Proprietary Records & Trade Secrets Subcommittee
Meeting Summary
May 1, 2017
1:30 PM
House Room 2
Capitol Building, Richmond, VA

The Proprietary Records & Trade Secrets Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) held its second meeting on May 1, 2017 to continue the study of the treatment of trade secrets and proprietary records under the Virginia Freedom of Information Act (FOIA). The study of this issue began under House Joint Resolution No. 96 (2014)(HJR 96), however that study concluded last year without resolution of the issue. Subcommittee members Delegate LeMunyon (Chair), Mr. Seltzer, and Mr. Vucci were present; Ms. King-Casey and Ms. Porto were absent.

After calling the meeting to order, staff presented the work group report of the Proprietary Records and Trade Secrets Subcommittee Work Group. The Work Group met on April 25, 2017 to consider draft legislation that would create a general exclusion for trade secrets submitted to a public body. Staff related that no members were appointed to the Work Group, however all interested parties had been invited to join the discussion.[1] Staff explained that 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. Staff explained that they presented to the Work Group, as background, 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 with no resolution of the issue. Staff noted that they then presented to the Work Group an overview of draft legislation (Trade Secrets Draft #3) that had been prepared for consideration by the Work Group. Staff stressed that after public comment on the draft, staff went through the draft line-by-line with the interested parties to identify areas of consensus. Staff related that at the conclusion of the Work Group meeting and after considerable discussion, the interested parties recommended amendments to Draft #3 to be incorporated into a new draft for presentation to the Proprietary Records and Trade Secrets Subcommittee at its meeting on May 1, 2017.

Staff then presented to the Subcommittee an overview of the Trade Secrets draft recommended by the Work Group (Draft #4). Staff explained that the draft creates a general record exclusion for trade secrets submitted to a public body. The draft states that a record is eligible for exclusion as a trade secret if the submitted information qualifies as a trade secret of the submitting entity as defined in the Uniform Trade Secrets Act. The draft requires the submitting entity to make a written request to the public body (i) invoking such exclusion upon

[1] Interested parties included FOIA Council member Cullen Seltzer, Chris McGee of the Virginia College Savings Plan (VCSP), Phil Abraham of the Vectre Corporation representing 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).

submission of the trade secret information for which protection from disclosure is sought, (ii) identifying with specificity the trade secret information for which protection is sought, and (iii) stating the reasons why protection is necessary. The draft provides that the public body may determine whether the requested exclusion from disclosure is necessary to protect the trade secrets of the submitting entity. The draft requires a requester filing a FOIA petition challenging a record's designation as an excluded trade secret to name the submitting entity or its successor in interest, in addition to the public body, as a defendant. The draft states that if a court finds that a public body improperly withheld a record designated a trade secret by the submitting entity, any award of reasonable costs and attorney fees to the requester shall be paid by the submitting entity or the public body, or both, in the proportion deemed appropriate by the court. Lastly, staff explained that draft provides that the general exclusion for trade secrets 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.[2]

Staff noted that the interested parties were unable to reach a consensus as to the mandatory joinder provision in lines 19-21 of Draft #4. 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 mandatory joinder provision in the draft for the time being but to continue further discussion on the issue at the Subcommittee meeting.

Staff also mentioned that it had been brought to their attention that the use of the word "chapter" in line 13 of Draft #4 may be interpreted to extend the application of the provisions in the new general exclusion for trade secrets created tby the draft (including the earmarking and remedies provisions) to trade secrets exclusions that exist in other code sections outside of Va. Code § 2.2-3705.6, such as the exclusions for the Virginia Retirement System and the Virginia College Savings Plan found in § 2.2-3705.7. After discussing the issue, the Subcommittee recommended to change the word "chapter" in line 13 to the word "subdivision", which would eliminate those unintended consequences.

The Subcommittee then proceeded to further discussion of the draft. Chairman LeMunyon, referring to the apportionment language in lines 21-25 of the draft[3], posed the question of whether, in the event that a requester challenges a withholding of trade secret information in court and the court rules against the requester, the requester should be responsible for paying the reasonable costs and attorney fees of the public body and the submitting entity (if applicable). Staff responded that in FOIA generally, each party pays its own costs and attorney fees if the court finds in favor of the public body.

Referring to the continuing debate over whether the joinder provision in the draft should be mandatory or optional, Mr. Vucci asked whether it is always the case that the requester will know who the submitting entity is. Doubting that to be the case in all situations, Mr. Vucci stated his preference that the joinder provision be optional rather than mandatory. In response to Mr.

[2] Please note that the full text of Draft #4 is posted on the FOIA Council's website.

[3] Lines 21-25 of the draft provide that " If, as a result of the action, the court requires the public body to produce such [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."

Vucci's comment, staff suggested that the requester could make a FOIA request to find out who the submitting entity is, but noted the requester may still not be able to figure out who the successor in interest is, if there is one.

Moving on to public comment, Miles Loria, representing the Northern Virginia Technology Council and the Northern Virginia Transportation Alliance, stated that he thinks the issue of paying costs and attorney fees should be a two-way street. He emphasized that, as the draft is currently written, if a requester challenges the withholding of trade secret information in court and loses, the requester loses nothing (aside from paying his own costs and attorney fees), while the submitting entity has to foot the bill for the costs and attorney fees required to defend itself against the petition. He stated that he takes issue with the fact that the draft permits the requester to target the submitting entity for payment of costs and attorney fees. He shared his opinion that if the submitting entity can be dragged into court and required to pay the requester's costs and attorney fees in the event that the submitting entity loses, the requester should also be on the hook for paying the public body's and submitting entity's costs and attorney fees in the event that the requester loses. He stated that this issue is particularly pertinent given that the requester is frequently a competitor of the submitting entity. Phil Abraham with the Vectre Corporation echoed Mr. Loria's remarks.

Both Cindy Wilkinson with the Virginia Retirement System and Chris McGee of the Virginia College Savings Plan commented that they support changing the word "chapter" in line 13 to the word "subdivision" in order to avoid making the provisions of the general trade secrets exclusion in the draft apply to VRS' and VCSP's exclusions that are located outside of Va. Code § 2.2-3705.6.

David Lacey with the Virginia Press Association questioned generally how the trade secrets exclusion created in Draft #4 would interact with the existing provisions in Va. Code § 2.2-3705.6, which use varying language including the terms "proprietary" and "confidential". He stated that Draft #4 is a good first step, but that we also must take the second step of resolving the confusing and varying language present in the remainder of Va. Code § 2.2-3705.6. On the issue of the joinder provision, Mr. Lacey stated his opinion that joinder should be optional as opposed to mandatory given that it may be difficult for the requester to join the submitting entity. As to the idea of requiring the requester to pay the public body's and submitting entity's attorney fees in the event that the requester challenges the withholding of trade secret information and loses, Mr. Lacey stated that he thinks this would be setting a dangerous precedent. He emphasized that Va. Code § 8.01-271.1 already provides a mechanism to address frivolous claims, and he stated that he feels that it is dangerous to put the economic burden of a meritorious but unsuccessful suit on the requesting party. Lastly, Mr. Lacey suggested changing the language in line 22 of Draft #4 from "improperly designated as a trade secret" to "improperly withheld pursuant to this subdivision as a trade secret".

At the conclusion of public comment on Trade Secrets Draft #4, Chairman LeMunyon suggested the following amendments to the draft:

1. On line 13, change the word "chapter" to "subdivision" (thereby avoiding making trade secrets exclusions that are outside of Va. Code § 2.2-3705.6, such as those of VRS and

the Virginia College Savings Plan, subject to the provisions of the general trade secrets exclusion created in Draft #4);
2. On line 20, change the word "shall" to "may" (thereby making the joinder provision optional as opposed to mandatory); and
3. On line 22, change the language "improperly designated as a trade secret" to "improperly withheld pursuant to this subdivision as a trade secret".

Chairman LeMunyon further suggested leaving the issue of payment of costs and attorney fees on the table for further discussion at the next FOIA Council meeting, which is scheduled for May 15, 2017.

The Subcommittee agreed with Chairman LeMunyon's suggestions and voted 3-0 to recommend Trade Secrets Draft #4 as amended to the full FOIA Council.

The Subcommittee then moved on to consider the issue of proprietary records. Staff provided the Subcommittee with a review of various existing definitions of the word "proprietary" from Virginia case law, other states' statutes, etc. Staff explained that 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. Staff further explained that research showed 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. Staff highlighted, however, that Michigan recently passed legislation that includes a definition of "financial and proprietary information." Staff informed the Subcommittee that they had prepared a draft for the Subcommittee's consideration based on the Michigan law, as well as concepts gleaned from other states' laws and current FOIA exemptions in light of the Supreme Court's decision. Staff noted that the draft was being presented for consideration of the definitional issue only and that if the Subcommittee chooses to go forward with a definition of "proprietary," a revised draft would need to be prepared that would amend the current exemptions as necessary to conform with the definition recommended by the Subcommittee.

Staff then presented the draft. Staff explained that the draft simply amends the definitions section in FOIA, Va. Code § 2.2-3701, to add a definition of "proprietary information". Staff explained that the draft defines "proprietary information" as "information that has not been publicly disseminated or which is unavailable from other sources, the release of which may cause the creator or submitter of the information competitive harm."[4]

Chairman LeMunyon then commented that he sees the issues related to proprietary information as more than just a definitional issue. He referenced the specific exclusions in § 2.2-3705.6 and read several of them aloud, emphasizing how many of the exclusions use different language to refer to what appears to be the same thing - proprietary information. He expressed a desire to clarify and simplify the language used in each of the specific exclusions in an effort to achieve uniformity in interpretation and application, in addition to the goal of coming up with a uniform definition of the word "proprietary".

[4] Please note that the full text of the "proprietary information" draft is posted on the FOIA Council's website.

The Subcommittee then heard public comment on the "proprietary information" draft. Kay Heidbreder, representing Virginia Tech, expressed concern with the definition in the draft, stating that she feels that it misses the point for academic matters and only addresses financial matters. She questioned whether the words "competitive harm" in the definition refer only to *financial* competitive harm. She stated that if that is the case, trade secrets that exist in the academic context would not necessarily be protected. She stressed that it is critical to protect these trade secrets, because not having the protection could affect the ability of public universities, as compared to private universities, to attract and retain professors. She emphasized that professors need the opportunity to fully develop and vet their ideas before releasing their research. She also stated that the lack of protection could also interfere with the university's ability to obtain a patent for academic research because someone could simply make a FOIA request for the information and apply for the patent first, thereby undercutting the university. She requested that the FOIA Council consider adding an ownership requirement to the definition, as well as language stating that information would be protected if its disclosure would affect the conduct or outcome of research.

Staff pointed out that Va. Code § 2.2-3705.4 already contains an exclusion for "Information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such information has not been publicly released, published, copyrighted or patented." Ms. Heidbreder responded, however, that the definition of "proprietary" in the draft would affect that exclusion, because the exclusion uses the word "proprietary". Mr. Seltzer responded that the exclusion in Va. Code § 2.2-3705.4 strikes him as no broader than the definition in the draft, and that the definition in the draft appears to be broader and better for faculty of institutions of higher education because the words "competitive harm" are not limited to financial competitive harm.

Sandi McNinch with the Virginia Economic Development Partnership expressed concern that the definition would not allow for the name of a company with which VEDP is negotiating to be protected from mandatory disclosure. She argued that such information is proprietary. She presented a suggested definition to the Subcommittee, which read as follows: '"Proprietary information' means the identity of a business or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities or operations in the Commonwealth, and all information that has not been publicly disseminated or which is unavailable from other public sources, the release of which may cause the creator or submitter of the information competitive harm."

John Ryan, the Associate Vice President for Research at Virginia Commonwealth University, echoed the comments made by Ms. Heidbreder from Virginia Tech. He stated that the words "competitive harm" are too vague to give protection to information created in the academic context. He gave the example of research data that has negative or inconclusive findings. He stated that the release such information may not cause competitive harm at the current time, however the data may later be found to be of significance and at that later time the same data may have tremendous value. He emphasized the importance of giving researchers at

public universities protection for their work and not disadvantaging them as compared to researchers at private universities.

Phil Abraham with the Vectre Corporation questioned whether the Subcommittee should try to come up with a definition of "proprietary" that works, or if the Subcommittee should go beyond that limited focus and instead examine and change the terms used in each of the specific exclusions in Va. Code § 2.2-3705.6. He directed the Subcommittee's attention to subdivision 11 of § 2.2-3705.6, which allows for protection for (i) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise and (ii) other information submitted by the private entity where if such information was made public, the financial interest or bargaining position of the public or private entity would be adversely affected. He suggested that the Subcommittee perhaps not use the word "proprietary" and instead use a different word that could be defined to provide the protections outlined in subdivision 11 of § 2.2-3705.6. Miles Loria, representing the Northern Virginia Technology Council and the Northern Virginia Transportation Alliance, echoed Mr. Abraham's comments.

David Lacey, representing the Virginia Press Association, stated that FOIA is currently using words that blur the distinction between proprietary information, trade secrets, financial information, confidential information, etc. Mr. Lacey took issue with the fact that the draft contains no requirement that the submitting entity have an ownership interest in the submitted information. He stated that this is the complete antithesis of the definition that the Supreme Court of Virginia used in *American Tradition Institute v. Rector and Visitors of the University of Virginia*.[5] He stated that the definition of "proprietary information" in the draft only further blurs the line, and that the definition of "proprietary" needs to correspond to the common usage of the word. Mr. Lacey also stated his opinion that the draft focuses too much on competitive harm.

Chairman LeMunyon then posed the question as to whether there is information that is *generated* by a public body that is proprietary and that should be kept out of the public view. Mr. Lacey responded to the question by stating that outside of the academic setting, he could not think of any such information off of the top of his head. Staff suggested that there may be such information when the public body is an actor in the marketplace, such as the Virginia Commercial Space Flight Authority. Roger Wiley with VACo said that there are instances in which a public body generates its own proprietary information. He gave examples of utility billing systems that are designed and sold by localities, as well as some construction plans that are owned by localities or the state.

Chairman LeMunyon then stated that it appears to him that there are three categories of "proprietary" information: (1) proprietary information that is submitted to a public body; (2) proprietary information that is created and owned by a public body; and (3) proprietary information that is created and owned by academic institutions. Chairman LeMunyon suggested that for the time being and for the purposes of the draft, the Subcommittee should focus

[5] See *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))("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.").

exclusively on the first category of proprietary information - proprietary information that is submitted to a public body (and not proprietary information that is owned or created by a public body or academic institution). Chairman LeMunyon then asked, if the Subcommittee does agree upon a definition of the word "proprietary", what happens with resolving the confusing and varying language currently present in the specific exclusions in Va. Code § 2.2-3705.6. Staff responded that if the Subcommittee chooses to pursue and ultimately agrees upon a definition of the word "proprietary", the next step would be to go through each of the specific exclusions in Va. Code § 2.2-3705.6 and conform them to the definition chosen by the Subcommittee.

Chairman LeMunyon then asked whether it would make sense, instead of trying to agree upon a definition and make it applicable to each of the specific exclusions in Va. Code § 2.2-3705.6, to instead go through and try to collapse as many of the specific exclusions as possible in an effort to clarify, simplify, and streamline the section. He suggested trying to use one word that would apply to all of the exclusions.

Staff then provided some historical context concerning the development of Va. Code § 2.2-3705.6 over time. Staff explained that subdivision 11 of Va. Code § 2.2-3705.6 was the first instance in which the General Assembly attempted to defined *what* was protected without using the word "proprietary". Subdivision 11 provides protection for (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) (ii); financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; and (iii) other information submitted by the private entity where if such information was made public, the financial interest or bargaining position of the public or private entity would be adversely affected. Staff further emphasized that the FOIA Council must make a policy decision - if it wishes to completely re-write Va. Code § 2.2-3705.6 in a completely different way it will be significantly deviating from the mandate of the HJR 96 study, which was to determine the continued applicability or appropriateness of each of the exclusions in FOIA and to determine whether FOIA should be amended to eliminate any exemption from FOIA that the Council determines is no longer applicable or appropriate. Staff stressed that the Council must decide whether it is going to re-write the section or simply chip away at the edges.

Chairman LeMunyon then suggested creating and defining a common term that would apply to all of the exclusions in Va. Code § 2.2-3705.6. He suggested using some of the language in subdivision 11 of Va. Code § 2.2-3705.6 as the basis for the definition. He stated that the definition would apply to circumstances in which a private entity submits proprietary information to a public body.

Mr. Seltzer commented that he does not understand why "proprietary" information or the concept of ownership is the inquiry at all. He questioned why it matters who owns the information. He stated that to him, the issue that the Subcommittee should be focusing on is the potential harm that could come from the release of the information.

Mr. Vucci stated that he thinks that if the Subcommittee wishes to move forward, the Subcommittee should come up with a definition and then see how the definition fits with all of

the existing exclusions in Va. Code § 2.2-3705.6. He stated that he is not sure that the definition will fit with each of the existing exclusions.

Chairman LeMunyon directed staff to create a new draft using and defining the words "confidential information". Chairman LeMunyon asked staff to model the definition on the applicable language in subdivision 11 of Va. Code § 2.2-3705.6. Chairman LeMunyon asked staff to include language stating that the public body may determine whether the requested exclusion from disclosure is necessary to protect the confidential information of the submitting entity. Chairman LeMunyon also asked staff to include the apportionment language from the trade secrets draft in the new draft. Chairman LeMunyon asked staff to have the draft available for consideration at the upcoming FOIA Council meeting scheduled for May 15, 2017 at 1:30 p.m. in House Room 1 in the Capitol building. There being no further business, the meeting was adjourned.