIA mtg exemption for sale or purchase of personal property.
No. 2: Operational plans that could affect the value of such property, real or personal, owned or desirable for ownership by the Authority		Unclear as to scope; need more information from VCUHSA
No. 3: matters relating to	No. 8: In the case of boards	same subject matter as other

<p>gifts, bequests and fund-raising activities;</p>	<p>of visitors of public institutions of higher education, discussion or consideration of matters relating to gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants, and contracts made by a foreign government, a foreign legal entity, or a foreign person and accepted by a public institution of higher education in Virginia shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a political subdivision thereof; (ii) "foreign legal entity" means any legal entity created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such entity is composed of foreign persons or foreign legal entities, or any legal entity created under the laws of a foreign government; and (iii) "foreign person" means any</p>	<p>exemptions as noted, emphasis added</p>
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	<p>individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.</p> <p>No. 9</p> <p>In the case of 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, discussion or consideration of matters relating to specific gifts, bequests, and grants.</p>	
<p>No. 4: grants and contracts for services or work to be performed by the Authority</p>	<p>No. 8 In the case of boards of visitors of public institutions of higher education, discussion or consideration of matters relating to gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants, and contracts made by a foreign government, a foreign legal entity, or a foreign person and accepted by a public institution of higher education in Virginia shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a</p>	<p>same subject matter as other exemption as noted, emphasis added.</p>

	<p>political subdivision thereof; (ii) "foreign legal entity" means any legal entity created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such entity is composed of foreign persons or foreign legal entities, or any legal entity created under the laws of a foreign government; and (iii) "foreign person" means any individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.</p>	
<p>No. 5 : marketing or operational strategies where disclosure of such strategies would adversely affect the competitive position of the Authority</p>	<p>No. 22 Those portions of meetings of the University of Virginia Board of Visitors or the Eastern Virginia Medical School Board of Visitors, as the case may be, and those portions of meetings of any persons to whom management responsibilities for the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, have been delegated, in which there is discussed proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and</p>	<p>same subject matter as other exemptions as noted; emphasis added</p>

	<p>activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would adversely affect the competitive position of the Medical Center or Eastern Virginia Medical School, as the case may be.</p>	
<p>No. 6: members of its medical and teaching staffs and qualifications for appointments thereto</p>	<p>A1 Personnel: Discussion, consideration, or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining, or resignation of specific public officers, appointees, or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be</p>	

	present to the presiding officer of the appropriate board.	
No. 7: qualifications or evaluations of other employees.	Same as above	Duplicative of A 1
This exemption shall also apply when the foregoing discussions occur at a meeting of the Virginia Commonwealth University Board of Visitors.		Needs rewrite to limit scope of exemption vis a vis VCU Board of Visitor's discussion of Authority exempt topics; unintended consequences and misinterpretation possible.

Source: FOIA Council 9 July 15.