

Virginia Freedom of Information Advisory Council
Records Subcommittee
June 1, 2016
10:30 AM
Speaker's Conference Room, Sixth Floor
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its third meeting of the 2016 Interim on June 1, 2016, to continue the three-year study of FOIA directed by House Joint Resolution No. 96 (HJR 96). Subcommittee members Mr. Ashby (Chair), Mr. Jones (Vice-Chair), Ms. King-Casey, Ms. Porto, and Mr. Vucci were present; Ms. Hamlett was absent.

The meeting began with consideration of the public safety consolidation draft, which seeks to reduce or eliminate redundant language used in current subdivisions 2, 4, 6, and 14 of § 2.2-3705.2. This draft has been considered previously by the Subcommittee without a decision whether to recommend it. After staff presented and explained the draft, the Subcommittee discussed some of the technical language used. Dave Ress, a reporter with the Daily Press, asked why things such as records of elevators were protected when they would be visible in the building itself and in building plans. He also asked what is different about "cybersecurity" as opposed to terrorist response plans. Staff replied that cybersecurity has to do with access codes, and noted that exemption (4) regarding terrorist response plans was originally enacted after 9/11. Tom Lambert of the Virginia State Police related that what needs to be protected includes records that would reveal things such as how to shut a building down and trap people inside. Ms. Porto noted that some of these things might already be public in other venues, such as building plans for private and commercial buildings. She noted that it made no sense to exempt items already public elsewhere, but that she was not suggesting to make public records that are not already public. Mr. Jones asked staff to have someone from the Secretariat of Public Safety and Homeland Security speak to the Subcommittee about these issues. Ginger Stanley of the Virginia Press Association (VPA) observed that this exemption was passed after 9/11 and that having had years of experience with it now it is appropriate to consider if it needs to stay as broad as it is. Noting the provision concerning the release of records after a catastrophic event such as a fire, Mr. Ashby asked how that release works in practice. Ms. Stanley, Dick Hammerstrom (formerly an editor with the Free Lance-Star), and staff related examples such as buildings which had caught fire where inspection reports and other records were released after the catastrophic events had occurred. After further discussion the Subcommittee members indicated they would like to hear from a representative of the Secretary of Public Safety and Homeland Security before making a recommendation on this draft.

The Subcommittee next considered the draft prepared regarding letters of recommendation. At its last meeting the Subcommittee 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. Michelle Gowdy of the Virginia Municipal League (VML) stated that the draft would encourage people to be honest and frank when making recommendations, which they would not be if they knew the subject of the letters would be able to read them. Ms. Porto reminded all present of the purpose of the study in the context of openness versus privacy, noting that the purpose was not "to keep stupid in the room" because one may be afraid of what the public might think. Mr. Ress raised the issue that "personnel record" is not defined in the law and that there seemed to be a fundamental flaw in confusing what is personal with what is personnel. David Lacy, representing the VPA, indicated that he shared this concern and also noted that the writer of a recommendation letter would not be the custodian of it, and since the custodian would have discretion to release personnel records, such letters might be released even if they were exempt. After further discussion among the members and interested parties, Megan Rhyne of the Virginia Coalition for Open Government (VCOG) informed the Subcommittee that about half of other states do not define personnel records, and of the rest that do define the term, some do so by saying what is exempt, and others do so by saying what is not exempt. She also informed the Subcommittee that many use a test to weigh the public interest and right to know against protecting the privacy of the subject of personnel records. The Subcommittee then directed staff to amend the draft for further consideration at the next meeting.

The Subcommittee then considered the draft excluding from mandatory disclosure certain personal information held by the Virginia College Savings Plan (VCSP). At the last Subcommittee meeting Chris McGee of VCSP stated that the current exemption (subdivision 6 of § 2.2-3705.4) addresses personal information of account holders, but VCSP also has personal information of beneficiaries, authorized individuals, and designated survivors. The Subcommittee directed staff to prepare a draft adding these individuals to the existing exemption. Mr. McGee stated that the purpose of the amendment is to make clear that personal information from all of these individuals is protected, particular in light of concerns about identity theft. There were no additional comments from the Subcommittee or the public. The Subcommittee voted unanimously to recommend the draft.

The next topic for consideration was the global language change found in House Bill 817 (2016), which goes into effect July 1, 2016. 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. Staff observed that in some instances the prior language ("nothing...shall prohibit") could be interpreted to mean that the public body can release

certain records, but does not have to do so, whereas the new language requires release. For some exemptions this change does not appear to cause any issues, but for others it might. Ms. Rhyne stated that it had always been her understanding that the prior language meant that records must be released. Phyllis Errico of the Virginia Association of Counties (VACo) stated that she would like more research regarding any unintended substantive changes. The Subcommittee decided to revisit this topic at its next meeting.

The Subcommittee then turned to consideration of the exclusions set out in § 2.2-3705.5 addressing health and social services records. Staff provided a brief legislative history of each exclusion and noted that most of these exclusions were cross-references to other provisions of law outside FOIA that made the records either exempt from mandatory release or prohibited from disclosure. Following its established practice, the Subcommittee considered each exclusion in turn and if no comment was made, then no changes would be recommended to that exclusion.

Subdivision 1 of § 2.2-3705.5 is the general exclusion for health records, and it cross-references Code § 32.1-127.1:03 outside of FOIA. There were no comments or recommendations for change regarding this exemption.

Subdivision 2 of § 2.2-3705.5 excludes from mandatory disclosure certain exam or licensure applications and scoring records maintained by the Department of Health Professions (DHP). Ms. Rhyne pointed out that the second sentence of the exemption is duplicative of the procedures for requesting records and charging for costs set out in § 2.2-3704. The Subcommittee voted unanimously to eliminate this duplicative language from the exemption.

Subdivision 3 of § 2.2-3705.5 excludes from mandatory disclosure certain records concerning adult services, adult protective services, the Office of the State Long-Term Care Ombudsman, and social services. Staff noted that this exclusion cross-references certain provisions of Title 51.5 and Code § 63.2-104, which is also cross-referenced again in subdivision 14 of § 2.2-3705.5. Mr. Ress noted that the areas covered by the exemption are very broad and shrouded in secrecy. Mr. Ashby agreed, but noted this was not the right forum because these areas were addressed outside FOIA and the Subcommittee was limited to considering FOIA. Ms. Stanley noted there was a time when the General Assembly tried to cross-reference access provisions in FOIA in order to make them easier to find. Staff noted that while some of the relevant provisions in Title 63.2 were cross-referenced in this exclusion and in subdivision 14, there were other access limitations in Title 63.2 that were not cross-referenced in FOIA. Mr. Ress questioned how inconsistent cross-references might be interpreted by a court, and Mr. Jones pointed out that the law loses clarity when it is inconsistent. There was no motion by the Subcommittee at this time.¹

Subdivision 4 of § 2.2-3705.5 excludes from mandatory disclosure certain records furnished to the Department of Social Services or the Office of the Attorney General related to certain investigations or litigation. This exclusion cross-references provisions in Titles 63.2, 8.01,

¹ At this point in the meeting Mr. Ashby had to leave due to another commitment, and passed the gavel to the Vice Chair, Mr. Jones.

and 32.1. There were no comments or recommendations for change regarding this exemption.

Subdivision 5 of § 2.2-3705.5 excludes from mandatory disclosure certain records collected for the designation and verification of trauma centers and other specialty care centers within the Statewide Emergency Medical Services System. There were no comments or recommendations for change regarding this exemption.

Subdivision 6 of § 2.2-3705.5 excludes from mandatory disclosure certain reports and court documents relating to involuntary admission required to be kept confidential pursuant to § 37.2-818. There were no comments or recommendations for change regarding this exemption.

Subdivision 7 of § 2.2-3705.5 excludes from mandatory disclosure certain records formerly required to be submitted to the Commissioner of Health. Joe Hilbert of the Department of Health stated that this exclusion referred to a certificate of public need, but the registration requirement was gone and the records covered had not been used since 1992. The Subcommittee voted unanimously to strike this exclusion.

Subdivision 8 of § 2.2-3705.5 excludes from mandatory disclosure certain information required to be provided to DHP by certain licensees pursuant to § 54.1-2506.1. Dr. David Brown of DHP stated that this exclusion covered workforce data and emergency contact information provided to DHP. In reply to an inquiry from Mr. Lacy, Dr. Brown confirmed that aggregate data would be open, and only individuals' data was excluded. Staff asked whether it might be possible to consolidate subdivisions 2 and 8, as both concerned records held by DHP. After further discussion, the Subcommittee directed staff to prepare such a draft.

Subdivision 9 of § 2.2-3705.5 excludes from mandatory disclosure certain records of a child fatality review team, family violence fatality review team, or adult fatality review team. This subdivision cross-references relevant provisions of Title 32.1. Mr. Ress noted that this exclusion covers very important data that he felt should be public, but he recognized that it was made confidential by provisions outside of FOIA. There were no other comments about this exclusion.

Subdivision 10 of § 2.2-3705.5 excludes from mandatory disclosure certain patient level data collected by the Board of Health and not yet processed, verified, and released, pursuant to § 32.1-276.9. Mr. Ress noted that hospital cost review commission reports used to be open. Ms. Stanley stated that VPA opposed this law when it passed. There were no other comments about this exclusion.

Subdivision 11 of § 2.2-3705.5 excludes from mandatory disclosure certain of the Health Practitioners' Monitoring Program Committee within DHP. The Subcommittee directed staff to incorporate this exclusion with the others concerning DHP, subdivisions 2 and 8.

Subdivision 12 of § 2.2-3705.5 excludes from mandatory disclosure certain grant application records submitted to the Commonwealth Neurotrauma Initiative Advisory Board. There were no comments or suggestions for change regarding this exclusion.

Subdivision 13 of § 2.2-3705.5 excludes from mandatory disclosure certain records copied, recorded or received by the Commissioner of Health in the course of an examination, investigation or review of a managed care health insurance plan licensee. The exclusion cross-references provisions of Title 32.1. Mr. Ress stated that this exclusion covers records of utilization review committees of regulated insurance companies and HMO's, records that are open in other states and he felt should be public, but again he recognized these records are made confidential by other laws outside FOIA and beyond the scope of the Subcommittee's charge to review. Mr. Jones suggested that staff note in the final report for HJR No. 96 the Subcommittee's concern in terms of openness over these provisions that are beyond the scope of this study.

Subdivision 14 of § 2.2-3705.5 excludes from mandatory disclosure certain social services records required to be kept confidential pursuant to §§ 63.2-102 and 63.2-104. Noting the duplication of the cross-reference from subdivision 3 previously discussed, and that there were additional provisions in Title 63.2 that were not cross-referenced, the Subcommittee directed staff to prepare a draft that would reference the relevant chapter in Title 63.2 instead, in order to capture all of the relevant cross-references in one location.

Subdivision 15 of § 2.2-3705.5 excludes from mandatory disclosure certain records of the Prescription Monitoring Program in Title 54.1. The Subcommittee directed staff to add this exclusion in a draft with the others applicable to DHP, subdivisions 2, 8, and 11, already discussed above.

Subdivision 16 of § 2.2-3705.5 excludes from mandatory disclosure records of the Virginia Birth-Related Neurological Injury Compensation Program required to be kept confidential pursuant to § 38.2-5002.2. There were no comments or suggestions for change regarding this exclusion.

Subdivision 17 of § 2.2-3705.5 excludes from mandatory disclosure certain of the State Health Commissioner relating to the health of any person or persons subject to an order of quarantine or an order of isolation with a cross-reference to the relevant provisions of Title 32.1. Mr. Ress observed that this exclusion does not "authorize the withholding of statistical summaries, abstracts, or other information in aggregate form."

Subdivision 18 of § 2.2-3705.5 excludes from mandatory disclosure certain records containing the names, addresses or other contact information of persons receiving transportation services under Title II of the Americans with Disabilities Act, (42 U.S.C. § 12131 et seq.) or funded by Temporary Assistance for Needy Families (TANF) created under § 63.2-600. There were no comments or suggestions for change regarding this exclusion.

Subdivision 19 of § 2.2-3705.5 excludes from mandatory disclosure records of certain health care committees and entities, to the extent that they reveal information that may be withheld from discovery as privileged communications pursuant to § 8.01-581.17. There were no comments or suggestions for change regarding this exclusion.

The Subcommittee asked if anyone wished to make any public comment. There was no further comment and the meeting was then adjourned. The next meeting of the Subcommittee is scheduled to be held at 10:30 AM on Wednesday, June 1, 2016.

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