

Records Subcommittee
Proprietary Records Work Group
Tuesday, July 21, 2015 Meeting Summary
Speaker's Conference Room, Sixth Floor
General Assembly Building, Richmond, VA

The Proprietary Records Work Group of the Records Subcommittee held its second meeting on Tuesday, July 21, 2015 to continue its examination of the proprietary records/trade secrets exemptions found in § 2.2-3705.6. At its last meeting, the work group reviewed draft legislation that would (i) provide that any conflicts between copyright law and FOIA would be governed by copyright law and (ii) create a general exemption for trade secrets in the possession of public bodies, whether submitted by a private individual or entity or whether such records were generated by a public body. After brief discussion, the work group agreed to recommend the copyright draft to the Records Subcommittee for its consideration, noting that it merely reflected the fact that federal law is controlling in this area. With regard to the trade secrets draft, there was extensive discussion and several objections made. The Virginia Retirement System (VRS) provided written comments to the work group, which indicated that VRS preferred that their exemption found at subdivisions 12 and 25 in § 2.2-3705.7 remain as written and not be swept into a general exemption due to the unique duties of VRS.

Roger Wiley indicated that he felt that trade secrets draft necessarily included proprietary records. Phil Abraham, Vector Corporation, stated that the draft may not cover the proprietary record exemption for PPEA or PPTA procurements found in subdivision 11 of § 2.2-3705.6. He objected to the portion of the draft suggested by the Virginia Press Association that would shift liability to the submitting private entity should a FOIA enforcement action be commenced and the court found that the submitting entity has improperly earmarked records for protection that were not trade secrets. Sandy McNinch, Virginia Economic Development Partnership Authority, advised that she agreed with Mr. Abraham, but noted that with economic development prospects, they keep even their names secret until the deal is done. Dave Ress, Daily Press, averred that the trade secret definition found in the UTSA is too broad. Roger Wiley suggested that if the press believes the definition is too broad and government folks think it too narrow, we are in the right place.

The work group considered at length whether the definition of trade secrets encompassed financial records. Roger Wiley, Chris McGee, and Craig Merritt advised that they believed it does. Julie Whitlock, Department of General Services, expressed concern that in the context of routine public procurement, financial records would not be covered by the definition of trade secrets. Mr. Merritt suggested that FOIA contain the definition of trade secrets found in the UTSA and include the provision that financial records that are not publicly available through regulatory disclosure or otherwise be added to the definition. He noted that any draft should distinguish between situations where the public body is generating the material versus trade secrets submitted to a public body. He and Mr. Ress both suggested that any records submitted as evidence of financial responsibility or other mandatory compliance purposes should be open to the public.

Mr. Merritt then went through the various provisions of the VPA draft proposal. There was a great deal of discussion about the burden-shifting provision in the draft for situations where a public body might be challenged in court to release a record that a private entity has marked as a trade secret. There was additional discussion over current language used in many exemptions of § 2.2-3705.6 regarding the three-step "earmarking" process and whether the public body should have to make a call as to whether the private entity has properly marked such records. Mr. Wiley noted that in routine procurements many public bodies simply allow the private entity to mark whatever they want, and the public body agrees to it because it does not want to lose the contract. Mr. Merritt pointed out there were risks of losing control over how an entity defines its own trade secrets. Mr. Ress expressed that the Uniform Trade Secrets Act and FOIA have different purposes, and other states use more specific definitions.

The workgroup then discussed how to re-draft the proposal to reflect the three different categories of records identified in the discussion. Staff volunteered to redraft the trade secrets draft to reflect the discussions held by the work group, including the creation of three distinct drafts to reflect each situation discussed above. There being no further business, the meeting was adjourned.