

Proprietary Records & Trade Secrets Subcommittee
Meeting Summary
April 25, 2017
1:30 PM
House Redistricting Room
General Assembly Building, 2nd Floor, Richmond, VA

At its meeting on April 4, 2017, the Proprietary Records and Trade Secrets Subcommittee directed staff to meet with interested parties to discuss creating a general record exclusion for trade secrets. Specifically, the Subcommittee stated that the goal of the work group was to identify areas of consensus among stakeholders in creating a general trade secrets exclusion. The work group was held on April 25, 2017. No members were appointed to the work group, however all interested parties were invited to join the discussion.¹ To facilitate consensus-building, staff requested that all interested parties with authority to comment on behalf their organization sit around the table with staff, and all other parties (though also invited to comment) sit in the audience.

As background, staff presented an overview of the work done to date on the topic of proprietary records and trade secrets under the HJR 96 study spanning from 2014 to 2016. Staff emphasized that to-date, there have been 25 meetings (consisting of a combination of Council, Subcommittee, and Work Group meetings) on the subject of proprietary records and trade secrets.

At the conclusion its April 4, 2017 Subcommittee meeting, the Subcommittee directed staff to create an amended drafted based on one of the two trade secrets drafts that were presented to the Subcommittee at that meeting. The amended draft (Trade Secrets Draft #3) was used as the vehicle for discussion during the work group meeting. Staff presented the draft, with emphasis on the changes between the previous draft and the current draft, to the interested parties present at the work group. Staff explained that the draft creates 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 submitted information qualifies as a "trade secret" of the submitting entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.);
2. The submitting entity furnished the information to the public body
 - (i) voluntarily;
 - (ii) in compliance with a statute, regulation, or other law of the United States or the Commonwealth; or
 - (iii) as a required component of a submission made in connection with a public procurement, public financing, or economic development transaction; and

¹ Interested parties included FOIA Council member Cullen Seltzer, Chris McGee of the Virginia College Savings Plan (VCSP), Phil Abraham of the Vector Corporation/Transurban, Cindy Wilkinson of the Virginia Retirement System (VRS), David Lacy of Christian & Barton representing the Virginia Press Association (VPA), Roger Wiley of the Virginia Municipal League (VML), Phyllis Errico of the Virginia Association of Counties (VACo), and Kara Hart of the Virginia Economic Development Partnership (VEDP).

3. The information that the submitting entity seeks to protect was clearly and specifically identified by the submitting entity as a trade secret upon submission of such information to the public body. Such identification shall be deemed 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 further requires the public body to determine whether the requested exclusion from disclosure is necessary to protect the trade secrets of the submitting entity. The draft requires the public body to make a written determination of the nature and scope of the protection to be afforded by it under the trade secrets exclusion.

The draft also contains a remedies section that provides that in the event that a public body denies a FOIA request for information that has been designated 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 provides 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 under this chapter to require the public body to produce the requested material and shall name the submitting entity as an additional defendant in the action. The draft provides 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, any award of reasonable costs and attorney fees to the requester pursuant to § 2.2-3713 shall be paid by the submitting entity or the public body, or both, in the proportion deemed appropriate by the court.

Finally, the draft contains a provision stating that the general trade secrets exclusion created in the draft shall not be construed to authorize the withholding of trade secret information where the submitting entity no longer exercises reasonable efforts to maintain the secrecy of such information or otherwise takes action that would constitute a waiver of the trade secret protection provided under the Uniform Trade Secrets Act (§ 59.1-336 et seq.).

After public comment, some of the interested parties expressed a concern about the language in line 11 of the draft that limits the eligibility for trade secret protection under FOIA to only those trade secrets submitted to a public body by a submitting entity *that is not a public body*. Several of the interested parties appearing on behalf of public bodies shared that they commonly receive trade secret information from other public bodies. Such information would not be eligible for protection under the general exclusion in Draft #3. The interested parties stressed that they do not want submitting entities to lose their trade secret protection simply because the information has been passed from one public body to another.

Interested parties also expressed concern with lines 15-18 of the draft in light of the word "voluntary" having been added. Several of the interested parties, while being in favor of expanding eligibility for protection to those trade secrets that had been submitted to a public body voluntarily, felt that adding the word "voluntary" made now the entire section in lines 15-

18 superfluous in that trade secrets submitted in an way, whether voluntarily or as a required submission, would be eligible for exclusion as a trade secret. The interested parties expressed a preference for simplifying the draft by deleting the provisions in lines 15-18 altogether.

The interested parties also expressed a concern about the earmarking language in lines 19-23 of the draft. The interested parties and staff noted that the earmarking language in the draft is different than the standard earmarking language used throughout FOIA, and introduces new concepts and standards, such as "clearly and specifically" and "good faith effort". The interested parties expressed a concern that using different language invites differing interpretations, especially when evaluated by a court. The interested parties stated their desire to see continuity in the language used in FOIA.

Additionally, some of the interested parties expressed concerns about the second half of the earmarking process outlined in lines 24-26 of the draft, which requires the public body to determine whether the requested exclusion from disclosure is necessary to protect the trade secrets of the submitting entity and to make a written determination of the nature and scope of the protection to be afforded by it.

Those opposed to the language expressed a concern for what would happen in the event that a submitting entity disagrees with the public body's determination. The interested parties questioned what recourse the submitting entity would have to stop the disclosure.

Staff responded with a reminder that all exclusions in FOIA state that the withholding is in the discretion of the public body. The only way to create a prohibition against disclosure is for the submitting entity to enter into a nondisclosure agreement with the public body.

Other interested parties expressed their concern that public bodies are not well-suited to determine what a submitting entity's trade secrets are. In order to make such a determination, the public body would have to undertake in-depth research into the particular industry at issue.

The interested parties agreed to compromise on the issue and recommended that the language be amended to make it permissive (as opposed to mandatory) for the public body to determine whether the requested exclusion from disclosure is necessary to protect the trade secrets of the submitting entity. Staff noted that the trade secrets exclusion, like all other exclusions in FOIA, is already discretionary on the part of the public body, however the interested parties expressed a preference for having this language in the draft because it gives the public body something to point to when it feels as though the submitting entity is overreaching in its designation of certain information as trade secrets. Additionally, the interested parties agreed to remove the requirement in lines 25-26 that the public body make a written determination of the nature and scope of the protection to be afforded by it under the trade secrets exclusion.

The interested parties had considerable discussion on the issue of notice to the submitting entity in the event that the withholding of its trade secret information by a public body is challenged by a requester, which is provided for in lines 27-31 of the draft. Ultimately, the interested parties decided to leave it up to the public body to determine if, how, and when it discusses the challenge with the submitting entity. The interested parties expressed their opinion that it is

unnecessary to enumerate in the Code a detailed back-and-forth procedure between the public body and the submitting entity.

Some of the interested parties expressed a dislike for the mandatory joinder provision in lines 31-35 of the draft, while other interested parties were in favor of the provision. Those in favor of the provision liked that it would put the submitting entity on notice in the event that the protection of its trade secret information was being disputed in court. Those opposed to the provision expressed a concern that the provision could be burdensome to the requester in that the requester may not know who the submitting entity is and may have to expend time and money researching the industry at issue in order to identify and join the submitting entity.

Several of the interested parties expressed an appreciation for the apportionment language that was added in Draft #3 that gives the court authority to apportion any award of reasonable costs and attorney fees between the submitting entity and the public body as the court deems appropriate. The interested parties requested that that language be kept in any drafts going forward.

Some of the interested parties emphasized that that the policy underlying FOIA is one of open government and, as such, that it should be preserved to the maximum extent possible. To that end, any exceptions from the policy of open government should be crafted line-by-line in a pinpointed, specific, and precise manner, rather than in a broad and sweeping manner. They highlighted that to aspire to create a general exclusion may be contrary to the fundamental public policy underlying FOIA.

In response to a question from one interested party about why the FOIA Council should try to create a general exclusion, staff explained that the expressed goal has been to explore the possibility of creating a general exclusion in order to stem the proliferation of agency-specific, pinpointed exclusions going forward, as well as to review and potentially eliminate some of the existing exclusions, especially those that use similar but different language, potentially inviting varying interpretations.

Lastly, the interested parties expressed an opinion that the language in lines 39-42 of the draft could be simplified. They suggested that the language be reworded to simply state that the protection afforded under the trade secrets exclusion will no longer apply in the event that the submitted information no longer meets the definition of a trade secret under the Uniform Trade Secrets Act. The interested parties stated that they see this language as providing important guidance to public bodies in the event that the submitted information is no longer a trade secret and is easily available in the public domain. They also saw their suggested language as valuable to the submitting entity in that it puts the submitting entity on notice that its information will no longer receive protection under FOIA if it does not take reasonable steps to maintain the secrecy of the information.

After considerable discussion, the work group agreed upon the following amendments to Draft #3:

- Remove the requirement in line 11 that the submitting entity not be a public body.

- Remove lines 15-18, which require that the submitting entity have furnished the information to the public body (i) voluntarily; (ii) in compliance with a statute, regulation, or other law of the United States or the Commonwealth; or (iii) as a required component of a submission made in connection with a public procurement, public financing, or economic development transaction.
- Remove the earmarking language in lines 19-23 and replace it with the standard earmarking language used throughout FOIA. Doing so removes, among other things, the standards of "clearly and specifically" and "good faith effort" that were introduced in the draft and that are not expressed elsewhere in FOIA. The work group's concern was that using different language with different standards than that used elsewhere in FOIA invites varying interpretations.
- Make it permissive (as opposed to mandatory, as it was in Draft #3) for the public body to make a determination as to whether the requested exclusion from disclosure is necessary to protect the trade secrets of the submitting entity.
- Remove the requirement in lines 25-26 that the public body make a written determination of the nature and scope of the protection to be afforded by it under the trade secrets exclusion.
- Eliminate the requirement in lines 27-31 that the public body notify the submitting entity within two working days if a requester challenges the submitting entity's designation of certain information as trade secrets.
- Eliminate the following language in lines 31-34: "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 under this chapter to require the public body to produce the requested material[.]"
- Amend the provision in lines 34-35 that requires the requester, if the requester brings an action to challenge the withholding, to name the submitting entity as an additional defendant in the action, to require the requestor to name the submitting entity or its *successor in interest* as an additional defendant.
- Keep the apportionment language in lines 35-38 that provides that if, as a result of an action, the court requires the public body to produce the trade secret information because it was improperly designated as a trade secret, any award of reasonable costs and attorney fees to the requester pursuant to § 2.2-3713 shall be paid by the submitting entity or the public body, or both, in the proportion deemed appropriate by the court.
- Amend and simplify the language in lines 39-42 pertaining to loss of protection in the event that the submitting entity's trade secrets are no longer secret to state, "The provisions of this subdivision shall not be construed to authorize the withholding of such information that no longer meets the definition of a trade secret under the Uniform Trade Secrets Act."

The interested parties were unable to reach a consensus as to the mandatory joinder provision in lines 34-35 of the draft. Some of the interested parties wanted to keep the provision as-is, while others felt that joinder should be permissive. The interested parties agreed to leave the issue on the table for the time being and to continue further discussion on the issue at the next Subcommittee meeting, scheduled for May 1, 2017 at 1:30 PM. The work group agreed for staff

to post the amended draft containing the work group's recommendations on the FOIA Council's website to allow for further consideration ahead of the upcoming Subcommittee meeting.