

Records Subcommittee
Meeting Summary
August 8, 2018
1:00 PM
House Room 300A
Pocahontas Building, Richmond, VA

The Records Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) held its third meeting of the 2018 interim on August 8, 2018, to continue study of the bills referred to the Subcommittee by the full Council from the 2018 Session of the General Assembly. The two bills on the agenda for study were Senate Bill 730 (DeSteph)¹ and House Bill 904 (Robinson).² 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 May 21, 2018, meeting, where he explained that the bill was necessitated by a recent court case involving a senator's Facebook page and whether information posted on the page qualified as public records pursuant to FOIA. At that meeting, there was discussion by the Subcommittee about language added to the definition of public record that had previously been removed due to confusion and unintended consequences. The Subcommittee had directed staff to provide a new draft addressing the concerns about that language and tying that language to the newly created exemption for social media records of members of the General Assembly from the mandatory disclosure provisions of FOIA. Staff presented the new draft and explained that the added language in the definition of "public records" mirrors what is in current law in order to avoid confusion and provide a clarifying statement. Additionally, the same language was added to the section exempting social media records of members of the General Assembly from the mandatory disclosure provisions of FOIA. In the new draft, social media records are exempt only if they (i) relate to the use of a social media account by a member in such member's individual capacity and (ii) are not prepared or owned by, or in the possession of, a public body or its officers, employees, or agents in the transaction of public business. Staff also explained to the

¹ **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.

² **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.

Subcommittee that a second draft includes a provision giving the Office of the Attorney General the ability to represent a member of the General Assembly, pursuant to the member's request, if the member is alleged to have violated FOIA in his or her official capacity. That issue was not discussed in detail at the May 21, 2018, Subcommittee meeting, but Senator DeSteph had mentioned it while presenting the bill. Since there was no language in SB 730 providing for the representation by the Attorney General, staff included language for the Subcommittee to consider. Senator DeSteph then spoke on the bill and explained that the new language added in the definition of public record was added as needed clarifying language since a judge interpreting the definition read it incorrectly.

The Subcommittee then discussed the addition of the language regarding the ability of the Office of the Attorney General to represent members of the General Assembly. There was some discussion as to whether the section of the Code addressing powers of the Office of the Attorney General already allows for representation of members of the General Assembly. Senator DeSteph pointed out that the Code currently does not specify that the legislative body can be represented by the Attorney General, which means that the Code section does not apply to the General Assembly. There was then further discussion about the possibility of conflicts between representation by the Attorney General and members of the legislature before the floor was opened for public comment.

Betsy Edwards of the Virginia Press Association (VPA) spoke on the bill. She stated that she does not object to the added language in the definition of public records but is opposed to the new language addressing social media accounts of members of the General Assembly. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) spoke next about the court case that led to the legislation. She explained that in that case the court said that Facebook posts, not entire Facebook accounts, can be public records. She went on to say that whether something is a public record depends on the content and that carving out social media accounts would encourage taking public business to nonpublic forums. Finally, she stated that she has not seen convincing justification for this protection. Phyllis Errico with the Virginia Association of Counties (VACO) stated that she shares some concerns that including the language on social media accounts for members of the General Assembly but not for other public officials will cause confusion.

The Subcommittee then returned to discussion of the drafts, noting that the language in the drafts applies to social media records, not necessarily the entire social media account. There was also some discussion on the different uses of the terms "individual capacity" and "personal account" in the bill. Mr. Seltzer expressed concerns about the clarifying language added to the definition of public record. He opined that courts may look at the change as meaning more than just clarifying. The Subcommittee then discussed whether to take the issues to the full Council without a recommendation. The Subcommittee referred both new drafts to the full Council without a recommendation by vote of 4-1 (King-Casey, Seltzer, Treadway, and Vucci voted in favor; Porto voted against).

Staff then provided background and an update on HB 904. Staff reminded the Subcommittee that the bill was reviewed for the first time at the last Subcommittee meeting on June 27, 2018. At that meeting, staff reviewed with the Subcommittee that the bill was the result of a white paper from the VPA and the three-year study of issues involving proprietary records and trade secrets

by the Council. Concerns arose during the 2018 Session that a general trade secrets exemption would allow for withholding of information related to chemicals used in hydraulic fracturing. At the last Subcommittee meeting, the Subcommittee heard from interested parties who elaborated on the concerns about limiting information related to hydraulic fracturing chemicals, in addition to concerns about the general possibility of other unintended consequences of the bill. Since the only specific concern raised at that time related to the hydraulic fracturing chemicals, the Subcommittee asked staff to work with interested parties to see if there was a solution to that particular issue.

Staff explained to the Subcommittee that they had been in contact with numerous parties who spoke at the June 27, 2018, meeting as well as others involved in previous discussions on the issue. Those who could not attend on the suggested meeting dates were invited to call into the meeting via conference or to call and set up a time to talk with staff at another time. A meeting was held on July 30, 2018, with parties participating in person and via conference call. Present at the meeting were representatives for the Southern Environmental Law Center (SELC), the Sierra Club, the Shenandoah Valley Alliance, VCOG, the Department of Mines, Minerals and Energy (DMME), and Virginia Oil and Gas. At that meeting, SELC, the Sierra Club, and the Shenandoah Valley Alliance expressed opposition to the bill as it is currently drafted even if there were a carve-out to address the specific issue of hydraulic fracturing chemicals. Their stated concerns were that the bill is too broad and the unintended consequence of limiting information could extend beyond hydraulic fracturing chemicals to other areas of concern, specifically in the contexts of public health and the environment. Staff explained that after the meeting they were able to speak with Miles Morin of Virginia Petroleum, who expressed support of HB 904 as it is written but stated that Virginia Petroleum would be opposed to any carve-out specifically for the oil and gas industries. Staff further explained that ultimately both sides are opposed to any sort of compromise on the specific issue of hydraulic fracturing. Additionally, staff provided the Subcommittee with a letter from VCOG that stated their position that the bill cannot be salvaged with a carve-out related to hydraulic fracturing. Instead, VCOG suggested that a definition of "trade secret" with earmarking provisions be placed in the introductory portion of the section of FOIA relating to trade secrets exemptions. With that placement, the new definition would apply to the exemptions as they are written in current law, instead of creating a new general trade secrets exemption.

The floor was then opened for further comment. Phil Abraham, of the Vectre Corporation, spoke first and stated that he agreed with the suggestion by VCOG, depending on the specific earmarking provisions. Kristen Davis, an attorney with the SELC, spoke next. She stated that the bill does not acknowledge that there are other areas in Virginia law where trade secrets are subject to release under FOIA. She further stated that she continues to have concerns regarding other information in the contexts of public health and environmental harms. Bryan Hofmann, with Friends of the Rappahannock, explained that on the local level there are individuals involved in the permitting and inspection processes who want to know this information in advance in order to receive the necessary training and to be prepared. There was then discussion among the individuals providing public comment and the Subcommittee regarding how local governments acquire the information under current law. Dave Ress, with the *Daily Press*, explained to the Subcommittee that the permit regulations promulgated by DMME specifically require the deposit of information regarding the chemicals to a program called FracFocus. He went on to state that issues arise when any state agency determines that particular information is

a trade secret. Miles Morin, with the Virginia Petroleum Council, explained to the Subcommittee that Virginia is one of two states that require that trade secrets, in the context of hydraulic fracturing chemicals, be disclosed, but provides no protection for them. He stated that he has spoken to companies that are using new technology to increase production in other states but are unwilling to come to Virginia out of fear that their trade secrets will be exposed. He continued to explain that it has a direct impact on income and jobs in the industry. He then discussed the chemicals used in the hydraulic fracturing process and stated that trade secrets are most often related to the order in which the chemicals are used.

The Subcommittee then briefly discussed the interplay between current exemptions for trade secrets pursuant to FOIA and the Uniform Trade Secrets Act (UTSA) before returning to public comment. Ms. Davis asked for more time to speak in response to Mr. Morin's comments. She stated that she did not believe that most companies are concerned with using new technology for purposes of being more environmentally friendly. Instead, she believes the companies look primarily at what technology increases production. Additionally, she stated that there is always a risk of contamination at any site and there are real examples, not just hypotheticals, in Virginia. Megan Rhyme, with VCOG, spoke last and explained to the Subcommittee that this particular issue, involving a trade secrets exemption for DMME, was discussed during the 2018 Session in the Natural Resources Committees. Pursuant to that discussion, the committees decided not to grant the exemption. She continued by saying that this is one example of what could happen with other information. As such, this discussion has presented the Subcommittee with an opportunity to reexamine the issue of trade secret exemptions again by seeing one of the unintended consequences before the bill has passed. She pointed out that the Subcommittee does not have to recommend passage of the bill in its current form.

The Subcommittee then took up discussion of the bill again. Mr. Seltzer and Mr. Vucci both expressed support of the proposal from VCOG regarding the creation of a unified definition for "trade secret." There was some discussion about the earmarking provisions suggested by VCOG as well as whether and how information that is currently exempted would be affected by the change in definition. Staff proposed the option of creating a draft that defined "trade secret" in the definitions section of FOIA as it is defined in the UTSA. The Subcommittee unanimously voted to refer the new draft, including only a definition of "trade secret," to the full Council. Additionally, the Subcommittee decided to continue discussion of the proposed earmarking provisions as well as the possibility of continued examination of trade secrets exemptions generally to the next meeting of the full Council on August 22, 2018.

With no further business, the meeting was adjourned.