

Virginia Freedom of Information Advisory Council  
Records Subcommittee  
July 22, 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 third meeting of the 2015 Interim on July 22, 2015, to continue the three-year study of FOIA directed by House Joint Resolution No. 96 (HJR 96). Subcommittee members Mr. Tavenner (Chair), Ms. Hamlett, and Messrs. Jones and Oksman were present; Mr. Ashby (Vice Chair) was absent.

After members were introduced and the meeting was called to order, the Subcommittee resumed its previous discussion of the exemption for working papers and correspondence, subdivision 2 of § 2.2-3705.7. Staff reminded the Subcommittee that 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. Elizabeth Kersey, representing Old Dominion University, advised that the president of ODU was also the president of the Council of Presidents. Ms. Kersey provided the Subcommittee with a letter signed by all of the presidents of public institutions of higher education stating their opposition to HB 1722/SB893 and the reasons therefor. A copy of the letter from the Council of Presidents appears on the FOIA Council's website. Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), said that the objective is to protect the executive, deliberative process and that VPA's concern was over the use of the term "correspondence" to protect records that were not part of that deliberative process. Carlos Hopkins, Counsel to the Governor, observed that there are lots of policy discussions in email. Mr. Tavenner observed that all correspondence of the officials listed in the exemption is currently exempt regardless of the nature of the correspondence. Mr. Merritt suggested that there be changes to the definition to tie the term correspondence to the concept of deliberative process. Laura Fornash from the University of Virginia (UVA) stated that UVA does not use the exemption to protect all of the President's email, but only for policy discussions. Dave Ress, a report for the Daily Press, stated that the whole exemption is broadly applied to keep records out of the hands of the public. He handed out copies of his comments comparing several different states and how they handled similar records (incorporated by reference and available on the FOIA Council website).

Delegate Ramadan next spoke specifically to his bill, HB 1722. He urged the elimination of the entire exemption, but in particular the part including university presidents because they are not elected officials or staff to elected officials. He said that from his experience on the Board of Visitors for George Mason University he did not see anything that needed to be shielded. He noted no other state agency or department head has the same protections, and asserted that

universities should not be treated differently because public universities are state agencies. He responded to four points made in the Council of Presidents' letter by stating as follows: (1) universities are not like cities and university presidents are not like mayors because universities are academic communities and their presidents are not elected; (2) regarding presidents being involved in bringing in new businesses, there are other exemptions in FOIA to cover competitive deals and trade secrets, and it is a secondary role for presidents; (3) regarding strategic partnerships with others in and out of state, if it is strategic the public should know, and no other state has the same protections so records out-of-state are not protected on the other side; and (4) regarding presidents' involvement in organizational issues such as enrollment growth plans, of course they should be involved but it should be a public process. Delegate Ramadan concluded by stating he saw no reason for the exemption and as it was a bipartisan bill (SB 893 introduced by Senator Petersen was identical to HB 1722), he hoped the Subcommittee would recommend it.

Mr. Ress noted that when other states addressed similar exemptions, their exemptions only applied to the state Governor. Marisa Porto, who is a newly appointed member of the FOIA Council, as well as President of VPA and Vice President of Content for the Daily Press, stated that this exemption is routinely used over broadly. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) handed out a chart she had prepared that listed examples of ways the working papers exemption had been used. In further discussion, Mr. Tavenner observed that there were two issues being discussed: (1) the inclusion of university presidents in the exemption, and (2) the use of the term "correspondence" in the exemption. Roger Wiley, a former FOIA Council member and an attorney representing local government, pointed out that while removing university presidents would not affect local government, the Subcommittee should consider the practical and potentially negative consequences of removing the term "correspondence." Mr. Ress suggested considering opening up papers after a decision was reached. Turning specifically to HB 1722, Mr. Jones noted that Virginia is the only state that gives this type of exemption to university presidents, and asked how it works for other states. Ms. Rhyne stated that while Virginia is the only state with this type of exemption for university presidents, in many states universities are not covered by freedom of information laws at all. There was some further discussion about whether there were academic freedom considerations at issue and whether keeping or removing university presidents from the exemption would make the governance of public universities more or less political. After further discussion, Mr. Jones moved to recommend HB 1722/SB 893 by striking the language including university presidents from the working papers and correspondence exemption. The motion died for lack of a second. The Subcommittee then directed staff to prepare a draft that would move the term "correspondence" within the definition of "working papers" for consideration at the next Subcommittee meeting.

The Subcommittee next considered certain records maintained by the Department of the Treasury or participants in the Local Government Investment Pool (§ 2.2-3705.7(27)). At its last meeting, the Subcommittee deferred consideration of this exemption in order to determine whether it was still necessary given the exemption for account and routing numbers enacted in 2010 (§ 2.2-3705.1(13)). At the Subcommittee's May meeting, it was agreed that Treasury officials and local government representatives would discuss the possibility of eliminating the more specific exemption (§ 2.2-3705.7(27)) if the general

exemption for account and routing numbers (§ 2.2-3705.1(13)) were amended to protect additional information, and if so, what additional information would need to be protected. Unfortunately, there was a Treasury Board meeting at the same time as this meeting and as a result, no representatives of the Department of the Treasury were available. The Subcommittee again deferred consideration of this exemption.

The Subcommittee next considered open meeting exemptions referred by the Meetings Subcommittee because the meeting exemption contained on a cross reference to the corollary record exemption. The first such exemption was for certain records of the Virginia Retirement System, a local retirement system, the Rector and Visitors of the University of Virginia, or the Virginia College Savings Plan relating to the acquisition, holding or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange. The Subcommittee considered this exemption last year and recommended leaving it unchanged. However, a proposal to amend the corresponding closed meeting exemption, § 2.2-3711(A) (20), was brought before and recommended by the Meetings Subcommittee. The amendment of the meetings exemption would require a corresponding amendment of the records exemption. The amendments would allow the existing exemptions to be used in the case of local boards that invest funds for post-retirement benefits other than pensions. Mr. Wiley explained that these investments are the equivalent to investments made by the Virginia Retirement System, but on a local level. The Subcommittee voted unanimously to make a corresponding amendment of the records exemption.

The Subcommittee next revisited the personnel records exemption. Last year, the Subcommittee voted to recommend combining the provisions of the personnel records exemption, § 2.2-3705.1(1), with the limitations to that exemption found at § 2.2-3705.8(A), so that all of the provisions concerning personnel records could be found in one statutory provision. In its consideration of the personnel exemption for closed meetings, the Meetings Subcommittee heard a proposal to open to the public performance reviews of local chief executives and school superintendents. The Meetings Subcommittee rejected this proposal, but after much discussion voted to ask staff to prepare a draft for consideration by the Records Subcommittee that would amend the personnel records exemption to open to the public the terms of dismissal of such chief executive officers unless ordered otherwise by a court. Mr. Ress stated that it had been his suggestion to open to the public deliberations when senior executives were up for disciplinary matters or performance reviews as a matter of public accountability. When asked about the scope of the suggestion, Mr. Ress said it started at the local government level, but from looking at other states he felt it should also including state department heads and include performance reviews, resignation, termination, and records antecedent to a decision not to review.

Mr. Wiley said that at the local government level not including schools, administrative officials serve at the pleasure of the governing body, have no fixed terms, and can be fired for any reason or no reason. He observed that requiring these processes to be public may introduce things into the record that may or may not be real reasons, as well as opening the door to litigation such as defamation suits. He agreed that the records should be open as to severance benefits, leave amounts, etc. but that governing bodies should preserve the ability

to give no reason at all. Mark Flynn of the Virginia Municipal League agreed, noting that he had been involved in such lawsuits and that the public pays for it. Ms. Porto noted there are states where everything is open for all employees except health records and personal contact information, and those states are able to function. Mr. Tavenner noted that personnel evaluations would be written differently if the author(s) knew the evaluations would be subject to public disclosure, and that for many officials and employees, there are no written evaluations anyway. After further discussion, the Subcommittee and staff considered what a draft would entail in detail: what type of records would be covered, to whom it would apply, how it could be worded, and how it might interact with current law and practice. Mr. Tavenner asked if there were any motions; there were none.

Staff provided the Subcommittee with a progress report on the work of the proprietary records work group, created at the direction of the Subcommittee to consist 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. It was suggested that the many specific exemptions in current law for various types of records containing trade secrets and proprietary information might be consolidated into one or more exemptions of general application. The work group has met twice on June 18 and July 21, 2015. The work group is considering a draft that provides a general exemption that may be used by any public body to the extent that portion of such records contain proprietary information or trade secrets. The draft is still under discussion at the work group level. The work group also recommended a draft to address copyright protected records. The Subcommittee took no action.

Continuing with the implementation of Subcommittee work plan, the Subcommittee considered the following records exemptions.<sup>1</sup>

Confidential records, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses (§ 2.2-3705.2(1)). The Subcommittee by consensus will recommend no change in the exemption.

Certain portions of engineering and construction drawings and plans (§ 2.2-3705.2(2)). Craig Merritt representing the Virginia Press Association pointed out that there was certain overlap between this exemption and subdivisions 4, 6, and 14 set out below. It was suggested that staff develop a chart comparing subdivisions 2, 4, 6, and 14 of 2.2-3705.2 to show where there is redundancy or overlap to enable the Subcommittee to remove the redundancies and craft a clearer exemption. As a result, the Subcommittee deferred consideration of this exemption until its next meeting on August 18, 2015. Staff noted that the application of subdivision 6 is currently before the Supreme Court of Virginia in the case of *Surovell v. Department of Corrections*. Staff told the Subcommittee that it will keep them updated on this case.

Certain records of security systems used to control access to or use of any automated data processing or telecommunications system (§ 2.2-3705.2(3)). Without objection or public comment, the Subcommittee made no recommendation for any change to this exemption.

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<sup>1</sup> No recommendation for change was the consensus of the Subcommittee where there was no public or other comment on a specific exemption.

Plans and information to prevent or respond to terrorist activity or cyber attacks, and certain records concerning antiterrorism and cybersecurity planning and protection (§ 2.2-3705.2(4)). As noted above, the Subcommittee directed staff to develop a chart comparing subdivisions 2, 4, 6, and 14 of 2.2-3705.2 to show where there is redundancy or overlap to enable the Subcommittee to remove the redundancies and craft a clearer exemption. As a result, the Subcommittee deferred consideration of this exemption until its next meeting on August 18, 2015.

Certain records of the security aspects of a railroad system safety program plan, and certain records of an ongoing investigation of a rail accident or other incident threatening railway safety (§ 2.2-3705.2(5)). Bethany Wolfe of the Department of Rail and Public Transportation stated that the Department would like to keep the exemption as it is, and in response to a question from Mr. Ress, pointed out that federal law is controlling. The Subcommittee made no recommendation for any change to this exemption.

Certain records that would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure if disclosed (§ 2.2-3705.2(6)). As noted above, the Subcommittee directed staff to develop a chart comparing subdivisions 2, 4, 6, and 14 of 2.2-3705.2 to show where there is redundancy or overlap to enable the Subcommittee to remove the redundancies and craft a clearer exemption. As a result, the Subcommittee deferred consideration of this exemption until its next meeting on August 18, 2015.

Records of school safety audits (§ 2.2-3705.2(7)). The Subcommittee noted that this exemption refers to § 22.1-279.8, which requires the results of a school safety audit to be made public within 90 days of completion. Without objection or public comment, the Subcommittee made no recommendation for any change to this exemption.

Expired exemption (§ 2.2-3705.2(8)). The Subcommittee by consensus recommended the deletion of this expired exemption.

Certain records of the Commitment Review Committee concerning the mental health assessment of an individual subject to commitment as a sexually violent predator (§ 2.2-3705.2(9)). Ms. Rhyne stated that an equivalent meetings exemption had been recommended by the Meetings Subcommittee.<sup>2</sup> Without objection, the Subcommittee made no recommendation for any change to this exemption.

Certain subscriber data provided by a telecommunications carrier to a public body that operates a 911 or other emergency dispatch or notification system, if the data is in a form not made available by the telecommunications carrier to the public generally (§2.2-3705.2(10)). Certain subscriber data collected by a local governing body, and other identifying information of a personal, medical, or financial nature provided to a local governing body in connection with a 911 or other emergency dispatch or notification

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<sup>2</sup> Subdivision A 31 of § 2.2-3711 allowing closed meetings for certain discussions of the Commitment Review Committee.

system, if such records are not otherwise publicly available (§ 2.2-3705.2(11)). Staff explained that these exemptions protect unpublished telephone numbers, whether the number was given from a carrier to a public body, or gathered by the public body itself. Without objection or public comment, the Subcommittee made no recommendation for any change to these exemptions.

Certain records of the Virginia Military Advisory Council or certain other public bodies concerning federal military and national security base closure, realignment, or relocation (§ 2.2-3705.2(12)). The Subcommittee deferred consideration of this exemption as no representative of the Virginia Military Advisory Council was present.

Certain records as determined by the State Comptroller that describe the design, function, operation, or implementation of internal controls over the Commonwealth's financial processes and systems, and the assessment of risks and vulnerabilities of those controls (§ 2.2-3705.2(13)). The Subcommittee deferred consideration of this exemption until its next meeting on August 18, 2015.

Certain records relating to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system (§ 2.2-3705.2(14)). As noted above, the Subcommittee directed staff to develop a chart comparing subdivisions 2, 4, 6, and 14 of 2.2-3705.2 to show where there is redundancy or overlap to enable the Subcommittee to remove the redundancies and craft a clearer exemption. As a result, the Subcommittee deferred consideration of this exemption until its next meeting on August 18, 2015.

Records of a Fire/EMS company or department that disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties (§ 2.2-3705.2(15)). Without objection or public comment, the Subcommittee made no recommendation for any change to this exemption.

Certain records of hospitals and nursing homes that reveal the disaster recovery plans or the evacuation plans for such facilities in the event of fire, explosion, natural disaster, or other catastrophic event (§ 2.2-3705.2(16)). Without objection or public comment, the Subcommittee made no recommendation for any change to this exemption.

The Subcommittee asked for public comment but there was none made at this time as public comment was taken throughout the meeting on a per exemption basis.

The next meeting of the Subcommittee is scheduled to be held at 10:00 AM on Tuesday, August 18, 2015. There being no further business, the Subcommittee meeting was adjourned.

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