

Virginia Freedom of Information Advisory Council
Records Subcommittee
October 7, 2015
1:30 PM
Speaker's Conference Room, Sixth Floor
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its fifth meeting of the 2015 Interim on October 7, 2015, to continue the three-year study of FOIA directed by House Joint Resolution No. 96 (HJR 96). Subcommittee members Mr. Tavenner (Chair), Mr. Ashby (Vice Chair), Mr. Jones, and Ms. Porto were present; Ms. Hamlett and Ms. King-Casey were absent.

After members were introduced and the meeting was called to order, the Subcommittee discussed a draft prepared by staff based on the comparison chart distributed at the August meeting 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 reminded the Subcommittee that as a result of preparing the comparison, it was apparent that there was significant overlap between the exemptions, and pointed out that drafting notes were left in the draft to help make it easier to understand. Dave Ress, a reporter with the Daily Press, handed out an alternative proposal he had prepared. He noted that the recent decision of the Supreme Court of Virginia in *Department of Corrections v. Surovell* indicated that redaction would not be required unless the exemption included the word "portions," and so his draft was prepared with that word in recognition of the Court's decision. The Subcommittee decided to post both drafts on the FOIA Council website to give interested parties time to consider them further before making any decision on whether to recommend them.

The Subcommittee next considered an issue raised by David Ogburn, representing Verizon, at the FOIA Council meeting on July 22, 2015. The Subcommittee had raised the issue at its August meeting, but Mr. Ogburn was unable to attend that day. Mr. Ogburn was present today, and suggested that the term "telecommunications carrier" may be outdated as used in the exemptions concerning 911 and E-911 dispatch records found in subdivisions 10 and 11 of § 2.2-3705.2. He stated that the term refers to someone certified by the State Corporation Commission (SCC) to provide local telecommunications or switched telephone services, but most service providers today use Voice Over IP technology, which is not certified by the SCC. After brief discussion, the Subcommittee voted unanimously to recommend amending these exemptions by using the term "communication services provider" as defined in Code § 58.1-647 in place of the term "telecommunications carrier."

Next, 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 considered multiple versions of several different draft proposals: 1) an exemption for trade secrets provided to a public body, 2) an exemption for trade secrets generated by a public body, 3) an exemption for certain financial records, and 4) a liability shifting provision addressing situations where a public body is brought to court over records that a third party has designated as proprietary or trade secrets. While it had considered all of these drafts and various related issues at length and in depth, the work group had not reached a consensus on any recommendations. Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), stated that there was no consensus and that some exemptions were unique and unlikely to change, but he felt there could be progress on others, particularly in regard to trade secrets and financial information submitted by private entities to public bodies. Mr. Merritt distributed a proposed draft for further consideration. Mr. Tavenner asked if the work group had identified specifically which exemptions would be affected if one or more generic exemptions were enacted, and was informed that the work group had not done so. Phil Abraham of the Vectre Corporation, representing transportation clients, noted that the exemption for public-private procurement transactions (subdivision 11 of § 2.2-3705.6) is very different from others, and agreed the work group should identify which existing exemptions would and would not be affected if one or more generic exemptions were enacted. Mr. Ressa spoke to the importance of the concept of having a generic trade secrets exemption that also ensures the public right to know, and distributed a proposed draft for consideration. The Subcommittee considered whether to take up the matter directly or whether it would be worthwhile to ask the interested parties to continue meeting as a work group. The Subcommittee voted unanimously to ask the work group to meet again.

The Subcommittee then considered new business, continuing its consideration of administrative investigation exemptions with discussion of the following exemptions:

Certain audit investigation records - § 2.2-3705.3(7). Without objection, the Subcommittee deferred consideration of this exemption until its next meeting at the request of Staci Henshaw of the Auditor of Public Accounts. Affected parties stated that they would have a proposal ready at the next meeting that addresses the issue of what is an "investigation" covered by the exemption.

Certain records of the Department of Human Resource Management (DHRM) with respect to employment dispute resolution - § 2.2-3705.3(8). Sara Wilson, Director of DHRM, stated that this exemption is meant to protect personal privacy in the employment dispute resolution process. In discussion with the Subcommittee and Mr. Ressa, she related that the hearing process is not public, but the result is public. Roger Wiley, an attorney representing local government and a former FOIA Council member, pointed out that the same type of proceedings happen at the local level and are covered by the general personnel records

exemption (§ 2.2-3705.1(1)). Ms. Wilson noted that this exemption was originally specific to the Department of Employment Dispute Resolution (EDR), which was a separate agency that then became a Division of DHRM. After some further discussion, the Subcommittee voted unanimously to have staff meet with the interested parties as a work group to consider whether the DHRM-specific exemption was needed or whether the matters addressed were already covered by the personnel records exemption.

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). Mr. Wiley stated that this exemption is used often at the local level, and encourages people to come forward while protecting them from potentially violent reactions. Mark Flynn of the Virginia Municipal League (VML) concurred, stating the exemption is often used to try to keep the peace among neighbors. Mr. Ress and Mr. Merritt brought up the issue of the right to confront one's accuser. Mr. Wiley stated that the complaint leads to an inspection and that enforcement is based on the inspection and the inspector's testimony, not on the complaint. The subject of the complaint would have the right to confront the inspector and challenge the inspector's testimony. Mr. Flynn noted that as many of these violations are criminal misdemeanors, the criminal records exemptions also apply. Phyllis Errico of the Virginia Association of Counties (VACo) stated that she has handled hundreds of these matters and the harm in releasing the information outweighs the general right to know who is the complainant. She stated that the complaint-driven process is better than having roving patrols looking for violations. Mr. Jones stated that while he may agree with the balance struck and understands the legal argument, it bothered him to think a public investigation would be triggered by an anonymous complaint. The Subcommittee voted unanimously to defer consideration of this exemption until its next meeting.

Active investigations being conducted by the Department of Criminal Justice Services (DCJS) regarding private security services, special conservators of the peace, bail bondsmen, and bail enforcement agents - § 2.2-3705.3(10). Teresa Gooch of DCJS stated that the exemption protects active investigations, allows complainants and subjects to fully respond, and once the investigation is completed, it becomes open to the public. The Subcommittee, Mr. Ress, Mr. Merritt, and Ms. Gooch discussed examples of how the exemption might be used, and confirmed that under the current language of the exemption, records become open once the investigation is no longer active. In the discussion the Subcommittee also confirmed that for purposes of this FOIA study, the lack of a motion by the Subcommittee would mean that the Subcommittee recommends keeping the exemption as written and moving on to the next topic. There was no motion on this exemption.

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) and certain records of the Board of Education related to the denial, suspension, or revocation of teacher licenses - § 2.2-3705.3(12). . Wendell Roberts and Mona Siddiqui of the Office of the Attorney General (OAG), and Patricia Potts and Susan Williams of the Department of Education (DOE), all spoke to both of these exemptions. They discussed

various reasons teacher licenses might be revoked and the process for revocation, noting that the subject has access rights as a matter of due process and that the teacher licensing investigation exemption also includes a public right to know. Mr. Roberts suggested that the test security exemption, subdivision 11, could be improved. He noted that testing irregularities may include such things as fire drills during a test and do not necessarily indicate improper conduct, but that there would be an investigation to determine whether students need to be re-tested. Mr. Roberts indicated that when subdivisions 11 and 12 are read together, the test security exemption would require investigation results to be released after the investigation was concluded, but that report also may be referred to in an ongoing licensing investigation by a different division within DOE, which would be exempt under subdivision 12. After further inquiry and discussion of the process, the Subcommittee was informed that under current law a report might be exempt under subdivision 11, then open for some period of time after the test security investigation is completed, then might be exempt again under subdivision 12 while a licensing investigation is conducted. The OAG and DOE representatives suggested that such reports should remain exempt until both investigations are complete. Mr. Ress suggested that a parent might then find out that students were being re-tested, but not know why. Staff pointed out that like other FOIA exemptions, these are discretionary, not prohibitory, and schools could state why and/or release redacted versions of the records. Mr. Merritt pointed out that these exemptions deal with different purposes: subdivision 11 deals with systemic integrity of the testing process, while subdivision 12 deals with discipline, due process, and protecting the reputation of accused teachers. He stated that VPA would oppose putting these exemptions "back-to-back." The Subcommittee noted that both exemptions use language stating that "this subdivision shall not prohibit the disclosure of records," but that this phrasing does not make sense because these exemptions are discretionary anyway, not prohibitory. The Subcommittee voted unanimously to have staff prepare drafts correcting this language in both exemptions.

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). Susan Curwood of the Tobacco Enforcement Unit of OAG stated that this exemption applied to two different paths of investigation. One was under the Tobacco Master Settlement Agreement (1998) to ensure that manufacturers are accurately reporting and depositing money, collect taxpayer documents, audit tax stamping agents, etc. She indicated that this path was predominantly civil and regulatory, and could lead to filing a civil suit to collect money. The other path deals with cigarette trafficking and tax evasion, and involves gather tax returns, sales tax exempt permits, financial account information, and other information that ultimately goes to law enforcement as criminal matters. She indicated that both paths involve tax information which is protected under § 58.1-3 outside of FOIA, and both involve information from manufacturers, wholesalers, distributors, and retailers. Ms. Curwood, Mr. Ress, the Subcommittee and staff discussed whether this exemption was needed in light of the exemption at § 2.2-3705.7(1) which refers to § 58.1-3, and decided that this exemption covers some records not covered under § 58.1-3. The Subcommittee made no motion regarding this exemption.

Next, the Subcommittee considered bills referred by the FOIA Council from the 2015 Session of the General Assembly as follows:

HB 1776 (Albo)/SB 1032 (McDougle) - Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority, created by the bill. The bill contains numerous technical amendments. The bill has a delayed effective date of July 1, 2018, except that the provisions of the thirteenth and fourteenth enactments become effective July 1, 2015. The thirteenth enactment clause directs the FOIA Council to study the provisions of the bill that would amend § 2.2-3705.7 by creating a new records exemption for certain records of the Authority. Kristina Stoney of the OAG spoke on behalf of ABC, noting that the effectiveness of the bill could not be measured since it does not go into effect until 2018, and ABC has not yet developed the marketing or operational strategies the exemption is designed to protect. Ginger Stanley of the VPA noted that there were grave concerns about the bill during Session, but the compromise was to send it to the FOIA Council for study. Staff noted that ABC did not originally request the exemption - others asked for it but could not recall why they had done so. Ms. Porto stated that she found it impossible to accept an exemption for something when we do not know what it is. Ms. Stoney suggested deferring consideration in order to give time to contact the patrons of the bill. Ms. Stanley observed that VPA is not opposed to what ABC wanted to do generally, and that as far as she knew no one opposed removing the exemption they just did not want to derail the bill during Session. After further discussion, the Subcommittee voted unanimously to send this exemption to the proprietary records work group for further consideration.

SB 1166 (Hanger) - Public service corporations; access to public records. Makes a public service corporation subject to the public records provisions of the Virginia Freedom of Information Act with respect to any project or activity for which it may exercise the power of eminent domain and has filed or prefiled for a certificate or other permitting document. Staff noted that the patron of the bill was invited but unable to attend today's meeting. Mr. Ogburn stated that he had opposed this bill during Session and continued to do so because it is overly broad as it applies to any public service corporation that may exercise the power of eminent domain, regardless of whether the corporation in question actually exercises that power. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) stated that with the power of eminent domain granted by the General Assembly there can be strings attached, such as disclosure of records related to the use of that power. In response to the Subcommittee, staff indicated that the bill was not drawn narrowly to only address public service corporations when the power of eminent domain is actually used. Staff also observed that the bill does not fit within the current enforcement provisions of FOIA as it does not address the venue to petition a public service corporation for a violation. Mr. Ress stated that records regarding the exercise of the power of eminent domain ought to be public, and the bill should be amended as needed to achieve that end. Mr. Ogburn stated that he would have no objection to a bill limited to a specific project, but that is not this bill. The Subcommittee decided to have staff invite the patron to come to the next Subcommittee meeting to address these questions and concerns.

The next meeting of the Subcommittee is scheduled to be held at 1:30 PM on Wednesday, November 18, 2015.

#