

Records Subcommittee
Meeting Summary
June 27, 2018
10:00 AM
House Room 300A
Pocahontas Building, Richmond, VA

The Records Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) held its second meeting on June 27, 2018, to continue study of the bills referred to the Subcommittee by the full Council from the 2018 General Assembly Session.¹ The eight bills on the agenda for study were House Bill 504 (Mullin), House Bill 664 (Kilgore), House Bill 904 (Robinson), House Bill 957 (Yancey), House Bill 958 (Yancey), House Bill 959 (Yancey), Senate Bill 730 (DeSteph), and Senate Bill 876 (Mason).²

¹ The full Council met on April 4, 2018, to assign the 13 bills referred to the Council from the 2018 Session of the General Assembly. Of those 13 bills, nine were referred to the Records Subcommittee.

² **HB 504 (Mullin) Virginia Freedom of Information Act; definition of "custodian."** Defines "custodian," for purposes of the Virginia Freedom of Information Act, as a public body or its officers, employees, or agents who (i) have prepared or (ii) own or are in possession of a public record. The bill allows for more than one custodian per record.

HB 664 (Kilgore) Virginia Freedom of Information Act; transfer of public records; definition of "custodian." Requires a public body initiating a transfer of public records to any entity, including to any other public body, to remain the custodian of those records only if the public body has transferred the entirety of those public records. Current law requires the public body initiating a transfer of public records to remain the custodian if it has transferred possession of any public records. The bill also excludes the transfer of a portion of information contained in one public body's public record to another public body from being considered as a transfer of an entire public record. The bill also prohibits a public body from withholding a public record in its entirety on the grounds that information contained in such public record was provided by another public body. The bill defines "custodian" for purposes of the Virginia Freedom of Information Act.

HB 904 (Robinson) Virginia Freedom of Information Act (FOIA); general exclusion for trade secrets submitted to a public body. Creates a general record exclusion for trade secrets submitted to a public body. The bill provides 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 (§ 59.1-336 et seq.) and requires the submitting entity to make a written request to the public body (i) invoking such exclusion upon 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 bill permits 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 bill also permits the public body to request that the court add the submitting entity as an additional defendant in the action. The bill 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. This bill is a recommendation of the Virginia Freedom of Information Advisory Council.

HB 957 (Yancey) Virginia Freedom of Information Act; definition of "custodian." Defines "custodian," for the purposes of the Virginia Freedom of Information Act, as the official in charge of a public body or entity that has created, prepared, or revised a public record or that maintains or possesses a public record. The bill allows for more than one custodian per record.

HB 958 (Yancey) Virginia Freedom of Information Act (FOIA); records containing both excluded and nonexcluded information; duty to redact. Provides that no provision of FOIA is intended, nor shall it be construed

Subcommittee members Porto (Chair), King-Casey, Seltzer, Treadway, and Vucci were present. The Subcommittee voted unanimously to adopt the proposed agenda.

Staff reminded the Subcommittee that Senator DeSteph presented SB 730 at the last meeting on May 21, 2017, and that after public comment and discussion on the bill, the Subcommittee directed staff to prepare a draft incorporating the Subcommittee's suggestions. Staff notified the Subcommittee that discussions with Senator DeSteph regarding the particular language in the bill are still ongoing. Additionally, Senator DeSteph could not attend today's meeting and asked that the discussion be continued to the Subcommittee's next meeting date. The Subcommittee unanimously agreed to continue discussion of SB 730 to the next meeting on August 8, 2018.

Staff then presented an update on the bills involving the custody and transfer of records and access to databases (HB 504, HB 664, HB 957, HB 958, HB 959, and SB 876). Staff explained that these bills were the result of the recent Virginia Supreme Court case *Daily Press, LLC. v Office of the Exec. Sec'y*, 293 Va. 551, 800 S.E.2d 822 (2017). In the *Daily Press* case, the issue was whether the requester could obtain a copy of a database hosted on servers operated and housed at the Office of the Executive Secretary (OES) in Richmond or if the requester needed to go to individual clerks of courts in order to obtain the records. The Court determined that the case ultimately turned on the determination of the custodian of the particular records. Although the term "custodian" is undefined in the Freedom of Information Act (FOIA), the Court found that the clerks of court are clearly established as the custodian of court records by § 17.1-242 of the Code of Virginia and therefore the requester needed to make a FOIA request for the records to the individual clerks and not OES. The bills on the agenda for today's meeting attempted to address some of the issues raised in the case by making changes in FOIA, including defining "custodian," addressing the transfer of public records, and prohibiting a public body from

or applied, to authorize a public body to withhold a public record in its entirety on the grounds that information contained in the public record was provided by another public body.

HB 959 (Yancey) Virginia Freedom of Information Act; transfer of public records. Requires a public body initiating a transfer of public records to any entity, including to any other public body, to remain the custodian of those records only if the public body has transferred the entirety of those public records. Current law requires the public body initiating a transfer of public records to remain the custodian if it has transferred possession of any public records. The bill also excludes the transfer of a portion of information contained in a public body's public record to another public body from being considered a transfer of an entire public record.

SB 730 (DeSteph) Virginia Freedom of Information Act. Clarifies that the definition of "public record" does not include records that are not prepared for or used in the transaction of public business. The bill defines "social media account" and creates a new discretionary exemption for social media records of General Assembly members when such records relate to the use of a social media account by a member in such member's individual capacity. The bill requires the public body to be a necessary party in any enforcement proceeding.

SB 876 (Mason) Virginia Freedom of Information Act; transfer of public records; definition of "custodian." Requires a public body initiating a transfer of public records to any entity, including to any other public body, to remain the custodian of those records only if the public body has transferred the entirety of those public records. Current law requires the public body initiating a transfer of public records to remain the custodian if it has transferred possession of any public records. The bill also excludes the transfer of a portion of information contained in one public body's public record to another public body from being considered as a transfer of an entire public record. The bill also prohibits a public body from withholding a public record in its entirety on the grounds that information contained in such public record was provided by another public body. The bill defines "custodian" for purposes of the Virginia Freedom of Information Act.

withholding a public record in its entirety on the grounds that information contained in such public record was provided by another public body. Staff also explained that in addition to these bills, two other bills were presented to the 2018 General Assembly addressing the issues in a different manner and were ultimately passed and signed by the Governor. House Bill 780 (Habeeb)³ and Senate Bill 564 (Peake)⁴ created specific provisions outside of FOIA that detail how the records maintained by clerks and the Executive Secretary of the Supreme Court are to be released. Prior to this meeting, staff spoke with all of the patrons of the bills on the agenda (Delegates Mullin, Yancey, and Kilgore and Senator Mason), who all agreed that the issues they were trying to address were resolved by HB 780 and SB 564 and that they do not want the FOIA Council to continue study of the bills. The Subcommittee agreed that further study of the bills was not needed. Staff explained to the Subcommittee that the bills will be put on the agenda for the next full Council meeting to update the full Council.

The Subcommittee then took up HB 904 (Robinson). Staff gave a brief history of the bill and explained that House Joint Resolution 96 (2014) directed the Council to study all exemptions in FOIA. Since the study began, the Council considered issues related to proprietary records and trade secrets at approximately 30 meetings, including meetings of Council subcommittees, workgroups, and the full Council. HB 904 was the result of a series of drafts considered as a result of a white paper from the Virginia Press Association (VPA), which proposed the creation of one or more general exemptions for trade secrets that might replace the agency-specific exemptions in current law. Numerous drafts were then reviewed regarding the general trade secrets exemption. Representatives from various affected agencies testified at each level, and attempts were made to have as many interested parties as possible at meetings for public comment. Staff then went through HB 904 and reminded the Subcommittee about the language of the bill. Finally, staff explained that during the 2018 Session of the General Assembly, a representative of the Southern Environmental Law Center (SELC) brought concerns to the House Committee on General Laws regarding chemicals used in hydraulic fracturing. Specifically, the SELC was concerned that the general trade secrets exemption would be used to withhold the chemicals used in hydraulic fracturing from the public. As a result of those concerns, the bill was sent back to the FOIA Council for further study. Staff explained that there are currently regulations developed by the Department of Mines, Minerals and Energy (DMME) that address

³**HB 780 (Habeeb) Public access to nonconfidential court records.** Provides that a clerk of court or the Executive Secretary of the Supreme Court shall make nonconfidential court records or reports of aggregated, nonconfidential case data available to the public upon request. The bill specifies that such records or reports shall be provided no later than 30 days after the request. The bill further provides that the clerk may charge a fee for responding to such request that shall not exceed the actual cost incurred in accessing, duplicating, reviewing, supplying, or searching for the requested records. Finally, the bill requires the Executive Secretary of the Supreme Court to make available to the public an online case information system of nonconfidential information for criminal cases by July 1, 2019. This bill is identical to SB 564.

⁴**SB 564 (Obenshain) Public access to nonconfidential court records.** Provides that a clerk of court or the Executive Secretary of the Supreme Court shall make nonconfidential court records or reports of aggregated, nonconfidential case data available to the public upon request. The bill specifies that such records or reports shall be provided no later than 30 days after the request. The bill further provides that the clerk may charge a fee for responding to such request that shall not exceed the actual cost incurred in accessing, duplicating, reviewing, supplying, or searching for the requested records. Finally, the bill requires the Executive Secretary of the Supreme Court to make available to the public an online case information system of nonconfidential information for criminal cases by July 1, 2019. This bill incorporates SB 519 and is identical to HB 780.

the disclosure of those chemicals and introduced Michael Skiffington, the Policy and Planning Manager at DMME, to discuss the development of the regulations.

Mr. Skiffington began by explaining that he would provide a high-level look at a process that took place over the last three years. He began by stating that DMME regulates mineral extraction across the Commonwealth. Hydraulic fracturing, the issue at the heart of the discussion for this meeting, is the name for the injection of chemicals under high pressure into the earth in order to extract natural gas. This is a process that has been used in Virginia since the 1960s. In December 2013, development of a regulatory scheme involving the chemicals used in hydraulic fracturing was initiated. In 2014, six meetings were held with a regulatory advisory panel, including relevant stakeholders. A number of recommendations were made as a result of these meetings. Regulations were published in 2015 for a public comment period. Over 1,000 comments were received in relation to the regulations. The final regulations were published in 2016 and require operators to disclose ingredients using FracFocus, a chemical disclosure registry. Additionally, DMME maintains a copy of all the data submitted by operators. In submitting a permit application, operators are required to list the ingredients they intend to use, and if the permit is approved it becomes a public record. After completion of a project, the operators must also provide a completion report that includes significant data, including what chemicals were used. In developing the regulations, DMME looked at the regulatory requirements in other states, finding that over 20 states use the FracFocus program, allowing to varying degrees the operator's ingredients and recipes to be protected as trade secrets. Everything that an operator puts down a well in Virginia is submitted to DMME. If the submitting entity makes a claim that something is a trade secret, DMME makes the final determination. Trade secrets are withheld unless there is an emergency.

The Subcommittee inquired as to what constitutes an "emergency." Mr. Skiffington replied that for simplicity and in the context of today's discussion, it would mean a spill. Mr. Seltzer then asked what the outcome is of information determined to not be a trade secret. Mr. Skiffington replied that the information would be public. Mr. Seltzer followed up by asking if there is a mechanism in place to determine if something is a trade secret if a provider of information disputes the classification by DMME. Mr. Skiffington answered that there is no mechanism in place with DMME. Mr. Vucci asked Mr. Skiffington if the bill up for discussion (HB 904) was in line with the regulations, and Mr. Skiffington stated that it was. Mr. Seltzer addressed the Subcommittee and stated that having the general trade secrets exemption would provide a better avenue for a requester to challenge a trade secrets classification by DMME since the requester could bring a court action.

The floor was then opened to public comment on the bill. Emily Francis with the SELC spoke first. She stated that the SELC was opposed to the bill during the 2018 Session and that this is the third year in a row this issue has come up in some form. She continued by saying that the bill misses the mark of the joint resolution that directed the Council to study exemptions and that the resolution was to determine if current exemptions were to be eliminated, not to expand the exemptions. One unintended consequence of the current bill is that right now anyone can have access to the chemicals and chemical formulas involved in hydraulic fracturing, but HB 904 would limit that access. She explained that comments opposing the bill were received by numerous organizations. The Piedmont Environmental Council received 400 comments, the

Augusta County Alliance received 100 comments, and the Virginia League of Conservation Voters received over 300 comments. She stated that the bill removes more access from the public. Mr. Vucci asked if, under current law, all of the information, including chemicals and chemical formulas, would have to be released in response to a FOIA request. Mr. Skiffington answered that under current law, without this bill, all of that information would have to be provided in response to a FOIA request.

Bob Shippee, Chairman of the Legislative Committee of the Sierra Club of Virginia, stated that the Sierra Club vigorously opposed the bill. The Sierra Club sent out alerts about the bill and received well over 1,000 comments in opposition. The public wants to know what goes into the ground. Mr. Seltzer asked why there is an option in the regulations for a requester to claim a trade secret when current law makes all of the information public. Mr. Skiffington responded by saying that currently, because the law makes all of the information public, operators do not submit requests to classify something as a trade secret and they therefore do not use the most advanced technology since it cannot be protected.

Phil Abraham of the Vectre Corporation spoke next and stated that there should not be a picking and choosing of various exemptions. Instead, the general trade secrets exemption should apply only to the exemptions already in place in FOIA. David Lacey spoke next on behalf of the Virginia Press Association and pointed out that the current section of FOIA with trade secrets exemptions is not a user-friendly section of FOIA. He reminded the Subcommittee that the bill was also the result of the terms "trade secret," "proprietary," and "confidential" being used throughout the section in varying combinations and contexts that are confusing. He noted that SELC had a good point that there may be other information, similar to hydraulic fracturing chemicals, that is now available but that may be withheld as a result of this exemption. If this is not the case, and the only issue is the identification of hydraulic fracturing chemicals, he suggested companion legislation to HB 904 that addressed that specific issue. He noted that the Subcommittee should be considering the potential unintended consequences of the legislation.

Miles Morin with the Virginia Petroleum Council then spoke about the DMME regulation development process. The regulations expected some type of exemption to be put in place, which is why there is an option for a submitting entity to assert trade secret status. He stated that it is bad for business if trade secrets are not protected because submitting entities will not use their latest technology out of fear it will be made public to competitors. Furthermore, he stated, it would be inequitable to carve out an exception only for oil and gas.

Finally, Megan Rhyne with the Virginia Coalition for Open Government stated that the problem she saw with the bill was the placement of the exemption. She stated that a definition of trade secrets could be placed in the definitions portion in order to unify the use of the words and keep the current exemptions.

After public comment, the Subcommittee considered the comments and the bill. Mr. Seltzer started by asking how a first responder obtains needed information about chemicals and if first responders need to make a FOIA request to get the information. Mr. Skiffington stated that the chemical information is included in the initial permit and that, once approved, the permit is a public record. Mr. Seltzer followed up by asking if HB 904 would change that, and Mr.

Skiffington stated he did not think so. The Subcommittee then went on to discuss the competing interest, opposing viewpoints on the bill, and the possibility of other unintended consequences. In that discussion, the Subcommittee also considered the length of time the bill was studied over the past three years. The Subcommittee noted that while the issue of unintended consequences was raised, no specific examples have been provided beyond that of the hydraulic fracturing chemicals. The Subcommittee voted unanimously to continue discussion of HB 904 to the next meeting on August 8, 2018, and to have staff work with the interested parties prior to that meeting on the particular issue of hydraulic fracturing chemicals to see if a resolution could be found.

With no further business, the meeting was adjourned.