

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
August 19, 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 fourth meeting of the 2015 Interim on August 19, 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 considered agenda item no. 3, concerning the VCU Health System Authority's open meeting exemption found at A 23 of § 2.2-3711. Staff reminded the Subcommittee of 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. The Subcommittee had 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 reviewed the staff prepared draft and made one clarifying amendment at the request of the Authority. In response to a question from the Virginia Press Association (VPA), Ms. Gunther explained that in regard to personnel discussions, this exemption needed to be broader than the general personnel exemption used by other public bodies because of certain federal requirements for the Authority to be able to discuss medical and teaching staff who are VCU employees, not employees of the Authority. The Subcommittee voted 4-0 to approve the draft as amended and to recommend it to the FOIA Council.

The Subcommittee then began review of six 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 19; Plans to protect public safety as it relates to terrorist activity or specific cybersecurity threats or vulnerabilities and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such matters or a related threat to public safety; discussion of records excluded from FOIA pursuant to subdivision 3 or 4 of § 2.2-3705.2. Staff advised the Subcommittee that it has previously considered this exemption last year on August 19, 2014 and made no recommendation for change. Josh Heslinga, Assistant Attorney General, who advises the Secretary of Technology, stated that he was available to answer any questions for the Subcommittee (there were none). The Subcommittee again made no recommendation for

¹ Dooley (Chair), Landon, Selph, and Porto.

change, but stated that it would revisit this exemption after the FOIA Council considers SB 1402 (2015, Cosgrove). SB 1402 was referred to the FOIA Council for further study.

A 29; award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract. Staff advised the Subcommittee that this exemption was the subject of a Virginia Supreme Court case, *White Dog Publishing v. Culpeper County Board of Supervisors*, decided on September 15, 2006. The court held that the unambiguous language of this exemption,² viewed in its entirety, demonstrates that the purpose of the exemption is to protect a public body's bargaining position or negotiating strategy vis-à-vis a vendor during the procurement process. Under that exemption, the terms or scope of a public contract are proper subjects for discussion in a closed meeting of a public body only in the context of awarding or forming a public contract, or modifying such contract, and then only when such discussion in an open meeting would adversely affect the public body's bargaining position or negotiating strategy regarding the contract. The exemption does not allow a public body to close a meeting in order to discuss the application or enforcement of the scope or terms of a previously awarded public contract. There was limited discussion about the breadth of this exemption, and the Subcommittee recognized that the Supreme Court's decision in the *White Dog* case was controlling. As a result, the Subcommittee made no recommendation for change.

A 38; Virginia Port Authority of proprietary information gathered by or for the Virginia Port Authority (records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.6). Andrew Sinclair, representing the Virginia Port Authority (VPA) told the Subcommittee that the VPA was responsible for 4 marine terminals in Hampton Roads, the Richmond terminal, and the Virginia Inland Port in Front Royal, Virginia. Mr. Sinclair stated that Virginia International Terminals, LLC, operates these ports on behalf of the VPA under a shared service agreement and competes with other ports. Staff informed the Subcommittee that certain information is prohibited from public release under § 62.1-132.4, including customer contracts, agreements, or information; ship tally sheets; ship manifests; information relating to tonnages and cargoes; and annual budgets. Staff informed the Subcommittee that § 62.1-134.1 contains similar prohibitions on the release of certain information concerning the shipment of coal. The Subcommittee voted 4-0 to keep the exemption as written.

A 42; Virginia Military Advisory Council or any commission created by executive order; BRAC (subdivision 12 of § 2.2-3705.2). Mike Coleman with the Office of the Secretary of Defense and Military Affairs advised that there are 23 military installations in Virginia and that the Virginia Military Advisory Council (VMAC) met two or three times per year to talk specifically about those installations and how to keep them in Virginia. He stated that the discussions included the values and weaknesses of the installations as well as how to grow their assets and improve the quality of life for those using them. He advised that there is steep competition among the states to keep or locate military installations. Ms. Dooley asked whether there were any commissions created by executive order, to which Mr.

² Note that when *White Dog* was decided, this exemption was codified at subdivision A 30 of § 2.2-3711, but it is now codified at A 29. There have been no changes to the substance of the exemption.

Coleman advised that one was created by Governor McDonnell, but finished its work last month and disbanded. Staff advised that the Records Subcommittee had reviewed the corollary record exemption for VMAC and had made no recommendation for change. Based on this information, the Subcommittee recommended to keep the exemption as it is current written.

A 46; Resource management plans; personal and proprietary information that are excluded from the provisions of this chapter pursuant to (i) subdivision 25 of § 2.2-3705.6 or (ii) subsection E of § 10.1-104.7. Dave Dowling, Department of Conservation and Recreation, advised that these records were furnished by an agricultural landowner or operator to the Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Agriculture and Consumer Services or any political subdivision, agency, or board of the Commonwealth. He stated that there are 47 soil and water conservation districts in Virginia and that they are the "boots on the ground" for resource management. Each conservation district approves the respective resource management plans. Mr. Dowling advised that these records are prohibited from release, except in aggregate or statistical form, and that the meetings exemption was necessary so that the conservation districts could discuss the confidential records in closed meetings as part of the approval process. Ms. Dooley suggested that this exemption be added to the "context draft" under consideration by the Subcommittee to provide additional clarification of the type of records that may be discussed and what public bodies may hold these discussions. The Subcommittee voted 4-0 to keep the exemption, but wanted to see the language of the exemption clarified as noted above.

A 47; (Eff. July 1, 2018); ABC; Board of Directors of the Virginia Alcoholic Beverage Control Authority of records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.3 or subdivision 34 of § 2.2-3705.7. Eddie Wirt, Director of Policy Analysis for the Department of Alcoholic Beverage Control, advised that this exemption, which does not go into effect until July 1, 2018, is forward-thinking in anticipating the needs of ABC regarding business plans, marketing, negotiating strategies, and other issues when it becomes an Authority. Staff informed the Subcommittee that while authorities are still public bodies subject to FOIA, authorities are exempted from procurement and personnel rules so they can act more like competitive businesses. Mr. Wirt noted that as the transition to an authority had not happened yet, he had no concrete examples, but as a hypothetical, he stated there could be competition in the liquor industry that would affect ABC if it participated in a promotion with one manufacturer but not another. Noting that the same bill that created this meeting exemption also created records exemptions that were referred to the Records Subcommittee, the Meetings Subcommittee chose to take no action until the Records Subcommittee completes its review of the corresponding records exemptions.

The Subcommittee and staff then reviewed the work completed so far and how to proceed with the rest of the study. Every meeting exemption in § 2.2-3711 had been considered, although several had been "deferred" or "flagged" for further consideration, depending on what action, if any, the Records Subcommittee may take regarding corresponding records exemptions. The Subcommittee agreed to have staff update the "context draft" that would give context to the various exemptions in § 2.2-3711 that refer to corresponding records

exemptions. The Subcommittee agreed to consider the updated draft at its next meeting, along with any other new business such as consideration of meeting notice requirements and other procedural matters.

The Subcommittee then asked for public comment. John Edwards, publisher of the Smithfield Times and former FOIA Council member, suggested that because of the myriad instances of discrepancies between what was actually discussed in a closed meeting versus what is legally allowed under FOIA to be discussed, closed meeting discussions should be recorded. Mr. Edwards stated that these recordings should be sealed and available only in camera if there is a FOIA suit alleging improprieties in the closed meeting. Mr. Edwards noted that under current FOIA, closed meeting minutes are not subject to mandatory disclosure. Mr. Edwards suggested that if drafted for the Subcommittee's consideration, there should be a three year sunset clause in order to see if making these recordings help to address the disputes over what happened in a closed meeting.

The next meeting of the Subcommittee was scheduled for Thursday, September 30, 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.