

Virginia Freedom of Information Advisory Council
Records Subcommittee
August 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 fourth meeting of the 2015 Interim on August 18, 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, Mr. Jones, and Ms. Porto 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 its last meeting, a motion was made to recommend the language of HB 1722 (Ramadan)/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, but that motion died for lack of a second. However, staff was directed to draft an amendment that would eliminate "correspondence" from the exemption, but to amend the definition of "working papers" to include correspondence. The Subcommittee reviewed the draft prepared by staff and the discussion centered on a staff recommended change in the definition of "working papers," the striking of the word "or" in the phrase "personal or deliberative use." Staff noted that this was done for discussion purposes as the term "personal" used in conjunction with "correspondence" was unclear. It was agreed by all in attendance at the meeting, the purpose of the exemption was to create a zone of privacy for the deliberative use of the official to whom the working paper privilege applies. In this context, the words "personal use" are meant to refer to use of the record by the individual who holds the exemption. The alternative interpretation would be a distinction between what is "personal" and what is "public." It was agreed this was not the proper interpretation because the definition of "public records" already limits the application of FOIA to records "in the transaction of public business." After extensive discussion about how a court would interpret that amendment, and stating that the goal was to clarify the exemption without changing it, the Subcommittee voted 3 to 1 to keep the phrase "personal or deliberative use."¹ Mr. Tavenner called for additional public comment on the draft. Ms. Porto shared notes she had received from Dave Ress, a reporter with the Daily Press, suggesting that the exemption should be amended so that once a decision was reached, the exemption would no longer apply. A motion was made to continue this idea at the next meeting of the Subcommittee, but the motion failed by tie vote.² The Subcommittee then voted unanimously to recommend the draft as amended to the FOIA Council.

¹ All members present voted in favor of the motion except Ms. Porto voted against the recommendation.

² Ms. Porto and Mr. Jones voted in favor, Mr. Tavenner and Ms. Hamlett voted against.

The Subcommittee next revisited the exemption for certain records maintained by the Department of the Treasury or participants in the Local Government Investment Pool, which relate to information required to be provided by such participants to the Department to establish accounts (§ 2.2-3705.7(27)). Tim Wilhide, Department of the Treasury, told the Subcommittee that he managed the LGIP and the records contain sensitive information, including tax identification numbers. Mr. Wilhide stated that the Department was not in favor of being the conduit to release this type of information. Chris McGee of the Virginia College Savings Plan advised that he agreed with the Department's position. There was no further public comment. The Subcommittee made no recommendation to change the existing exemption.

The Subcommittee next considered the exemption for the records 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, including the annual assessment of internal controls mandated by the State Comptroller (§ 2.2-3705.2(13)). Randy McCabe, State Comptroller, advised the Subcommittee that internal controls protect the financial assets of the Commonwealth and this was standard practice in both the public and private sectors. Staci Henshaw, Deputy Auditor of Public Accounts, agreed with Mr. McCabe. There was no public comment. The Subcommittee made no recommendation to change the existing exemption.

The Subcommittee then revisited the records exemption for the Virginia Military Advisory Council (VMAC) or certain other public bodies concerning federal military and national security base closure, realignment, or relocation, which had been deferred from the previous meeting of the Subcommittee (§ 2.2-3705.2(12)). Jaime Areizaga-Soto, Deputy Secretary of Veterans and Defense Affairs, advised the Subcommittee that the VMAC works with the Department of Defense concerning Ft. Belvoir and the Pentagon and an executive summary is provided at the end of each year that describes the activities of the VMAC. Mike Coleman, also with the Secretary's office, told the Subcommittee that the VMAC is trying to identify assets of the defense industry and military installations, and that a portion of the exemption is to protect trade secrets provided to the VMAC in carrying out its mission. He acknowledged that to date, the VMAC has not seen any records containing trade secrets. Mr. Coleman indicated that because there may be high level discussion with the military industry, it was the position of the Secretary to keep the exemption as currently written, even though there may be overlap with other FOIA exemptions for trade secrets. Ed Jones explained to the Subcommittee that at Dahlgren, there is a lot of work done by private defense contractors and while that part of the exemption has not been used, it easily could. Mr. Tavenner stated that the issue is not whether the exemption has been used, but rather it is needed. There was no public comment. The Subcommittee made no recommendation to change the existing exemption. Before moving to the next item of business, Craig Merritt, representing the Virginia Press Association, inquired whether, if the proprietary records workgroup is able to craft a general trade secret exemption, would the VMAC be OK if the trade secrets portion of their exemption would be eliminated. Mr. Coleman responded that that would be acceptable, but they would like to see a cross reference in their exemption to any general trade secret exemption.

The next agenda item was the review of the staff-prepared comparison chart relating to the various public safety exemptions found in § 2.2-3705.2, including subdivisions 2 (portions of engineering and construction drawings and plans), 4 (terrorism and cybersecurity plans), 6 (security of governmental facilities, buildings, and structures, and safety of persons using them), and 14 (Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system). Staff advised that as a result of preparing the comparison, it was apparent that there was significant overlap between the exemptions. Roger Wiley, representing local governments, told the Subcommittee that this public safety exemption should include protection at all levels of government and for private buildings and facilities as well. Marisa Porto indicated that she would be interested in consolidating the above exemptions, so long as the law did not change. Ed Jones suggested that staff prepare a draft, based on what was revealed by the comparison chart, for the Subcommittee's review at their next meeting. Mr. Tavenner indicated that with the exemption for Statewide Agencies Radio System (subdivision 14 of § 2.2-3705.2), if the exemptions were combined, it may not be helpful to law-enforcement agencies. Currently, all protected material is articulated under subdivision 14 as it relates to STARS and it may be more useful to keep it that way. The Subcommittee directed staff to prepare the draft suggested by Mr. Jones consolidating repetitive portions of subdivision 2, 4, 6, and 14 of § 2.2-3705.2.

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 on June 18, July 21, and August 18, 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 portions of such records contain proprietary information or trade secrets. The draft is still under discussion at the work group level.

The Subcommittee also considered an issue raised by David Ogburn, representing Verizon, at the last FOIA Council meeting on July 22, 2015. Mr. Ogburn suggested that the term "telecommunications carrier" may be outdated as used in the exemptions concerning 911 and E-911 dispatch records found in subdivisions 10 and 11 of § 2.2-3705.2. The Subcommittee had previously considered these exemptions without recommending any changes. As Mr. Ogburn was not present at today's meeting, the Subcommittee asked staff to invite him to attend the next Subcommittee meeting to present his concerns regarding these exemptions.

The Subcommittee then considered new business and began discussion of the following exemptions:

Investigations of applications for licenses and permits, and of licensees and permittees, of certain agencies - § 2.2-3705.3(1). Amy Dilworth of the State Lottery, Mike Menefee of the

Department of Agriculture and Consumer Services, and Eddie Wirt of the Department of Alcoholic Beverage Control (ABC) all spoke in favor of keeping this exemption as it is currently written. In response to questions from Mr. Merritt, the Subcommittee was informed that ABC uses this exemption for approximately 6,500 applications for licenses per year, roughly 60% of which are temporary licenses. There were no other comments and the Subcommittee recommended no changes to this exemption.

Active investigations being conducted by the Department of Health Professions (DHP) or by any health regulatory board in the Commonwealth - § 2.2-3705.3(2). Jaime Hoyle of DHP stated that the exemption is used to protect highly sensitive information in investigations including physical health, mental health, and substance abuse information concerning health professionals. The Subcommittee was informed that there is a public hearing prior to a final decision, at the conclusion of which any orders, sanctions, and notices are made public, including an order saying there would be no sanctions. There were no other comments and the Subcommittee recommended no changes to this exemption.

Active investigations of individual employment discrimination complaints - § 2.2-3705.3(3). Mr. Wiley pointed out that this exemption and the one just discussed both refer to "active" investigations, but seem to differ regarding what must be released once the investigation is closed. Staff noted there are similar provisions regarding what is to be released from completed investigation reports in several of the exemptions being studied, but they all use slightly different language. Staff also noted there may be other applicable exemptions and prohibitions on the release of certain records found outside of FOIA, such as in Title 54.1. Mr. Merritt noted that if one cross-referenced each of the FOIA exemptions for administrative investigation records to other Code sections, the substantive language found outside FOIA may drive the differences. The Subcommittee and interested parties further discussed whether cross-references should be added, noting the fact that agencies typically know the exemptions that apply to them both within FOIA and outside of it, but that it can be difficult for the public to know agency-specific exemptions outside of FOIA. Due to the monumental nature of the task of looking to cross-reference every exemption outside of FOIA, it was suggested that perhaps at the conclusion of the three-year study, the FOIA Council might want to begin examining the exemptions section-by-section in smaller one-year studies. Returning to consideration of subdivision 3, there were no further comments and no motions for change.

Active investigations being conducted by the Department of Medical Assistance Services (DMAS) - § 2.2-3705.3(4). Nancy Malczewski of DMAS informed the Subcommittee that DMAS uses this exemption when auditing providers, and can be used for cost-settlement reports. Without the exemption providers could find out beforehand that they are going to be audited. Ms. Malczewski stated that if fraud is found, the investigation is referred to the Attorney General, and that final letters are released to the public after audits are completed. After some further discussion of the process and public hearings involved, there were no recommendations for any changes to this exemption.

Investigations or conciliation processes involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act - § 2.2-3705.3(5). Tom Payne of the Office of

the Attorney General (OAG) stated that the exemption protects information before and after the investigation, as many employee witnesses are employed by respondents who are being investigated and retaliation is a concern. He also explained that DHRM handles complaints from state employees while OAG handles complaints from others, which is why this exemption is needed in addition to subdivision 3 (discussed above). Mr. Payne further stated that OAG has a work share agreement with the federal Equal Employment Opportunity Commission which also makes this exemption necessary. There were no other comments and the Subcommittee recommended no changes to this exemption.

Certain studies and investigations by the Virginia Lottery - § 2.2-3705.3(6). Ms. Dilworth spoke in support of keeping this exemption, stating that its use often involves crime by a retailer and investigations in conjunction with local law enforcement. In response to questions she stated that records become public if charges are brought and the case is public, but depending on circumstances records may not become public otherwise, for example if the case is closed or the prosecutor is waiting to bring charges later. There were no other comments and the Subcommittee recommended no changes 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 meeting was then adjourned.

As expected, the Subcommittee did not have enough time to consider all of its new business. The following exemptions will be discussed at the next meeting of the Subcommittee.

- *Certain audit investigation records - § 2.2-3705.3(7);*
- *Certain records of the Department of Human Resource Management with respect to employment dispute resolution - § 2.2-3705.3(8);*
- *The names, addresses and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints or complaints relating to the Uniform Statewide Building Code or the Statewide Fire Prevention Code made to a local governing body - § 2.2-3705.3(9);*
- *Active investigations being conducted by the Department of Criminal Justice Services regarding private security services, special conservators of the peace, bail bondsmen, and bail enforcement agents - § 2.2-3705.3(10);*
- *Board of Education review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees - § 2.2-3705.3(11);*
- *Certain records of the Board of Education related to the denial, suspension, or revocation of teacher licenses - § 2.2-3705.3(12);*
- *Records, notes and information provided in confidence and related to an investigation by the Attorney General regarding the Tobacco Master Settlement Agreement and related matters - § 2.2-3705.3(13).*

The next meeting of the Subcommittee is scheduled to be held at 1:30 PM on Wednesday, October 7, 2015.

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