



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

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May 1, 2017

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

- 1. Call to Order, introduction of members.**
- 2. Work Group Report.** *As you will recall, at its last meeting on April 4, 2017 the Subcommittee asked staff and interested parties to meet as a work group to consider draft legislation that would create a general exemption for trade secrets submitted to a public body. The work group met on April 25, 2017 and has recommended an amended draft.*
- 3. Review of draft recommended by the work group.** *The proposed draft is an amended version of a draft presented to the Subcommittee at its last meeting. The draft would create a general exemption for trade secrets submitted to a public body as defined in the Uniform Trade Secrets Act; provide a mechanism for the submitting entity to designate what trade secrets are to be protected; provide a mechanism for the submitting entity to be added as a party defendant if that designation is challenged in court; would allow the court to award costs and fees proportionately between the public body and the submitting entity if the court finds that information was improperly withheld because it was improperly designated as a trade secret; and would strike the term "trade secrets" from other current exemptions of more limited scope, as the new general exemption would exempt the same information (and more).*
- 4. Public Comment.**
- 5. Discussion.**
- 6. Recommendations.**
- 7. Proprietary records - Review of various definitions of the word "proprietary" from Virginia case law, other states' statutes, etc.** *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.*

**8. Public Comment.**

**9. Discussion.**

**10. Recommendations.**

**11. Adjournment.**

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**Subcommittee Members**

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

**Cullen Seltzer**  
**Mark Vucci**

**Staff**

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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.]*