Criminal Investigative Records Subcommittee
of the Virginia Freedom of Information Advisory Council
Meeting Summary
Thursday, August 19, 2010
1:30 PM
General Assembly Building
Richmond, Virginia

The Criminal Investigative Subcommittee held its first meeting of the interim on August 19, 2010.[1] The purpose of this meeting was to study Senate Bill 711 (Edwards) regarding access to criminal investigative records.

After calling the meeting to order and having the Subcommittee members and members of the public introduce themselves, Mr. Fifer invited Senator Edwards to present his bill. Senator Edwards explained that under current law, law enforcement agencies may withhold criminal investigative records without providing any reason for doing so, even after the investigation is closed. The concept of the bill was to make such records open after investigations are closed, whether by having a court case fully adjudicated or otherwise, with exceptions for four categories of information: (1) personal information such as social security numbers or health information, (2) information related to an ongoing criminal investigation, (3) information that might jeopardize someone's safety, and (4) information given under a promise of confidentiality, including the name and identification of any confidential informant. Senator Edwards indicated further that once a case is completely closed, he saw no public policy reason to maintain confidentiality of the records absent good cause shown. Instead, there is a public and press interest in getting information on criminal matters and seeing how police handled them. Reasoning by analogy, the public interest here is like the public interest in seeing that criminals receive a speedy and public trial as guaranteed by the Sixth Amendment to the United States Constitution. Senator Edwards further suggested that there be a provision for courts to review records *in camera* if there is any dispute over whether the records should be released.

As there were no comments or questions from the subcommittee at this time, the Chair opened the floor to public comments. Chief Phillip Broadfoot of the Danville Police Department stated that officers are trained to put into their investigative files as much detail as possible, which might include unsubstantiated accusations, opinions, beliefs, and "raw data" that could be harmful if released. He indicated that pictures were especially sensitive records. He provided several examples, such as in domestic cases where there may be accusations of affairs without proof, rape cases that include details about the victim's voluntary sexual partners, a business owner's suspicions about employees in an embezzlement case, or even accusations that a "new kid" may be

[1] Present at the Richmond location were members Fifer (Chair), Miller, Selph, and Treadway. Delegate Griffith, also a member of the subcommittee, participated by telephone from his Salem office: 113 East Main Street, Salem, Virginia 24153. No members were absent. Note that Senator Edwards also participated by telephone, as patron of the bill being studied (Senator Edwards is not a member of the subcommittee).

responsible for a stolen bicycle. He further indicated that only about 25 percent of investigated cases were actually prosecuted; the rest would be marked "inactive" but might be reopened later, especially if new evidence was discovered. Additionally, he stated that he believed most mainstream media was responsible in handling such sensitive information, but was concerned that under the bill as written, others might take sensitive information and publish it on social media web sites such as YouTube or Facebook. He concluded by saying that the bill as written goes too far, and that the current process is good because it allows for necessary judgment calls regarding each case and for courts to order records to be released.

Senator Edwards responded by suggesting there should a process to sort out sensitive information from information that is not sensitive, the problem being that currently law enforcement can just refuse to release records with no explanation. To remedy that problem, the Senator suggested that a third party tribunal - either a court or administrative body - be able to review records when there is a dispute.

Robert Beasley, the Commonwealth's Attorney for Powhatan County, next indicated his agreement with Chief Broadfoot, and stated that there is a lot of other information contained in investigative files that does not go to court, such as identifications, names, credit card numbers, and other information about witnesses and third parties. Mr. Beasley noted that the bill as introduced made no provision for such data to be protected. Additionally, he indicated that much of the background data might amount to outright slander, such as malicious allegations between neighbors. He indicated that if there was no prosecution, such files would then be marked "evidence not sufficient to go forward." Once released, those files might be used against someone to damage their reputation. For example, if a person later decided to run for political office, the accusations collected in a criminal investigative file might be presented by a political opponent as if there was some basis for them, but that the evidence was "not sufficient to go forward." As a practical matter, Mr. Beasley also noted that even if a procedure was established to go to a circuit court to settle disputes, 18 circuit courts are currently unfunded and do not have judges in office. Further, he indicated his office has only one secretary, and assigning her to review and redact all records that were requested would be too much additional work. In conclusion, he indicated that the bill was overreaching and actually created the problems the subcommittee is now trying to solve.

Randolph Sengel, the Commonwealth's Attorney for Alexandria, stated that the Subcommittee should focus on whether vetting or redacting material is even a practical reality that may be accomplished. As an example, Mr. Sengel held up a file approximately 3" thick that he said was a simple credit card fraud case file. He said it would take three or more hours to go through and redact that file. He indicated that passing the bill would require the General Assembly to fund new positions in every Commonwealth's Attorney's office and law enforcement agency, just to handle records requests, which is not practical given current funding and the fact that positions are being cut now due to the economy. He reiterated that the bill as proposed is trying to solve a problem that does not exist.

Victoria Benjamin, representing the Richmond Police Department, indicated a further concern that having to release and redact records would greatly increase costs, which would then have to be passed on to the requesters. However, in her experience, many requesters including the media do not want to pay costs, especially if the charges are over $50.

David Sloggie, Chief of the Williamsburg Police Department, stated that releasing records as proposed in the bill would hurt efforts to get the public to work with the police, and law enforcement efforts generally. Mike Doucette, Commonwealth's Attorney for the City of Lynchburg, indicated that while agencies try to get officers to put more information in their reports, if this bill passes, the practical result will be that officers put less in the reports out of concern that the information would later be released under FOIA. Thus the bill may cause Commonwealth's Attorneys to miss both inculpatory and exculpatory information, and may implicate their constitutional duties to disclose information to the other side. Both prosecutors and defendants may be harmed by the lack of necessary background information in the investigative reports that might have otherwise affected the outcome of the case. Greg Riley, also with the Williamsburg Police Department, asked how a case is determined to be closed. He said some cases reach a dead end but are reopened months or years later when the police get a new lead, for example when a pawn check turns up an item related to a stolen property case months after the theft occurred.

John Jones, representing the Virginia Sheriffs Association, indicated that the Sheriffs Association opposed the bill during the 2010 Session and continues to oppose it, with the dampening effect on victims' and witnesses' willingness to speak with law enforcement being a primary reason, among many others. Timothy Field of the Fairfax County Police Department agreed, stating that releasing information would be a problem because of perpetrators who seek retaliation, making victims and witnesses reluctant to come forward. He further indicated a concern that it would result in underreporting of crimes, especially if the crimes revealed personal information, sexual orientation, or potentially embarrassing information. Furthermore, he indicated that victim and witness photos are often very graphic, especially in sex crimes and domestic violence cases, and if they got on the Internet, they would be there forever. He also was concerned that the required release under the bill as written would conflict with other provisions of FOIA, such as protections for victims and witnesses.

Ginger Stanley, of the Virginia Press Association (VPA), thanked Senator Edwards for bringing the bill forward and indicated that there are real problems in that the press and public are not getting basic information about crimes, there is no uniformity of disclosure between different law enforcement agencies, and there are no standard forms that are regularly used to provide basic information. She acknowledged the legitimate concerns expressed by law enforcement, and said the VPA would like to partner with law enforcement to reach a solution. Ms. Stanley indicated that the complexity of the current statute is a problem for both citizens and law enforcement. She suggested that a standard form be considered as application of the exemptions currently is not uniform. As examples, Ms. Stanley indicated that basic charging information should

be released in all cases but is not always released, that 911 tapes are released most of the time but not always (there should be express rules for them), and that there should be a definition of "active investigations."

John Bell, of the Virginia Beach Police Department, indicated that a case is never really closed until the criminal(s) responsible are behind bars. As an example, he mentioned a woman murdered in Virginia Beach years before. He said that case is not closed, it is unresolved. Additionally, he pointed out that information on crimes in Virginia Beach is available at the public library and through the existing FOIA.

John Conrad, a former law enforcement officer who is now a private investigator, indicated his support for increased release of records because of abuse of the current exemption. He related a situation where he was working as a law enforcement officer in a case where an adult woman was accused of leaving her incapacitated father without proper care for days. He indicated that he consulted with social services staff and the local Commonwealth's Attorney via electronic mail, then arrested the woman and had her charged based on email approval to do so by the Commonwealth's Attorney. He went on to state that the Commonwealth's Attorney then dismissed the charges and publicly said he did not know why charges had been filed. Mr. Conrad said he then requested copies of the email where the Commonwealth's Attorney told him to file charges, but that request was denied pursuant to the exemption for records related to a criminal investigation or prosecution. Mr. Conrad suggested a procedure might be used that has a time limit, similar to declassification of military records after a certain number of years passed. He said he did not advocate for carte blanche release of criminal investigative records. Additionally, he pointed out that in order to prove slander, one must know the exact words of the slander, which are often only available in the criminal investigative file.

Senator Edwards spoke next, acknowledging that the bill is not in perfect form but serves as a vehicle for discussion of the issues. He suggested working toward uniform standards for release, and discussed what is a "closed case" as opposed to a "cold case," for example. He suggested one possible standard be that when a case has been through the judicial process and there is no longer any possibility for appeal, it may be considered closed. At that point, he suggested the records should be open, except for certain personal and sensitive information, and again suggested there be a process for a third party tribunal to review records under dispute.

There was further discussion among the subcommittee members, particularly regarding whether it was possible to create standard disclosure forms and whether the parties could agree on definitions, such as what is a "closed case." Delegate Griffith suggested that the interested parties probably could not agree upon the bill as drafted or the necessary definitions because each case is different, but it may be possible to draft a mechanism whereby a requester could petition a court for the release of records upon a showing that the failure to release would cause some discernable harm, such as if the records were necessary to exonerate someone or defend one's reputation. After further discussion the subcommittee reached unanimous consensus to ask staff to draft language

for such a petition process, as well as to suggest changes to improve the clarity of the existing statute without substantially changing it. The meeting then adjourned.

The next meeting of the subcommittee will be held October 4, 2010 in the General Assembly Building, Richmond, Virginia.

#