

Records Subcommittee  
Proprietary Records Work Group  
2:30 PM Tuesday, November 10, 2015  
Speaker's Conference Room, Sixth Floor  
General Assembly Building, Richmond, VA  
Meeting Summary

The Proprietary Records Work Group of the Records Subcommittee held its fourth meeting on Tuesday, November 10, 2015 to continue its examination of the proprietary records and trade secrets exemptions found in § 2.2-3705.6 and elsewhere in FOIA. Staff presented a brief recap of the work done to date and a reminder that the Records Subcommittee had asked the Work Group to continue meeting to address whether one or more generic exemptions for trade secrets and similar records might be crafted. Specifically, at its last meeting the Records Subcommittee had asked whether the Work Group had gone through the exemptions one by one to determine which might be amended or eliminated if one or more generic trade secrets exemptions were enacted. The Work Group had not done so. For reference, staff presented a chart that listed various exemptions with blank spaces to be filled in as to whether each exemption would be affected and for any relevant notes. Staff also distributed a draft prepared by the Virginia Press Association (VPA) that went through § 2.2-3705.6 and struck language likely to be affected by any generic exemption(s)(the "VPA markup"). Craig Merritt, speaking on behalf of VPA, explained that the VPA markup was not a recommendation of what VPA felt should be done, but instead only identified those exemptions or portions thereof likely to be affected by any generic exemption(s) for trade secrets or financial records. Mr. Merritt referred to a draft proposal VPA had submitted to the Records Subcommittee at its October 7, 2015 meeting (the "VPA draft") that identified three categories of records submitted by a private entity to a public body that would be protected: (1) trade secrets as defined in the Uniform Trade Secrets Act, (2) certain financial records not otherwise made public or required for decision making by the public body, and (3) other records in the nature of a trade secret or confidential financial information that is prohibited from release under state or federal law.

Phil Abraham of the Vectre Corporation pointed out that the work group had not yet agreed on what a generic exemption would look like, that some current exemptions would be easier to put within a generic version than others, and that assuming there is agreement on a generic agreement, it still must be decided what current exemptions should and should not remain. He noted his prior understanding that the exemption for certain procurement records under the Public-Private Transportation Act of 1995 and the Public Private Education Facilities and Infrastructure Act of 2002 (PPEA), subdivision 11 of § 2.2-3705.6 (the PPEA/PPTA exemption), would remain unaffected but that understanding was not reflected in the VPA draft. Christopher Lloyd of McGuire Woods Consulting agreed and pointed out that some exemptions may actually cover more than what is at first apparent. He gave the example of the Virginia Port Authority exemption, subdivision 1 of § 2.2-3705.6, which might at first appear to cover only confidential financial records but could in fact also apply to cargo manifests, bills of lading, and many other types of documents. Dave Ress, a reporter with the Daily Press, noted that as a practical matter, he had had a request denied on the basis of the PPEA, without any citation to a FOIA exemption.

Mr. Merritt asked whether there was any alternative counterproposal or modification of the VPA draft. No alternatives were presented and the general consensus was to use the VPA draft as a vehicle for further discussion (although there was no agreement to recommend it in its current form). In further discussion it was agreed that it would be helpful to leave certain exemptions unchanged at this time in order to facilitate further discussion of the draft, including the PPTA/PPEA exemption and certain exemptions for money managers such as the Virginia College Savings Plan and the Virginia Retirement System. Sandi McNinch and Kara Hart of the Virginia Economic Development Partnership (VEDP) expressed concerns with the method of designating exempt information in the VPA draft as written.

The participants then began to discuss what process the work group should use to move forward. It was generally agreed first to identify and bifurcate the various exemptions into those that are agency-specific and those that apply more generally. Second, notice would be sent to affected agencies summarizing the work so far, including draft proposals. It was agreed that certain exemptions including the PPEA/PPTA exemption and various exemptions for money managers such as VEDP, Virginia College Savings Plan, and the Virginia Retirement System would not be under consideration at this time, in order to allow the discussion of one or more generic exemptions to move forward. The third step would be to present a definite date by which all comments and any alternative draft proposals would be received. These steps are to be carried out before the 2016 Session of the General Assembly begins, and with a reminder that the next meeting of the work group will be held in March or April of 2016, after the 2016 Session adjourns.

There being no further business, the meeting was adjourned.

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