

Virginia Freedom of Information Advisory Council  
Records Subcommittee  
April 11, 2016  
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 second meeting of the 2016 Interim on May 9, 2015, to continue the three-year study of FOIA directed by House Joint Resolution No. 96 (HJR 96). Subcommittee members Mr. Ashby (Vice-Chair), Ms. Hamlett, Mr. Jones, Ms. Porto, and Mr. Vucci were present; Ms. King-Casey was absent.

After members introduced themselves, the Subcommittee elected Mr. Ashby as Chair and Mr. Jones as Vice-Chair. Staff then described the provisions of the "consolidation draft" which amends four current public safety exemptions that use very similar language. This draft was first presented last year, but the Subcommittee has not yet taken action on it. The Subcommittee directed staff to keep the draft posted on the FOIA Council website, and that if there was no objection, then the Subcommittee would recommend the draft at its next meeting.

Next, the Subcommittee heard from Staci Henshaw with the Auditor of Public Accounts (APA) regarding the audit investigations exemption, subdivision 7 of § 2.2-3705.3. Ms. Henshaw informed the Subcommittee that after speaking to other public bodies listed in the exemption it became apparent that in order to clarify the exemption, it would be necessary to separate the existing exemption into multiple exemptions. She indicated that this separation would be needed because of the different tasks and functions performed by the various public bodies currently covered. June Jennings, the State Inspector General, agreed, noting that careful consideration would be needed due to the different missions performed by different entities. Hal Greer of the Joint Legislative Audit and Review Commission (JLARC) agreed that the existing language could be improved. In further discussion it was suggested that the three state agencies mentioned might work together, but local auditors and auditors working in the higher education context might have different concerns. Ms. Porto asked why certain audits would be exempt. Ms. Henshaw replied with examples such as incidents of fraud, following rules of evidence, protecting the identity of people coming forward, that regular audits may change to something else (i.e. fraud or criminal investigations) as information is uncovered, and that APA only wishes to put out good information rather than preliminary information that may be subject to change. Mr. Greer also noted that JLARC often conducts performance reviews, which are not necessarily "investigations," and that the exemption language should better reflect what the agencies actually do. The Subcommittee directed staff and interested parties to further discuss this exemption in a work group and report back.

Next, staff reported that the proprietary records work group had met on June 18, July 21, August 18, and November 10, 2015, and again on March 24, 2016. As a reminder, the Subcommittee directed staff to meet with interested parties as a proprietary records work group to study the various exemptions for proprietary records and trade secrets in § 2.2-3705.6 and elsewhere in FOIA. It was suggested that the many specific exemptions in current law for various types of records containing trade secrets and proprietary information might be consolidated into one or more exemptions of general application. The work group considered several drafts but did not reach consensus on a recommendation. At its most recent meeting the work group determined it was unlikely to reach consensus on a recommendation, and therefore recommended that the Subcommittee take up the various proprietary records and trade secrets exemptions for consideration one-by-one, in the same manner as it has studied all of the other exemptions to date. It was further suggested that these exemptions be considered later this summer so that all affected agencies may be contacted. As part of its work plan, the Subcommittee agreed to continue going through the exemptions in numerical order, including the exemptions for proprietary records and trade secrets.

The Subcommittee then turned to new business, the consideration of the various education-related records exemptions in § 2.2-3705.4. The Subcommittee considered the exemptions in numerical order. Staff provided a brief legislative history of each exemption as it was brought up before the Subcommittee. The Subcommittee confirmed that it would continue to follow its standard procedure thus far: if there were no comments about an exemption or proposed amendments, the Subcommittee would recommend no changes to that exemption.

Subdivision 1 of § 2.2-3705.4, the scholastic records exemption, was enacted as part of the original FOIA in 1968, and has been amended several times since. This exemption both protects privacy and guarantees access to students' own records, either to the student or to the student's parents or guardians. There were no comments about this exemption.

Subdivision 2 of § 2.2-3705.4 provides an exemption for certain confidential statements & letters of recommendation held by educational institutions. This exemption was enacted in 1975 and amended in 2014. Roger Wiley, an attorney representing several local government bodies, pointed out that all public bodies should be treated the same way, and in his opinion there should be no access to letters of recommendation in the employment context. In further discussion it was noted that generally public employees have the right to see their own personnel records, which may include letters of recommendation, as opined in Freedom of Information Advisory Opinion 03 (2005). Additionally, the Government Data Collection And Dissemination Practices Act (GDCDPA) treats these records differently, by stating in subsection B of § 2.2-3806 that "nothing in this chapter shall be construed to require an agency to disseminate any recommendation or letter of reference from or to a third party that is a part of the personnel file of any data subject." The Subcommittee directed staff to prepare a draft to reconcile these various provisions for consideration at the next meeting.

Subdivision 3 of § 2.2-3705.4 was enacted in 2006 to exempt from mandatory disclosure certain records of the Brown v. Board of Education Scholarship Committee. There were no comments about this exemption.

Subdivision 4 of § 2.2-3705.4 was enacted in 1982 and amended in 1984. It exempts certain proprietary records concerning study or research on medical, scientific, technical, or scholarly issues. The Supreme Court of Virginia recently addressed this exemption in detail in the case *American Tradition Institute v. Record and Visitors of the University of Virginia*, 287 Va. 330, 756 S.E.2d 435 (2014). There were no comments about this exemption.

Subdivision 5 of § 2.2-3705.4 was enacted in 1996 and amended in 2002 to exempt from mandatory disclosure certain records of the University of Virginia or the University of Virginia Medical Center or Eastern Virginia Medical School regarding proprietary, business-related information. Sally Barber of the University of Virginia (UVA) stated that UVA is actually comprised of three agencies, the academic university in Charlottesville, the Medical Center, and UVA-Wise. She informed the Subcommittee that the Medical Center has "codified autonomy" and competes with private businesses. She also pointed out that the records exemption uses language almost identical to the meetings exemption (subdivision A 22 of § 2.2-3711), which has already been recommended without change by the Meetings Subcommittee. She asked that the records exemption also remain unchanged. There were no further comments about this exemption.

Subdivision 6 of § 2.2-3705.4 was enacted in 1997 and amended in 1999 and 2000. It exempts certain personal information provided to the Virginia College Savings Plan (VCSP). Chris McGee of VCSP stated that the exemption currently speaks to account owners, but VCSP also has similar types of personal information for beneficiaries (i.e. children), authorized individuals (usually an adult who is not an account owner, such as a spouse or grandparent), and designated survivors. He asked that the exemption be amended to protect the personal information of these individuals as well. There were no further comments on this exemption. The Subcommittee directed staff to prepare a draft as described for the Subcommittee's consideration at its next meeting.

Subdivision 7 of § 2.2-3705.4 was enacted in 2008 to exempt certain fundraising records concerning identifiable or prospective donors to public institutions of higher education. Kathryn Jarvis of UVA stated that she was part of the team that crafted this legislation in 2008 working with the Virginia Press Association (VPA). She stated that only 1% of FOIA requests UVA has received concern donor gifts, and that the reasons donors may want anonymity include humility, identity theft, avoiding "spammers," having a child at the university, having been patients at the Medical Center, and other reasons. She told the Subcommittee that since July, 2014 only 1.2% of gifts were made anonymously, for a total of less than 5% of the money coming into UVA, and that UVA wishes to maintain the current exemption. Laura Fornash, also of UVA, added that the Board of Visitors is made aware of any gift over \$10,000, including the identity of the donor. Mr. Jones asked if there were any issues regarding the wording of the exemption, and Ms. Jarvis stated there were not. There were no further comments about this exemption.

Subdivision 8 of § 2.2-3705.4 exempts certain records of threat assessment teams of public institutions of higher education. This exemption was enacted in 2010, and was amended this year so that effective July 1, 2016, the exemption will also apply to threat assessment teams established by local school boards. There were no comments about this exemption.

Mr. Ashby opened the floor to any additional comments from the Subcommittee or the public; there were none. The Subcommittee scheduled its next three meetings to be held at 10:30 AM on Monday, May 9, 10:30 AM on Monday, June 22, and 10:30 AM on Wednesday, July 20, 2016. There being no further business on the agenda, the meeting was then adjourned.

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