

Virginia Freedom of Information Advisory Council  
Records Subcommittee  
November 18, 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 sixth meeting of the 2015 Interim on November 18, 2015, to continue the three-year study of FOIA directed by House Joint Resolution No. 96 (HJR 96). All Subcommittee members were present.

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). This public safety consolidation draft had been presented at the October 7, 2015 Subcommittee meeting but the Subcommittee deferred consideration to give interested parties more time to consider it. Dave Ress, a reporter with the Daily Press, noted that language stating that the exemption does not prohibit disclosure should be changed to state that it does not authorize withholding, because FOIA generally does not prohibit disclosure. David Lacey, speaking for the Virginia Press Association (VPA), pointed out additional old language that needed to be fixed. Staff noted that the change from "shall not prohibit the disclosure" to "shall not authorize the withholding" needs to be a global change in FOIA as similar language appears in many exemptions. The Subcommittee voted unanimously in favor of this global change. Dan Wilson of the Virginia State Police recommended adding the term "transmitter sites" to the exemption for STARS and similar communications systems. The Subcommittee directed staff to prepare a new draft reflecting these changes for consideration at its next meeting.

Next the Subcommittee heard about the progress of the Proprietary Records Work Group from staff, Ginger Stanley of the VPA, and Phil Abraham of the Vectre Corporation. They stated that the work group had by consensus agreed that certain exemptions should not be affected if a generic exemption for trade secrets is adopted: the exemptions for economic development (subdivision 3 of § 2.2-3705.6), public-private procurement transactions (subdivision 11 of § 2.2-3705.6), and exemptions for certain investment entities such as the Virginia Retirement System (VRS) and the Virginia College Savings Plan (VCSP) (subdivisions 12 and 25 of § 2.2-3705.7). The work group had also agreed to include trade secrets, certain financial records, and other records that affection the competitive position of a private entity within the ambit of a generic exemption. The work group will continue

studying these exemptions next year after the adjournment of the 2016 Session of the General Assembly.

Staff then reported that the DHRM Records Work Group had recommended eliminating subdivision 8 of § 2.2-3705.3, an exemption for certain employment dispute resolution records that is limited to the Department of Human Resource Management (DHRM). The work group had determined that the records exempted are already exempt under the general exemption for personnel records (subdivision 1 of § 2.2-3705.1), making the more specific exemption redundant and unnecessary. The Subcommittee voted unanimously in favor of eliminating this exemption.

The Subcommittee then returned to consideration of certain administrative investigation exemptions begun at its last meeting on October 7, 2015, with discussion of the following exemptions:

Certain audit investigation records - § 2.2-3705.3(7). Without objection, the Subcommittee again 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 were working on a proposal that addresses 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). As stated above, the Subcommittee recommended striking this 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). At its last meeting the Subcommittee heard from interested parties that this exemption is used often in situations involving feuding neighbors, but others stated they felt it was inappropriate because one should have a right to confront someone making a complaint. At that time the Subcommittee deferred it for further consideration. Having had time to consider it, the Subcommittee did not recommend any changes to 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). At its last meeting on October 7, the Subcommittee had heard from 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), regarding both of these exemptions. At that meeting, 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 (this same issue was noted regarding the public safety consolidation draft above). The Subcommittee had voted unanimously to have staff prepare a

draft correcting this language in both exemptions. Staff presented that draft today, and the Subcommittee recommended adopting it.

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 (subdivision 34 of that section). The new exemption had been considered by the Subcommittee at previous meetings and concern was expressed that it provides a record exemption to cover marketing and operational strategies that are not yet known for an agency that does not yet exist. Staff presented a comparison chart comparing this new ABC exemption to existing exemptions for proprietary records, trade secrets, financial records, cost estimates, marketing and operational strategies, and other "earmarking" provisions for designating which records are to be protected. Considering that the need for this exemption is only speculative at this time, and noting that this exemption or one like it may be added if the need arises, the Subcommittee voted unanimously to strike this exemption.

SB 1166 (Hanger) - Public service corporations; access to public records. Makes a public service corporation subject to the public records provisions of FOIA 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. Lacey stated that VPA does not favor recommending this bill. Mr. Ress expressed that an entity exercising the power of eminent domain should be treated as a public body, and that he would like to hear from the State Corporation Commission (SCC). Megan Rhyne of the Virginia Coalition for Open Government (VCOG) spoke in favor of the bill, stating that records concerning the power of eminent domain should be open to the public. She also noted that concerns had been expressed at the committee level over unintended consequences and that the bill may cover too much. Mr. Abraham stated that the bill needs a lot of work. Mr. Ashby stated that he understands and supports the concept behind the bill. The Subcommittee voted unanimously to recommend no action be taken on the bill.

The Subcommittee then asked for any public comment. Mr. Ashby referred to an editorial that appeared in the Daily Press that was critical of the FOIA Council's study of FOIA under HJR No. 96. Noting that he did not mean his comments to be taken negatively toward Mr. Ress or Ms. Porto, Mr. Ashby stated that since the Subcommittee started this process it has been open and collaborative. He pointed out that the Subcommittee has deferred consideration of exemptions to allow parties to do more research and to give a "fair shake" to all involved. He concluded that the editorial's insinuation that the Subcommittee is "spineless" is unfair.

The Subcommittee directed staff to poll members for a date for its next meeting, to try for the first week in April, 2016 (after the 2016 Session of the General Assembly adjourns). There being no further business at this time, the meeting was adjourned.

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