

Proprietary Records and Trade Secrets Subcommittee
Meeting Summary
July 11, 2017
10:00 AM
House Room 2
Capitol Building, Richmond, VA

The Proprietary Records and Trade Secrets Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) held its third meeting on July 11, 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); however, that study concluded last year without resolution of the issue. Subcommittee members Delegate LeMunyon (Chair), Ms. King-Casey, Ms. Porto, Mr. Seltzer, and Mr. Vucci were present.

After the meeting was called to order, staff reminded the Subcommittee of the issues being studied concerning the trade secrets and proprietary records exemptions in FOIA. Staff reviewed the Subcommittee's work to date, reminding the Subcommittee that (1) it had recommended to the Council a draft of a general trade secrets exemption that would be considered further by the Council at its meeting on August 14, 2017, and (2) the Subcommittee still had before it the issue of what to do with exemptions using the word "proprietary." The term "proprietary" is not defined in FOIA but has been interpreted by the Supreme Court of Virginia as "an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls."¹ In the concurrence to the same opinion, Justice Mims noted that the term "proprietary" is used in many different exemptions, each with a somewhat different context, and may be subject to differing interpretations. At its last meeting, the Subcommittee considered a definition of "proprietary" that sought to address this problem; however, there was no agreement to move forward with it. Instead, the Subcommittee asked staff to prepare a draft that defines the term "confidential information" and creates an exemption for the same ("confidential information draft"). Staff also prepared an alternative draft for certain financial information or other information submitted to a public body that would adversely affect the submitting party's financial interest or competitive position if made public ("financial information draft"). These two drafts were on today's agenda. Additionally, at the last Subcommittee meeting, Mr. Seltzer had suggested the possibility of deleting the terms "proprietary" and "confidential" from the various exemptions in § 2.2-3705.6, noting that he did not believe such deletion would have any negative material effect on the use of the exemptions and that it would help to simplify them. Staff prepared a third draft implementing that suggestion for the Subcommittee's consideration ("deletion draft").

Delegate LeMunyon asked staff to review the deletion draft, and he stated that if the Subcommittee favored this draft, the other two drafts would not be considered further. Staff went through the deletion draft exemption by exemption, noting first that the draft was prepared only for illustration purposes and if the Subcommittee decided to move forward with it, it would have to be updated to reflect amendments to FOIA that went into effect on July 1, 2017, to check and amend cross-references as necessary, and to combine any proposal adopted by the Subcommittee

¹ *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)).

with the previously recommended trade secrets draft, as amended by the Council. Staff also noted that the proposed deletions would not apply to the phrase "promise of confidentiality," because that phrase usually refers to some arrangement between a submitting entity and a public body such as a nondisclosure agreement. Additionally, many of the exemptions in § 2.2-3705.6 do not use the terms "proprietary" or "confidential" and therefore would not be amended by this draft.²

Turning to the text of the draft, staff noted that the catchline for § 2.2-3705.6 refers to "proprietary records and trade secrets," which would have to be changed if the word "proprietary" is deleted. Staff then went through all of the exemptions in order. In the majority of cases, the Subcommittee agreed by consensus that the terms "proprietary" and "confidential" could be removed without adversely affecting the current exemptions, especially where the FOIA exemption is a cross-reference to a substantive exemption or prohibition in other sections of the Code. The Subcommittee observed that because the term "proprietary" was broadly defined by the Supreme Court, the effective limitations on the scope and application of each exemption are found either in cross-references to other Code provisions, in additional limiting language within each exemption, or both. Below are noted exemptions where other concerns were raised or discussed by the Subcommittee.

Subdivision 1, concerning certain information held by the Virginia Port Authority, is one such exemption that cross-references other law in Title 62.1. In response to inquiries from Delegate LeMunyon, staff confirmed that because the underlying law in Title 62.1 would remain unchanged, removing the word "proprietary" from subdivision 1 may simplify FOIA but would not affect those provisions outside of FOIA. Mr. Seltzer suggested perhaps creating a list of cross-references to exemptions and prohibitions that appear elsewhere might be a better approach than having exemptions in FOIA that might use different terminology or add additional prohibitions or other requirements within FOIA.

Staff informed the Subcommittee that subdivision 4, which refers to information "filed as confidential under the Toxic Substances Information Act . . . as such Act existed prior to July 1, 1992," appears to refer to specific criteria as to what information was considered confidential under that Act. The Subcommittee directed staff to contact the Department of Health to inquire further as to whether and how this exemption is still used, or whether it could be stricken as obsolete.

Subdivisions 6 and 9 refer to certain records held by the Department of Rail and Public Transportation (DRPT) and the Virginia Department of Transportation (VDOT), and both exemptions make reference to federal laws. Staff informed the Subcommittee that in previous years DRPT had indicated that it might seek to amend these exemptions, but staff had not heard further about this matter. The Subcommittee directed staff to contact DRPT and VDOT regarding the scope and application of these exemptions.

Subdivision 10 is a cross-reference to records provisions found in the Virginia Public Procurement Act and contains language adopted from that Act. It was suggested that perhaps the exemption could be shortened to a simpler cross-reference. The Subcommittee agreed to do so but to retain mention of the Act for context so it would be easier for readers to understand.

² Subdivisions 2, 5, 11, 15, 16, 20, 22, 23, 24, 26, and 30.

Staff pointed out that subdivision 14 uses slightly different language than the prior exemptions, as it refers to "Information of a proprietary or confidential nature" rather than "proprietary information" or "confidential information." The Subcommittee noted that it did not make a substantive difference because the exemption cross-references law and regulations outside of FOIA.

The Subcommittee observed that subdivisions 18 and 19 are different in that both exemptions apply to situations where the information to be protected was created by the public body, rather than submitted to the public body by some other entity, and the public body is acting as a competitor in the marketplace. After some discussion, the Subcommittee recommended striking the term "trade secrets" from these exemptions, as well as the terms "proprietary" and "confidential."

Regarding subdivision 21, it was pointed out that the first cross-reference refers to a Code section that has been repealed (§ 32.1-276.5:1, repealed effective May 11, 2017). After discussion, the Subcommittee recommended striking this cross-reference. Mr. Vucci suggested checking to make sure the repealed language was not moved or incorporated into some other Code section.

While new subdivisions 29 and 30, effective July 1, 2017, did not appear in the draft, the Subcommittee considered them anyway. The Subcommittee recommended striking the term "proprietary" from subdivision 29 and observed that the terms "proprietary" and "confidential" do not appear in subdivision 30.

The Subcommittee directed staff to prepare an updated version of this draft for the Subcommittee's consideration at its next meeting. The Subcommittee also directed staff to contact all affected agencies so they might comment on the draft. Finally, the Subcommittee noted that the trade secrets draft before the full FOIA Council would have to be reconciled with this draft if both are recommended. As other business, staff informed the Subcommittee and those present that there is a new FOIA officers webpage on the FOIA Council website that has forms, information on online training, and the FOIA officers list; that a new public comment form is available on the "Forms and Sample Letters" webpage; and that there is new contact information due to the move from the General Assembly Building to the Pocahontas Building. Delegate LeMunyon directed staff to include the public comment forms as an information item for the full FOIA Council meeting on August 14, 2017. The Subcommittee meeting was then adjourned.