

Records Subcommittee  
Proprietary Records Work Group  
Tuesday, August 18, 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 third meeting on Tuesday, August 18, 2015 to continue its examination of the proprietary records/trade secrets exemptions found in § 2.2-3705.6. The work group began by reviewing separate draft proposals that would provide general exemptions for trade secrets generated by a public body, trade secrets of a private entity submitted to a public body, and certain financial records, and a draft proposal regarding shifting liability for attorney's fees and costs concerning records submitted to a public body that were improperly designated as trade secrets by a private entity. All of the drafts are posted on the FOIA Council web site.

Regarding the draft for trade secrets generated by a public body, concerns were expressed regarding the scope of the draft and whether it was sufficient to cover things such as enterprise or accounting software and economic development records, or whether it was limited to academic and scientific research only. Staff pointed out that software is already covered by other exemptions, although the exemption for "vendor proprietary information software" had been submitted to the work group for further study.<sup>1</sup> The work group discussed the economic development exemption<sup>2</sup> in detail after Kara Hart of the Virginia Economic Development Partnership (VEDP) raised concerns that the draft did not cover records already exempt under existing law. Craig Merritt, representing the Virginia Press Association (VPA), noted that the two clauses of the existing exemption covered certain records submitted to public bodies by private entities and certain records generated by public bodies, respectively, and might be treated differently. The work group discussed various amendments to the draft to address the issue. More generally, the work group discussed various types of trade secrets - other than academic and scientific research - generated by public bodies, such as proposals, incentives, and other records when public bodies compete with each other and with other states to attract businesses, tourism, and commerce.

The work group then moved on to consider the draft exemption for trade secrets submitted to a public body, and the issue of shifting liability. In discussing the scope and language of the draft, Mr. Merritt suggested that investment entities (such as the Virginia Retirement System, the Virginia College Savings Plan, etc.) would need their own rules as they deal with unique situations. Julie Whitlock of the Department of General Services (DGS) expressed concern about the time period during which trade secrets are protected, i.e., during the course of negotiations, after a contract is entered into, and while the contract is being carried out. The work group discussed the scope of the draft and specific language used regarding "transactions," "contracting," and "public contracts." The work group also discussed nondisclosure agreements as a "promise of confidentiality" as contemplated by the current economic development

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<sup>1</sup> Subdivisions 6 and 7 of § 2.2-3705.1. The Records Subcommittee had recommended no changes to subdivision 7, which exempts "Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth."

<sup>2</sup> Subdivision 3 of § 2.2-3705.6.

exemption. Phil Abraham of the Vectre Corporation, and Roger Wiley, an attorney representing local government, suggested that the economic development exemption should remain free standing. In response to a question from Mr. Merritt, Ms. Hart informed the work group that Virginia regularly competes with Georgia, Maryland, North Carolina, and other southeastern states, as well as some mid-Atlantic states.

The work group next considered the complexities involved with the liability shifting proposal and current "earmarking" provisions where private entities designate what records need to be protected as proprietary/trade secrets. Some of the current earmarking provisions require agreement by the public body regarding such designations, but others do not. Mr. Wiley noted that public bodies are under pressure to agree with private entities' designations as to what is proprietary and a trade secret in order to get deals done. Mr. Merritt noted that local government attorneys are often not in a fair position to evaluate whether particular records are trade secrets, which places the burden on the public body to guess correctly. Mr. Abraham suggested that instead of a statutory provision, public bodies could use indemnification clauses in contracts. Ms. Whitlock asked why a public body's attorney should have to defend a private entity's designation of a trade secret. After further discussion, Mr. Merritt suggested the solution is to make the private entity that submits trade secrets a party to any FOIA suit on the issue, and to impose the cost on any party that improperly designates as trade secrets records that should be open. The work group discussed in further detail who should pay fees and generally agreed that the courts would make that determination on a case-by-case basis. Noting that the draft has the liability provision in the same subdivision as the exemption, the work group agreed with staff that the liability shifting provision should instead be moved into the remedies section of FOIA, § 2.2-3713.

The work group then discussed briefly the draft for certain financial records and how it relates to procurement law provisions. The work group then agreed to have staff re-draft the drafts considered today to reflect the various suggested changes and post them on the FOIA Council website for further consideration. Those present agreed to let staff know whether they felt it would be helpful to meet again as a work group, or whether staff should instead report to the Records Subcommittee that the work group had considered the issues and drafts discussed above, but had not agreed on a recommendation.

There being no further business, the meeting was adjourned.