Proprietary Records & Trade Secrets Subcommittee
Meeting Summary
April 4, 2017
1:30 PM
House Room C
General Assembly Building, Richmond, VA

The Proprietary Records & Trade Secrets Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) held its first meeting on April 4, 2017 to continue studying the treatment of trade secrets and proprietary records that was conducted under House Joint Resolution No. 96 (2014)(HJR 96), which study concluded last year without resolution of this issue. Subcommittee members Delegate LeMunyon (Chair), Ms. Porto, and Mr. Vucci were present; Ms. King-Casey and Mr. Seltzer were absent.

After calling the meeting to order and introducing the members, staff presented an overview of the work done to date under HJR 96. Staff reported that the full Council had considered proprietary records and trade secrets exemptions at its meetings held on September 16, 2014, May 20, 2015, September 30, 2015, November 18, 2015, May 4, 2016, June 23, 2016, September 19, 2016, October 1, 2016 and November 21, 2016. Additionally, the Subcommittee had considered issues relating to proprietary records and trade secrets at its meetings held on July 8, 2014, May 11, 2015, July 22, 2015, August 18, 2015, October 7, 2015, November 15, 2015, April 11, 2016, July 20, 2016, and August 18, 2016. The Proprietary Records Work Group (the Work Group) also considered these issues in depth at its meetings held on June 8, 2016, July 21, 2015, August 18, 2015, November 10, 2015, and March 24, 2016. Among other issues, the Council has considered the "vendor proprietary software" exemption (subdivision 6 of § 2.2-3705.1); various exemptions that use the terms "proprietary" and "trade secrets" found in § 2.2-3705.6 and elsewhere in FOIA; proposed amendments to certain proprietary records exemptions of the Department of Rail and Public Transportation (HB 339 (2014) and SB 387 (2014)); legislation concerning certain records and meetings of the Alcoholic Beverage Control Authority that would not take effect until 2018, and which the Council recommended against (HB 1776 (2016) and SB 1032 (2015)); a white paper and commentary from the Virginia Press Association (VPA) proposing the creation of one or more general exemptions that might replace the many agency-specific exemptions in this area; the definition of the term "proprietary" as set out by the Supreme Court of Virginia in *American Tradition Institute v. Rector and Board of Visitors of the University of Virginia* (2014); and several related issues remaining for further consideration included on the Chairman's list for further study in 2017. The legislation referred to the Council by the General Assembly was incorporated into the HJR 96 study as part of the review of all exemptions in FOIA. The Subcommittee decided to incorporate the referred legislation and all exemptions using the terms "proprietary" and "trade secrets" into its review of the exemptions in § 2.2-3705.6. The VPA first presented its white paper proposing one or more general exemptions for such records to the Subcommittee at its meeting on July 8, 2014. The VPA presented a revised version of its white paper to the Council on June 23, 2016. Over the course of the study, the Subcommittee and the Work Group used the VPA white paper proposal as vehicles for further discussion and considered multiple draft proposals based on the ideas presented therein. Various draft proposals addressed an exemption for trade secrets provided to a public body, an exemption for trade secrets generated by a public body, an exemption for certain financial records, and a liability shifting provision addressing situations where a public

body is brought to court over records that a third party has designated as proprietary or trade secrets. As the study progressed, the Subcommittee and Work Group agreed by consensus to focus first on trying to craft an exemption for trade secrets submitted to a public body. They also decided not to alter the exemptions for economic development (subdivision 3 of § 2.2-3705.6), public-private procurement transactions (subdivision 11 of § 2.2-3705.6), and exemptions for certain investment entities such as the Virginia Retirement System (VRS) and the Virginia College Savings Plan (VCSP) (subdivisions 12 and 25 of § 2.2-3705). Representatives from various agencies that currently have exemptions likely to be affected testified at each level of study. Nearly all such representatives expressed their agency's desire to keep its current exemption(s) without change. At the conclusion of the study, the Work Group and Subcommittee both reported progress in studying and identifying the issues that need to be addressed, but both failed to reach consensus on any specific legislative recommendation. Therefore the Council decided not to include any changes to trade secrets or proprietary records exemptions in the omnibus legislation presented to the General Assembly pursuant to HJR 96, but to continue to study these issues after adjournment of the 2017 Session.

Staff then presented to the Subcommittee for its consideration two staff-prepared drafts, each creating a general exclusion from mandatory disclosure in § 2.2-3705.6 for trade secrets submitted to a public body. The first draft (Draft #1) implemented the ideas outlined in the VPA white paper that was presented to the Council on June 23, 2016. Draft #1 created a general exclusion from mandatory disclosure in § 2.2-3705.6 for a record delivered or transmitted to a public body by a submitting entity that is not a public body to the extent that:

> 1. The record contains information in which the submitting entity has an ownership interest;
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> 2. The submitted information qualifies as a "trade secret" of the submitting entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.)[1];
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> 3. The submitting entity delivered or transmitted the record to the public body:
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> > (i) In compliance with a statute, regulation, or other law of the United States or the Commonwealth; or
> > (ii) As a required component of a submission made in connection with a public procurement, public financing, or economic development transaction; and

[1] Virginia Code § 59.1-336 provides: "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.

4. The information that the submitting entity seeks to protect was clearly and specifically identified by the submitting entity as a trade secret at the time of its delivery or transmission to the public body, such identification being a representation by the submitting entity that it has made a good faith effort to designate as trade secrets only those portions of the submitted information that are entitled to protection under the Uniform Trade Secrets Act (§ 59.1-336 et seq.).

The draft also contained a liability-shifting provision providing that in the event a public body denies access to a public record or a portion of a public record on the grounds that the requested information has been identified by the submitting entity as a trade secret and the requester challenges the characterization of the withheld information as a trade secret, the public body shall notify the submitting entity within two working days of the challenge made by the requester.

The draft further provided that if the submitting entity and the requester are unable, after conferring, to reach an agreement on the proper designation of the material in dispute, or the submitting entity refuses to confer with the requester, the requester may bring an action to require the public body to produce the requested material and shall name the submitting entity as an additional defendant in the action. Lastly, the draft provided a requirement that if, as a result of the action, the court requires the public body to produce material that has been improperly designated as a trade secret by the submitting entity, any award of reasonable costs and attorney fees to the requester pursuant to § 2.2-3713 shall be paid by the submitting entity and not by the public body.

The draft contained several enactment clauses that allow for a delayed effective date for portions of the draft. If the draft were to be passed by the 2018 Session of the General Assembly, the general trade secrets exclusion, including the earmarking requirement and liability shifting provision, would go into effect in due course on July 1, 2018. The general trade secrets exclusion would co-exist with the specific trade secrets exclusions that currently exist in § 2.2-3705.6 for two years. Then, on July 1, 2020, the specific trade secrets exclusions would be removed from § 2.2-3705.6, leaving only the general trade secrets exclusion.

The second draft that was prepared by staff and presented to the Subcommittee (Draft #2), added a definition of "Trade Secret" in § 2.2-3701 and defined "Trade Secret" to mean the same as that term is defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.). Draft #2 then created in § 2.2-3705.6 a general exclusion for trade secrets submitted to a public body. This provision included an earmarking requirement, requiring the submitting entity, in order for the trade secrets to be excluded from mandatory disclosure, to make a written request to the public body (i) invoking the trade secrets exclusion upon submission of the data or other materials for which protection from disclosure is sought; (ii) identifying with specificity the data or other materials for which protection is sought; and (iii) stating the reasons why protection is necessary.

Similar to Draft #1, Draft #2 contained several enactment clauses allowing for a delayed effective date for portions of the draft. If the draft were to be passed by the 2018 Session of the General Assembly, the definition of trade secrets in § 2.2-3701 and the general trade secrets

exclusion in § 2.2-3705.6 would go into effect in due course on July 1, 2018. The general trade secrets exclusion would co-exist with the specific trade secrets exclusions that currently exist in § 2.2-3705.6 for two years. Then, on July 1, 2020, the specific trade secrets exclusions would be removed from § 2.2-3705.6, leaving only the general trade secrets exclusion.

Staff explained to the Subcommittee that both drafts are conceptual in nature and that should the Subcommittee wish to move forward with either of the drafts, numerous technical amendments would be necessary to amend cross-references in other areas of the Code. For present purposes, amendments to those cross-references had been left out to allow the Subcommittee to focus on the substantive changes made by each draft.

The Subcommittee then heard public comment on each of the two trade secrets drafts. Dave Ress, with the Daily Press in Newport News, emphasized that it is important to create a general exemption, as there are currently twenty-eight individual exemptions, many of which use different and undefined terms. He stressed that it is important to address fundamental policy issues, including the question of what is a trade secret? He also stated that if the owner or submitter of the trade secret information no longer takes reasonable efforts to keep the information secret, the public body should correspondingly no longer have a responsibility to keep the information secret. Mr. Ress stated that he prefers Draft #1.

Phil Abraham with the Vectre Corporation stated that he represents clients that are particularly concerned with the public-private procurement records exemption found at subdivision 11 of § 2.2-3705.6. He stated that he finds Draft #1 to be confusing and prefers Draft #2 because it is clearer. He pointed out that Draft #1 creates a new category of records. The exclusion in Draft #1 requires more than that the records simply qualify as trade secrets under the UTSA definition. For example, the exclusion in Draft #1 requires that the submitting entity also have an ownership interest in the information. Mr. Abraham highlighted that there are situations in which the submitting entity does not own the trade secret information, but instead has a license for the information. Such information would not be protected under the exclusion in Draft #1. Mr. Abraham also took issue with the additional requirement that the information be submitted (i) in compliance with a statute, regulation, or other law of the United States or the Commonwealth or (ii) as a required component of a submission made in connection with a public procurement, public financing, or economic development transaction. He pointed out that in procurement transactions businesses sometimes voluntarily include additional information along with their submission in response to a Request for Proposal. Such information would not be exempt from mandatory disclosure under the general exclusion in Draft #1 because the information was not a required component of the submission. This may make businesses reluctant to submit such information if there is no reassurance that it can be protected. In discussing the liability shifting provision, Mr. Abraham stated that he takes no issue with requiring the public body to notify the submitting entity in the event that the public body denies a request for the trade secret information and the requestor challenges that denial. However, he believes that if both the submitting entity and the public body agreed that the submitted information should be protected, the public body should also be responsible for paying any award of reasonable costs and attorney fees to the requester that is awarded by the court. Mr. Abraham stated that he thinks Draft #2 is good, but he expressed a concern that striking the individual references to "trade secrets" in the second enactment would be confusing to the public. He recommended leaving each of the

individual references to "trade secrets" as is, and instead having each individual reference to "trade secrets" cross-reference the general trade secrets exclusion that is created in the draft.

Craig Merritt, representing the Virginia Press Association (VPA), stated that the VPA is trying to represent the common interest of all people in good, clear public access laws. He stated that neither of the two bills were drafted or endorsed by the VPA. He shared that in his opinion, Draft #1, which is based upon proposals previously put forth by the VPA, is the more coherent and sensible of the two bills. He emphasized that the VPA is seeking to solve the problem of the proliferation of exclusions in § 2.2-3705.6. He stated that if a sufficiently broad and clear general exclusion for trade secrets is created it would eliminate the need for the twenty-eight existing individual exclusions, as well as any new individual exclusions. One issue he raised with Draft #1 was that the draft leaves in the word "proprietary". He stated that we should be able to take out not only the words "trade secrets" but also the word "proprietary" from each of the individual exclusions in § 2.2-3705.6 if a sufficiently broad and clear general exclusion is crafted. In response, Chairman LeMunyon asked Mr. Merritt if he believes that trade secret information and proprietary information is the same thing. In response, Mr. Merritt, citing the Supreme Court of Virginia's decision in *American Tradition Institute v. Rector and Visitors of the University of Virginia*, stated that in his opinion "proprietary" simply means that the holder of the information has an ownership interest in the information. Mr. Merritt further stated that in his opinion the general exclusion created in Draft #1 needs to be amended to create an additional category of protected information, in addition to trade secrets, that would capture confidential proprietary information (proprietary information that is kept confidential in the regular course of business and which should not be open to the public simply because it is required to be submitted to a public body), which would include financial information. He stated that if such a general exclusion properly encompassing all of those things could be crafted, all of the individual exclusions could be removed. Mr. Merritt further stated that he finds the multiple enactment clauses in Draft #1 to be confusing, and recommended instead to simply giving the bill a delayed effective date. Mr. Merritt then discussed the remedies section in Draft #1. He expressed a concern about potential scenarios in which a submitting entity overreaches in designating certain information as a trade secret. In such scenarios the public body would subsequently be left to defend such designation in court if a requestor challenged the designation. Mr. Merritt stated that it is a tremendous burden for the public body to be required to decide whether certain information is protected as a trade secret. He emphasized that in crafting the enforcement mechanism, the burden of overreaching must be fairly allocated. In closing, Mr. Merritt recommended that the Subcommittee work on creating a general exclusion that is intended to replace all of the existing individual exclusions and to be used by all public bodies, disseminate a new draft, and then invite interested parties to come before the Subcommittee and explain why their specific exclusion needs to remain.

Cindy Wilkinson with the Virginia Retirement System stated that VRS's FOIA exclusion is contained in § 2.2-3705.7 and highlighted that line 25 of Draft #1 states that the remedies section applies "[i]n the event a public body, in response to a request under this *chapter*, denies access to a public record or a portion of a public record on the grounds that the requested information has been identified by the submitting entity as a trade secret and the requester challenges the characterization of the withheld information as a trade secret..." (emphasis added). She stated that she believes this language would make the remedies section in Draft #1 applicable in the

event of a denial of a FOIA request by VRS on the grounds that the requested information contains information that the submitting entity has designated as a trade secret. She expressed a concern that should the remedies section of Draft #1 be applicable in such situations, it would have a chilling effect on private equity managers who voluntarily submit information to VRS. She further emphasized that because such information is voluntarily provided to VRS, it would not qualify for protection under the general exclusion created by Draft #1.

Chris McGee with the Virginia College Savings Plan echoed Ms. Wilkinson's comments. He emphasized that the information voluntarily provided by private equity managers is very helpful, and is used to grade the effectiveness and safety of investments. He stressed the importance of ensuring that such information be protected from disclosure.

Rob Tyler, counsel for the University of Virginia, stated that he agrees with Mr. Merritt regarding the usefulness to the public body of the earmarking provision in Draft #1. He stated that the public body is poorly placed to determine what a private entity's trade secrets are. He also emphasized that research universities hold a great deal of trade secret information that they have created themselves. This information would not be covered by the general exclusion in Draft #1 because it has not been "submitted" to a public body.

The Subcommittee members then discussed the two drafts. Ms. Porto stated that she thinks there can still be some compromise on at least some major points. Mr. Vucci stated that it is very difficult to come to a consensus on the fly. He suggested that staff meet with interested parties and report back on the discussion at the next Subcommittee meeting.

Chairman LeMunyon then directed staff to create a new trade secrets draft using Draft #1 as the starting point. He instructed staff to remove the portion in Draft #1 that requires the submitting entity to have an ownership interest in the submitted information; amend the portion of the draft that requires that the information have been submitted in "(i) compliance with a statute, regulation, or other law of the United States or the Commonwealth or (ii) as a required component of a submission made in connection with a public procurement, public financing, or economic development transaction" to also cover information that was submitted voluntarily by the submitting entity to the public body; add language that gives the public body an opportunity to push back if it feels that the submitting entity has overreached in its designation of certain information as a trade secret; keep the language that requires the public body to give notice to the submitting entity when the public body denies access to a public record or a portion of a public record on the grounds that the requested information has been identified by the submitting entity as a trade secret and the requester challenges the characterization of the withheld information as a trade secret; and add a provision stating that if the submitting entity makes the information public by legitimate means, the public body is no longer required to withhold the information. Chairman LeMunyon asked staff to have the new draft available for review by the Subcommittee members and interested parties by April 17, 2017.

Chairman LeMunyon directed staff to place the issue of proprietary records onto the agenda for the next Subcommittee meeting, which was set for May 1, 2017 at 1:30 p.m. The meeting was then adjourned.