

Virginia Freedom of Information Advisory Council
Records Subcommittee
July 20, 2016
10:30 AM
House Room C
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its fifth meeting of the 2016 Interim on July 20, 2016, to continue the three-year study of FOIA directed by House Joint Resolution No. 96 (HJR 96). Subcommittee members Mr. Jones (Vice Chair), Ms. Hamlett, Ms. King-Casey, Ms. Porto, and Mr. Vucci were present; Mr. Ashby (Chair) was absent. Mr. Jones acted as Chair in Mr. Ashby's absence.

The meeting began with consideration of 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). The draft was written to consolidate similar language and eliminate redundancies, and has been updated to reflect changes in the law that went into effect as of July 1, 2016. Shawn Talmadge of the Secretariat of Public Safety and Homeland Security addressed the Subcommittee, first noting that SB 645 (2016) had adopted the federal definition of "critical infrastructure" and added a provision for notification of the Secretary if someone requests such records. He stated that his expertise concerned addressing potential threats, and he would be happy to answer the Subcommittee's questions in that area, but he would need more time to consult legal counsel regarding the language of the proposed draft. Mr. Talmadge discussed with the Subcommittee items such as how records about an elevator shaft could pose a threat to safety and concerns regarding what information is already public (i.e. the location of public elevators in government buildings, what floors they reach, etc.) balanced against information that is not readily apparent (control features, whether the elevator is hydraulic or cable-operated, materials used in shaft construction, etc.). He indicated that building plans, for example, contain information that is not readily apparent and could be exploited by someone with nefarious intent. He also discussed coordination between the Secretariat and records custodians, relating an example where the various parties worked together to release information so a requester could be better prepared for an emergency. The Subcommittee deferred further consideration in order for Mr. Talmadge to have an opportunity to consult legal counsel.

The Subcommittee then considered a draft prepared by staff addressing the treatment of letters of recommendation, amended to reflect suggestions made by the work group. 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 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 at its last meeting, the Subcommittee directed staff and interested parties get together as a work group to try to work on language. Staff reported that the work group met on July 14, 2016 and had made some progress toward a definition of "personnel records," but had not reached a final recommendation and planned to meet again. Staff described how the current version of the draft, which was based on language originally suggested by the Department of Human Resource Management (DHRM), incorporated provisions setting out exceptions to the personnel records exemption and drew a distinction between personnel records and administrative investigation records. Staff announced that the work group had scheduled another meeting for August 4, 2016, and all interested parties are welcome to attend and participate. Ms. Porto noted that the question of "payroll" records raises issues where open government folks want information not only about salaries, but also things like liens for child support and whether an employee gets a car or other perks as benefits, whereas the government side wants to withhold information on retirement benefits and employment dispute settlement contracts. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) raised two issues: 1) whether to include dates of employment, and 2) that the definition of "personnel information" in the Government Data Collection and Dissemination Practices Act includes ancestry, which leads to the question of whether it could be used to track back to family members in government or with government contracts. Ms. Porto also reflected on situations where law enforcement officers, teachers, or other public employees were allowed to resign rather than being fired, which allowed those individuals to find positions in other jurisdictions or other states where the prior issues followed them to their new jobs. She noted as an example that some other states made public allegations of sexual misconduct between teachers and underage students. Mr. Jones asked for public comment; there was none.

Agenda item number 3 concerned four bills referred for study from the 2017 Session of the General Assembly to the FOIA Council, which referred them to the Subcommittee for its consideration in conjunction with the HJR No. 96 study. In response to the Subcommittee's inquiry, staff related the understanding that the bills stemmed from requests for certain site plans concerning a data center to be built in Prince William County that were denied as economic development records. The bills addressed access to site plans as well as provisions concerning nondisclosure agreements (NDA's) as summarized below:

- **HB 280** Marshall RG-- any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under the Virginia Freedom of Information Act.
NOTE: HB 280 would amend § 15.2-2259.
- **HB 281** Marshall, RG--Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of the Freedom of

Information Act (FOIA) that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body.

NOTE: HB 281 would amend § 2.2-3705.6.

- **HB 282** Marshal, RG--Requires that a nondisclosure agreement by a public body be approved at an open meeting if it is to serve as the basis for an exclusion from the provisions of the Freedom of Information Act (FOIA) of confidential proprietary records of a private business. Such an approval must be renewed at least every three months at further open meetings if it is to continue to supply the basis for the FOIA exclusion.

NOTE: HB 282 would amend §§ 2.2-3705.6 and 2.2-3711.

- **HB 383** Marshall, RG--Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of the Freedom of Information Act (FOIA) that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body and provides that any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA.

NOTE: HB 383 would amend §§ 2.2-3705.6 and 15.2-2259.

The Subcommittee deferred making any recommendation on the bills because the bills' patron, Delegate Robert G. Marshall, was unable to attend. However, the Subcommittee did take comment from those interested. Ms. Hamlett noted that some of the bills affected the economic development exemptions for both records and meetings, subdivision 3 of § 2.2-3705.6 and subdivision A 40 of § 2.2-3711, respectively. Kara Hart of the Virginia Economic Development Partnership (VEDP) noted that HB 280 was directed only at local government, but the other three bills affected these economic development provisions. She stated that she could not speak for localities, but VEDP gets inquiries daily from national and international businesses and noted that the information they need to share is commercially sensitive to the extent that they often work through consultants without even identifying the name of their businesses. Ms. Hamlett suggested inviting a local representative from Prince William County to speak to the bills as well as re-inviting Delegate Marshall. Mr. Ress observed that the records at issue are applications for site plans and zoning changes that come before public bodies at public hearings after a deal is already made. He stated that secrecy risks having the public body act on something that affects the community without community input or awareness, and traditionally one would go to the planning commission office to see such plans. Roger Wiley, an attorney representing local government and a former FOIA Council member, noted that data centers are huge contributors to the local economy and that the project at issue is larger than usual. He stated that the meetings provisions of HB 282 would cause economic development to grind to a halt by requiring votes of the local governing bodies on NDA's, but the other bills are more in line with what Mr. Ress mentioned as part of the public approval process. Specifically, Mr. Wiley stated that he felt HB 280 was unnecessary as it is already the law,

and that HB 281 and HB 383 would require records to be made public too early in the process, which would damage economic development efforts. Regarding HB 282, Ms. Hart noted that the VEDP Board does not approve NDA's, but instead NDA's are routine matters handled daily by staff. She noted that discussing NDA's at a public meeting would defeat the purpose of having NDA's because it would require public discussion of the proprietary information the NDA's seek to protect. The Subcommittee directed staff to invite Delegate Marshall and representatives of Prince William County to the next Subcommittee meeting.

The Subcommittee then turned to consideration of the exemptions for proprietary records and trade secrets found in § 2.2-3705.6. The Subcommittee last year asked staff and interested parties to meet as a work group to discuss the proprietary records and trade secrets exemptions, with the goal of drafting one or more general exemptions for these types of records. The Proprietary Records Work Group met four times in 2015 and once in 2016 to consider the issues involved and review several draft proposals, but did not reach consensus on a recommendation for any new draft(s). At its last meeting, the Work Group recommended returning the subject matter to the Subcommittee. To begin consideration of these exemptions, staff provided a brief legislative history of the exemptions in § 2.2-3705.6 that are not limited in application to particular public bodies, by subdivision as follows:

- Financial statements not publicly available filed with applications for industrial development financings (§ 2.2-3705.6(2));
- Certain records used for business, trade and tourism development or retention, and certain records related to businesses that are considering locating or expanding in Virginia (§ 2.2-3705.6(3));
- Certain records relating to the Virginia Public Procurement Act (§ 2.2-3705.6(10));
- Certain records relating to the Public-Private Transportation Act of 1995 or the Public Private Education Facilities and Infrastructure Act of 2002 (§ 2.2-3705.6(11));
- Certain records relating to the grant of public utilities and other service franchises by localities (§ 2.2-3705.6 (13));
- Certain records relating to the provision of telecommunications and cable television services by localities (§ 2.2-3705.6(18)); and
- Certain records relating to the provision of qualifying communication services under the Virginia Wireless Service Authorities Act.

Ms. Hamlett noted that regarding subdivision 2, federal tax laws require a government issuer for tax-exempt bonds and that local industrial or economic development authorities act as a pass-through for that purpose. Mr. Jones asked if the work group had had differences of opinion on these exemptions. Staff related that the work group had primarily focused on trying to create a generic exemption for trade secrets, and that agencies that would have been affected did not want to lose their own individualized exemptions. Ms. Porto reminded the Subcommittee that a goal of HJR No. 96 was to simplify FOIA, and to that end it would be useful to have a generic trade secrets exemption. Ms. Hamlett noted it would take longer to reach agreement than the time remaining in the study, because while it

seems intuitive to have one exemption, in practice each of the existing exemptions works differently. Mr. Jones and Ms. King-Casey suggested having the Virginia Press Association (VPA) resubmit its proposal regarding trade secrets, and David Lacy, Esq., agreed on behalf of the VPA. Mr. Lacy also noted the crux of the issue was raised by Justice Mims in his dissent in the case *American Tradition Institute v. Rector and Visitors of the University of Virginia* (2014), that the real problem was that many exemptions use the same terms in different ways and are subject to different interpretations. Mr. Lacy further noted the concerns that in creating a generalized exemption for trade secrets, agencies worry that something currently protected might lose its status, but the idea is not to make any fundamental changes. Phil Abraham of the Vectre Corporation, representing transportation industry clients, stated that the issue goes beyond trade secrets and his clients were concerned over any changes to the exemption regarding records under the Public-Private Transportation Act (PPTA)(subdivision 11). He noted that subdivision 11 worked differently than many other exemptions, particularly by requiring agency review and determination of what records would be protected. He noted that his clients would also oppose the proposal regarding attorney fees in the VPA draft. Robert Bohannon, representing the Virginia Transportation-Construction Alliance, agreed with Mr. Abraham and noted that if existing protections were removed it would have a severe chilling effect on large projects such as those in Hampton Roads. The Subcommittee agreed to invite affected agencies and put this issue on the agenda for the next Subcommittee meeting.

Mr. Jones invited any other public comment, but there was none. The next meeting of the Subcommittee is scheduled to be held at 10:00 AM on Thursday, August 18, 2016. The Subcommittee also set a date to meet at 10:00 AM on Thursday, September 8, 2016. The meeting was then adjourned.

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