



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

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August 18, 2016

10:00 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. Bills referred for study from the 2017 Session of the General Assembly. *The bills listed below 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. Delegate Marshall, the patron of these bills, has been invited to address them. A representative of Prince William County has also been invited to help provide background information relevant to the bills.*
  - **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.*

3. 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. Homeland Safety and Resilience Staff Director Shawn Talmadge was present at the last meeting of the Subcommittee, but asked to defer further consideration in order to consult with legal counsel.*
- 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 and August 4, 2016, and will meet again on September 7, 2016 to complete its work for the year.*
- Global language change. *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. Staff will provide a summary of the agency responses.*

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. At its meeting on July 20, 2016, the Subcommittee begin by considering the exclusions in § 2.2-3705.6 that are of general application and not necessarily limited to a specific public body, but deferred making any recommendations. The Subcommittee directed staff to invite representatives from agencies with exclusions in § 2.2-3705.6. It is anticipated that some agency representatives will be present at this meeting, but others who are unable to attend have submitted written comments instead. Additionally, one provision from § 2.2-3705.1 concerning "vendor proprietary information software" had also been deferred to be considered with other proprietary record exclusions. Therefore the following 29 exclusions are to be considered at today's meeting:*

- *Vendor proprietary information software (§ 2.2-3705.1(6));*
- *Certain proprietary information gathered by or for the Virginia Port Authority (§ 2.2-3705.6(1));*
- *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));*
- *Information that was filed as confidential under the Toxic Substances Information Act, as such Act existed prior to July 1, 1992 (§ 2.2-3705.6(4));*
- *Certain fisheries data that would permit identification of any person or vessel, except when required by court order (§ 2.2-3705.6(5));*
- *Certain information provided to the Department of Rail and Public Transportation that is exempt under certain federal laws (§ 2.2-3705.6(6));*

- *Certain proprietary information related to inventory and sales voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy (§ 2.2-3705.6(7));*
- *Certain confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee (§ 2.2-3705.6(8));*
- *Certain information provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance if disclosure is exempt under certain federal laws (§ 2.2-3705.6(9));*
- *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 confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity pursuant to a promise of confidentiality to the Virginia Resources Authority (§ 2.2-3705.6(12));*
- *Certain records relating to the grant of public utilities and other service franchises by localities (§ 2.2-3705.6 (13));*
- *Certain information of a proprietary nature furnished by a supplier of charitable gaming supplies to the Department of Agriculture and Consumer Services (§ 2.2-3705.6(14));*
- *Certain information related to Virginia apple producer sales provided to the Virginia State Apple Board (§ 2.2-3705.6(15));*
- *Certain trade secrets submitted by CMRS providers to the Wireless Carrier E-911 Cost Recovery Subcommittee relating to the provision of wireless E-911 service (§ 2.2-3705.6(16));*
- *Certain information relating to a grant or loan application, or accompanying a grant or loan application, to the Innovation and Entrepreneurship Investment Authority or to the Commonwealth Health Research Board (§ 2.2-3705.6(17));*
- *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 (§ 2.2-3705.6(19));*
- *Certain trade secrets or financial information of a business that are not generally available to the public through regulatory disclosure or otherwise provided to the Department of Small Business and Supplier Diversity (§ 2.2-3705.6(20));*
- *Certain information of a proprietary or confidential nature disclosed by a carrier to the State Health Commissioner (§ 2.2-3705.6(21));*
- *Certain trade secrets including, but not limited to, financial information, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, and revenue*

*and cost projections supplied by a private or nongovernmental entity to the State Inspector General (§ 2.2-3705.6(22));*

- *Certain information relating to a grant application, or accompanying a grant application, submitted to the Tobacco Region Revitalization Commission (§ 2.2-3705.6(23));*
- *Certain information held by or provided to the Commercial Space Flight Authority (§ 2.2-3705.6(24));*
- *Certain information of a proprietary nature 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 (§ 2.2-3705.6(25));*
- *Certain trade secrets provided to the Department of Environmental Quality (§ 2.2-3705.6(26));*
- *Certain information of a proprietary nature furnished by a licensed public-use airport to the Department of Aviation (§ 2.2-3705.6(27));*
- *Certain records submitted as a grant or loan application, or accompanying a grant or loan application, for an award from the Virginia Research Investment Fund (§ 2.2-3705.6(28));*

5. Public Comment.

6. Discussion.

7. Future meeting dates. *Reminder: The next Subcommittee meeting will be held at 10:00 AM on Thursday, September 8, 2016 in House Room C. Please note that Delegate LeMunyon has directed the Subcommittees to complete their work before the Monday, October 17, 2016 meeting of the FOIA Council. Please bring your calendars.*

8. Adjournment.

### **Subcommittee Members**

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

**Shawri King-Casey**  
**Marisa Porto**  
**Mark Vucci**

The FOIA Council's web site is: <http://foiacouncil.dls.virginia.gov/>. To assist us in providing Internet dissemination of materials, presenters are requested to submit written comments and handouts in electronic format by (i) e-mail to staff prior to meetings or (ii) diskette furnished to staff at meetings. Presenters are also requested to bring 20 copies of their remarks or handouts to meetings. These copies will be provided to FOIA Council Subcommittee members and the public.

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