

Maria:

This is in response to your memo dated July 8, 2016, concerning the provisions of HB817 of 2016. Thank you for giving the Virginia Department of Health (VDH) the opportunity to provide input concerning the impact of this legislation on certain FOIA exemptions applicable to VDH records.

It is my understanding that the primary objective of HB817 was to specify in the FOIA statute that a public body is not authorized to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by a FOIA exemption or by some other provision of law. Based on my review of your memo, it is my further understanding that, in seeking to apply that general provision to the various sections of the FOIA statute, unintended consequences have resulted. Specifically, where FOIA used to “not prohibit” disclosure of a record even though there is an applicable exemption, the statute now – in numerous sections – states that a public body is “not authorized to withhold” a public record even though there is an applicable exemption.

I appreciate the statement in your memo that “[t]here was no intent to change what was exempt, but upon reflection, it appears that a substantive change may have occurred that would require the release of certain reports and/or documents effective July 1, 2016.” VDH concurs with your assessment.

VDH has reviewed HB817 in its entirety. In addition to the amendments in the specific sections that you identified [i.e., §§2.2-3705.2(2), 2.2-3705.2(15), and 2.2-3705.5(17)], VDH believes the following additional amendments made by the legislation may also negatively impact how VDH applies the pertinent FOIA exemption:

- § 2.2-3705.1(1) – Personnel records;
- § 2.2-3705.1(9) – Investigation of a claim or potential claim against a public body’s insurance policy or self-insurance plan;
- § 2.2-3705.2(2) – Information contained in inspection drawings and plans that reveal critical structural components, security equipment and systems;
- § 2.2-3705.2(4) – Information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event;
- § 2.2-3705.3(3) – Investigator notes furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to DHRM;
- § 2.2-3705.3(5) – Investigative notes furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory process under the Virginia Human Rights Act; and
- § 2.2-3705.3(8) – Information furnished in confidence to DHRM with respect to an investigation, consultation or mediation.

Please note that, in conjunction with the Office of the Attorney General, VDH conducts annual FOIA training for its staff. It has never been the policy or practice of VDH to withhold an entire document solely on the grounds that some portion of the document is exempt from FOIA.

I understand from your memo that the FOIA Advisory Council is interested in fixing any unintended consequences that may have resulted from the enactment of HB817. Please let me know if VDH can be of any further assistance to the Council in its efforts to make the necessary corrections.

Sincerely,

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