

Virginia Freedom of Information Advisory Council
Records Subcommittee
August 18, 2016
10:00 AM
House Room C
General Assembly Building
Richmond, Virginia
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its sixth 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. King-Casey, Ms. Porto, and Mr. Vucci were present; Mr. Ashby (Chair) and Ms. Hamlett were absent. Mr. Jones acted as Chair in Mr. Ashby's absence.

The meeting began with consideration of 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. 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 bills' patron, Delegate Robert G. Marshall, spoke to these bills via speakerphone. He stated as background that there is a controversy over a data center to be built in Haymarket six miles outside the industrial zone, and Virginia Dominion Power has stated it will require a 110 foot high 220 volt power line. He stated that the Board of Supervisors of Prince William County is limited by a nondisclosure agreement (NDA) from stating which business is involved, but there is a high probability that it is Amazon. He said the bills were not to prohibit NDA's or site plans, but to provide access and accountability to the public. He stated that HB 282, regarding meetings, should apply to the governing bodies of localities when discussing economic development that will affect property values. He also related that the State Corporation Commission had recently stated that it favors underground power lines, and that there was a similar problem in Loudoun County. Regarding NDA's, he indicated it was inappropriate for unelected officials to bind elected officials, and that for accountability elected officials should have to vote on NDA's. Jeff Kaczmarek, Executive Director of Economic Development for Prince William County, stated that from an economic development perspective these bills impact sensitive company locations throughout the Commonwealth. He noted the competitive nature of the information technology industry and concerns over sensitive information and cybersecurity, including federal concerns such as military and classified information. He stated that anything beyond the disclosure necessary for good planning harms these operations from a security perspective, and companies choose locations based on risk assessments. He further stated that Virginia is in competition with other states, regions, and countries and needs to have a relationship of trust regarding confidentiality and security in order to compete, which is why companies require NDA's. Mr. Jones asked how other states handle such matters. Mr. Kaczmarek stated that treating records confidentially is taken as a given in the realm of economic development. In response to further inquiry, he stated that companies are aware of open government issues and address them through legal counsel. Delegate Marshall observed that Mr. Kaczmarek did not mention "Amazon" and noted that he was not opposed to the data center, but objected to the overhead power lines outside of the industrial zone. He noted there would be no issue if the data center was in an industrial zone. Delegate Marshall also noted that government must comply with the Constitution and expressed concern over citizens' property rights.

Opening the floor to public comment, Dave Ress, a reporter with the Daily Press, indicated that he has requested building permits and site plans in the past, and the fact that the economic development exemption is so extended to cover such permits and plans shows a real problem. Roger Wiley, Esq., speaking for Loudoun County, stated that there are many data centers in Loudoun County that are great corporate citizens bringing in tax revenue, but they do use a lot of electricity. He indicated the problem is one of timing regarding the release of records during the rezoning process, in that eventually all the records will be made

public, but if released too early they can have an adverse effect on a project. He also observed that while arguments could be made regarding whether a companies' desire for secrecy is rational, it is nevertheless real, especially during the early stages of a project. Sandy McNinch of the Virginia Economic Development Partnership (VEDP) stated that the need to get elected officials' approval on NDA's as proposed would significantly impact the ability to get NDA's and bring companies to a community. She informed the Subcommittee that companies look for reasons to take communities off their list of potential locations, that the VEDP Board meets quarterly, and they cannot tell companies to wait for months for a decision. She stated that staff doing the day-to-day work needs to be able to enter NDA's. Delegate Marshall noted that HB 282, regarding voting on NDA's, would be limited to local governing bodies. Hearing no further public comment, the Subcommittee voted unanimously to send these bills back to the FOIA Council for its consideration, but without a recommendation for action.

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). 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 at its last meeting and again today. He stated that he had reviewed the draft with legal counsel and expressed concern that the exemptions could put the public at risk because they are too specific. He suggested that the exemption should stop trying to list types of exempt information, because the information that needs protection changes. He suggested that the law should exempt any information that if disclosed would pose a risk to the public. He further stated that there should not be a requirement for those submitting records to invoke the exemption and identify which records are to be protected and why. Mr. Talmadge then said custodians should be educated to make informed decisions, and that each agency should define what is critical, developing its policy in conjunction with the Secretariat. He also indicated that the requirement to produce records about the structural or environmental soundness of buildings, and about the performance of buildings after catastrophic events, was too broad, and that information would come out by other means anyway. He acknowledged in response to questions from the Subcommittee that his concerns went beyond the consolidation draft presented to the overall balance between transparency and security. The Subcommittee noted that the draft was meant only to reorganize and consolidate existing law without any substantive changes. David Lacy, Esq., representing the Virginia Press Association (VPA), noted that without the carve-out for catastrophic events, such information about the performance of buildings would not necessarily be made public. Mr. Ress related a recent experience regarding a fire in the Hampton Roads Bridge Tunnel where people had to be evacuated and records were withheld pursuant to current subdivision 6 of § 2.2-3705.6 He noted the clause regarding catastrophic events needed to be in the law in order to get relevant information about what happened. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) agreed

with Mr. Lacy and Mr. Ress. She stated that while there is a level of trust build into FOIA, the recommendation to protect any information that could cause harm goes from trust to blind trust, and is not the direction the law should take. Hearing no further public comment, the Subcommittee voted unanimously to send this draft to the full FOIA Council for its consideration, but without any recommendation for action.

Staff then provided a brief update on the progress of the personnel records work group, which met on July 14 and August 4, 2016, to consider adding a definition of "personnel records" to FOIA. The work group had considered several different approaches and draft proposals, but had yet to reach consensus on moving forward with specific language. The work group plans to meet again at 1:30 PM on September 7, 2016, and all interested parties are invited to attend and participate.

Next, the Subcommittee revisited its recommendation last year to replace 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 contact agencies whose exclusions have been affected by these changes so that the Subcommittee might hear directly from them. Staff sent a letter to the affected agencies asking for responses by July 29, 2016; four agencies had provided written comments in reply, which are posted on the FOIA Council website. Mr. Lacy noted that only one agency had quoted the amended language in its reply, which he felt signaled that any concerns expressed otherwise were merely hypothetical. The Subcommittee deferred further consideration and directed staff to extend the time period for agencies to respond.

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. The Subcommittee began consideration of these issues at its meeting in July, but deferred in order to invite affected agencies to speak to their exemptions.

Anne Pace spoke and submitted written comments¹ on behalf of the Commonwealth Health Research Board (CHRB), and indicated that the CHRB wished to continue its current

¹ In addition to the comments received from various agencies for today's meeting, please note that written comments on the same topics were also submitted to the Proprietary Records Work Group for its meeting on March 24, 2016. All of the written comments received are posted on the FOIA Council website on the 2016 Subcommittees webpage.

exemption for grant applications concerning research-related information (subdivision 17 of § 2.2-3705.6). Speaking to the same exemption, Bob Stolle of the Center for Innovative Technology (CIT), the nonprofit arm of the Innovation and Entrepreneurship Investment Authority (IEIA), stated that they also wished to maintain the current exclusion. He stated that they help companies get products out of the lab and into the marketplace, and that changing the exemption would compromise records and the quality of materials and proposals received. He stated that they tell applicants they will not disclose proposals, and noted that there may also be outside investors and partners who would be affected. In response to a question from Ms. Porto, he said that lists of awardees, the areas involved, and amounts awarded are made public but not the specific technologies.

Julie Grimes of the Office of the State Inspector General (OSIG) stated that OSIG wishes to maintain its current exemption (subdivision 22 of § 2.2-3705.6) for certain records submitted to OSIG, and provided written remarks detailing the reasons (herein incorporated by reference).

Jean Bass of the Virginia Resources Authority (VRA) indicated that VRA wishes to maintain its current exemption (subdivision 12 of § 2.2-3705.6) as VRA is involved with many other agencies and funds, and performs credit review and analysis involving the financial records of private sector parties. VRA also submitted written comments (herein incorporated by reference).

Verniece Love stated that the Department of Small Business and Supplier Diversity (DSBSD) wishes to keep its current exemption (subdivision 20 of § 2.2-3705.6) or businesses would not apply for certification. She said that DSBSD currently certifies approximately 13,000 businesses, and that Governor McAuliffe by Executive Order had ordered 42% utilization of certified businesses. In reply to an inquiry she stated that the categories used for assessments are made public.

Mr. Lacy stated that it sounds like everyone affected will request that their exemptions remain the same. He noted that VPA has submitted a white paper which was included with today's meeting materials, and VPA recognizes the need to protect private entities' trade secrets. However, VPA is concerned about two main points: 1) that the current language is "loose" and subject to varying interpretations as stated by Justice Mims in *American Tradition Institute v. Rector and Visitors of the University of Virginia* (Va. 2014), and 2) that FOIA is being filled in and expanded by adding new exemptions in this section almost every Session of the General Assembly. He went on to state that having a single, uniform exemption could help solve both of these problems, using the definition of "trade secrets" from the Uniform Trade Secrets Act (UTSA). Mr. Lacy also stated that the term "proprietary" does not mean "confidential," but only indicates some ownership interest. He recognized that the VPA proposal does vary regarding attorneys' fees, but stated there is a disconnect in current law where public bodies have to pay attorneys' fees with citizens' tax dollars if they lose even though it is private entities that request secrecy. Additionally, he noted that the proposal recognizes there are occasions when information that does not meet the definition of "trade secrets" would need to be protected, and that is when there should be individual exemptions for such information. In further discussion with Mr. Jones, Mr. Lacy expressed that the

VPA proposal would be a new law, but consistent with current law except for the part about attorneys' fees.

Bethany Thomas of the Department of Rail and Public Transportation (DRPT) spoke to subdivisions 6 and 9 of § 2.2-3705.6. She stated that DRPT was in favor of keeping the exemptions, but recognized redundancies and a need to clean up the language of the exemptions. DRPT submitted written comments on these exemptions to the Proprietary Records Work Group in March, 2016. Ms. Thomas stated that DRPT is not necessarily opposed to the concept of a general exemption for trade secrets, but is focused at this time on amending the existing exemptions in current law.

Joanne Maxwell spoke on behalf of the Virginia Department of Transportation (VDOT), which also submitted written comments. She noted that VDOT had no issues with DRPT's submission in context, but might have some technical tweaks to the proposed language (note that subdivision 9 applies to both DRPT and VDOT). Regarding the exemption for public-private procurement transactions (subdivision 11 of § 2.2-3705.6), Ms. Maxwell stated that the exemption needs to remain as-is, because it was a well negotiated compromise and nothing has changed that would favor amending the exemption. Additionally, she said she was unsure how the VPA draft would interact with other provisions in the Code (such as the procurement laws) and VDOT was concerned there may be unintended consequences. Further, she observed that the VPA proposal would leave out information generated by VDOT that are trade secrets or otherwise critical, which would hinder the agency's ability to negotiate current and future transactions. She stated that VDOT would defer to industry representatives to express private companies' interests in the same exemption. Phil Abraham of the Vectre Corporation spoke on behalf of private companies such as Transurban and others involved in large public-private transportation projects. He noted that the current exemption does not use the terms "proprietary" and "confidential," agency review is required for submitted information to be protected, and that procurement law provides significant opportunities for public input. He stated that the problem with the VPA proposal is it goes beyond current law and the UTSA definition regarding ownership interests. He pointed out that a company may hold information it does not own, lease, or patent, such as alternative technical ideas, that it would still want protected. He also noted that not all information submitted is required to be submitted. Regarding the attorneys' fees provisions, he stated that his clients were concerned about them as proposed, but would not have a problem with being added as a party.

Cindy Wilkinson of the Virginia Retirement System (VRS) stated that VRS has two exemptions in § 2.2-3705.7 and wants to make sure that the proposal for a generalized trade secrets exemption does not inadvertently affect those existing VRS exemptions. Specifically, she informed the Subcommittee that VRS's concerns arose because subdivision 25 b of § 2.2-3705.7 refers to trade secrets and the VPA proposal addresses trade secrets "under this chapter," although the VPA white paper does recognize the different nature of investment exemptions such as those applicable to VRS.

Rob Bohannon representing the Virginia Transportation Construction Alliance echoed the concerns expressed by Ms. Maxwell and Mr. Abraham concerning subdivision 11. He

stated that if current protections were removed it would have a chilling effect on public-private procurement transactions by effectively "giving the playbook out" for such projects.

Sarah McCoy of the Port of Virginia stated that the Port Authority's exemption (subdivision 1 of § 2.2-3705.6) is really a reference to two exemptions in Title 62. She stated that the Port is in regular competition with private ports on the east coast, has a positive impact on jobs and revenue, and needs to be able to preserve confidentiality in order to compete. The Port wishes to keep its exemption as it is.

Chris McGee of the Virginia College Savings Plan (VCSP) echoed the concerns expressed by VRS (subdivision 25 of § 2.2-3705.7 also applies to VCSP). He recognized the appeal and efficiency of having a uniform trade secrets exemption and suggested it deserves further discussion.

Bruce Harper of the Commercial Space Flight Authority (CSFA) stated that a universal trade secrets exemption might work depending on the language, but CSFA has similar concerns as the Port of Virginia regarding competition. CSFA submitted written remarks including an alternative proposal to amend its exemption (subdivision 24 of § 2.2-3705.6).

David Clarke, representing the Virginia Oil and Gas Association, stated that industry regulations were currently under review, will require submission of trade secrets, and that the Association would ask the legislature for an exemption. He supported the concept of a global exemption, noting that any time a new exemption is added it raises public concern. He suggested considering a prospective global exemption rather than one that replaces current exemptions. Regarding VPA's proposal, he said it would need to flesh out the concept of ownership interests, and suggested that courts be allowed to determine who should pay attorneys' fees, and open up a shifting of fees to the requester if it was a frivolous request.

Ms. McNinch stated that VEDP wanted to keep the economic development exemption (subdivision 3 of § 2.2-3705.6) as it is currently, noting that the term "proprietary" is much broader than the definition of "trade secrets." As examples, she noted that the name of a company or how much of a product it sells may need to be protected in some transactions. She also expressed concern about the use of the term "required" in the VPA proposal, stating that companies are not "required" to give VEDP anything by law, but they need to share information with VEDP in order for VEDP to help them.

Mr. Wiley stated that he was in favor of having the discussion and sees the value in simplifying FOIA, but observed that today's testimony demonstrates that anyone with a specific exemption wants to keep it. He noted that local government would like the liability shifting regarding attorneys' fees, but private industry does not. He also stated that putting these provisions into a larger FOIA bill might put the whole bill in jeopardy.

After further discussion among the Subcommittee and interested parties, the Subcommittee voted unanimously to recommend that the FOIA Council study the concept of a uniform exemption for trade secrets next year, but take no action at this time.

Mr. Jones invited any other public comment. Mr. Ress noted that agenda item number 4 also referred to law enforcement exemptions in § 2.2-3706. He stated that Virginia has an unusually broad exemption for criminal investigative records compared to other states. As examples, he noted that under Virginia law records of 30-year old homicides by a serial killer and the mass shooting at Virginia Tech nearly 10 years ago may still be withheld. The Subcommittee will carry this agenda item over to its next meeting, scheduled to be held at 10:00 AM on Thursday, September 8, 2016. The meeting was then adjourned.

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