

Virginia Freedom of Information Advisory Council
Records Subcommittee
June 23, 2016
1:30 PM
House Room D
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its fourth meeting of the 2016 Interim on June 23, 2016, to continue the three-year study of FOIA directed by House Joint Resolution No. 96 (HJR 96). Subcommittee members Mr. Ashby (Chair), Ms. King-Casey, Ms. Porto, and Mr. Vucci were present; Mr. Jones (Vice-Chair) and Ms. Hamlett were absent.

The meeting began with consideration of a draft that would make several amendments to current Code § 2.2-3705.5 as discussed by the Subcommittee at its last meeting.¹ Those changes include consolidating the various exclusions applicable to the Department of Health Professions (DHP) into one subdivision; clarifying a reference to social services laws outside FOIA that prohibit the release of certain records and striking a redundant reference to the same law in a different exemption; and striking an exemption for certain records regarding certificates of public need under a law that was repealed in 1992. Members of the Subcommittee, staff, Lisa Hahn of DHP, and Dave Ress, a reporter with the Daily Press, discussed the changes regarding DHP's exclusions and confirmed that they were meant to consolidate them into one area of the law, not to expand them or make other substantive changes. The Subcommittee then voted unanimously to recommend the draft to the full FOIA Council.

The Subcommittee next considered the public safety consolidation draft originally prepared by staff last year 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). Staff told the Subcommittee that the draft was written to consolidate similar language and eliminate redundancies, and has been updated to reflect changes in the law that will go into effect as of July 1, 2016. The Subcommittee again deferred making a recommendation until it has an opportunity to hear from representatives of the Secretariat of Public Safety and Homeland Security.

The Subcommittee then considered a draft prepared by staff addressing the treatment of letters of recommendation. Previously 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

¹ Legislative Draft LD 171000067D.

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." Staff noted that the definition in the draft was a combination of language from many sources and likely would need refining, but was presented in order to array options for discussion. Mr. Ress observed that the personnel exemption in current law is very broad and that defining "personnel records" presents a challenge in balancing privacy rights with the public interest in knowing how well public officials and employees do their jobs. He suggested that personal information of public officials and employees should be protected, but job-related information concerning performance, evaluations, termination, and other issues should be made public. Ms. Porto stated she had experience in other states such as Florida where one could get copies of records such as resumes or applications for the top director job in a city. She also questioned the balance when some information being kept private under law is already in the public domain through social media. David Lacy, Esq., representing the Virginia Press Association (VPA), reiterated the prior points about balance and stated that under current law if a public body does not want records to come out, they will withhold it as a personnel record if it even mentions an employee. He suggested that the draft language was too broad in this regard. Looking at an alternative proposed by the Department of Human Resource Management (DHRM), Mr. Lacy also stated that the draft language presented by DHRM was also too broad. Cindy Wilkinson of the Virginia Retirement System (VRS) noted that VRS' records included not only retirees, but over 650,000 individuals, with very broad types of information including divorce, beneficiary, optional life benefits, potentially vulnerable populations, disability, and survivor information. Mr. Ashby expressed concern that more work needs to be done and suggested a work group of staff and interested parties get together to try to work on language. The Subcommittee, interested parties and staff agreed.

The Subcommittee next considered the global language change effected by HB 817 (2016) and SB 494 (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. The Subcommittee at its last meeting asked staff to research any prior opinions interpreting this language. Staff described the issue using the "risk management" exemption, subdivision 9 of § 2.2-3705.1, as an example. The previous version of the exemption stated that "nothing in this subdivision shall prohibit the disclosure of information taken from inactive reports upon expiration of the period of limitations for the filing of a civil suit." The current language, as amended by HB 817/SB 494, states that "nothing in this subdivision shall authorize the withholding of information taken from inactive reports upon expiration of the period of limitations for the filing of a civil suit." Mr. Ress noted that all of the FOIA exemptions affected still have prefatory language granting

the custodian discretion to release exempt records, but the amended language here appears to require release, which is confusing when read together. The Subcommittee discussed the language and indicated it would like to hear from the agencies whose exemptions were affected, and to that end the Subcommittee directed staff to contact those agencies for comment.

The Subcommittee asked if anyone wished to make any public comment, but there was none. The next meeting of the Subcommittee is scheduled to be held at 10:30 AM on Wednesday, July 20, 2016. The Subcommittee directed staff to poll for meeting dates in August and September. The meeting was then adjourned.

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