



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

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September 29, 2016

10:00 AM

House Room D

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:*
  - Audit exemption--2.2-3705.3 (7). *At the Subcommittee's April meeting certain interested parties representing the Auditor of Public Accounts, the Office of the State Inspector General, and the Joint Legislative Audit and Review Committee indicated that they were not sure that the language of the current exemption accurately covered the activities of their agencies. Representatives of these agencies have submitted a draft proposal to the Subcommittee for consideration. The proposed draft would remove these three agencies from the existing exemption (but leave the exemption in place as it also applies to other public bodies) and create a new, separate exemption to address records of these three agencies.*
  - Letters of recommendation/personnel records - *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, August 4, and September 7, 2016 but concluded it*

would not be able to reach agreement on a definition at this time. The Subcommittee has not yet taken action on the draft prepared by staff.

- 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 again contact agencies whose exclusions have been affected by these changes so that the Subcommittee might hear directly from them. Staff has sent a second letter to the affected agencies asking for responses by September 28, 2016. Staff will provide a summary of the agency responses at the September 29, 2016 of the Records Subcommittee.
- Review of § 2.2-3701--Definition of "public record." As a reminder, at its last meeting the Subcommittee recommended deleting the following language from the current definition: "Records that are not prepared for or used in the transaction of public business are not public records." This language was added in 2011 as a clarification of existing law, but experience has shown it to have had unintended consequences.
- Review of § 2.2-3704-- Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc. As a reminder, the Subcommittee began consideration of this section at its last meeting by spotting issues of concern.
- Review of § 2.2-3706--Disclosure of criminal records; limitations. As a reminder, this section was the subject of review by the Criminal Records Subcommittee from 2010 through 2012, which resulted in clarifying legislation passed by the 2013 Session of the General Assembly as a recommendation of the FOIA Council (SB 1264). At its last meeting the Subcommittee began consideration of this section, identifying the treatment of criminal investigative files as the main issue of concern. A comparison was made between Virginia's treatment of information from the Virginia Tech shooting in 2007 and the Sandy Hook Elementary School shooting in Connecticut in 2012. The Subcommittee asked staff to report back with more information regarding Connecticut's treatment of such criminal records information.

3. Public Comment.

4. Discussion.

5. Future meeting dates. *Reminder: Today's meeting is the last scheduled Subcommittee meeting for 2016. Please note that Delegate LeMunyon has directed the Subcommittees to complete their work before the Monday, October 17, 2016 meeting of the FOIA Council.*
6. 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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