

Virginia Freedom of Information Advisory Council  
Records Subcommittee  
September 29, 2016  
10:00 AM  
House Room D  
General Assembly Building  
Richmond, Virginia  
Meeting Summary

The Records Subcommittee of the FOIA Council (the Subcommittee) held its eighth meeting of the 2016 Interim on September 29, 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.

The Subcommittee first heard about a proposal to amend the audit exemption (subdivision 7 of § 2.2-3705.3). At prior meetings the Auditor of Public Accounts (APA), Joint Legislative Audit and Review Commission (JLARC), and the Office of the State Inspector General (OSIG) had stated that the current exemption language did not necessarily cover the actual activities and duties of these agencies. Staci Henshaw of the APA discussed how the agencies had started by trying to modify the existing language, but found it difficult because of the number of different entities included in the current exemption. She stated that agency representatives had met with representatives of the Virginia Press Association (VPA) and the Virginia Coalition for Open Government (VCOG). Ms. Henshaw said they focused on addressing the agencies' statutory duties by removing these three agencies from the existing exemption and crafting a new exemption that would better match with what the agencies actually do. She also noted that as accountants, they must follow professional auditing standards which include review before the release of information. Ms. Porto asked if there had been any issues in the past, to which Ms. Henshaw replied that there had been issues where the timing under the auditing standards did not match with FOIA's five working day response time. June Jennings of OSIG expressed the same, that OSIG had received requests for records and had to ask the requester to wait in order to complete the required audit reviews. Hal Greer of JLARC added that JLARC does performance and policy reviews, not "investigations" as stated in the current exemption. David Lacy, on behalf of the VPA, expressed that he had worked closely with Ms. Henshaw but had not fully reviewed the latest draft. He indicated he expected the parties would continue working together, and that the VPA had no position on the draft at this time. Dave Ress, a reporter with the Daily Press, expressed a concern that the intent is to shield a work in progress but that the language as drafted would shield notes forever. Ms. Henshaw indicated that the APA generally gives out working papers once an audit is complete, so long as no other exemption applies. Ms. Porto expressed that the goal of the study is to make the law smaller with fewer exemptions to make it easier for the public to understand, but this proposal would take an existing exemption apart and add another. After brief discussion, the Subcommittee directed the parties to continue working on the draft language and bring it to the full FOIA Council at the FOIA Council's next meeting on October 17, 2016.

The Subcommittee next took up a draft that had previously been considered but not acted upon concerning letters of recommendation. The Subcommittee had previously 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 of the draft and suggestions from interested parties, the Subcommittee directed staff and interested parties to meet as a workgroup to discuss these issues in greater depth and report back to the Subcommittee. The workgroup met on July 14, August 4, and September 7, 2016 but concluded it would not be able to reach agreement on a definition at this time. Mr. Ressa of the Daily Press, Megan Rhyne of VCOG, and Michele Gowdy, speaking on behalf of the Virginia Association of Counties (VACo) and the Virginia Municipal League (VML), all expressed concerns that the draft was not ready to move forward. The Subcommittee agreed and let the draft rest in committee without further action.

The Subcommittee next considered the "global language change" enacted by House Bill 817/Senate Bill 494 (2016). Staff summarized the issue by reminding the Subcommittee that 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 then 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 again contact agencies whose exclusions have been affected by these changes so that the Subcommittee might hear directly from them. Staff sent a second letter to the affected agencies asking for responses by September 28, 2016. Staff summarized the agency responses received, noting that some felt the change had no practical effect, others felt it had a negative unintended effect, and others said they needed time and experience with the change before they would know its effect. Mr. Lacy pointed out that most of the agency comments were brief and do not address the actual language, which he believes shows that they are merely being cautious but have not read the changes thoroughly. He indicated that those who have read the changes expressed that there is no difference between the old language and the new. Ms. Rhyne expressed that agencies perceived the language changes as substantive when they were not meant to be, and recommended outreach to agencies regarding what the language actually means. Phyllis Errico of VACo stated that given the differing responses the language is obviously confusing. Ms. Porto expressed agreement with Ms. Rhyne that the issue should be addressed through an advisory opinion and education rather than legislative action. After further discussion by the Subcommittee, the members voted 4-1 to revert the language to what it was before HB 817/SB 494 (Ms. Porto voted against).

Next, staff presented to the Subcommittee a draft amending the current definition of "public record." At its last meeting the Subcommittee recommended deleting the following language from the current definition: "Records that are not prepared for or used in the transaction of public business are not public records." This language was added in 2011 as a clarification of existing law, but experience has shown it to have had unintended consequences. The Subcommittee had already voted to recommend this change at its last meeting, and today agreed without objection that the draft presented accurately reflected that recommendation.

Also at its last meeting the Subcommittee began reviewing the procedure for making and responding to requests for public records, § 2.2-3704. Staff reviewed the areas previously considered. Mr. Lacy stated that some proposed changes were not controversial, but others were more problematic, particularly because the Supreme Court of Virginia is going to hear a case on appeal that may address issues such as who is the custodian of a database. Ms. Porto disclosed that she has an interest in that case because the Daily Press is the party appellant. Mr. Lacy, Ms. Porto, Ms. Gowdy, and Mr. Ress all agreed that clarifying the right of a requester to get an estimate in advance by adding a tolling provision may be helpful. The Subcommittee then agreed by consensus to have staff prepare a draft addressing the tolling provision and other non-controversial changes for consideration by the full FOIA Council.

The Subcommittee then took up § 2.2-3706 which addresses criminal and law-enforcement records. Staff reminded that Subcommittee that this section was the subject of review by the Criminal Records Subcommittee from 2010 through 2012, which resulted in clarifying legislation passed by the 2013 Session of the General Assembly as a recommendation of the FOIA Council (SB 1264). At its last meeting the Subcommittee began consideration of this section, identifying the treatment of criminal investigative files as the main issue of concern. At the last meeting a comparison was made between Virginia's treatment of information from the Virginia Tech shooting in 2007 and the Sandy Hook Elementary School shooting in Connecticut in 2012. The Subcommittee asked staff to report back with more information regarding Connecticut's treatment of such criminal records information. Staff presented an overview of Connecticut law on the topic, based on research as well as a telephone conversation with Tom Hennick, the Public Education Officer at the Connecticut Freedom of Information Commission. Staff noted that Connecticut law addresses many of the same subject areas as Virginia law, but it is structured differently and differs greatly in the details. Additionally, Mr. Hennick had informed staff that at least one Connecticut court case concerning public access to certain evidentiary materials in the Sandy Hook shootings is still pending appeal. Staff also reminded the Subcommittee that the 2016 Session of the General Assembly had referred two bills to the FOIA Council for further study that would have amended § 2.2-3706, HB 432 (Villanueva) and SB 492 (Surovell), neither of which had yet been acted upon by the FOIA Council. Because the FOIA Council had not yet considered these bills, and in light of the fact that this was to be the last scheduled meeting of the Subcommittee for 2016, the Subcommittee agreed by consensus not to take any action on § 2.2-3706, but instead to wait for the full FOIA Council to take up the bills referred to it.

Mr. Jones asked whether anyone from the public wished to speak. There was no public comment. Mr. Jones reminded those present that the full FOIA Council will meet on October 17, 2016. The meeting was then adjourned.

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