

Virginia Freedom of Information Advisory Council
Meetings Subcommittee
July 8, 2014
10:00 AM
General Assembly Building
Richmond, Virginia
Meeting Summary

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its second meeting of the 2014 interim on July 8, 2014. Subcommittee members Whitehurst (Chair), Dooley, Landon, and Oksman were present. The purpose of the meeting was to continue the study of records exemptions under House Joint Resolution No. 96 (HJR 96).

The meeting began with a brief review by staff of the guidance memo sent by the Chair and Vice-Chair of the FOIA Council dated June 10, 2014, herein incorporated by reference. Staff quoted from the memo, which suggested using the following measures:

For applicability, review of FOIA exemptions should be from a "zero-based FOIA approach" by assuming that all meetings are open to the public and requiring justification for any exemptions. For appropriateness, give consideration to the following factors:

- *Public good (protection of the public purse or of the public bargaining, negotiating, litigating position) vs private interest (privacy or proprietary interests);*
- *Attorney/client privilege;*
- *Application of the narrow construction rule found in FOIA at § 2.2-3700;*
- *Updating and clarifying nomenclature;*
- *Impact of court decisions and of opinions of the Attorney General and the FOIA Council;*
- *Legislative history and intent, to the extent available; and*
- *Review of comparable provisions in other states' FOIA laws.*

Staff also presented exemption review worksheets that would be used to track these measures and any additional issues for each exemption. There was no comment on the worksheets.¹

The Subcommittee next turned to Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), to present the VPA's position paper titled "Virginia Press Association Comments Regarding Principles to be Considered During Study Under HJR 96." After a brief description of the history of FOIA, Mr. Merritt observed that the paper does not address procedural aspects of FOIA but that the VPA would comment if such matters come up. Instead, the position paper focuses on general principles applicable to any statute in part I, on the scope of FOIA in part II, particularly noting that the definition of "public body" should be broad and

¹ For additionally legislative history, public policy, and other considerations applicable to each exemption, please see the relevant worksheet for that exemption.

include the administrative functions of courts and the State Corporation Commission, and on specific topics and types of exemptions in parts III through IX.

The Subcommittee next turned to consideration of the exemptions in subsection A of § 2.2-3711. Staff presented a brief overview of each exemption and its legislative history as each was brought up for consideration.

Subdivision A 1 of § 2.2-3711 allows closed meetings to be held for the discussion or consideration of certain personnel matters. Staff stated that the exemption is privacy-based and has been interpreted in several opinions of the Office of the Attorney General (OAG) and the FOIA Council. The OAG opinions state that the exemption only applies for consideration of persons over whom the public body has authority or control. Mr. Whitehurst raised an example of a local body hiring an administrator or manager who later turned out to be a bad fit with the governing body, versus a situation of revealing embarrassing details about a person, versus a situation of gross incompetence. Mr. Landon asked how to clarify the law in situations where a governing body wishes to discuss a lower-level employee who otherwise answers only to the manager of the locality, not the public body. Roger Wiley, an attorney representing local governments and former FOIA Council member, observed that staff's recitation of the OAG opinions was accurate, but that most local government attorneys believe the OAG opinions on point to be wrong. As a practical matter, he noted that the OAG opinions did not reflect how local governments actually operate and that managers need to be able to discuss employee matters with the governing bodies. He pointed out that holding such discussions in public could lead to lawsuits for defamation, discrimination, and other issues. Mr. Oksman noted that such public discussion of employees has in fact led to lawsuits.

Peter Easter, representing the Virginia Association of Broadcasters (VAB), stated that one of the biggest complaints he hears concerns public bodies using the personnel exemption to talk about other things. Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), stated that Mr. Wiley was on target and noted two concerns: (1) proportionality and (2) misfeasance, malfeasance, and criminality. Mr. Merritt stated regarding proportionality that at some level the public interest is not worth the problems of disclosure, but for higher level employees, such as senior administrators with six-figure salaries and large benefits packages, there should be more transparency. On the second issue, Mr. Merritt stated that he was not sure the policy giving confidentiality outweighs the public interest in disclosure.

Mr. Whitehurst expressed his opinion that if one takes any compensation from government, it should be fair game for disclosure. Mr. Oksman voiced his opinion that any performance or personnel evaluation should be performed in private. He also noted that good reporters have other resources for getting information besides FOIA.

Ms. Dooley stated for the record that she felt compelled to disclose that as a City Attorney, she is directly affected by this exemption as an appointee of the City Council.

Megan Rhyne of the Virginia Coalition for Open Government (VCOG) related that this exemption was the top problem shown in her survey of VCOG members. She noted that from a

citizen's perspective, meetings closed for personnel matters often strayed to other policy or personnel issues that did not concern specific individuals.

After further discussion, including consideration of the possibility of requesting a new opinion from the OAG, Mr. Wiley agreed to discuss the matter with other interested parties and staff to create a new draft of this exemption that would reflect current practice rather than the prior OAG opinions for the Subcommittee's consideration at its next meeting.

There were no comments about subdivision A 2 of § 2.2-3711, concerning the discussion of certain matters contained in scholastic records. By consensus the Subcommittee decided to recommend keeping the exemption as it is.

Turning to subdivision A 3 of § 2.2-3711, concerning the acquisition and disposition of real property, the Subcommittee by consensus recommended keeping this exemption as it is.

Regarding subdivision A 4 of § 2.2-3711, concerning "personal matters not related to public business," Mr. Oksman noted an example might be discussing a health condition afflicting a member's spouse. Staff noted that given the exception in subsection G of § 2.2-3707, discussions that do not concern public business are not considered public meetings anyway; Mr. Merritt and Ms. Stanley expressed their opinion that this provision is superfluous. However, as it appears to cause no harm and may do some good, the Subcommittee decided to leave it as it is currently written.

The Subcommittee next considered subdivision A 5 of § 2.2-3711, which allows closed meetings "concerning a prospective business or industry or the expansion of an existing business or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities in the community." In the absence of statutory definitions of certain terms, the Subcommittee members and interested parties discussed what constitutes an "announcement" and "the community." After several examples were given of different factual situations, the Subcommittee discussed without deciding whether an "announcement" must be given by a person with some authority, whether the exemption should be rephrased in the active voice, and whether the term "community" might be replaced with "locality" and "Commonwealth." Mr. Merritt pointed out that the passive voice works because it does not matter who makes the announcement. Mr. Landon noted that it is not the Subcommittee's decision to designate who may make an announcement on behalf of another public body. Staff noted that some deals involve regional economic development and multiple localities and public bodies. Mr. Wiley noted that Prince George, Hopewell, and Petersburg had worked together in such a deal to attract Rolls-Royce. After this discussion, the Subcommittee decided to leave this exemption as it is.

Mr. Wiley pointed out that the key aspect of subdivision A 6 of § 2.2-3711, concerning the investment of public funds, is that it concerns investments and not expenditures. As an example, he pointed out that "investing in the community" by building a community center would not be the type of investment covered under this exemption. Again, the Subcommittee decided to leave this exemption as it is.

Regarding subdivision A 7 of § 2.2-3711, concerning probable litigation and consulting legal counsel on specific legal matters, Mr. Merritt pointed out that the problems with this exemption lie more in its application than in its language. Mr. Easter stated that they encountered many problems with the use of this exemption. Various modifications to the existing language were discussed, and the Subcommittee decided to have staff create a new draft that clearly separates the two different parts of this exemption, one addressing discussions of probable litigation and the other addressing consultation with legal counsel on specific legal matters.

The Subcommittee then discussed scheduling future meetings and decided to hold its next meeting at 1:30 p.m. on August 19, 2014. The meeting was then adjourned.

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