

Proprietary Records and Trade Secrets Subcommittee  
Meeting Summary  
August 1, 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 fourth meeting on August 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). 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 presented a brief overview of the Subcommittee's work to date. In the case of *American Tradition Institute v. Rector and Bd. of Visitors of the University of Virginia* (2014), the Supreme Court of Virginia considered the definition of "proprietary" as used in FOIA and held it to have its ordinary meaning because it is not defined by statute. In a concurrence to that opinion, Justice Mims observed that the term is used in many different exemptions and contexts, which may lead to confusion and conflicting interpretations. The Virginia Press Association (VPA) presented a white paper in 2014 suggesting possible solutions, including the establishment of a general exemption for trade secrets. The concepts presented in the white paper were incorporated into the three-year FOIA study under HJR 96. Between the work done under that study and further work this year, various issues concerning proprietary records and trade secrets have been considered at approximately 30 meetings at the Council, Subcommittee, and workgroup levels. The Subcommittee this year recommended to the Council a draft proposal for a general exemption for trade secrets, which is currently before the Council for consideration at its next meeting on August 14, 2017. The Subcommittee at its last meeting considered 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 prepare an updated version of the "deletion draft" (LD 18100099D) for consideration at today's meeting and also asked staff to contact agencies that would be affected by this proposal to get their feedback regarding the proposal. Staff presented the updated deletion draft and reminded the Subcommittee that while the draft deletes the terms "proprietary" and "confidential" from most of the exemptions in § 2.2-3705.6, it does not delete those terms from other sections of FOIA or where they appear in cross-references outside of FOIA. Staff also presented written comments from the Virginia Department of Health (VDH) regarding subdivision 4 of § 2.2-3705.6, which exempts information "filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992." VDH indicated that it may still receive such information in the future and wishes to keep the current exemption as it is written.<sup>1</sup>

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<sup>1</sup> The deletion draft, VDH's letter regarding subdivision 4, and other materials presented at today's meeting are available on the Council's 2017 Subcommittees webpage at [http://foiacouncil.dls.virginia.gov/subcom\\_mtgs/2017/subcom17.htm](http://foiacouncil.dls.virginia.gov/subcom_mtgs/2017/subcom17.htm).

The Subcommittee opened the floor to public comment. Craig Merritt, Esq., speaking on behalf of the VPA, stated that the problem was that, over time, this section had grown in a way that was not structured and consistent, which made it difficult for a court to interpret. He noted that often the same words were used in multiple ways and that the term "proprietary" was often used broadly to mean "confidential." After reviewing some examples, Mr. Merritt stated that having general exemptions for trade secrets and financial information would protect most of the things needed and that he did not agree with striking the terms "proprietary" and "confidential," as he believes such deletions would cause a massive broadening of the existing exemptions. Mr. Seltzer agreed that there was no intent to expand the existing exemptions, but he stated that the Subcommittee had found that the terms "proprietary" and "confidential" were either unhelpful as words of limitation or duplicative of terms in cross-references to other laws. He also provided examples, noting that some exemptions were limited by terms other than "proprietary" while others cross-referenced laws outside FOIA that used the term "proprietary" (and would continue to do so even if the word were stricken within FOIA). Mr. Merritt noted that deleting the terms from FOIA while leaving them in other laws merely kicked the problem of interpretation to the other statute(s). Delegate LeMunyon pointed out that the issue is one of scope and that this draft is a first step rather than an attempt to fix all of the issues presented at once. Mr. Merritt observed that there is always a tension regarding cross-references, because it is helpful in finding exclusions, but it can cause additional problems of interpretation when language is pulled from other statutes into FOIA. Phil Abraham of the Vectre Corporation, speaking on behalf of clients in the transportation industry, stated that, in a lot of places, removing the terms "proprietary" and "confidential" does no harm. He suggested the possibility of combining this idea with the trade secrets draft that was recommended to the full Council but separating the liability shifting language that is in the trade secrets draft. Delegate LeMunyon asked if there was any additional public comment; there was none.

Returning the discussion to the Subcommittee, Ms. Porto commented that after hearing Mr. Merritt's comments she was concerned about unintended consequences and did not want to expand the existing exemptions. Mr. Vucci noted that only three or four exemptions had been mentioned as examples, and he suggested reviewing all the exemptions that would be affected to determine whether there was disagreement about them. Mr. Seltzer observed that Justice Mim's point was that not all terms are meant to mean the same thing in different exemptions and that it would be necessary to either use definitions so broad as to apply to all exemptions or to use separate definitions for each exemption. He further stated that if the cross-references or other terms in an exemption do not limit it sufficiently, then the problem returns to the original issue of the definition of "proprietary." Delegate LeMunyon noted that the Subcommittee did look at the cross-references at its last meeting and was comfortable that the deletion draft would not create new problems, even though the referenced language might also need to be cleaned up. He reminded the Subcommittee that from a legislative perspective, changing laws outside FOIA would necessarily involve other agencies and committees of the General Assembly. After further discussion, the Subcommittee decided to present the draft without recommendation to the full Council for its consideration at the Council's meeting on August 14, 2017. Delegate LeMunyon directed staff to post any comments received from affected agencies on the Council's website and to contact VDH to have a representative available to speak to the Council regarding subdivision 4, noting that it refers to a repealed statute and the Subcommittee was unclear as to why it is still necessary to keep the exemption.

Delegate LeMunyon then asked representatives of the Department of General Services (DGS) to discuss aspects of the agency's procurement policy concerning the designation of trade secrets. He noted that this matter was related to the liability shifting provisions in the trade secrets draft that would be considered by the Council at its next meeting. Sandra Gill, representing DGS, presented excerpts from its Agency Procurement and Surplus Property Manual (APSPM) as well as its Vendors Manual. The APSPM contains the following policy language:

The classification of an entire bid or proposal document, line item prices and/or total bid or proposal prices as proprietary or trade secrets is not acceptable. If, after being given reasonable time, the bidder or offeror refuses to withdraw an entire classification designation, the bid will be considered nonresponsive or the proposal will be rejected.

The Vendors Manual contains nearly identical language:

The classification of an entire bid or proposal document, line item prices and/or total bid or proposal prices as proprietary or trade secrets is not acceptable. If, after being given reasonable time, the bidder or offeror refuses to withdraw an entire classification designation, the bid or proposal will be rejected.

Delegate LeMunyon observed that if a potential contractor was abusing the process, this policy allowed the agency to push back, which Ms. Gill confirmed. Mr. Seltzer observed that the policy places the onus on the bidder to be specific about what needs to be protected as proprietary or a trade secret. In response to questions, Ms. Gill related that some bidders would make broad designations out of habit, but in practice they would change them once it was pointed out that the designations were too broad. She stated that no one has refused to change a designation in her 18 years of experience.

Delegate LeMunyon invited public comment. Mr. Abraham repeated his suggestion that the liability shifting provision in the trade secrets draft be separated into its own bill. He stated that the DGS policy statements reflect best practices for agencies and show that the liability shifting provision is not needed. He suggested that public bodies should use indemnification clauses in contracts instead. He stated that the liability shifting provision, if enacted, would also have to address private entities' liability for bringing frivolous or retaliatory suits seeking competitive advantage. In response to questions from Delegate LeMunyon, Mr. Abraham further stated there was no issue with the policy approach of DGS, as it is preventative, but he did not know if there would be any problem if it was expanded to other areas, as those issues were of greater concern to local government. Delegate LeMunyon asked if there were any other comments from the public or Subcommittee members; there were none. The Subcommittee meeting was then adjourned.