



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

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July 11, 2017

### **PROPOSED AGENDA (Annotated)**

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

- 1. Call to Order, introduction of members.**
- 2. 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 to the definition recommended by the Subcommittee.*
- 3. Review of draft reviewed by the FOIA Council at its May 15, 2017 meeting and remanded to the Subcommittee for further consideration. (LD 18100016D).** *NOTE: As you will recall, at the FOIA Council meeting on May 15, 2017, staff informed the Council that staff had been directed by the Subcommittee to create a definition of "confidential information" instead of "proprietary". Staff then briefly went through the draft line-by-line with the Council, though in the interests of time and efficiency, staff recommended that the Council send the draft back to the Subcommittee for further refinement. Staff explained that lines 9-13 of the draft define "confidential information" to mean financial information, including balance sheets and financial statements, or other information of a submitting entity that are not (i) generally available to the public through regulatory disclosure or otherwise or (ii) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), where if such information was made public, the financial interest or competitive position of the submitting entity would be adversely affected. Staff then explained that lines 68-74 create an exclusion from the mandatory disclosure provisions of FOIA for*

*"confidential information" and provide an earmarking process for invoking the exclusion. Lastly, staff explained that lines 75-81 contain the same permissive joinder and apportionment of attorney fees provisions as were included in Trade Secrets Draft #5. Staff reminded the Council that there is a two-part process involved in attempting to resolve the issue of proprietary records - the first step being to decide upon a definition (either "proprietary", "confidential", or something else) and the second step being to conform each of the individual exclusions in Va. Code § 2.2-3705.6 to the terminology and definition adopted by the Subcommittee. As such, staff explained that this draft focuses solely on the definitional issue and does not attempt to strike or amend any of the existing exclusions in Va. Code § 2.2-3705.6.*

**4. Public Comment.**

**5. Discussion.**

**6. Recommendations.**

**7. Adjournment.**

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**Subcommittee Members**

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

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

**Staff**

Maria J.K. Everett, Executive Director and Senior Attorney  
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## I. 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)).

## II. 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.]"*