

**FOIA Council Meeting Summary**  
**June 23, 2016**  
**10:30 AM**  
**House Room C**  
**General Assembly Building**  
**Richmond, Virginia**

The Virginia Freedom of Information Advisory Council (the Council) held its second meeting of the 2016 Interim on June 23, 2016.<sup>1</sup> This meeting was held to review draft legislation recommended by the Records Subcommittee and the Meetings Subcommittee, which subcommittees were created in 2014 as part of the study of FOIA in accordance with House Joint Resolution No. 96, to receive progress reports from the Subcommittees, to consider bills referred by the 2016 Session of the General Assembly to the Council for further study, and to discuss other issues of interest to the Council.

**Review of Bills Referred by the 2016 Session of the General Assembly**

Chairman LeMunyon told the Council that Delegate Pogge was unable to attend the meeting as she had previously planned and so review of Delegate Pogge's HB 334 and HB 336<sup>2</sup> was deferred until the next Council meeting. Regarding HB 819 (LeMunyon) and SB 202 (Stuart),<sup>3</sup> Chairman LeMunyon advised the Council that neither he nor Senator Stuart were interested in advancing their bills and recommended no action be taken by the Council on these two bills. The Council, by consensus, agreed with this recommendation.

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<sup>1</sup> Council members Delegate LeMunyon (Chair), Treadway, Ashby, Jones, King-Casey, Hamlett, Porto, Selph, and Vucci were present; members Senator Stuart (Vice Chair), Dooley, and Landon were absent.

<sup>2</sup> **HB 334 Pogge--Bill Summary:** Provides that in an enforcement action, if the court finds the public body violated certain meeting notice requirements, the court may invalidate any action of the public body taken at such meeting.

**HB336 Pogge--Bill Summary:** Protects from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years. The bill provides that access shall not be denied to the parent, including a noncustodial parent, or guardian of such person, unless the parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For records of persons under the age of 18 years who are emancipated, the right of access may be asserted by the subject thereof. Any parent or emancipated person under the age of 18 years who is the subject of the record may waive, in writing, the protections afforded by the bill. If the protections are so waived, the public body shall open such records for inspection and copying.

<sup>3</sup> **HB 819 LeMunyon--Bill Summary:** Requires the release of any audio or video recording or combination thereof made by a correctional officer, jail officer, or deputy sheriff of an individual imprisoned in a penal institution in the Commonwealth being subdued by the correctional officer, jail officer, or deputy sheriff in a manner that results in the death of the individual being subdued or rendering him unconscious. The bill defines "correctional officer," "jail officer," and "deputy sheriff." The requirement applies to any audio or video recording that exists on or after July 1, 2016, regardless of when the audio or video recording was made.

**SB 202 Stuart--Bill Summary:** Provides that public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is the annual equivalent of twice the federal minimum wage or less is not required under FOIA. Currently, public access to salary information is required for public employees whose annual rate of pay is more than \$10,000. The bill also provides that publicly available databases of public employees' salaries shall not include the name of any public officer, appointee, or employee.

Delegate Kay Kory, patron of HB 698 (2016)<sup>4</sup> did appear before the Council to discuss her bill and the reason for its introduction. HB 698 had previously been referred to the Meetings Subcommittee for review. Nonetheless, Delegate Kory explained that she had researched other states laws regarding the opportunity at public meetings for citizens to make their voice heard. She indicated that other states' laws were all over the map on this issue. Delegate Kory indicated that in Pennsylvania, California, and New Jersey, however, a public comment period is required by law. Delegate Kory advised that she is aware that HB 757 (R. Bell) was also introduced during the 2016 Session, dealt with required public comment at public meetings, and like her bill was referred to the Council for study. She stated she believed her bill provided balance by allowing a public body to impose reasonable restrictions on any public comment period.

### **HJR No. 96 Study Work Plan and Subcommittee Reports**

Staff discussed generally the work of the subcommittees to date and the study work plan going forward. The Meetings Subcommittee has finished its study of exemptions and moved on to consider procedural matters. After finishing procedural matters and electronic meetings, the Meetings Subcommittee will move on to more general issues no longer limited to meetings issues, such as definitions, general provisions, remedies, and the legal structure of FOIA.

The Records Subcommittee has considered §§ 2.2-3705.1 (exemptions of general application), 2.2-3705.2 (public safety exemptions), 2.2-3705.3 (administrative investigation exemptions), 2.2-3705.4 (exemptions related to education), 2.2-3705.5 (health and social services exemptions), 2.2-3705.7 (exemptions for specific public bodies and other limited exemptions), and 2.2-3705.8 (limitations on record exclusions). The Records Subcommittee also had the Proprietary Records Work Group consider § 2.2-3705.6 (proprietary records and trade secrets exemptions), but as Mr. Merritt noted, the Work Group returned the subject matter to the Records Subcommittee without a recommendation. Therefore the Records Subcommittee has yet to consider §§ 2.2-3705.6 (proprietary records and trade secrets exemptions) and 2.2-3706 (criminal and law-enforcement records). The Records Subcommittee plans to go through these remaining sections in numerical order, then turn to procedural matters (§§ 2.2-3704 and 2.2-3704.1).

### **Review of Subcommittee Recommendations**

Maria J.K. Everett, Executive Director of the Council, reviewed the draft legislation that has been recommended to date by both Subcommittees. As a reminder, the Council has previously indicated that rather than introduce individual legislative recommendations as separate bills while the HJR No. 96 study is ongoing, the Council prefers to introduce omnibus legislation at the conclusion of the study. As this is the third and final year of the study, the Council will hear the Subcommittee recommendations throughout this year in an

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<sup>4</sup> **Virginia Freedom of Information Act; right to speak at open meetings.** Requires that every public body afford an opportunity for public comment during any open meeting. A public body may adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The bill contains technical amendments.

ongoing fashion in order incorporate those recommendations into the omnibus legislation as the study progresses, rather than trying to consider all of the Subcommittee recommendations at once in a single meeting at the end of the year.

Delegate LeMunyon indicated that he had compiled a list of what he described as remaining open issues regarding the HJR 96 study of FOIA. A copy of the chairman's open issues list was distributed to the Council, made available to the public, and is posted on the Council website under the June 23, 2016 meeting. A copy of the chairman's list appears as Appendix A to this meeting summary. Briefly, the chairman's list included the following issues:

- Personnel records (2.2-3705.1.1);
- Records of communications (e.g. email, regular mail) initiated by a citizen to elected officials be presumed to be private, e.g. exempt from release under FOIA unless agreed to by the citizen;
- Definition of working papers be revised beyond the subcommittee's recommendation;
- What records, if any, are "proprietary" in 2.2-3705.6 that are not covered by the Trade Secrets Act; and
- "Vendor proprietary software."

#### **Records Subcommittee Recommendations**

Staff presented to the Council the proposed amendments recommended by the Records Subcommittee to date. Specifically, the Council reviewed:

- **Virginia Freedom of Information Act; exemption for personal information of beneficiaries and certain other individuals; Virginia College Savings Plan.** Exempts from mandatory disclosure personal information provided to the Board of the Virginia College Savings Plan or its employees related to (i) qualified beneficiaries, (ii) designated survivors, or (iii) authorized individuals. The bill defines these terms. (LD 0033).
- **Virginia Freedom of Information Act (FOIA); working papers and correspondence.** Revises the definition of working papers under FOIA to include correspondence that is prepared by or for certain public officials for their personal, deliberative use and eliminates correspondence as a separate exemption. (LD 0199).
- **Virginia Freedom of Information Act (FOIA); personnel records exemption.** Reorganizes the applicable sections of FOIA relating to public access to personnel records into a single subdivision. The bill provides that it is declaratory of existing law. (LD 0326).
- **Virginia Freedom of Information Act (FOIA); record exemption for certain contact information.** Clarifies that only personal contact information, defined as home address, home telephone number, personal cell phone number, or personal email address, is exempt from the mandatory disclosure provisions of FOIA, where such information is furnished to a public body for the purpose of receiving electronic mail from the public

body. Currently, the exemption applies to personal information as that term is defined in the Government Data Collection and Dissemination Practices Act. (LD 0327).

- **Virginia Freedom of Information Act; public safety and administrative investigations; clarification of terminology.** Changes and updates the term "telecommunications carrier" to "communications services provider." The bill provides that "communications services provider" means the same as that term is defined in § 58.1-647. The bill also makes technical amendments to certain records exemptions for public safety and administrative investigations. (LD 0995).
- **Virginia Freedom of Information Act; record exemption for certain tax and scholastic information.** Makes a technical correction to remove scholastic records from the tax record exemption found in the Freedom of Information Act. Scholastic records are currently exempt under a different provision of the Freedom of Information Act. (LD 1102).
- **Virginia Freedom of Information Act; record exemption for certain customer account information.** Clarifies that the record exemption for certain customer account information does not include such records that reveal the amount of money charged or paid for utility service. (LD 1103).
- **Virginia Freedom of Information Act; record exemption for Virginia Wildlife magazine.** Removes the FOIA exemption for the names and addresses of subscribers to Virginia Wildlife magazine, published by the Department of Game and Inland Fisheries, who have requested in writing that the Department not release such information. The bill contains technical amendments and is a recommendation of the FOIA Council. (LD 1104).
- **Virginia Freedom of Information Act; record exemption for certain correspondence.** Removes, as duplicative of existing law, the FOIA exemption for the names, physical addresses, telephone numbers, and email addresses contained in correspondence between an individual and a member of the governing body, school board, or other public body of the locality in which the individual is a resident, unless the correspondence relates to the transaction of public business. (LD 1105).
- **Virginia Freedom of Information Act (FOIA); records of administrative investigations by the Department of Human Resource Management.** Eliminates the record exemption for records of administrative investigations conducted by the Department of Human Resource Management as it is duplicative of the general personnel exemption found in FOIA. The bill contains technical amendments. (LD 6514).

Chairman LeMunyon indicated that several of the above mentioned recommendations were on his list for further consideration. Those recommendations for further consideration were identified as LDs 0199, 0326, and 1105, identified above. The remainder of the above recommendations by the Records Subcommittee was approved by the Council

unanimously. A chart appearing as Appendix B indicates those LDs identified for further consideration and the corresponding issue on the chairman's list.

### **Meetings Subcommittee Recommendations**

Staff presented to the Council the proposed amendments recommended by the Meetings Subcommittee to date. Specifically, the Council reviewed:

- **Virginia Freedom of Information Act (FOIA); certain exclusions from open meetings.** Removes obsolete or expired open meeting exclusions from FOIA. The bill also clarifies that in the case of the boards of trustees of the Virginia Museum of Fine Arts, the Virginia Museum of Natural History, the Jamestown-Yorktown Foundation, and The Science Museum of Virginia, discussion or consideration of matters relating to specific gifts, bequests, and grants from private sources may be discussed in a closed meeting. The bill provides that closed meetings may be held by a local finance board or board of trustees of a trust established by one or more local public bodies to invest funds for post-retirement benefits other than pensions, acting pursuant law. (LD 0002).
- **Virginia Freedom of Information Act (FOIA); open meeting exemption for Virginia Commonwealth University Health System Authority.** Eliminates redundancies for Virginia Commonwealth University Health System Authority with other FOIA open meeting exemptions and clarifies that discussions of the board of visitors of Virginia Commonwealth University related to exempt discussions of the Authority are likewise exempt from open meeting law. The bill contains technical amendments. (LD 0201).
- **Virginia Freedom of Information Act (FOIA); exemptions for local government trusts for post-employment benefits other than pensions.** Provides a FOIA records and corollary open meeting exemption for records or discussions of a local finance board or board of trustees of a trust established by one or more local public bodies to invest funds for post-retirement benefits other than pensions when acting pursuant to Article 8 (§ 15.2-1544 et seq.) of Chapter 15 of Title 15.2. (LD 1008).
- **Virginia Freedom of Information Act (FOIA); closed meetings procedures; technical corrections.** Clarifies the closed meeting motion procedures under FOIA. (LD 1652).

None of these recommendations were flagged by Chairman LeMunyon as listed on his issues list for further consideration. All of the above Meetings Subcommittee recommendations were approved by the Council unanimously. A chart appearing as Appendix B indicates those LDs identified for further consideration and the corresponding issue on the chairman's list.

### **Public Comment**

Craig Merritt on behalf of the Virginia Press Association (VPA) noted that the Proprietary Records Work Group has not been successful in drafting a general exemption for trade secrets, but he felt there was still a need to address the issue. He distributed a VPA white

paper addressing the uniform treatment of private trade secrets under FOIA. Appended to the white paper was a draft that would accomplish a general exemption for trade secrets for the Council's consideration at some future meeting. Additionally, Mr. Merritt distributed a VPA draft proposal on the topic of recording closed meeting, which Mr. Merritt requested be added to the Chairman's Open Issues list. This draft proposal requires a public body to (i) make an audio recording of the entirety of every meeting that is closed to the public; (ii) use a means of recording that fully captures and can clearly reproduce all statements made during a closed meeting; and (iii) preserve the recording for a period of no less than one year. The proposal also provides that a recording made shall not be subject to the disclosure provisions of FOIA, but its production may be compelled, and the recording used as evidence, in a proceeding to enforce the provisions of FOIA. Mr. Merritt closed his public comment by noting the upcoming retirement of Ginger Stanley, Executive Director of the VPA. Mr. Merritt praised Ms. Stanley for her attributes that have made the mission of the VPA successful. Specifically, her ability to (i) listen and be open to the possibility that she could be wrong, (ii) look for common good, (iii) be persistent in the face that while VPA does not have all of the resources available to other lobbyists, Ginger Stanley takes both a merit based and long view approach to issues of importance to VPA and citizens. Finally, Mr. Merritt praised Ms. Stanley's grace in the face of the negative and added that she has moved the ball forward for professional women at the General Assembly and elsewhere.

Dave Ress, reporter for the Daily Press, suggested to the Council that the following two issues be added to the Chairman's list, namely, providing public access to closed criminal investigative files and clarifying the legal requirements for closed meeting motions.

### **Other Business**

Staff apprised the Council of the plans for Council-provided FOIA Officer training as per HB 818,(c. 748 2016 Acts of Assembly), which plans are in progress for an online training format available through the Knowledge Center administered by the Department of Human Resource Management. An online training format was ultimately selected to make it easy for FOIA officers to be trained at a time when it is convenient for them. Staff noted that by using the Knowledge Center, records would be generated of who has completed training, and upon completion, the Center's ability to issue a certificate of completion contemporaneously with successful course completion.

Staff suggested to the Council that review of the outline for the suggested reorganization of FOIA be deferred as there remain many substantive provisions of FOIA to be reviewed in the time remaining for the HJR 96 study. Chairman LeMunyon concurred with staff that the reorganization of FOIA be deferred, but stated that if time permits this fall, the topic may be reopened. There was consensus among the Council members for this approach.

Staff reminded the Council that with the passage of HB 817, FOIA redaction bill, enacted as Chapter 620 Acts of Assembly of 2016, there was the issue of the global language change that still need to be addressed. The Council agreed with staff and directed staff to contact those agencies affected for their advice and comment. Appendix C to this summary provides more detailed information about this issue.

The Council praised the service to the Council and to public access generally of Council members John Selph and Frosty Landon<sup>5</sup> for the last eight years. The terms of both Messrs. Selph and Landon will expire on July 1, 2016. Both gentlemen completed two four-year terms on the Council and by law are not eligible for reappointment at this time. Chairman LeMunyon noted that both John Selph and Frosty Landon have made significant contributions to the work of the Council and could always be counted on to participate in numerous Council subcommittees' work. Delegate LeMunyon thanked them for their service, acknowledged that they will be sorely missed and wished them the best in future endeavors. The Council and those present at the meeting celebrated these two outstanding members with refreshments.

Chairman LeMunyon spoke concerning the retirement of Ginger Stanley, Executive Director of the VPA. He noted that Ms. Stanley has been a staunch advocate for transparency in government and has participated in every FOIA Council study since its inception. The Council recognized her efforts and thanked her for her support of the Council's work.

### **Future Meetings**

Delegate LeMunyon asked if there was any other business or additional public comment. There was none. The Council scheduled its meetings for the rest of 2016 as follows:

Monday, July 18, 2016 at 1:30 p.m.;  
Monday, September 19, 2016 at 1:30 p.m.;  
Monday, October 17, 2016 at 1:30 p.m.; and  
Monday, November 21, 2016 at 1:30 p.m.

All of the above meetings will be held in the General Assembly Building, Richmond, Virginia.

There being no further business, the meeting was adjourned.

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<sup>5</sup> Mr. Landon was unable to attend this meeting.

## APPENDIX A

### Chairman's FOIA Review Open Issues

1. With respect to personnel records (2.2-3705.1.1), should the reference to “information concerning” or other terminology be narrowed, and if so, in what ways and by how much?
2. Should records of communications (e.g. email, regular mail) initiated by a citizen to elected officials be presumed to be private, e.g. exempt from release under FOIA unless agreed to by the citizen? What about such communications with a government body or staff person generally? Presently, the subcommittee is recommended additional personal contact information, but the exemption from release is only if requested by the citizen. See 2.2-3705.1 (10).
3. Should the definition of working papers be revised beyond the subcommittee’s recommendation of “including correspondence”, and if so, in what ways and by how much? (2.2-3705.7 (2))
4. What records, if any, are “proprietary” in 2.2-3705.6 that are not covered by the Trade Secrets Act?
5. Mindful that “vendor proprietary software” is exempt from release under FOIA (2.2-3705.1(6)), is it necessary to continue to include the exemption for software “developed by or for a state agency.....” in 2.2-3705.1(7)?



## APPENDIX B

### Recommendations for further consideration and the corresponding issue on the Chairman's Open Issues for Review

LD NO.	Related to:	Draft Recommended by:	Corollary item on Chairman's list		
0326	Reorganizes the applicable sections of FOIA relating to public access to personnel records into a single subdivision. The bill provides that it is declaratory of existing law.	Records Subcommittee	#1 Personnel records (2.2-3705.1.1); and #5 "Vendor proprietary software."		
0327	Clarifies that only personal contact information, defined as home address, home telephone number, personal cell phone number, or personal email address, is exempt from the mandatory disclosure provisions of FOIA, where such information is furnished to a public body for the purpose of receiving electronic mail from the public body. Currently, the exemption applies to personal information as that term is defined in the Government Data Collection and Dissemination Practices Act.	Records Subcommittee	#2-- Records of communications (e.g. email, regular mail) initiated by a citizen to elected officials be presumed to be private, e.g. exempt from release under FOIA unless agreed to by the citizen		
0199	Revises the definition	Records	#3-- Definition		

	of working papers under FOIA to include correspondence that is prepared by or for certain public officials for their personal, deliberative use and eliminates correspondence as a separate exemption.	Subcommittee	of working papers be revised beyond the subcommittee's recommendation		
1105	Removes, as duplicative of existing law, the FOIA exemption for the names, physical addresses, telephone numbers, and email addresses contained in correspondence between an individual and a member of the governing body, school board, or other public body of the locality in which the individual is a resident, unless the correspondence relates to the transaction of public business.	Records Subcommittee	#2-- Records of communications (e.g. email, regular mail) initiated by a citizen to elected officials be presumed to be private, e.g. exempt from release under FOIA unless agreed to by the citizen		

## APPENDIX C

### FOIA EXEMPTIONS GENERALLY AGENCIES/ENTITIES AFFECTED BY THE GLOBAL LANGUAGE CHANGE HB 817 (2016) July, 2016

<p><b>Specific exclusions affected by the global language change under HB 817 (2016)<sup>6</sup></b></p> <p><i>"shall not authorize the withholding of...."</i></p> <p><i>or</i></p> <p><i>"Information....shall be disclosed...."</i></p>	<p><b>Identity of specific public body(s) affected by the global language change under HB 817 (2016)</b></p>
<p>§ 2.2-3705.1 (9) re: risk management</p>	<p>Department of the Treasury, Risk Management Division</p>
<p>§ 2.2-3705.2 (2) re: engineering &amp; construction drawings &amp; plans</p>	<p>Applicable to multiple public bodies</p>
<p>§ 2.2-3705.2 (4) re: terrorism &amp; cybersecurity -</p>	<p>Secretary of Public Safety and Homeland Security</p>
<p>§ 2.2-3705.2 (7) re: school safety audits</p>	<p>Dept. of Education, VSBA, OAG</p>
<p>§§ 2.2-3705.2 (9) and (10) re: E911 subscriber data</p>	<p>Applicable to multiple public bodies</p>
<p>§ 2.2-3705.2 (15) re: disaster recovery, evacuation plans</p>	<p>Department of Health</p>
<p>§ 2.2-3705.3 (3) re: employment discrimination</p>	<p>DHRM, local public bodies &amp; school</p>

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<sup>6</sup> Specific text relating to the global language change appearing in FOIA prior to July 1, 2016: "However, nothing in this subdivision shall *prohibit the disclosure* of information...."  
Effective July 1, 2016, the above language was amended as follows: "However, nothing in this subdivision shall *authorize the withholding* of information..."  
This change was suggested because FOIA does not prohibit the release of any records. Upon reflection, however, the Council noted that this specific amendment had unintended consequences that needed to be addressed as part of the HJR 96 Study.

investigations -	boards, public institutions of higher ed.
§ 2.2-3705.3 (5) re: Human Rights Act violations	Applicable to multiple public bodies, including local human rights/relations commissions
§ 2.2-3705.3 (8) re: DHRM mediations, etc.	DHRM  NOTE: Already recommended by the FOIA Council for elimination b/c would be considered personnel records
§ 2.2-3705.4 (6) re: Virginia College Savings Plan	Virginia College Savings Plan
§ 2.2-3705.5 (4) re: certain DSS and OAG investigations	Department of Social Services, OAG
§ 2.2-3705.5 (17) re: quarantine orders	State Health Commissioner
§ 2.2-3705.7 (12) re: investment information	Virginia Retirement System, UVA, VCSP
§ 2.2-3705.7 (16) re: federal enforcement actions and strategies	Department of Environmental Quality, the State Water Control Board, the State Air Pollution Control Board, or the Virginia Waste Management Board
§ 2.2-3705.7 (22) re: parks and recreation records that contain information about identifiable individuals under the age of 18	Department of Conservation and Recreation, local park and recreation departments, and local and regional park authorities