



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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Senator Richard H. Stuart, Vice-Chair

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VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

Monday, November 21, 2016 - 1:30 p.m.
House Room D, General Assembly Building

SUGGESTED AGENDA ANNUAL LEGISLATIVE PREVIEW, PART II *ANNOTATED*

- 1. Call to Order, introduction of members.**
- 2. Introduction of new FOIA Council staff, Jessica Budd.**
Jessica Budd recently joined the staff of the Division of Legislative Services to work with the FOIA Council. Jessica, an attorney, will also be working with Maria Everett as staff attorney to the House Committee on General Laws.
- 3. Review of bills referred to Council for study by 2016 Session of General Assembly.** *To be considered by the FOIA Council at today's meeting, following presentations by the following patrons concerning their respective bills:*

HB 334 Pogge--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.

HB 336 Pogge--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,

participated by telephone in that meeting, as did representatives of Prince William County. After hearing the presentations and public comment, the Records Subcommittee decided to return the bills to the Council for further consideration, without a recommendation for action.

4. Virginia Parole Board and FOIA; Delegate Hope; Review of HB 397 (2012).

5. Reconsideration of certain drafts recommended by the Records Subcommittee:

- Procedure for requesting records and responding to requests (LD 17100765D). *Note: The Records Subcommittee recommended this draft in concept, but review of a draft was deferred by full FOIA Council until today's meeting based on public comment made at the October 17, 2016 meeting.*
- Global language change (LD 17100766) *Last year the Records Subcommittee recommended replacing language that appears in multiple existing exemptions that states that "nothing ... shall prohibit" disclosure or release of records. Recognizing that FOIA generally does not prohibit release, the Subcommittee recommended replacing that phrasing with language stating that "nothing ... shall authorize withholding" or other language indicating an affirmative duty to disclose. However, it has come to the attention of staff that such a global change may have unintended consequences, and therefore reconsideration of this recommendation is necessary. The Subcommittee at its August meeting asked staff to again contact agencies whose exclusions have been affected by these changes so that the Subcommittee might hear directly from them. Staff has sent a second letter to the affected agencies asking for responses by September 28, 2016. Staff provided a summary of the agency responses at the September 29, 2016 meeting of the Records Subcommittee. At this meeting, the Records Subcommittee voted 4 to 1 to restore the language as it existing in FOIA prior to July, 2017 (i.e. "nothing ... shall prohibit" disclosure or release of records...").*
- Personnel record exclusion; consolidating 2.2-3705.1 (1) and 2.2-3705.8 (LD 15100326). *Note: Deferred by Council on June 23, 2016 due to creation of personnel workgroup whose charge was to attempt a definition of "personnel record." No consensus among Personnel workgroup re its charge.*
- Letters of recommendation; FOIA and GDCDPA; fix discrepancy. (LD17100023). *Note: Deferred by Council on June 23, 2016 due to creation of personnel workgroup whose charge was to attempt a definition of "personnel record." No consensus among Personnel workgroup re its charge.*
- Certain correspondence of local officials not public records (LD 151001105). *Note: Deferred by Council on June 23, 2016 because this issue was raised on the Chairman's list.*

6. Disposition of remaining Chairman's List of Issues. See Appendix B.

7. Other Business.

- § 2.2-3704.1--Posting of FOIA Rights and Responsibilities Document; inclusion of school boards. *As enacted, HB 818 required local governing*

bodies to post a rights and responsibilities document on their respective website. School boards were inadvertently omitted from this requirement. The question is whether school boards should be included.

- **§ 2.2-3700--FOIA policy statement.** *At the beginning of the HJR 96 study, staff suggested that FOIA be amended to include a policy statement to the effect that: "Any public body procuring any computer system, equipment or software, shall ensure that the proposed system, equipment or software is capable of producing public records in accordance with this chapter." To date there has been no action on this issue. Note: a similar provision is found in § 2.2-1111, requiring the Division of Purchases and Supply of the Department of General Services to do this by regulation governing public procurement. However, VITA is the agency responsible for the procurement of IT and related equipment. It is believed that inclusion in FOIA as part of its policy statement would enhance compliance with the redaction rule of FOIA.*

8. Review of proposed HJR 96 omnibus bill(s) to be recommended to the 2017 Session of the General Assembly (LD 17100968). *(See Appendix A for listing of Council-approved drafts to date by Subcommittee.)*

9. Annual Legislative Preview, Part II.

Audit exemption--2.2-3705.3 (7). At prior meetings of the Records Subcommittee, certain interested parties representing the Auditor of Public Accounts, the Office of the State Inspector General, and the Joint Legislative Audit and Review Committee indicated that they were not sure that the language of the current exemption accurately covered the activities of their agencies. Representatives of these agencies have submitted a draft proposal to the Records Subcommittee for consideration. The proposed draft would remove these three agencies from the existing exemption (but leave the exemption in place as it also applies to other public bodies) and create a new, separate exemption to address records of these three agencies. The Records Subcommittee recommended that the parties continue working on the draft and bring it to the full FOIA Council for review.

10. Informational only: Issues continued to 2017 for study:

- Proprietary records and trade secrets draft proposed by the Virginia Press Association. *Note: The Record Subcommittee has recommended that study of § 2.2-3705.6 (proprietary record exclusions) be carried over to 2017 as the Proprietary Records Workgroup failed to reach consensus on creating a general exemption for trade secrets and proprietary records, despite several meetings.*
- Review of FOIA in light of advancement in technology
 - website posting
 - notice
 - definitions
- Reorganization of FOIA

11. Public Comment.

12. Discussion.

13. Adjournment.

Council Members

Delegate James M. LeMunyon, Chair	Senator Richard H. Stuart, Vice-Chair
Sandra G. Treadway	Christopher Ashby
Ed Jones	Stephanie Hamlett
Kathleen Dooley	Mark Vucci
Shawri King-Casey	Marisa Porto
William "Billy" Coleburn	Michael Stern

Staff

Maria J.K. Everett, Executive Director and Senior Attorney
Alan Gernhardt, Senior Attorney

The FOIA Council's web site is: <http://foiacouncil.dls.virginia.gov>. To assist us in providing Internet dissemination of materials, presenters are requested to submit written comments and handouts in electronic format by (i) e-mail to staff prior to meetings or (ii) diskette furnished to staff at meetings. Presenters are also requested to bring 20 copies of their remarks or handouts to meetings. These copies will be provided to FOIA Council members and the public.
E-mail: foiacouncil@dls.virginia.gov.

APPENDIX A



**October 21, 2016
HJR 96 FOIA Study
Legislative Recommendations Tracking Document**

I. Legislative Recommendations Approved by FOIA Council by subcommittee and date with vote:

MEETING SUBCOMMITTEE (8):

LD Number	Relating to	Date Approved by FOIA Council	Vote	Notes
1. 16101652	2.2-3712 closed mtg procedures	June 23, 2016	8-0	technical fixes
2. 15100276	2.2-3711; legal matters/litigation	June 23, 2016	8-0	Make 2 separate exclusions; declaratory of existing law
3. 1610002	2.2-3711; museums, etc., clarifications	June 23, 2016	8-0	
4. 16100201	2.2-3711; VCUHSA clean up	June 23, 2016	8-0	
5. 17100049	2.2-3711; Context draft	September 19, 2016	8-0	
6. 17100176	2.2-3708; 2.2-3708.1; Emtgs	September 19, 2016		

LD Number	Relating to	Date Approved by FOIA Council	Vote	Notes
	clarifications			
7. 17100786	2.2-3707.1; posting minutes	October 17, 2016		
8. 17100047	2.2-3707; notice and agenda posting	October 17, 2016		

RECORDS SUBCOMMITTEE (12):

LD Number	Relating to	Date Approved by FOIA Council	Vote	Notes
1. 15100327	2.2-3705.1; email subscriptions	June 23, 2016	9-0	
2. 15101102	2.2-3705.1; "scholastic record" out of this list	June 23, 2016	9-0	Excluded under 2.2-3705.4 already; also removed in HB 817 (2016)
3. 15101103	2.2-3705.7; customer acct info	June 23, 2016	9-0	
4. 15101104	2.2-3705.7; Wildlife Magazine	June 23, 2016	9-0	
5. 161001008	2.2-3705.7; local boards nonpension comp.	June 23, 2016	9-0	
6. 16100995	2.2-3705.2 and .3; public safety and admin	June 23, 2016	9-0	

LD Number	Relating to	Date Approved by FOIA Council	Vote	Notes
	investigations; terminology fix			
7. 17100033	2.2-3705.4; VCSP	June 23, 2016	9-0	
8. 17100048	2.2-3705.3; DHRM admin investigation	June 23, 2016	9-0	
9. 17100067	2.2-3705.5; DHP and DSS consolidations	September 19, 2016	8-0	
10. 17100698	2.2-3701; definition of public record	October 17, 2016	8-0	
11. 17100603	2.2-3705.7; working papers	October 17, 2016	7-1	LeMunyon's version; includes Subcommittee recommendation
12. 17100035	2.2-305.2; Public Safety consolidation of 2, 4, 6, and 14	October 17, 2016	7-0-1	

II. SUBCOMMITTEE RECOMMENDATIONS STILL PENDING BEFORE FOIA COUNCIL (5)

LD Number	Relating to	Notes
15100326	Personnel records; consolidation of 2.2- 3705.1 and 2.2-3705.8	deferred by Council June 23, 2016 (on chairman's list)
15101105	Del Cole's certain correspondence not a public record (2.2- 3705.7)	deferred by Council June 23, 2016
17100023	Letters of	deferred by Council on June

LD Number	Relating to	Notes
	recommendation; FOIA vs GDCDPA	23, 2016 (on chairman's list)
17100765	FOIA requests and responses (2.2-3704)	deferred by Council October 17, 2016
17100766	Global language change; revert to pre 2016 law (i.e. "Nothing...to prevent/prohibit disclosure...")	deferred by Council October 17, 2016

APPENDIX B

Remaining 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. 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)?