



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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July 20, 2016

10:30 AM

House Room C

General Assembly Building, Richmond, Virginia

Meeting of the RECORDS Subcommittee of the FOIA Council

Proposed Agenda

1. Call to order and introduction of subcommittee members.
2. Continue implementation of subcommittee work plan: old business. *The following agenda items are carried over from the last meeting of the Subcommittee:*
 - Comparison draft re: public safety exemptions. *Last year the Subcommittee considered a draft prepared by staff based on a chart comparing several 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). The draft was written to consolidate similar language and eliminate redundancies. At its last meeting the Subcommittee stated that it would like to hear from representatives of the Secretariat of Public Safety and Homeland Security before making a recommendation.*

Homeland Safety and Resilience Staff Director Shawn Talmadge has been invited to address the Subcommittee.
 - Letters of recommendation/personnel records - update. *The Subcommittee previously identified a discrepancy between the way letters of recommendation are treated in regard to students or employees of educational agencies or institutions (subdivision 2 of § 2.2-3705.4), other public employees under the personnel records exemption (subdivision 1 of § 2.2-3705.1), and all data subjects under the Government Data Collection and Dissemination Practices Act (subsection B of § 2.2-3806). The Subcommittee directed staff to prepare a draft that would reconcile these provisions such that letters of recommendation would be exempt from mandatory disclosure in all cases. The Subcommittee also directed staff to prepare a definition of "personnel records."*

After discussion of the draft and suggestions from interested parties at its last meeting, the Subcommittee directed staff and interested parties to meet as a workgroup to discuss these issues in greater depth and report back to the Subcommittee. The workgroup met on July 14, 2016 and plans to meet again.

- *Global language change - update. Last year the Subcommittee recommended replacing language that appears in multiple existing exemptions that states that "nothing ... shall prohibit" disclosure or release of records. Recognizing that FOIA generally does not prohibit release, the Subcommittee recommended replacing that phrasing with language stating that "nothing ... shall authorize withholding" or other language indicating an affirmative duty to disclose. However, it has come to the attention of staff that such a global change may have unintended consequences, and therefore reconsideration of this recommendation is necessary. The Subcommittee at its last meeting asked staff to contact agencies whose exclusions have been affected by these changes so that the Subcommittee might hear directly from them. Staff has sent a letter to the affected agencies asking for responses by July 29, 2016.*
3. Bills referred for study from the 2017 Session of the General Assembly. *The following bills were referred for study from the 2017 Session of the General Assembly to the FOIA Council, which referred them to the Subcommittee for its consideration in conjunction with the HJR No. 96 study:*
- **HB 280** Marshall RG-- any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under the Virginia Freedom of Information Act.
NOTE: HB 280 would amend § 15.2-2259.
 - **HB 281** Marshall, RG--Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of the Freedom of Information Act (FOIA) that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body.
NOTE: HB 281 would amend § 2.2-3705.6.
 - **HB 282** Marshal, RG--Requires that a nondisclosure agreement by a public body be approved at an open meeting if it is to serve as the basis for an exclusion from the provisions of the Freedom of Information Act (FOIA) of confidential proprietary records of a private business. Such an approval must be renewed at least every three months at further open meetings if it is to continue to supply the basis for the FOIA exclusion.
NOTE: HB 282 would amend §§ 2.2-3705.6 and 2.2-3711.
 - **HB 383** Marshall, RG--Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of the

Freedom of Information Act (FOIA) that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body and provides that any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA.

NOTE: HB 383 would amend §§ 2.2-3705.6 and 15.2-2259.

4. Continue implementation of subcommittee work plan: *Time permitting, in addition to the exemptions carried over for further study, the remaining sections to be studied at this and future meetings include §§ 2.2-3705.6 (proprietary records and trade secrets), and 2.2-3706 (Disclosure of criminal records; limitations). As you will recall, the Subcommittee last year asked staff and interested parties to meet as a work group to discuss the proprietary records and trade secrets exemptions, with the goal of drafting one or more general exemptions for these types of records. The Proprietary Records Work Group met four times in 2015 and once in 2016 to consider the issues involved and reviewed several draft proposals, but did not reach consensus on a recommendation for any new draft(s). At its last meeting, the Work Group recommended returning the subject matter to the Subcommittee for review of the exemptions one-by-one. It is suggested that the Subcommittee begin by considering the exemptions that are of general application and not necessarily limited to a specific public body:*

- *Financial statements not publicly available filed with applications for industrial development financings (§ 2.2-3705.6(2));*
- *Certain records used for business, trade and tourism development or retention, and certain records related to businesses that are considering locating or expanding in Virginia (§ 2.2-3705.6(3));*
- *Certain records relating to the Virginia Public Procurement Act (§ 2.2-3705.6(10));*
- *Certain records relating to the Public-Private Transportation Act of 1995 or the Public Private Education Facilities and Infrastructure Act of 2002 (§ 2.2-3705.6(11));*
- *Certain records relating to the grant of public utilities and other service franchises by localities (§ 2.2-3705.6 (13));*
- *Certain records relating to the provision of telecommunications and cable television services by localities (§ 2.2-3705.6(18)); and*
- *Certain records relating to the provision of qualifying communication services under the Virginia Wireless Service Authorities Act.*

It is suggested that the Subcommittee take up the other exemptions in this section (those that apply to named public bodies) at its next meeting. Representatives of the affected public bodies will be invited to attend.

5. Public Comment.

6. Discussion.

7. Future meeting dates. *Reminder: We need to set meeting dates for August, September, and October. Please bring your calendars. Please note that Delegate LeMunyon has directed the Subcommittees to complete their work before the October 17, 2016 meeting of the FOIA Council.*
8. Adjournment.

Subcommittee Members

Christopher Ashby, Chair
Ed Jones, Vice-Chair
Stephanie Hamlett

Shawri King-Casey
Marisa Porto
Mark Vucci

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