

Virginia Freedom of Information Advisory Council  
Records Subcommittee  
September 8, 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 seventh meeting of the 2016 Interim on September 8, 2016, to continue the three-year study of FOIA directed by House Joint Resolution No. 96 (HJR 96). Subcommittee members Ms. Hamlett, Ms. King-Casey, Ms. Porto, and Mr. Vucci were present; Mr. Ashby (Chair) and Mr. Jones (Vice Chair) were absent. Ms. Hamlett acted as Chair.

The Subcommittee chose to take up agenda item number 3 first, starting with consideration of the definition of "public record" in § 2.2-3701. Staff told the Subcommittee that the definition was amended in 2011 with the addition of the final sentence: "Records that are not prepared for or used in the transaction of public business are not public records." That language stemmed from a court case in Loudoun County and was intended as a clarification and restatement of existing law. However, experience has shown that the language may be subject to misinterpretation, especially as it refers to whether records are prepared or used in the transaction of public business, whereas the previous sentence refers to who prepared, owns, or possesses them in the transaction of public business. Because it was not intended to change the law and has been subject to misinterpretation, the Subcommittee voted unanimously to recommend striking the final sentence of this definition.

Next, the Subcommittee considered whether to add a definition of the term "custodian" to FOIA. Staff provided a background synopsis of how the term is used in FOIA currently, how it has been interpreted in prior advisory opinions, and a definition used in the Virginia Public Records Act, § 42.1-77 ("Custodian" means the public official in charge of an office having public records."). Ms. Hamlett noted it was not clear what impact it might have if the term was defined by statute, particularly regarding museums and foundations. Ms. Porto stated she had a potential conflict in that her media organization was currently involved in a litigation appeal to the Supreme Court of Virginia regarding a database held by the Office of the Executive Secretary, and the question of who is the custodian of the database is central to the case. The Subcommittee by consensus chose to defer further consideration of this issue until the Court decides whether to take the appeal, and if so, until the Court renders its decision in the case.

The Subcommittee next considered the procedural section for public records requests, § 2.2-3704, with an emphasis on spotting issues of concern rather than taking action today. Staff noted that some question whether the language "all public records shall be open to inspection and copying by any citizens" in subsection A means that a public body must send copies upon request, or merely allow a requester to come to the public body's offices to make copies. Staff informed the Subcommittee that staff advises sending copies upon

request because it is the better option to fulfill the stated purposes of FOIA to inform the citizens of the Commonwealth about the operations of government. The Subcommittee asked to see draft language that would clarify this provision. David Lacy, representing the Virginia Press Association (VPA), observed that the key words of limitation regarding media representatives in subsection A were that they have circulation in, or broadcast in or into, the Commonwealth, implying a presence here in Virginia. He stated that if Internet media is included then the limitation might as well be removed entirely. Ms. Porto agreed that Internet-only media raises further questions compared to traditional print media. Ms. Hamlett stated she did not want to change the original policy limitation. Regarding charges, staff noted that under subsection F a requester has a right to an estimate "in advance" but the statute does not state in advance of what, or provide for the five working day response time to be tolled after a public body provides the estimate and then waits to hear from the requester whether to proceed with the request. Under subsection H, regarding advance deposits, staff stated that the section requires the requester "to agree to payment," which has been interpreted as actually making payment of the deposit, but the language could be clarified. It was also observed that the charging provisions for topographical maps in subsection F were outdated and obsolete given modern technology. Another technology issue arose with consideration of subsection G, looking at what is "format" versus "media" of electronic records, and various issues concerning databases such as when a body has a right of access but does not take possession or ownership of a database. Mr. Lacy noted that FOIA is clear regarding databases but in application public bodies do not consider FOIA. Additionally, it was suggested that a provision be added stating that a public body must consider FOIA when it acquires new technology, similar to an existing provision for the Department of General Services.<sup>1</sup> Regarding databases, Ms. Hamlett stated that public bodies still have possession of records in the "cloud." Megan Rhyne of the Virginia Coalition for Open Government (VCOG) also noted issues regarding whether a public body has possession of information in databases maintained by third party vendors such as red-light camera companies. Ms. Hamlett noted that it would be related to the issue of custody. Staff related an example where a public body took possession of a database temporarily, extracted some information, then deleted the rest. A requester who sought the full database was told the public body did not have it. Ms. Porto stated specific language was needed to deal with the issue. Staff noted that the treatment and use of text messages and social media raised additional concerns regarding both records and meetings provisions in FOIA.

The Subcommittee next considered § 2.2-3706 regarding criminal and other law enforcement records. Staff described the legislative history of the section, noting that some version of the criminal investigative records exemption has been in the law since its enactment in 1968. Staff noted that there were differences in opinion regarding fundamental policy choices, particularly regarding whether the exemption for criminal investigative files should be limited to "active" investigations. Bills introduced in 2010, 2011, and 2012 which would have limited this exemption to active or ongoing investigations led to a study of this section by the Criminal Records Subcommittee of the FOIA Council

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<sup>1</sup> "The regulations adopted by the Division shall: ... Require that before any public body procures any computer system, equipment or software, it shall consider whether the proposed system, equipment or software is capable of producing products that facilitate the rights of the public to access official records under the Freedom of Information Act (§ 2.2-3700 et seq.) or other applicable law." Subdivision B 2 of § 2.2-1111.

from 2010 through 2012. That study culminated in a re-organization of the section recommended by the FOIA Council and enacted by the General Assembly in 2013. Staff also informed the Subcommittee that the 2016 Session of the General Assembly had referred to the FOIA Council for study HB 432 (Villanueva), which would also have limited this exemption to "active" investigations, but the Council had yet to act on it.

The Subcommittee invited public comment regarding this section. Captain Fertig of the Chesterfield County Police Department informed the Subcommittee that sometimes cases may be declared "inactive" or "cleared" but are later reopened as new information becomes available, and the release of details of an investigation could taint such a case. Charlene Hinton of the Petersburg Police Department stated that even in closed cases the release of the criminal investigative file could jeopardize the safety and privacy of persons mentioned in the file. Dan Wilson of the State Police agreed, and used the Virginia Tech shootings as an example, stating for example that the investigative file of that incident included sensitive photos withheld for the protection of victims and witnesses and their families. He noted that witness information can often be extrapolated from other information in a file even if names are redacted, and part of the reason to withhold some information is to avoid re-victimizing victims. Ms. Porto noted that the Virginia Tech case has been closed for some time, and asked whether any part of the file could be released, as it may be beneficial. Mr. Wilson said yes, but the Virginia Tech "file" is actually a room full of bankers' boxes, and the first step is determining whether the State Police have what the requester wants. He also noted that the parents of victims are especially impacted and do not want to see these records on the internet. Ms. Hamlett observed that there would also be tactical information in the file. Captain Burke of the Portsmouth Police Department noted that the criminal investigative file exemption allows for discretionary release, and provided an example where Portsmouth police worked with requester to release some information regarding a high profile homicide case. Dave Ress, a reporter with the Daily Press, stated that Virginia's exemption is much broader than other states' exemptions, and that other states say what is open and what is not. Regarding the shootings at Virginia Tech, he said the big question is whether officials did their jobs correctly. Dick Hammerstrom, who holds position with both VPA and VCOG, suggested that criminal investigative files should only be withheld where they would cause jeopardy to a case. He noted that in his experience as a former editor of the Free Lance-Star, he had seen requests denied not based on FOIA so much as because public officials were angry with the media. Ms. Hamlett observed that if law enforcement had to provide a reason for withholding that itself may be a "tell" that causes jeopardy to a case. Ms. Rhynne stated that the issue is staged as law enforcement versus the media, but there are other parties with interests in these records such as family members, academics, advocacy groups, and victims. She further observed that in general the exemption is used as a blanket rule to deny all requests for criminal investigative files. She noted that in contrast to the lack of information about the Virginia Tech shootings, Connecticut has set up a website with records regarding the Sandy Hook shootings, including a redaction log stating what has been withheld and why as per law.

Ms. King-Casey and Mr. Vucci had to leave the meeting due to other pressing business. Ms. Hamlett and Ms. Porto decided to end the meeting as there was no longer a quorum of the full Subcommittee present, with direction to staff to look at Connecticut law regarding

criminal investigative files. Staff gave a brief review of the information items in agenda item #2, all of which will be subject to further consideration by the Subcommittee at its next meeting on September 29, 2016, or by the full FOIA Council at its meeting on September 19, 2016. The meeting was then adjourned.

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