



# VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

## COMMONWEALTH OF VIRGINIA

Delegate James M. LeMunyon, Chair  
Senator Richard H. Stuart, Vice-Chair  
foiacouncil@dls.virginia.gov

Maria J.K. Everett, Esq., Executive Director/ Senior Attorney  
Alan Gernhardt, Esq., Senior Attorney  
Jessica L. Budd, Esq., Attorney

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Pocahontas Building ~ 900 East Main Street, Tenth Floor ~ Richmond, Virginia 23219  
804-698-1810 ~ (Toll Free) 1-866-448-4100 ~ (Fax) 804-698-1899 ~ <http://foiacouncil.dls.virginia.gov>

August 1, 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 - Recap of work to date.** *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. The Subcommittee to date has considered several draft proposals to address this issue, but at its last meeting decided to go forward with a draft that would delete the terms "proprietary" and "confidential" from the exemptions in § 2.2-3705.6. The Subcommittee found that in most instances, if not all, deletion of the terms would have little or no substantive effect on the use of the exemptions. The Subcommittee asked staff to contact agencies that would be affected by this proposal to get their feedback at today's meeting.*
- 3. Review of "Deletion Draft #2." (LD 18100099D).** *As directed by the Subcommittee at its last meeting, staff prepared an amended "deletion draft" that strikes the terms "proprietary" and "confidential" where they currently appear in § 2.2-3705.6 and makes other amendments as directed by the Subcommittee. This draft has also been updated to reflect changes to FOIA that went into effect on July 1, 2017, including two new exemptions added to § 2.2-3705.6. This draft has not been amended to reflect the recommendations made in the Trade Secrets Draft #6 (LD 18100101), as that draft will be before the full Council for its consideration at its August 14, 2017 meeting.*
- 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  
Alan Gernhardt, Senior Attorney  
Jessica L. Budd, Staff Attorney

**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.]"*