



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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April 4, 2017

Trade Secrets and Proprietary Records Subcommittee of the Virginia Freedom of Information Advisory Council

- 1. Call to Order, introduction of members.**
- 2. Review of work to date under HJR No. 96 (2014).** *As you will recall, HJR No. 96 directed the Council to review all of the exemptions in FOIA. In conjunction with the study, the Virginia Press Association (VPA) presented a white paper suggesting the creation of one or more general exemptions for trade secrets, rather than continuing to add exemptions that are limited to specific agencies. Using the VPA draft proposal as a vehicle for discussion, over the course of the three-year study, the Council, the Records Subcommittee, and the Proprietary Records Work Group all studied the issues involved, heard testimony from affected agencies and other interested parties, and considered many different versions of the draft legislation. However, no consensus was reached on any recommendation. As a result these topics have been continued for further study this year.*
- 3. Study plan.** *As you will recall, the Council adopted a study plan for 2017 directing that Subcommittees meet one at a time (i.e. serially), rather than having multiple subcommittees studying multiple issues concurrently. It is expected that the subcommittee will meet two to three times on each issue and make a recommendation to the full Council. In order to facilitate this process, it is recommended that the Subcommittee first consider the use of the term "trade secrets," and then separately consider the use of the term "proprietary." Note that there is a statutory definition of the term "trade secrets" in the Uniform Trade Secrets Act, but because there is no statutory definition of "proprietary," the Supreme Court of Virginia has held that the term be given its meaning in ordinary usage (see Appendix A).*
- 4. Charges to the Subcommittee:**
 - *First, decide whether to explore the possibility of creating a general record exclusion for trade secrets submitted to a public body, or whether to continue the current practice of adding agency-specific exemptions.*
 - *Second, decide whether to add a statutory definition of the term "proprietary."*
- 5. Trade Secrets - Review of Council-prepared drafts implementing a general record exclusion for trade secrets submitted to a public body.** *Two drafts have been prepared addressing trade secrets. The first draft is an implementation of the proposal presented in the VPA white paper. The second draft is also based on that proposal, but it*

strikes out many of the elements that were subject to disagreement during the HJR No. 96 study, leaving only the addition of a general trade secrets exemption along with corresponding changes to existing exemptions that would become effective after a two year delay.

6. Public Comment.

7. Discussion.

8. Recommendations.

9. Proprietary records - Review of various definitions of the word "proprietary" from Virginia case law, other states' statues, etc. *As stated above, the Supreme Court of Virginia has considered the definition of "proprietary" as used in FOIA and held it to have its ordinary meaning because it is not defined by statute (see Appendix A). Staff has found that while many states use the term "proprietary" in various exemptions and in contexts other than records access laws, it is not separately defined in most instances and there is little consistency in its application. However, Michigan currently has legislation before it that includes a definition of "financial and proprietary information." Staff has prepared a draft for the Subcommittee's consideration based on the Michigan proposal, as well as concepts gleaned from other states' laws and current FOIA exemptions in light of the Supreme Court's decision. Please note that this draft is presented for consideration of the definitional issue only. If the Subcommittee decides to go forward with a definition of "proprietary," a revised draft will be prepared that amends current exemptions as necessary to conform with the definition recommended by the Subcommittee.*

10. Public Comment.

11. Discussion.

12. Recommendations.

13. Adjournment.

Subcommittee Members

Delegate James M. LeMunyon (Chair)
Shawri King-Casey
Marisa Porto

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Appendix A: Definitions

I. Current definition of "trade secret" in the Uniform Trade Secrets Act (§ 59.1-336)

"Trade secret" means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

II. Current definition of "PROPRIETARY"

- No statutory definition in FOIA
- The Supreme Court of Virginia has held that "proprietary" should be given its ordinary meaning:

"A proprietary right is a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls."

American Tradition Institute v. Rector and Visitors of the University of Virginia, 287 Va. 330, 340-342, 756 S.E.2d 435, 440-441 (2014)(quoting *Green v. Lewis*, 221 Va. 547, 555, 272 S.E.2d 181, 186 (1980)).

III. Definition of "PUBLIC RECORDS" under current law, § 2.2-3701:

Public records *"means all writings and recordings that consist of letters, words or numbers, or their equivalent...however stored, and regardless of physical form or characteristics, **prepared or owned by, or in the possession of a public body or its officers**, employees or agents in the transaction of public business. Records that are not prepared for or used in the transaction of public business are not public records. [Emphasis added.]*