

REPORT OF THE

**Virginia Freedom of
Information Advisory Council
Pursuant to House Joint
Resolution 96 (2014)**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 6

**COMMONWEALTH OF VIRGINIA
RICHMOND
2017**



**REPORT OF THE
VIRGINIA FREEDOM OF INFORMATION
ADVISORY COUNCIL
PURSUANT TO HOUSE JOINT RESOLUTION NO. 96
(2014–2016)**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**

COMMONWEALTH OF VIRGINIA
JUNE 2017

**MEMBERS
OF THE
VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**

Delegate James M. LeMunyon, Chair
Senator Richard H. Stuart, Vice-Chair
Christopher Ashby¹
Shawri King-Casey
William D. Coleburn
Kathleen Dooley
Stephanie Hamlett
Edward Jones
Marisa Porto
Michael Stern
Sandra G. Treadway
Mark Vucci

Staff

Division of Legislative Services

Maria J.K. Everett, *Executive Director and Senior Attorney*
Alan Gernhardt, *Senior Attorney*
Jessica L. Budd, *Staff Attorney*
Darlene Jordan, *Senior Operations Staff Assistant*

¹ Mr. Ashby's term on the Virginia Freedom of Information Advisory Council expired on July 1, 2016.

TABLE OF CONTENTS

	Page
STUDY AUTHORITY AND SCOPE	1
EXECUTIVE SUMMARY	3
INTRODUCTION	9
PART I--WORK OF THE MEETINGS SUBCOMMITTEE	9
PART II--WORK OF THE RECORDS SUBCOMMITTEE	59
PART III--WORK OF THE FOIA COUNCIL.....	119
FINAL LEGISLATION RECOMMENDATIONS OF THE COUNCIL	135
CONCLUSION	136
 APPENDICES	
A. House Joint Resolution No. 96 (2014)	A1
B. HJR 96 Proposed Study Plan by Year & Code Section & Virginia Press Association Comments Regarding Principles to Be Considered During Study Under HJR 96	B-1
C. Study Guidance Memorandum to Subcommittees	C-1
D. 2014 Meetings Subcommittee Materials	D-1
E. 2015 Records Subcommittee Materials	E-1
F. 2014 Records Subcommittee Materials	F-1
G. 2015 Records Subcommittee Materials	G-1
H. 2016 Records Subcommittee Materials	H-1
I. 2015 Department of Human Resource Management Records Workgroup	I-1
J. 2015 Proprietary Records Workgroup Materials	J-1
K. 2016 Proprietary Records Workgroup Materials	K-1
L. 2016 Personnel Records Workgroup Materials	L-1
M. FOIA Council-recommended Legislation for the 2017 Session of the General Assembly (HB 1539 and HB 1540), annotated with LD tracking and Drafting Notes	M-1

REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL PURSUANT TO HOUSE JOINT RESOLUTION NO. 96 (2014)

**To: The Honorable Terence R. McAuliffe, Governor of Virginia,
and The General Assembly of Virginia**

**Richmond, Virginia
June 2017**

STUDY AUTHORITY AND SCOPE

House Joint Resolution 96 (HJR 96, 2014) directed the Virginia Freedom of Information Advisory Council (the Council) to study all exemptions contained in the Virginia Freedom of Information Act (FOIA) to determine the continued applicability or appropriateness of such exemptions and whether FOIA should be amended to eliminate any exemption that the Council determined is no longer applicable or appropriate. In conducting its study, the Council also was directed to examine the organizational structure of FOIA and make recommendations to improve its readability and clarity. HJR 96 directed the Council, in conducting this study, to consider comment from citizens of the Commonwealth; representatives of state and local governmental entities; broadcast, print, and electronic media sources; open government organizations; and other interested parties. HJR 96 required the Council to report its findings and recommendations to the General Assembly by December 1, 2016.

2014 Study Plan Overview

The Council established two subcommittees, one to examine records exemptions and one to examine meetings exemptions. Because there are far more records exemptions than there are meetings exemptions, it was anticipated that when the meetings subcommittee concluded its work on open meeting exemptions and procedures, it would assist the records subcommittee in reviewing exclusions from FOIA's mandatory disclosure provisions.

It was expected that each subcommittee would meet two to three times (or more frequently if necessary) and then report its findings to the full Council. As the full Council meets quarterly and is required to file its annual report to the General Assembly each December 1, the goal was to complete the first phase of the study by November 2014.

It was not anticipated that the Council would recommend study-related legislation each year of study. Instead, omnibus legislation would be fashioned when all subcommittee work was complete at the conclusion of 2016 and recommended to the 2017 Session of the General Assembly.

2014 Subcommittees

- *Records Subcommittee*: It was suggested that this subcommittee begin its work by studying §§ 2.2-3705.1 (exemptions of general application), 2.2-3705.7 (records of specific public bodies and certain other limited exemptions), and 2.2-3705.8 (limitation on record exclusions). The subcommittee would also study § 2.2-3705.6 (proprietary records and trade secrets) during the 2014 interim. Note that because § 2.2-3706 (concerning criminal and law enforcement records) was the subject of three years of study resulting in legislation passed in 2013 as a recommendation of the Council, further study of this section was not recommended until the third year of study.
- *Meetings Subcommittee*: The goal of this subcommittee was to study all meetings exemptions in § 2.2-3711 during the 2014 interim, as well as procedural or other meetings issues, should any be raised.

2015 Subcommittees

- *Records Subcommittee #1*: It was suggested that this subcommittee study §§ 2.2-3705.2 (records relating to public safety) and 2.2-3705.3 (records relating to administrative investigations).
- *Records Subcommittee #2*: It was suggested that this subcommittee study §§ 2.2-3705.4 (educational records and certain records of educational institutions) and 2.2-3705.5 (health and social services records).

2016 Subcommittees

- *General Provision Subcommittee*: This subcommittee will study other provisions of FOIA as needed.

Guidance to the Subcommittees/Role of the FOIA Council

Bills referred by the General Assembly: It was anticipated that the Council would address the bills referred to it by the General Assembly either by assigning them to the appropriate subcommittee or handling them directly. Of the four bills referred for study during the 2014 interim, three would be sent to the Records Subcommittee if the Council did not dispose of them itself: two identical bills (HB 339/SB 387) would modify an existing records exemption, and one (HB 788) addressed out-of-state records requests. The fourth bill (HB

839) addressed the applicability of FOIA to the Office of the Attorney General, an issue the Council may wish to address directly.

Organization of FOIA and policy issues: HJR 96 requires the Council to examine the organizational structure of FOIA. This could be accomplished to more clearly differentiate between sections pertaining to records, sections pertaining to meetings, and sections pertaining to both. Additionally, the Council will provide guidance on policy issues, while the respective subcommittees focus on addressing specific exemptions in detail. For example, one policy question is whether to have numerous limited exemptions, fewer exemptions that are more broadly applicable, or a combination of both types. As a specific example, § 2.2-3705.6 currently contains many exemptions for trade secrets held in different types of records by different agencies. Does the Council prefer this approach, or would the Council prefer to have one exemption covering trade secrets generally?

Contacting agencies: It is suggested that the study, following the policy statement of FOIA expressed in § 2.2-3700, take the approach that all records and meetings are presumed to be open, and that any exemption must be justified. To facilitate this approach, it is suggested that agencies to which particular exemptions apply be contacted and asked to explain the need for their particular exemption(s). It is further suggested that appearances by agency representatives be scheduled to address all relevant exemptions at once, rather than asking agency representatives to appear multiple times.

Technology issues: The goals of the study include the elimination of obsolete language within FOIA as well as any additional changes necessitated by technological advances. Electronic mail, geographic information systems (GIS), records management issues as they affect access, and consideration of FOIA in the procurement of technology are areas of particular concern.

Court opinions, FOIA Advisory Opinions and other resources: During the course of work, subcommittees are expected to review relevant court opinions, FOIA Advisory Opinions, and other information relevant to their work, including comparable provisions in open government laws in other states and the federal government. This may be helpful in providing insight into opportunities to clarify the Virginia Code to reduce litigation and the need for Advisory Opinions.

EXECUTIVE SUMMARY

The Council completed its third and final year of study of the Virginia FOIA pursuant to HRJ 96 on December 5, 2017. HJR 96 directed the Council to (i) study all exemptions contained in FOIA and determine the continued applicability or appropriateness of such exemptions, (ii) determine whether FOIA should be amended to eliminate any exemption from FOIA that the Council determines is no longer applicable or appropriate, (iii) examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA, and (iv) report its findings and recommendations by December 1, 2016. The Council was required to consider comment from citizens of the Commonwealth; representatives of state and local governmental entities; broadcast, print, and electronic

media sources; open government organizations; and other interested parties as part of its study.

At its first meeting on April 22, 2014, the Council approved a study plan, which (i) provided for the formation of two subcommittees (the Subcommittees), one to study records exemptions and the other to study open meeting exemptions and other FOIA provisions related to meetings; (ii) set out a timetable for the exemption review by each Subcommittee; and (iii) included in the study a review of any FOIA bills that may be referred by the General Assembly over the course of the study. In reviewing exemptions, the Subcommittees were directed to give consideration to the following factors to help determine the appropriateness of any exemption:

- The public policy advanced by the exemption--protection of the public good (protection of the public purse or of the public bargaining, negotiating, or litigating position) versus the protection of private interests (privacy or proprietary interests);the application of the attorney-client or other recognized privilege(s);
- Whether there was a clear understanding of the nature and scope of records or meetings subject to an exemption, especially in light of the narrow construction rule found in FOIA at § 2.2-3700;
- Whether there was a need/desire to (i) update or clarify terminology or (ii) remove obsolete or redundant exemptions;
- The impact of court decisions, and opinions of the Attorney General and the FOIA Council, on an exemption;
- Legislative history and intent, to the extent available, of an exemption and whether the exemption clearly reflects the intent of the General Assembly; and
- Whether there exist comparable provisions in other states' FOIA laws that may offer a preferred way of addressing the underlying public policy for which the exemption was granted.

In addition to meeting notices posted on the Council website and sent to the Council's mailing list, a process was devised to notify each affected state or local agency of the timetable of review as well as the standard for review of exemptions. The Council also decided that rather than introduce individual legislative recommendations as separate bills while the study was ongoing, it would recommend for the 2017 Session one or more omnibus bills at the conclusion of the study. Meetings of the two Subcommittees were generally informal and reflected the Subcommittees' preference for dialogue among the study participants over a more formal process. At each meeting, public comment was solicited to ensure the free exchange of ideas between all interested parties and to find consensus where possible. Consensus led to legislative proposals, which were posted on the Council's website to give wider notice of the proposals and to allow time for reflection upon them before they were acted upon formally by a Subcommittee. Frequently, such proposals were the subject of discussion at two or more meetings before action was taken by the Subcommittee. Ultimately, the Council recommended two omnibus bills--one bill incorporating the recommendations of the Records Subcommittee and the other

incorporating the recommendations of the Meetings Subcommittee. At its meeting on December 5, 2016, the Council voted unanimously to recommend these two omnibus bills to the 2017 Session of the General Assembly.

The Records Subcommittee met 18 times during the course of the study. The Records Subcommittee systematically reviewed all of the records exemption sections of FOIA (§§ 2.2-3705.1 through 2.2-3706), as well as relevant FOIA definitions (§ 2.2-3701) and the procedures for making and responding to a public records request (§ 2.2-3704). A Proprietary Records Work Group, which met four times in 2015 and once in 2016, was created by the Records Subcommittee. That Work Group did not reach consensus to move forward, and due to time constraints, the Records Subcommittee recommended that the issue of proprietary records and trade secrets continue to be studied in 2017, which recommendation was adopted by the Council. The Records Subcommittee also formed a Personnel Records Work Group in 2016 that met three times to study the personnel records exemption (subdivision 1 of § 2.2-3705.1) and to attempt to define the term "personnel records." This Work Group also did not reach a consensus to move forward with a definition, and the Council decided to continue studying the issues related to personnel records in 2017. The Records Subcommittee formed a DHRM Records Work Group in 2015 that met once and recommended removing a DHRM-specific exemption that exempts records already exempt as personnel records. In three years of study, the Records Subcommittee considered 33 different legislative proposals addressing concerns raised about particular exemptions, of which it recommended 17 proposals to the Council. These 17 recommendations were approved by the Council and were ultimately incorporated into the Records Omnibus draft (HB 1539).

The Meetings Subcommittee met 17 times over the course of the study. The Meetings Subcommittee systematically reviewed all of the closed meeting exemptions in FOIA (approximately 48 exemptions in total) and also studied closed meetings procedures, electronic meetings and remote participation by members of a public body, and relevant definitions contained in FOIA. The Meetings Subcommittee considered 14 different legislative proposals, of which it recommended eight proposals to the Council. These eight recommendations were approved by the Council and were ultimately incorporated into the Meetings Omnibus draft.

Summaries of the Records Subcommittee's and Meetings Subcommittee's work, including agendas, recommendations, and other materials, are available on the Council's website and are incorporated in the Final FOIA Study Report of the Council.

Final Recommendations

Two omnibus bills, one bill incorporating the Council-approved recommendations of the Records Subcommittee and the other incorporating the Council-approved recommendations of the Meetings Subcommittee,² were recommended by the Council. See Appendix M to this report.

² House Bills 1539 (2017) and 1540 (2017), respectively.

1. Substantive Changes

As a result of the study, the Council recommended several substantive changes to FOIA. These substantive changes are as follows:

HB 1539, the Records Omnibus bill:

- Eliminates the "correspondence" exemption for the Office of the Governor; the Lieutenant Governor; the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates and the Senate of Virginia; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia³ (§ 2.2-3705.7);
- Directs that information publicly available or not otherwise subject to an exclusion under FOIA or other provision of law that has been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed "working papers" (§ 2.2-3705.7);
- Adds school boards to the public bodies required to post a FOIA Rights and Responsibilities document on their websites to assist citizens in obtaining records (§ 2.2-3704.1);
- Protects personal information of citizens in the following instances:
 - Designated survivors and authorized individuals under the Virginia College Savings Plan (§ 2.2-3705.4) and
 - Individuals obtaining postemployment benefits, other than pensions for local government employees (§§ 2.2-3705.7 and 2.2-3711); and
- Eliminates the record exemption for certain operational and marketing strategies of the yet-to-be created Alcoholic Beverage Control Authority (§§ 2.2-3705.7 and 2.2-3711);

HB 1540, the Meetings Omnibus bill:

- Redefines "regional public body" (§ 2.2-3701);
- Adds the requirement that notices of meetings be posted on government websites (§ 2.2-3707);
- Adds the requirement that notice of continued meetings be given, regardless of whether the meetings are held by traditional or electronic communication means (§§ 2.2-3707 and 15.2-1416);
- Adds the requirement that a proposed agenda be included with agenda packets available to the public (§ 2.2-3707);
- Limits discussion in closed meetings of certain museum boards to specific gifts, bequests, or grants from private sources (§ 2.2-3711);
- Allows closed meetings for discussion by a local finance board or board of trustees of a trust established by one or more local public bodies to invest funds for postemployment benefits other than pensions (§ 2.2-3711);

³ NOTE: To the extent that any correspondence meets the definition of a "working paper" for the public officials identified above, it may be withheld from the mandatory disclosure provisions of FOIA.

- Limits closed meeting discussion held by the Board of Visitors of Virginia Commonwealth University and the VCU Health System Authority (§ 2.2-3711); and
- Limits remote participation by a member of a public body due to a personal matter to two meetings per year (§ 2.2-3708.1).

2. Clarifying Amendments

The Council also recommended several clarifying amendments to FOIA. These clarifying amendments include:

HB 1539, the Records Omnibus bill:

- Revises the definition of public record (§ 2.2-3701);
- Clarifies citizen rights to inspect or receive copies of public records (§ 2.2-3704);
- Creates uniform reference to government websites ("official public government website" (2.2-3704.1 et seq.);
- Merges general provisions relating to personnel records into one section (§ 2.2-3705.1);
- Clarifies that the name of a public employee is subject to mandatory disclosure in the context of requests for position and salary information (§ 2.2-3705.1);
- Creates a definition of "personal contact information" (§ 2.2-3705.1);
- Consolidates public safety exemptions (subdivisions 4, 6, and 14 of § 2.2-3705.2) relating to security of buildings, people in buildings, critical infrastructure, cybersecurity, and the Statewide Agencies Radio System (STARS) (§ 2.2-3705.2);
- Updates terminology for "telecommunications provider" to "communications services provider" (§ 2.2-3705.2); and
- Consolidates the exemptions for Department of Health Professions (subdivisions 8, 11, and 15 of § 2.2-3705.5).

HB 1540, the Meetings Omnibus bill:

- Removes references to the Commonwealth Calendar in favor of "a central electronic calendar" (§ 2.2-3707 et seq.);
- Separates the closed meeting exemption for legal matters and litigation into two distinct exemptions (§ 2.2-3711);
- Clarifies the purposes for which closed meetings may be held in an effort to better distinguish the "subject" of a closed meeting from its "purpose" (§ 2.2-3712); and
- Provides better context for open meeting exemptions in an effort to better inform citizens of the topic of discussions allowed and by whom such discussions may be made (§ 2.2-3711).

3. Removal of Obsolete or Redundant Provisions

Finally, the Council also recommended the removal of obsolete or redundant provisions contained in FOIA. These deletions are as follows:

HB 1539, the Records Omnibus bill:

- Deletion of subdivision 8 of § 2.2-3705.3, relating to Department of Human Resource Management (DHRM) investigations, as redundant of the personnel record exemption;
- Deletion of subdivision 7 in § 2.2-3705.5, relating to data formerly held by the Commissioner of Health, as obsolete;
- Deletion of subdivision 13 in § 2.2-3705.7, relating to names and addresses of persons subscribing to *Wildlife Magazine*, as obsolete; and
- Deletion of subdivision 30 in § 2.2-3705.7, as redundant of the definition of "public record."

HB 1540, the Meetings Omnibus bill:

- Deletion of the reference to informal gatherings of the General Assembly (§ 2.2-3707) as obsolete;
- Deletion of the reporting requirement to the Joint Commission on Science and Technology (JCOTS) (§ 2.2-3708) as redundant (these reports go to the FOIA Council); and
- Deletion of references to local crime commissions (§ 2.2-3711) as obsolete.

Continuation of Study Issues to 2017:

Despite a very active three years of study, the Council was unable to achieve the goals set out in its original study plan. This was due in part to the time constraints imposed by HJR 96 and in part by the lack of consensus among interested parties concerning larger issues related to personnel records and proprietary/trade secret records. The Council, however, is committed to a complete review of all of the provisions of FOIA and has declared that the following issues will be considered during the 2017 interim:

- The proprietary records and trade secrets draft proposed by the Virginia Press Association. *Note: The Council recommended that study of § 2.2-3705.6 (proprietary record exclusions) be carried over to 2017, as efforts were unsuccessful in reaching consensus to create a general exemption for trade secrets and proprietary records;*
- Review of FOIA provisions in light of the advancement in technology;
- 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." It is believed that inclusion of this statement in FOIA as part of its policy statement would enhance compliance with the redaction rule of FOIA;*
- Definitions;
- Vendor proprietary information software is exempt from release under § 2.2-3705.1(6), vis a vis the exemption for software "developed by or for a state agency..." in § 2.2-3705.1(7);
- Website posting of notice and minutes (§§ 2.2-3707 and 2.2-3707.1);

- Texting among members during public meetings and its impact on open meeting provisions;
- Access to law-enforcement records (§ 2.2-3706);
- Personnel records (§ 2.2-3705.1);
- Enforcement of FOIA; penalties for violations; and
- Reorganization of FOIA--*Examine the organizational structure of FOIA and make recommendations to improve its readability and clarity.*

INTRODUCTION

Until 2016, the Council received progress reports from its two Subcommittees but did not act on any Subcommittee recommendations. Beginning in 2016, the Council reviewed each draft recommended by the Subcommittees and took action on each recommendation. The vast majority of the HJR 96 study work was conducted by the Council's two Subcommittees, which were tasked with the review of each FOIA record and meeting exemption. What follows is a summary of the work of the Meetings Subcommittee and Records Subcommittee, respectively. The work of each Subcommittee is set forth below by year.

PART I--MEETINGS SUBCOMMITTEE

Work of the Meetings Subcommittee--Year One, 2014

May 14, 2014

The Meetings Subcommittee (the Subcommittee) held its first meeting on May 14, 2014. Subcommittee members Dooley, Landon, Oksman, John G. Selph, and Whitehurst were all present. The Subcommittee began the meeting by electing Mr. Whitehurst as chair by unanimous vote. Staff then presented a brief review of HJR 96, which directs the FOIA Council to conduct a three-year study of FOIA, and the study plan adopted by the FOIA Council at its meeting on April 22, 2014. HJR 96 directs the FOIA Council to examine all of the exemptions in FOIA, as well as the organization and structure of FOIA. At its meeting in April, the FOIA Council established the Subcommittee with the goal of studying all of the meetings exemptions, as well as any other meetings-related issues that may arise. Staff related that the Records Subcommittee had met earlier the same day and expressed concerns over policy issues and a desire for more direction from the full FOIA Council. The Subcommittee discussed the possibility of having a full FOIA Council meeting in June. Staff reminded the members that the FOIA Council already has statutory authority to study all FOIA issues and that the Subcommittee may take a full view of meetings law. The Subcommittee then invited others present to express their views.

Craig Merritt, representing the Virginia Press Association (VPA) observed that HJR 96 tasks the FOIA Council to study all exemptions for applicability and appropriateness. He opined that determining applicability would be easy, but he questioned how the members would

determine appropriateness. He suggested there be some definite measures determined before studying individual exclusions. Mark Flynn of the Virginia Municipal League (VML) observed that what FOIA is really about is determined by working through the details of each exemption.

In discussion among the Subcommittee members, Ms. Dooley suggested approaching the exemptions using current FOIA policy as a guide to determine what is appropriate, noting that the language of HJR 96 directed a study of the exemptions, the structure, and the readability and clarity of FOIA, not a study of the underlying policy of FOIA. Mr. Oksman indicated that following the existing policy of openness strictly, there would be no exemptions at all. He agreed with Mr. Merritt's idea of having guidelines and criteria to judge new exclusions, and he expressed his support for seeking further guidance from the full FOIA Council, but he also stated that he believed the Subcommittee could begin its part of the study before receiving additional guidance. Mr. Selph agreed, and the Subcommittee discussed the possibility of scheduling a FOIA Council meeting in June. Ms. Dooley also observed that there are certain balancing factors expressed in the current exemptions that could be used to judge appropriateness: the public good (including protecting of bargaining and negotiating positions, the financial interest of the public, and attorney-client confidentiality) versus private interests (such as individual privacy, employment and education matters, and private businesses' proprietary interests).

After further discussion, the Subcommittee agreed it wanted further guidance on how to determine the appropriateness of exemptions. The Subcommittee then discussed scheduling future meetings and decided to hold approximately four more meetings. It was suggested that the Subcommittee might meet again in June, perhaps on the same day as the full FOIA Council, if the full FOIA Council agreed to hold an additional meeting.⁴ Mr. Whitehurst invited any final public comment. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) noted that in the past a lot of work was done using informal and that such an approach might be helpful for the study. The meeting was then adjourned.

July 8, 2014

The Subcommittee held its second meeting of the 2014 interim on July 8, 2014. Subcommittee members George T. Whitehurst (Chair), Kathleen Dooley, Forest M. "Frosty" Landon, and Timothy Oksman were present. The purpose of the meeting was to continue the study of records exemptions under 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

⁴ Note that after the meeting, staff brought the Subcommittee's concerns to the attention of the chair and vice-chair of the FOIA Council. They decided to issue a letter to the Subcommittee members providing guidance rather than to convene a full FOIA Council meeting.

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.⁵

The Subcommittee next turned to Craig Merritt, speaking on behalf of the 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 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, a former FOIA Council member representing local government interests, 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

⁵ For additional legislative history, public policy, and other considerations applicable to each exemption, please see the relevant worksheet for that exemption.

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. Mr. Merritt, speaking on behalf of the VPA, stated that Mr. Wiley was on target and noted two concerns: (1) proportionality and (2) misfeasance, malfeasance, and criminality. Mr. Merritt stated that regarding proportionality, 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 VCOG related that this exemption was the top problem revealed 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 that 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.

August 19, 2014

The Subcommittee held its third meeting of the 2014 interim on August 19, 2014. Subcommittee members Whitehurst (Chair), Dooley, Landon, Oksman, and Selph were present. The purpose of the meeting was to continue the study of meetings exemptions under HJR 96.

The meeting began with the consideration of two drafts the Subcommittee had requested at its previous meeting. The first draft concerned the legal matters and litigation exemption currently codified as subdivision A 7 of § 2.2-3711. The second addressed the personnel exemption currently codified as subdivision A 1 of § 2.2-3711.

The first draft separates the legal matters and litigation open meeting exemption into two distinct exemptions in order to clarify the current exemption without making any substantive changes. In the course of discussing this exemption, the Subcommittee members and Craig Merritt, speaking on behalf of VPA, discussed the concepts of attorney-client privilege and various hypothetical examples of what would be legally protected and what would not. Delegate Richard L. Morris, who attended the meeting out of personal interest in the subject matter, stated that he liked the language regarding litigation but was concerned that the term "reasonable basis" could be construed too broadly, and that he would prefer if a specific basis were required instead. Ms. Dooley noted that if the requirement were for litigation to be specifically threatened before it could be discussed, that would hand power to the plaintiff. It was also noted that "probable litigation" is defined in the exemption and must be by or against a known party; a vague concern that "we might get sued for that" would not be enough to hold a closed meeting. Roger Wiley, a former FOIA Council member representing local government interests, provided an example of a rezoning application where an adjacent landowner spoke against the application at the rezoning hearings as the type of "probable litigation" the exemption would cover. He noted that if he, as the attorney for the public body, discussed the matter with the public body openly at a public meeting, it would make him a witness rather than a defender in the suit. After some further discussion, the Subcommittee voted unanimously to recommend the draft splitting the current exemption into two separate exemptions for clarity, without any substantive changes.

The second draft considered by the Subcommittee would clarify that the personnel exemption as applied to local governing bodies includes all officers, appointees, or employees of a governing body of a locality and is not limited to those whom a local governing body directly hires or fires. The draft defines "locality" and overrules prior opinions of the OAG as to the applicability of this exemption to local governing bodies. Mr. Merritt submitted a written statement opposing the draft on behalf of VPA and spoke to VPA's concerns about public access and how this draft, by treating non-employees as employees, would be contrary to laws outside of FOIA establishing who is an employee. Mr. Wiley agreed that it is not the FOIA Council's business to change the relationship of local governments to employees, but he added that he believed the OAG opinions at issue misstated that relationship. He indicated that, in practice, it always applied to all employees of a locality; that, in reality, all local government employees are under the governing body; and that the change is to recognize that reality, not to change the relationship. Mark Flynn of the VML concurred and noted that most local government attorneys disagreed with the OAG opinions. Mr. Oksman observed that the public holds members of the governing body accountable for the performance of the government as a whole, including all employees, and that the governing body cannot do its job if it cannot discuss the performance of lower- and middle-level employees. He further observed that those discussions could involve serious

problems and criminal activity, for which open discussion would be impossible. Delegate Morris stated his view that there is a responsibility to discuss complaints about government employees in public. Mr. Whitehurst observed from his experience as a former reporter that local governing bodies generally did not discuss low- to mid-level employees, but dealt with administrators in closed meetings. Mr. Wiley related that such discussions usually were held for the purpose of informing the governing body, not to ask the governing body to decide the fate of lower-level employees. After further discussion without reaching agreement on any changes, the Subcommittee decided to defer consideration of this exemption until a later date.

The Subcommittee then proceeded with the rest of its agenda, beginning with consideration of subdivision A 8 of § 2.2-3711, which provides an exemption to boards of visitors of public institutions of higher education for the discussion of certain gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed. Staff provided a brief legislative history of the exemption, which was enacted in 1979, and Mr. Landon noted that 1979 was also when universities were first brought under FOIA. After inquiry by the Subcommittee, representatives of Virginia Commonwealth University and George Mason University both indicated that they were comfortable with the existing exemption but that they would need to consult with their respective university counsel to answer specific questions about the use of the exemption. The Subcommittee deferred further consideration of this exemption for that reason.

The Subcommittee next considered subdivision A 10 of § 2.2-3711, which provides an exemption for the discussion of honorary degrees or special awards. Ms. Dooley noted that it would matter to persons who were considered but not chosen if such discussions were public. Laura Fornash, on behalf of the University of Virginia (UVA), noted that UVA used the exemption for special awards but that UVA does not award honorary degrees. Without objection, the Subcommittee decided to leave the exemption as it is.

Staff informed the Subcommittee that subdivision A 11 of § 2.2-3711, which provides an exemption for the discussion of tests, exams, and certain other records corresponding to the exemption at subdivision 4 of § 2.2-3705.1, was also enacted in 1979. Without objection, the Subcommittee decided to leave the exemption as it is.

Subdivision A 13 of § 2.2-3711 provides an exemption for the discussion of certain matters concerning hazardous waste siting agreements. Cindy Berndt, on behalf of the Department of Environmental Quality (DEQ), stated that part of the authorization to DEQ involved certifications, that local governments would negotiate with facility operators, and that the negotiations would remain confidential. She observed that the process has not been used but that there is the opportunity to do so. The process also would require filing notice of intent to site hazardous waste, with public notice and a public hearing process. Mr. Wiley observed that there is no such facility in the Commonwealth. Mr. Merritt asked whether the exemption was mere surplusage. Ms. Berndt, Mr. Wiley, and Ms. Dooley replied that the exemption would be helpful if anyone actually wanted to establish a hazardous waste site and that it was driven by a process established elsewhere in the Code. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 15 of § 2.2-3711 provides an exemption for the discussion of medical and mental health records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.5. Staff informed the Subcommittee that the exemption was passed in 1989, with only minor amendments since then. Ms. Dooley noted that both state and federal laws made health records exempt from disclosure. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 17 of § 2.2-3711 provides an exemption for those portions of meetings by local government crime commissions where the identity of, or information tending to identify, individuals providing information about crimes or criminal activities under a promise of anonymity is discussed or disclosed. Staff related that the exemption was passed in 1989 and that on the records side there is a prohibition on the release of the identities of confidential informants. Mr. Wiley asked if there was a comparable exemption for the State Crime Commission; staff stated that the State Crime Commission is not subject to FOIA.⁶ After further inquiry from the Subcommittee, it appeared that no one present could recall this exemption ever being used or could think of an example of a local government crime commission. The Subcommittee asked that local government representatives and staff look into the matter and suggested that if there are in fact no local government crime commissions in existence, then this exemption should be eliminated.

Staff informed the Subcommittee that subdivision A 19 of § 2.2-3711 provides an exemption for the discussion of certain public safety and security matters; it was enacted in 1991 and amended in 2002 and 2007. Ms. Dooley observed that the 2007 amendment came about after the Fredericksburg City Council needed a briefing on the safety and security of a courthouse built in 1858 that would have revealed security vulnerabilities but that it was not covered under the exemption at that time because it did not concern terrorist activity. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 28 of § 2.2-3711 provides an exemption for the discussion of certain records of transactions conducted under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002. Staff observed that the public policy basis of the exemption was to protect the public purse and bargaining position, as well as proprietary information of vendors. Jackie Cromwell, of the Virginia Office of Public-Private Partnerships (VAP3), stated that VAP3 uses the exemption only during independent review panel discussions of confidential documents and then it reopens the meeting to the public. She stated that by protecting cost estimates, financial models, and other records, it allows the private sector comfort in doing business with the public sector and allows the public sector to get the best value. Mr. Oksman asked for the opinion of VPA; Mr. Merritt and Ginger Stanley, Executive Director of VPA, indicated they felt both the meetings exemption and the corresponding records exemption were overbroad. As an example, Mr. Merritt described Virginia Department of Transportation (VDOT) projects done in increments and phases where records and meetings were not open to the public for

⁶ Subdivision A 4 of § 2.2-3703.

many years. He indicated that the practice described by Ms. Cromwell was not problematic but the statute itself is much broader. Ms. Dooley noted that the meetings exemption is driven by the records exemption, which matches the practice in her experience. Ms. Cromwell stated that the private sector generally wants to exempt everything but VAP3 does not agree to do so in practice and only exempts things that may damage the private company after reviewing the material with representatives of OAG. Mr. Wiley and Ms. Dooley observed that it is common for boilerplate contracts and even cover letters to be claimed as exempt. After further discussion, the Subcommittee agreed without objection to wait until the Records Subcommittee had a chance to review the corresponding records exemption and then reconsider the meetings exemption.

Subdivision A 29 of § 2.2-3711 provides an exemption for the discussion of certain matters related to the award of public contracts. Staff related that it was enacted in 2003 as a FOIA Council recommendation along with a records exemption and it had been the subject of a Virginia Supreme Court case in 2006.⁷ A representative of VDOT stated that VDOT would want the exemption kept as it is, because panel members and committees sign confidentiality agreements, and that there is transparency once the contracts are awarded. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 33 of § 2.2-3711 provides an exemption for the discussion of certain proprietary records and trade secrets of a local governing body that provides telecommunication or cable television services. Subdivision A 34 of § 2.2-3711 provides an exemption for the discussion of certain proprietary records and trade secrets of a local authority created in accordance with the Virginia Wireless Service Authorities Act. Subdivision A 40 of § 2.2-3711 provides an exemption for the discussion of certain economic development and retention records. There were no comments regarding subdivisions A 33 and A 34. A representative of the Virginia Economic Development Partnership (VEDP) stated that VEDP finds subdivision A 40 to be very effective as it is. As all three of these exemptions reference corresponding records exemptions, the Subcommittee decided without objection to wait until the Records Subcommittee had a chance to review the corresponding records exemptions and then come back to reconsider the meetings exemptions.

Mr. Whitehurst opened the floor to any further comments from the public or Subcommittee members; there were none. The Subcommittee then discussed scheduling future meetings and decided to hold its next meeting at 10:00 a.m. on September 16, 2014, prior to the full FOIA Council meeting that afternoon.⁸ The meeting was then adjourned.

November 5, 2014

The Subcommittee held its fourth meeting on November 5, 2014. Subcommittee members Whitehurst (Chair), Dooley, Oksman, and Selph were present at the Richmond location;

⁷ *White Dog Publishing, Inc. v. Culpeper County Bd. of Supervisors*, 272 Va. 377, 634 S.E.2d 334 (2006).

⁸ Please note that the meeting of the Subcommittee scheduled for September 16, 2014, was subsequently canceled; the next meeting of the Subcommittee was then scheduled to be held at 1:30 p.m. on November 5, 2014.

Mr. Landon participated by telephone from his home in Roanoke, Virginia.⁹ The purpose of the meeting was to continue the study of FOIA records exemptions in accordance with HJR 96.

After the call to order and introductions, the Subcommittee decided to take up matters on the printed agenda out of order, beginning with item #3 (new business) to continue implementation of the Subcommittee's work plan and returning to item #2 (old business) at the end. Additionally, some items were taken up out of order when they concerned similar or related subject matter and representatives of the affected agencies were prepared to speak. Staff read the language of each exemption considered and gave a brief legislative history of each. Each exemption is addressed separately below in the order in which it was discussed.

Subdivision A 9 of § 2.2-3711 allows a closed meeting to be held for the purpose of discussing certain gifts, bequests, and grants by the boards of trustees of the Virginia Museum of Fine Arts (VMFA), the Virginia Museum of Natural History, the Jamestown-Yorktown Foundation, and The Science Museum of Virginia. It was enacted in 1981, amended in 2003 to add the Virginia Museum of Natural History, and amended again in 2013 to add the Jamestown-Yorktown Foundation. David Bradley of the VMFA stated that all four of the listed entities rely heavily on contributions and this exemption provides confidentiality for information learned in the negotiating process, such as donors' cash flow, tax strategies, estate planning, and other personal information. He noted that using private foundations for fundraising protects information to a point, because private foundations generally are not subject to FOIA. However, such foundations do not operate in a vacuum and must be able to keep the state-appointed boards aware of the foundations' activities, and the boards are subject to FOIA. In response to a question from Mr. Whitehurst, Mr. Bradley indicated that donors want both anonymity and protection of proprietary information, citing as an example safety issues for those who loan a high-value art collection to the museum. Roger Wiley, a former FOIA Council member representing local government interests, stated that he was on the FOIA Council when this exemption was last amended and felt that it was appropriate, but he noted that there are local governments that operate museums subject to the same considerations, such as the Chrysler Museum in Norfolk. Mr. Oksman suggested that localities should come forward if they wished to be added to the exemption. Ginger Stanley of the VPA questioned why the exemption included grants; Mr. Bradley indicated it had to do with grants from private foundations, not government grants that go through an appropriations process. There was further inquiry and discussion among the Subcommittee members, staff, Ms. Stanley, Elizabeth Hooper of Virginia Polytechnic Institute and State University, Frances Bradford of The College of William and Mary, and Matt Conrad of Virginia Commonwealth University (VCU). The initial consensus of the Subcommittee was to add "from private sources" after the word "grants," but there were concerns with how this language might affect other organizations and how it might be construed in relation to other exemptions such as subdivision A 8 of § 2.2-3711. The Subcommittee agreed without objection to look further at this language before recommending any change.

⁹ Note that this meeting was noticed as an electronic meeting pursuant to § 2.2-3708. No members of the public participated from Mr. Landon's remote location.

Subdivision A 12 of § 2.2-3711 was enacted in 1982. It allows a closed meeting to be held for the purpose of discussing possible disciplinary action against a member of the General Assembly arising out of the possible inadequacy of the disclosure statement filed by the member. It was noted that this exemption would not apply to the Virginia Conflict of Interest and Ethics Advisory Council. There were no additional comments or recommendations for change.

The Subcommittee next took up subdivision A 8 of § 2.2-3711, which had been considered at the Subcommittee's last meeting in August. It allows a closed meeting to be held for the purpose of discussing gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by boards of visitors of public institutions of higher education. The Subcommittee had discussed this exemption at its last meeting but deferred decision until representatives from the state institutions of higher education were ready to speak on the matter. Laura Fornash of the University of Virginia (UVA) stated that this exemption was important to the UVA Board of Visitors and gave the example of needing to discuss matters such as a new 20-year, \$70 million dining services contract. She noted there were similar considerations regarding donors and fundraising strategies as were expressed regarding the earlier exemption for museums. Ms. Bradford, Ms. Hooper, Mr. Conrad, Sabena Moretz of George Mason University, and Chris White of the University of Mary Washington all agreed. Ms. Stanley indicated she was still unsure why grants were included. After brief discussion, the Subcommittee recommended leaving this exemption unchanged.

Subdivision A 14 of § 2.2-3711 was enacted in 1984. It allows a closed meeting to be held for the purpose of discussing forecasts of economic activity and estimating general and nongeneral fund revenues by the Governor and any economic advisory board. Ms. Stanley asked what would be the harm in knowing the forecasts; staff observed that disclosure is required by December 15 each year, but this exemption covers discussions before that date. The consensus of the Subcommittee was to leave this exemption unchanged.

Subdivision A 16 of § 2.2-3711 was enacted in 1989 and amended in 2003 and 2014. It allows a closed meeting to be held for the purpose of discussing certain licensing appeal actions and other Virginia Lottery matters discussed by the Virginia Lottery Board. In response to questions from the Subcommittee, Amy Dilworth of the Virginia Lottery indicated there was no need to change the exemption. The consensus of the Subcommittee was to leave this exemption unchanged.

Subdivision A 20 of § 2.2-3711 was enacted in 1993 and amended in 1997, 2002, and 2007. It allows a closed meeting to be held for the purpose of discussing certain security or ownership interests discussed by the Virginia Retirement System (VRS), UVA, or the Virginia College Savings Plan (VCSP). Robert Schultze, Director of VRS, stated that this is a long-standing exemption to promote an investment program involving a large trust fund used to fund benefits. He noted that two-thirds of benefits are paid through investment gains. He further stated that a small portion of the portfolio is in private equity assets and that VRS lost access to some of these previously because it lacked an exemption. He observed that the corresponding records exemption is more important but this exemption

preserves options for meetings. Ms. Fornash stated that the UVA endowment shared the same interests. Chris McGee of VCSP agreed, and he stated that it was an integral part of the diversity of VCSP's portfolio and ability to attract top investment managers. Mr. Wiley stated that since this exemption was adopted, accounting rules had changed and local governments now have a pooled investment trust worth over \$500 million with some of the same issues, and that it might be worth adding to the exemption. Staff suggested taking this idea up at the first meeting of 2015 by considering adding a cross-reference to the investment pool trust. The consensus of the Subcommittee was to have staff work with Mr. Wiley on appropriate language for consideration next year.

Subdivision A 39 of § 2.2-3711 was enacted in 2007. It allows a closed meeting to be held for the purpose of discussing certain exempt records of VRS, a local retirement system, or VCPS by certain public bodies. Mr. Schultze stated that the exemption was added in 2007 at the request of VRS after a bad experience with an investment manager. He said that Wall Street firms had made FOIA requests to VRS for investment strategies, and then the firms had sold those strategies, and the best-performing external investment manager for VRS then dropped VRS as a client as a result. The consensus of the Subcommittee was to leave this exemption unchanged.

Subdivision A 21 of § 2.2-3711 was enacted in 1995 and amended in 1999. It allows a closed meeting to be held by child fatality review teams or family violence fatality review teams for the purpose of discussing individual death cases. Virginia Powell of the Office of the Chief Medical Examiner stated that the goal of the program is to determine how victims die in order to devise preventative strategies. She said that they look at child deaths and domestic violence victims on a case-by-case basis and that the exemption helps protect the privacy of victims and families as well as deliberation on strategies. The consensus of the Subcommittee was to leave this exemption unchanged.

Subdivision A 22 of § 2.2-3711 was enacted in 1996 and amended in 2002. It allows a closed meeting to be held for the purpose of discussing certain proprietary, business-related information pertaining to the operations of the UVA Medical Center or Eastern Virginia Medical School (EVMS). Sally Barber of the UVA Medical Center stated that the exemption was added in 1996 to work with other statutory provisions and because of a need to be competitive with private entities. Ms. Barber submitted written remarks, incorporated herein by reference. A representative of EVMS agreed with Ms. Barber's comments. The consensus of the Subcommittee was to leave this exemption unchanged.

Subdivision A 23 of § 2.2-3711 was enacted in 1996 and amended in 2000. It allows a closed meeting to be held for the purpose of discussing various matters by the Virginia Commonwealth University Health System Authority (VCUHSA). The Subcommittee noted that this exemption appears to repeat items from other exemptions, such as personnel matters and real property discussions. Karah Gunther of VCU stated that when it was first created, VCUHSA was not subject to the Virginia Public Procurement Act, and these items were specifically listed in an abundance of caution. The Subcommittee, Ms. Stanley, and Ms. Gunther discussed whether the redundancy was needed, and the status of VCUHSA employees as public employees, but not state employees. Mark Flynn of the VML expressed

concern that removing these provisions could be construed as a lack of authority to hold closed meetings on the covered topics. Mr. Wiley and staff indicated that any decision could be explained in the report at the conclusion of the HJR 96 study. Ms. Gunther stated that after speaking with general council for VCU, she would want to be very careful before changing this exemption because VCUHSA is an authority, not a state agency. Ms. Dooley indicated she did not feel a great need for change, and Mr. Selph expressed concern over unintended consequences. After some further discussion of the structural differences between UVA, VCUHSA, and EVMS, the Subcommittee agreed to ask staff to examine the matter further and bring it back for reconsideration next year. Ms. Gunther noted that VCU was considering asking for legislation in the 2015 Session of the General Assembly to clarify existing exemptions because VCU and VCUHSA work closely together and need to protect many of the same matters.

Subdivision A 24 of § 2.2-3711 was enacted in 1997 and amended in 2009. It allows a closed meeting to be held for the purpose of discussing certain matters of the Health Practitioners' Monitoring Program Committee within the Department of Health Professions (DHP). Peggy Ward, Manager of the Health Practitioners' Monitoring Program, stated that the committee meets every other month and discusses individual participants, including their mental health records, substance abuse problems, and other issues. After further discussion noting that an order to participate in the program is public but the reasons for the exemption include not only the privacy of those participating but the protection of public health as well, the Subcommittee agreed to recommend leaving this exemption unchanged.

Subdivision A 25 of § 2.2-3711 was enacted in 1997 and amended in 1999 and 2000. It allows a closed meeting to be held by the Board of the Virginia College Savings Plan wherein certain personal information is discussed. Staff noted that the Records Subcommittee had recommended a change in the definition of "personal information" used in a corresponding records exemption, rather than a cross-reference to the definition used in the Government Data Collection and Dissemination Practices Act (GDCDPA). Mr. McGee stated that VCSP by law collects lots of personal information, including names, ages, and social security numbers of parents, children, and grandchildren, and this exemption allows protection for discussions involving such information. There was discussion among the Subcommittee members about the possibility of adding a definition of "personal information." Mr. McGee stated that VCSP would like the exemption to remain as it is currently written but that he would look into it and report back to the Subcommittee.

Subdivision A 27 of § 2.2-3711 was enacted in 2002 and amended in 2003. It allows a closed meeting to be held for disciplinary proceedings by any regulatory board within the Department of Professional and Occupational Regulation (DPOR), Department of Health Professions (DHP), or the Board of Accountancy (BoA). A representative of DHP spoke in support of the current exemption and provided a general description of the disciplinary process. She stated that the various boards regulate individual licensees; accept complaints from the public, press, consumers, and others; issue public notice to licensees to come before the appropriate board; and hold either an informal conference or a hearing, all of which is done publicly. The board would then convene a closed meeting to deliberate, acting like a jury to consider evidence and sanctions, including considerations of mental health issues,

substance abuse, patient abuse, and other matters. She stated that, if the exemption were changed, then the disciplinary process would have to be changed as well. The consensus of the Subcommittee was to recommend leaving this exemption unchanged.

Subdivision A 43 of § 2.2-3711 was enacted in 2009. It allows the Board of Trustees of the Veterans Services Foundation (the Foundation) to hold a closed meeting to discuss certain fundraising records that are exempt pursuant to subdivision 29 of § 2.2-3705.7. Steven Combs of the Department of Veterans Services (DVS) stated that the Records Subcommittee had reviewed the corresponding records exemption and recommended no changes. He explained that the Foundation is a public body created by statute and therefore subject to FOIA, unlike most other fundraising foundations that are private tax-exempt entities not subject to FOIA. He stated that the Foundation had raised about \$400,000 last year that was used to supplement services by DVS, including veterans' cemeteries, the Virginia War Memorial, and the Virginia Wounded Warrior Program. The consensus of the Subcommittee was to recommend leaving this exemption unchanged.

Subdivision A 17 allows a closed meeting to be held by local government crime commissions for discussions involving the identity of anonymous informants. At the last meeting of the Subcommittee, no one could recall if there actually were any "local government crime commissions" in existence or authorized under the law. The Subcommittee indicated that if there are no entities that would use the exemption, then it could be repealed, but it wanted to give staff and interested parties time to further research the matter. Staff indicated that research had revealed no other mentions of "local government crime commissions" in the Code and that no one staff had spoken with could recall any such entity. Mr. Wiley stated that he would ask others in local government about this matter and report back to the Subcommittee.

Mr. Whitehurst asked if there were any additional comments or questions from the Subcommittee or the public. Mr. Oksman thanked staff for their work; there were no other comments. The Subcommittee decided to have staff poll members for dates for the next meeting to be held after the 2015 Session of the General Assembly has adjourned sine die. Ms. Stanley asked whether the Subcommittee was planning to introduce an omnibus bill or individual legislation for each recommendation. Mr. Wiley noted that the Records Subcommittee favored an omnibus approach but that one objection could kill the whole bill. Ms. Dooley confirmed with the chair that the Subcommittee's recommendations would be sent to the full FOIA Council, which would then decide how to proceed. Mr. Wiley suggested a possible approach would be to draft two bills: one addressing noncontroversial items and the other one addressing more controversial items. The Subcommittee meeting was then adjourned.

Work of the Meetings Subcommittee--Year Two, 2015

May 12, 2015

The Subcommittee held its first meeting of the 2015 interim on May 12, 2015. Subcommittee members Whitehurst (Chair), Dooley, Landon, and Selph were present; Mr. Oksman was absent. The purpose of the meeting was to continue the study of FOIA meetings exemptions begun in 2014 in accordance with HJR 96.

After the call to order and introductions, Mr. Whitehurst asked for nominations to replace him as chair of the Subcommittee, because his term on the Council ends this year. Having served two full four-year terms, Mr. Whitehurst is not eligible for reappointment to the Council. Ms. Dooley was selected as the new chair by unanimous vote of the members present.

Staff then provided a brief overview of the Subcommittee's work in 2014, and the Subcommittee proceeded with old business, starting with subdivision A 9 of § 2.2-3711, which provides that 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 may discuss or consider in closed meetings matters relating to specific gifts, bequests, and grants. Last year there was a proposal to specify that the exemption applied to grants from private sources, not grants from other government entities. Roger Wiley, a former FOIA Council member representing local government interests, and Mark Flynn of the VML both suggested there may be times when there might be competition among government entities, such as when a museum closes and other museums compete for its collection. Dave Ress, a reporter with the *Daily Press*, asked whether the exemption was to protect the privacy of individuals or government bodies. After some discussion, Ms. Dooley stated that the privacy of the donor is one rationale, while the competitive position of the public entity is another. She also noted no one from the affected institutions was present to talk about it. Ginger Stanley of the VPA noted that the language was a compromise but VPA had wanted to eliminate mention of grants altogether. The Subcommittee then unanimously voted in favor of amending the exemption to limit its application to grants from private sources.

The Subcommittee next considered subdivision A 17 of § 2.2-3711, which provides a closed meeting exemption for local crime commissions. Staff and Ms. Dooley related that after making many inquiries since last year, they still received no indication that any local crime commissions actually exist. The Subcommittee adopted by consensus a recommendation to eliminate this exemption.

The Subcommittee next addressed subdivision A 20 of § 2.2-3711, which provides a closed meeting exemption for discussions of certain investments by the respective boards of the VRS, UVA, and the VCSP. The proposal was to add the Local Government Investment Pool (LGIP) to the list of entities that can use the exemption, as LGIP uses the same types and methods of investment. Mr. Ress asked if the exemption covered only investments or also actuarial matters; a VRS representative explained that it only covered certain

investments, such as private equity where private equity managers will not do business with government entities if the managers feel their trade secrets and proprietary information might be revealed due to FOIA. After some discussion among Mr. Ress, Mr. Wiley, Ms. Dooley, and the VRS representative, it was questioned whether LGIP or a different investment entity was the appropriate entity to add. Mr. Wiley agreed to look into the matter, and the Subcommittee agreed to study this exemption further at its next meeting.

The Subcommittee then considered subdivision A 23 of § 2.2-3711, which allows the VCUHSA to discuss numerous matters in closed meetings. The question previously raised was whether some parts of this exemption were redundant with other closed meeting exemptions that could be used by any public body. Staff and representatives of VCUHSA agreed to work together to try to identify any such redundancies.

Staff noted that subdivision A 32 of § 2.2-3711 had expired, and recommended removing it.

The Subcommittee then continued its ongoing discussion of the closed meeting exemption for personnel matters, subdivision A 1 of § 2.2-3711. Staff reminded those present that the previous discussions stemmed from advisory opinions of the OAG that said public bodies may use the personnel exemption only to discuss personnel over whom the public body exercises direct control, which in the case of local governing bodies is usually only three, four, or five people. Mr. Flynn noted there are some exceptions to that general rule. Mr. Wiley stated that the OAG's opinion was internally inconsistent with the remainder of FOIA, largely ignored by local government, and reflects a lack of understanding of local government. Mr. Flynn informed the Subcommittee that a general district court in Hopewell recently ruled in favor of the city on this issue; he stated that the OAG's opinion was argued before the court and rejected. Mr. Wiley indicated that at this point local government is content with the status quo on this exemption, while recognizing there is some ambiguity.

Mr. Ress suggested that the exemption be amended to require that discussions of top-level local officials such as chief executives be conducted in open meetings, as they are highly paid employees for whom there is no other accountability. He stated that many other states do require employee performance and discipline to be discussed in open meetings. Mr. Wiley stated that if such discussions are required to be open, members will not be forthcoming and express criticisms in public. He later pointed out that the local governing body has fiscal responsibility for all employees of the locality and it is untenable to say, for example, that a city attorney or city manager cannot discuss city employees with the city council in closed meetings. He also noted liability concerns regarding defamation and other issues were such discussions made public. Mr. Ress noted that other states successfully hold such discussions in public, and he agreed to provide examples for the Subcommittee's consideration at its next meeting.

The Subcommittee next considered whether it is good policy to have meeting exemptions that merely reference record exclusions. The issue was raised of whether there should be a general rule allowing closed meetings to discuss any exempt records. Mr. Wiley noted that the reverse is already true, as there is a records exemption for records recorded in or

compiled exclusively for use in closed meetings.¹⁰ Staff suggested comparing existing subdivisions A 40 and A 41 of § 2.2-3711, noting that one is little more than a reference that by itself does not inform the reader what the topic is, whereas the other strikes a middle ground by providing greater context but without repeating the entire records exemption. Ms. Stanley reminded those present that one goal of HJR 96 is to make FOIA more citizen-friendly and that adding context helps to do that.

Ms. Dooley then summarized the Subcommittee's work plan: to consider Mr. Ress' proposal regarding the personnel exemption; to further study subdivision A 25 of § 2.2-3711 concerning certain closed meetings of VCSP; and to review clean-up items (technical changes) and meetings exemptions that are dependent on corresponding records exemptions. The Subcommittee had previously agreed to defer consideration of proprietary records-related exemptions until the Records Subcommittee has completed its study of the same; staff informed the Subcommittee that those exemptions had not yet been considered by the Records Subcommittee.

As public comment, Mr. Ress stated that, in his experience, public bodies often fail to provide the required three elements of a closed meeting motion (subject, purpose, and cite), and suggested requiring that the three elements be required as part of meeting notices. There was no further public comment.

The Subcommittee agreed to hold its next meeting on Wednesday, June 17, at 1:00 p.m. The meeting was then adjourned.

June 17, 2015

The Subcommittee held its second meeting of the 2015 interim on June 17, 2015. All Subcommittee members were present.¹¹ The purpose of the meeting was to continue the study of FOIA meetings exemptions begun in 2014 in accordance with HJR 96. After the call to order and introductions, the Subcommittee addressed old business carried over from prior meetings in the form of a revised draft prepared by staff (agenda item #2). The discussion began with subdivision A 9 of § 2.2-3711, which provides that the boards of trustees of the VMFA, the Virginia Museum of Natural History, the Jamestown-Yorktown Foundation, and The Science Museum of Virginia may discuss or consider in closed meetings matters relating to specific gifts, bequests, and grants. The Subcommittee agreed at its previous meeting in May to amend this exemption to specify that the exemption applied to grants from private sources, not grants from other government entities. However, no one was present at that time to speak for the affected institutions. David Bradley of VMFA was present today and said VMFA and the other institutions agreed to the clarification to distinguish between private grants and government grants. He stated that government grants go through the public appropriations process anyway, so the change would not be a burden.

The Subcommittee next addressed subdivision A 17 of § 2.2-3711, which provides a closed meeting exemption for local crime commissions. Staff reminded the Subcommittee that at

¹⁰ Subdivision 5 of § 2.2-3705.1.

¹¹ Dooley (Chair), Landon, Oksman, Selph, and Whitehurst.

the Subcommittee's May meeting it was recommended that this exemption be eliminated because it does not appear that there actually are any local crime commissions; the draft strikes this exemption.

The Subcommittee next addressed subdivision A 20 of § 2.2-3711, which provides a closed meeting exemption for discussions of certain investments by the respective boards of the VRS, UVA, and the VCSP. This exemption was also discussed at the May meeting; a proposal was made to amend the exemption to allow local government entities that invest funds for post-retirement benefits other than pensions to also use the exemption. Roger Wiley, a former FOIA Council member representing local government interests, indicated he had helped prepare the language used in the draft. The Subcommittee voted unanimously to recommend this amended language for subdivision A 20.

The Subcommittee then turned to subdivision A 23 of § 2.2-3711, which allows the VCUHSA to discuss numerous matters in closed meetings. The question previously raised was whether some parts of this exemption were redundant with other closed meeting exemptions that could be used by any public body. There was a brief discussion among the subcommittee and Ginger Stanley of the VPA regarding determining what is redundant and what is different in this exemption, and the basis for the differences. Karah Gunther of VCU pointed out that VCUHSA runs a hospital, competes with private businesses, and is an authority, and therefore has some important differences from other public bodies and public institutions of higher education. It was agreed that staff and representatives of VCUHSA would work together to try to identify any such redundancies and differences and then report back to the Subcommittee.

The Subcommittee then addressed subdivision A 25 of § 2.2-3711, which allows the Board of the VCSP to discuss personal information, as defined in § 2.2-3801, under certain circumstances. A general issue had been raised regarding the use of the reference to § 2.2-3801 in various exemptions throughout FOIA, as it refers to a definition of "personal information" in the Government Data Collection and Dissemination Practices Act (GDCDPA) that is very broad. Chris McGee, General Counsel for VCSP, stated that VCSP would prefer to keep the reference because the definition of personally identifiable information is not static. He stated that the broad language used in the GDCDPA captures in its first clause the essence of personally identifiable information, then in its second clause provides a nonexclusive list of examples, which accounts for the dynamic nature of personally identifiable information. He also observed that eliminating all references to the GDCDPA definition of personal information would require amending six or seven different statutes, and he stated that the suggested draft language does not cover everything that needs to be protected. He also stated that VCSP is waiting on details of a new program that may require VCSP to hold medical records as well. Dave Ress, a reporter with the *Daily Press*, asked whether discussions of individuals came up often and whether the VCSP Board would close meetings to discuss aggregate data. Mr. McGee replied that discussing individuals did not come up often, but it could happen, and that discussion of aggregate data would be open to the public. After further discussion, the Subcommittee voted unanimously to reject the proposed amendment to this exemption.

The Subcommittee next noted it had already recommended elimination of the expired exemption found at subdivision A 32 of § 2.2-3711.

The Subcommittee then discussed the personnel exemption, subdivision A 1 of § 2.2-3711. A proposal had been suggested at the last Subcommittee meeting to require the review of higher-level officials to be conducted in open meetings. Mr. Oksman inquired whether a draft was needed for discussion; Ms. Dooley stated that staff would prepare a draft if so directed by the Subcommittee. Mr. Ress, who had suggested this change, stated that it would apply to performance evaluations of high-level officials who are not elected, such as city managers and school superintendents. Mr. Oksman expressed concern that the proposed change would tie the hands of elected officials. Mr. Wiley asked why the change would apply only to local officials and not state officials. He stated that there were cases of dismissed officials filing defamation suits against public bodies for public discussion of their performance. Mr. Ress stated that such public reviews do happen in other states and that the distinction is that the proposal would apply only to appointed officials who have employment contracts but no other public accountability. He stated that the proposal could be changed to include state boards, but he noted that the Governor is elected (so there is accountability to voters) while local chief executives are not elected. In response to an inquiry from Mr. Landon, Mr. Ress provided examples of nine states with such provisions as he proposed, noting that some were broader than others. Ms. Stanley observed that VPA has seen this exemption abused regularly over the years, and she stated that the proposal is a modest change that would solve one issue. She explained that the abuse to which she referred was the absence of information about matters concerning the highest paid local officials. There was further discussion about specifically limiting the proposal to officials directly appointed by public bodies, to which there was general agreement. Mr. Wiley stated that he was sympathetic to the idea that the terms of a dismissal be public but that he still believed that performance reviews should not be public. Ms. Dooley noted that the governing bodies are responsible to voters but she could not support opening up all evaluations of employees. Phyllis Errico of the Virginia Association of Counties (VACo) expressed concern that there would be a chilling effect, shrinking the pool of persons who would go into public service, if all evaluations were open to the public. After further discussion, the Subcommittee voted in favor of having staff prepare a draft for consideration by the Records Subcommittee that would make the terms of dismissal of a chief executive officer public unless otherwise ordered by a court; all members present voted in favor except Mr. Landon, who abstained.

Having concluded the discussion of old business, the Subcommittee moved on to consider as a matter of policy whether closed meeting exemptions should be drafted as mere references to corresponding records exemptions or whether they should have more context to inform readers what topics are covered based on the language used in each exemption (agenda item #3). Staff went through a number of examples of such exemptions in current law and in a proposed draft form that would give them greater context where context was currently lacking. Ms. Dooley expressed support for the concept, noting that some of the current exemptions are so truncated that one cannot tell what they say, but she also noted that the Subcommittee does not want to create confusion when adding context to the

meeting exemptions (i.e., if the language differs from the language of the corresponding records exemption). Staff noted that this concern was why the draft repeatedly used the phrase "certain records" combined with a reference to the appropriate records exemptions, in order to allow some context in the meetings exemptions without having to fully reproduce the corresponding records exemptions. Ms. Stanley observed that adding context fits the purpose of the study and makes the exemptions easier to understand. Several people expressed support for the concept, including Julie Whitlock of the Department of General Services, Mr. Ress, Katya Herndon from the Department of Forensic Science, and Mr. Flynn. The Subcommittee agreed not to act today, but to give additional consideration to this policy matter and its implementation at future meetings.

The Subcommittee then continued with the study of meetings exemptions not previously considered (agenda item #4), beginning with subdivision A 18 of § 2.2-3711, which provides a closed meeting exemption for certain portions of meetings where the Board of Corrections discusses matters that may identify prisoner informants. Although the Board of Corrections was notified of today's meeting, no one appeared from the Board to speak to this exemption. There was no comment on this exemption, so the Subcommittee took no action.

The Subcommittee next considered subdivision A 35 of § 2.2-3711, which provides a closed meeting exemption for the discussion or consideration by the State Board of Elections (SBE) or local electoral boards of certain voting security matters. Kristina Stoney of the OAG stated that the rationale for this exemption was self-explanatory, that it was seldom used but very important, and that it was narrowly tailored to address voting equipment security. She provided an example where the SBE decertified problematic voting equipment. She stated that because the report on the equipment was effectively a roadmap on how to hack into the voting machines, it needed to be discussed in a closed meeting, but after the machines were decertified, SBE voted to make the report public. She said that by doing so, SBE maintained the integrity of voting equipment security while also serving the purpose of transparent government. The Subcommittee expressed support for this exemption and moved on to the next exemption without objection.

The Subcommittee next considered subdivision A 36 of § 2.2-3711, which provides a closed meeting exemption for the discussion or consideration by the Forensic Science Board or the Scientific Advisory Committee of exempt criminal investigative files. Ms. Herndon stated that these public bodies sometimes review case files that they do not disclose to the public, that the public can get relevant records in court proceedings, and that she knew of one instance where the Forensic Science Board had used the exemption. There was no further comment, and the Subcommittee moved on without objection.

The Subcommittee next considered subdivision A 37 of § 2.2-3711, which provides a closed meeting exemption for the discussion or consideration by the Brown v. Board of Education Scholarship Program Awards Committee of certain exempt records containing personal information and other matters concerning scholarship awards. Brenda Edwards of the Division of Legislative Services, who staffs the committee, stated that the committee uses the exemption in the application process to protect various types of personal, medical, and scholastic records and to discuss who will receive scholarships. There were no additional

comments; the Subcommittee decided to leave this exemption unchanged without objection.

The Subcommittee next considered subdivision A 41 of § 2.2-3711, which provides a closed meeting exemption for the discussion or consideration by the Board of Education of records relating to the denial, suspension, or revocation of teacher licenses. Staff informed the Subcommittee that the Board of Education had asked that the Subcommittee defer consideration of this exemption; the Subcommittee agreed to do so without objection.

The Subcommittee next considered subdivision A 42 of § 2.2-3711, which provides a closed meeting exemption for certain meetings of the Virginia Military Advisory Council or certain other public bodies concerning federal military and national security base closure, realignment, or relocation. No one was present from an affected public body to speak to this exemption. After observing that the exemption itself provides context, the Subcommittee expressed general support for this exemption and decided to leave it unchanged without objection.

Staff then reminded the Subcommittee of upcoming exemptions to be considered at its next meeting, including subdivisions A 26, A 30, A 31, A 44, and A 45 of § 2.2-3711 (agenda item #5), and more generally of the Subcommittee's work plan (agenda item #6). As per the study plan adopted by the Council, upon completion of review of open meeting exemptions found in § 2.2-3711, the Subcommittee will review related meeting provisions, including § 2.2-3707 (notice of meetings, etc.), § 2.2-3707.01 (meetings of the General Assembly), § 2.2-3707.1 (posting of minutes for state boards and commissions), § 2.2-3710 (voting), § 2.2-3712 (closed meeting procedures), and §§ 2.2-3708 and 2.2-3708.1 (electronic communication meetings).

The Subcommittee scheduled its next meeting to be held on Tuesday, July 21, 2015, at 1:00 p.m. The meeting was then adjourned.

July 21, 2015

The Subcommittee held its third meeting of the 2015 interim on July 21, 2015. All Subcommittee members were present.¹² The purpose of the meeting was to continue the study of FOIA meetings exemptions begun in 2014 in accordance with HJR 96.

After the call to order and introductions, the Subcommittee began review of seven exemptions that allow closed meetings for the discussion of the topics that follow below. For each exemption, staff provided the legislative history and policy basis for the exemption to the Subcommittee.

Subdivision A 41 of § 2.2-3711; Board of Education; denial, suspension/revocation of teacher licensing (subdivision 12 of § 2.2-3705.3). Wendell Roberts and Mona Siddique of

¹² Dooley (Chair), Landon, Oksman, Selph, and Whitehurst.

the OAG and Patty Pitts, Assistant Superintendent at the Department of Education, provided additional information about this exemption and how it was used. Mr. Roberts advised that the Board of Education (Board) meets 10 times per year on average and such meetings are open. However, near the conclusion of each meeting, the Board convenes in closed meeting to discuss the denial or suspension of teacher licenses. The exemption references the corollary records exemption (subdivision 12 of § 2.2-3705.3) for teacher licensing records. It is the Board's practice to allow the licensee who is the subject of the closed meeting to attend. If negative action is taken by the Board, the name of the teacher, the underlying facts, and the Board action taken on the license are disclosed. If no action is taken by the Board, nothing is disclosed. After further discussion of the exemption and how it is used, the Subcommittee voted unanimously to leave the exemption as written because it is specific and narrowly drawn. The Subcommittee directed staff to flag this exemption should the Records Subcommittee recommend change to the Board's corollary record exemption.

Subdivision A 42 of § 2.2-3711; Virginia Military Advisory Council or any commission created by executive order; Defense Base Closure and Realignment Commission (subdivision 12 of § 2.2-3705.2). No representative of the Council was present at the meeting, and, as a result, the Subcommittee deferred consideration until a representative was present to provide specific information to the Subcommittee.

Subdivision A 26 of § 2.2-3711; Wireless Carrier E-911 Cost Recovery Subcommittee; trade secrets. Eric Link, Virginia Information Technologies Agency (VITA) addressed the Subcommittee and advised that the purpose of the Wireless Carrier E-911 Cost Recovery Subcommittee was to determine whether the reimbursement for 911 services submitted by wireless carriers is reasonable. Seventy-five cents of each Virginian's phone bill goes to local governments and wireless carriers. Mr. Link stated that the sole purpose of the Committee's discussion of this exemption was to determine whether a requested reimbursement was reasonable. The Subcommittee voted unanimously to make no changes in the exemption. Subdivision A 30 of § 2.2-3711; Commonwealth Health Research Board or the Innovation and Entrepreneurship Investment Authority or the Research and Technology Investment Advisory Committee appointed to advise the Innovation and Entrepreneurship Investment Authority; loan and grant applications. Anne Pace with the Commonwealth Health Research Board explained that the board reviews grant applications and awards grants for human health research. She stated that, to date, 181 grants totaling \$14.5 million have been awarded. Ms. Pace indicated that there is a 33 percent match by grant recipients and the Health Research Fund is managed by the VRS. She advised that the grant process involves three steps: concept paper, full proposal, and award of grant. She stated that the award rate is seven percent. Once grants are awarded, the grant files become public, and the board issues a press release for each grant awarded and abstracts of the grant award are available on their website. Nancy Vorona on behalf of the Research and Technology Investment Advisory Committee (RTIAC) of the Innovation and Entrepreneurship Investment Authority provided written comments to the Subcommittee concerning the Advisory Committee's use of the exemption. Ms. Vorona wrote that the RTIAC recommends awards to the CIT Board, which makes final award decisions. Prior to making its recommendations to the CIT Board, the RTIAC holds an in-person meeting to determine those proposals that

merit funding by the Commonwealth. Closed meetings allow RTIAC members to be forthright in their assessments of, for instance, the project's technical and financial feasibility and the management and scientific experience and capabilities of the proposal team. It also allows them to vote which applications to fund without concern about potential resentment or retribution from applicants and/or their associates. The RTIAC has used this opportunity once during each solicitation since the Commonwealth Research Commercialization Fund was established. That is, the RTIAC has used it twice in FY 2012 and FY 2014 and once in FY 2013 and FY 2015. The CRCF provides a rigorous, multi-step review process, and the ability to review grant applications in closed session is an important part of that process. The Subcommittee voted unanimously to make no changes in the exemption.

Subdivision A 31 of § 2.2-3711; Commitment Review Committee (Committee); individuals subject to commitment as sexually violent predators (subdivision 9 of § 2.2-3705.2). Eric Madson, Department of Corrections, and Stephen Wolf (program administrator), Department of Behavioral Health and Developmental Services (DBHDS), advised the Subcommittee that the Committee makes nonbinding recommendations to the Attorney General for civil commitment. They indicated that the Committee's review includes virtually all records of the individual, including health records and records that are sealed by the court. The Committee is composed of three members of DBHDS, three members of the Department of Corrections, and one representative of the OAG, each member appointed by his respective agency. They told the Subcommittee that while the commitment proceedings in circuit court are open, the deliberations of the Committee are conducted in closed meeting because of the nature of the records reviewed. The exemption references the corollary records exemption (subdivision 9 of § 2.2-3705.2) for sexually violent predators. The Subcommittee voted unanimously to make no changes in the exemption. The Subcommittee directed staff to flag this exemption should the Records Subcommittee recommend change to the Board of Education's corollary record exemption. Subdivision A 44 of § 2.2-3711; Virginia Tobacco Region Revitalization Commission; grant applications, including grant applicant's financial records and scholarly study materials (subdivision 23 of § 2.2-3705.6). Elizabeth Myers of the OAG and Ned Stephenson of the Tobacco Region Revitalization Commission advised the Subcommittee that the commission reviews grant applications that contain trade secrets and proprietary information. The exemption references the corollary records exemption (subdivision 23 of § 2.2-3705.6) for such grant applications. They advised that it is not unusual for a grant applicant to be a local government. The Subcommittee questioned why the process is closed when the public body is the grant applicant. The answer provided was that the exemption was needed because the discussions in closed meetings are limited to the trade secrets, scholarly work, financial records, and other proprietary information. The Subcommittee was of the opinion that the rationale for the exemption was clear—the protection of intellectual property—and, as a result, the Subcommittee voted unanimously to recommend no change to the exemption. The Subcommittee directed staff to flag this exemption should the Records Subcommittee recommend change to the Board of Education's corollary record exemption.

Subdivision A 45 of § 2.2-3711; Commercial Space Flight Authority (Authority); rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority (subdivision 24 of § 2.2-3705.6). Bruce Harper, Williams Mullen, and

Zigmond "Zig" Leszczynski with the Authority advised the Subcommittee that the Authority's board consists of nine members and one part of the Authority's mission is economic development. The Authority has an agreement with NASA for the operation of two launch pads to service the International Space Station and other orbital launches. They indicated that Virginia is one of four orbital launch sites in the United States, including Florida, California, and Alaska, and that Virginia is in competition with the other space boards for business. They advised that closed meeting discussions are limited to discussions of specified records as written in the exemption. The exemption references the corollary records exemption (subdivision 24 of § 2.2-3705.6) for rate structures, services rendered by the Authority, etc. The Subcommittee voted unanimously to recommend no change to the exemption. The Subcommittee directed staff to flag this exemption should the Records Subcommittee recommend change to the Board of Education's corollary record exemption.

Staff then briefed the Subcommittee on its meeting with Karah Gunther, a representative of VCUHSA, to discuss the open meeting exemption found in A 23 of § 2.2-3711, with an eye toward eliminating any redundancies between the exemption of VCUHSA and other existing open meeting exemptions. Staff advised that the exemption of VCUHSA was enacted to protect the authority's competitive position vis-à-vis the HCA and Bon Secours hospitals in the Richmond area. Staff provided the Subcommittee with a chart, attached to this report as Appendix F, that compared the VCUHSA meeting exemption to other existing open meeting exemptions to show where redundancies existed. Ms. Gunther told the Subcommittee that the reason for a separate exemption for VCUHSA as compared to other hospitals affiliated with public institutions of higher education (i.e., UVA Hospitals, EVMS, etc.) was that VCUHSA was a separate and distinct public body from VCU, which was not the case for other such affiliated hospitals. Noting that the VCU Board of Visitors was added to the exemption, the Subcommittee and others expressed concern about possible misinterpretation of the new language. After review of the chart and further discussion, the Subcommittee directed staff to prepare a draft revising the VCUHSA exemption to eliminate the redundancies and improve imprecise language contained in the current exemption. The Subcommittee will review the draft at its next meeting on August 19, 2015.

The Subcommittee next discussed open meeting exemptions that it has previously deferred pending review by the Records Subcommittee. These open meeting exemptions contained only a reference to the records exemption. The Subcommittee asked staff to flag these exemptions should the Records Subcommittee take action to amend the corresponding records exemption. Otherwise, it would be the recommendation of the Subcommittee to recommend no changes to the following exemptions: A 31, A 41, A 44, and A 45.

The next meeting of the Subcommittee was scheduled for Wednesday, August 19, 2015, at 1:00 p.m. in the Speaker's Conference Room in the General Assembly Building. There being no further business, the meeting was adjourned.

August 19, 2015

The Subcommittee held its fourth meeting of the 2015 Interim on August 19, 2015. All Subcommittee members were present.¹³ The purpose of the meeting was to continue the study of FOIA meetings exemptions begun in 2014 in accordance with HJR 96.

After the call to order and introductions, the Subcommittee considered agenda item no. 3, concerning the VCU Health System Authority's open meeting exemption found at A 23 of § 2.2-3711. Staff reminded the Subcommittee of its meeting with Karah Gunther, a representative of the VCUHSA to discuss the open meeting exemption found in A 23 of § 2.2-3711, with an eye toward eliminating any redundancies between the VCUHSA exemption and other existing open meeting exemptions. The Subcommittee had directed staff to prepare a draft revising the VCUHSA exemption to eliminate the redundancies and improve imprecise language contained in the current exemption. The Subcommittee reviewed the staff-prepared draft and made one clarifying amendment at the request of VCUHSA. In response to a question from the VPA, Ms. Gunther explained that in regard to personnel discussions, this exemption needed to be broader than the general personnel exemption used by other public bodies because of certain federal requirements for VCUHSA to be able to discuss medical and teaching staff who are VCU employees, not employees of VCUHSA. The Subcommittee voted 4-0 to approve the draft as amended and to recommend it to the FOIA Council.

The Subcommittee then began review of six exemptions that allow closed meetings for the discussion of the topics that follow below. For each exemption, staff provided the legislative history and policy basis for the exemption to the Subcommittee.

Subdivision A 19; Plans to protect public safety as it relates to terrorist activity or specific cybersecurity threats or vulnerabilities and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such matters or a related threat to public safety; discussion of records excluded from FOIA pursuant to subdivision 3 or 4 of § 2.2-3705.2. Staff advised the Subcommittee that it has previously considered this exemption last year on August 19, 2014, and made no recommendation for change. Josh Heslinga, Assistant Attorney General, who advises the Secretary of Technology, stated that he was available to answer any questions for the Subcommittee (there were none). The Subcommittee again made no recommendation for change but stated that it would revisit this exemption after the FOIA Council considers SB 1402 (2015, Cosgrove). SB 1402 was referred to the FOIA Council for further study.

A 29; award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract. Staff advised the Subcommittee that this exemption was the subject of a Virginia Supreme Court case, *White Dog Publishing v. Culpeper County Board of Supervisors*, decided on September 15, 2006. The court held that the unambiguous language of this exemption,¹⁴ viewed in its

¹³ Dooley (Chair), Landon, Selph, and Porto.

¹⁴ Note that when *White Dog* was decided, this exemption was codified at subdivision A 30 of § 2.2-3711, but it is now codified at A 29. There have been no changes to the substance of the exemption.

entirety, demonstrates that the purpose of the exemption is to protect a public body's bargaining position or negotiating strategy vis-à-vis a vendor during the procurement process. Under that exemption, the terms or scope of a public contract are proper subjects for discussion in a closed meeting of a public body only in the context of awarding or forming a public contract, or modifying such contract, and then only when such discussion in an open meeting would adversely affect the public body's bargaining position or negotiating strategy regarding the contract. The exemption does not allow a public body to close a meeting in order to discuss the application or enforcement of the scope or terms of a previously awarded public contract. There was limited discussion about the breadth of this exemption, and the Subcommittee recognized that the Supreme Court's decision in the *White Dog* case was controlling. As a result, the Subcommittee made no recommendation for change.

A 38; Virginia Port Authority of proprietary information gathered by or for the Virginia Port Authority (records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.6). Andrew Sinclair, representing the Virginia Port Authority (VPA) told the Subcommittee that the VPA was responsible for four marine terminals in Hampton Roads, the Richmond terminal, and the Virginia Inland Port in Front Royal, Virginia. Mr. Sinclair stated that Virginia International Terminals, LLC, operates these ports on behalf of the VPA under a shared service agreement and competes with other ports. Staff informed the Subcommittee that certain information is prohibited from public release under § 62.1-132.4, including customer contracts, agreements, or information; ship tally sheets; ship manifests; information relating to tonnages and cargoes; and annual budgets. Staff informed the Subcommittee that § 62.1-134.1 contains similar prohibitions on the release of certain information concerning the shipment of coal. The Subcommittee voted 4-0 to keep the exemption as written.

A 42; Virginia Military Advisory Council or any commission created by executive order; BRAC (subdivision 12 of § 2.2-3705.2). Mike Coleman with the Office of the Secretary of Defense and Military Affairs advised that there are 23 military installations in Virginia and that the Virginia Military Advisory Council (VMAC) met two or three times per year to talk specifically about those installations and how to keep them in Virginia. He stated that the discussions included the values and weaknesses of the installations as well as how to grow their assets and improve the quality of life for those using them. He advised that there is steep competition among the states to keep or locate military installations. Ms. Dooley asked whether there were any commissions created by executive order, to which Mr. Coleman advised that one was created by Governor McDonnell but that it finished its work last month and disbanded. Staff advised that the Records Subcommittee had reviewed the corollary record exemption for VMAC and had made no recommendation for change. Based on this information, the Subcommittee recommended to keep the exemption as it is current written.

A 46; Resource management plans; personal and proprietary information that are excluded from the provisions of this chapter pursuant to (i) subdivision 25 of § 2.2-3705.6 or (ii) subsection E of § 10.1-104.7. Dave Dowling, Department of Conservation and Recreation, advised that these records were furnished by an agricultural landowner or operator to the

Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Agriculture and Consumer Services or any political subdivision, agency, or board of the Commonwealth. He stated that there are 47 soil and water conservation districts in Virginia and that they are the "boots on the ground" for resource management. Each conservation district approves the respective resource management plans. Mr. Dowling advised that these records are prohibited from release, except in aggregate or statistical form, and that the meetings exemption was necessary so that the conservation districts could discuss the confidential records in closed meetings as part of the approval process. Ms. Dooley suggested that this exemption be added to the "context draft" under consideration by the Subcommittee to provide additional clarification of the type of records that may be discussed and what public bodies may hold these discussions. The Subcommittee voted 4-0 to keep the exemption but to clarify the language of the exemption as noted above.

A 47; (Eff. July 1, 2018); Department of Alcoholic Beverage Control; Board of Directors of the Virginia Alcoholic Beverage Control Authority of records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.3 or subdivision 34 of § 2.2-3705.7. Eddie Wirt, Director of Policy Analysis for the Department of Alcoholic Beverage Control (ABC), advised that this exemption, which does not go into effect until July 1, 2018, is forward-thinking in anticipating the needs of ABC regarding business plans, marketing, negotiating strategies, and other issues when it becomes an authority. Staff informed the Subcommittee that while authorities are still public bodies subject to FOIA, authorities are exempted from procurement and personnel rules so they can act more like competitive businesses. Mr. Wirt noted that as the transition to an authority had not happened yet, he had no concrete examples, but as a hypothetical, he stated there could be competition in the liquor industry that would affect ABC if it participated in a promotion with one manufacturer but not another. Noting that the same bill that created this meeting exemption also created records exemptions that were referred to the Records Subcommittee, the Meetings Subcommittee chose to take no action until the Records Subcommittee completes its review of the corresponding records exemptions.

The Subcommittee and staff then reviewed the work completed so far and discussed how to proceed with the rest of the study. Every meeting exemption in § 2.2-3711 had been considered, although several had been "deferred" or "flagged" for further consideration, depending on what action, if any, the Records Subcommittee may take regarding corresponding records exemptions. The Subcommittee agreed to have staff update the "context draft" that would give context to the various exemptions in § 2.2-3711 that refer to corresponding records exemptions. The Subcommittee agreed to consider the updated draft at its next meeting, along with any other new business such as consideration of meeting notice requirements and other procedural matters.

The Subcommittee then asked for public comment. John Edwards, publisher of the *Smithfield Times* and a former FOIA Council member, suggested that because of the myriad instances of discrepancies between what was actually discussed in a closed meeting versus what is legally allowed under FOIA to be discussed, closed meeting discussions should be recorded. Mr. Edwards stated that these recordings should be sealed and available only in

camera if there is a FOIA suit alleging improprieties in the closed meeting. Mr. Edwards noted that under current FOIA regulations, closed meeting minutes are not subject to mandatory disclosure. Mr. Edwards suggested that if the recordings change is drafted for the Subcommittee's consideration, there should be a three-year sunset clause in order to see if making these recordings help to address the disputes over what happened in a closed meeting.

The next meeting of the Subcommittee was scheduled for Thursday, September 30, 2015, at 1:00 p.m. in the Speaker's Conference Room in the General Assembly Building. There being no further business, the meeting was adjourned.

September 30, 2015

The Subcommittee held its fifth meeting of the 2015 interim on September 30, 2015. All Subcommittee members were present.¹⁵ The purpose of the meeting was to continue the study of FOIA in accordance with HJR 96. As per the study plan adopted by the Council, with the completion on August 19, 2015, of the review of open meeting exemptions found in § 2.2-3711, the Subcommittee undertook the review of related meeting provisions, specifically § 2.2-3712 (closed meeting procedures). Kathleen Dooley, Subcommittee Chair, announced that at future meetings of the Subcommittee, review of §§ 2.2-3707 (notice of meetings, etc.), 2.2-3707.01 (meetings of the General Assembly), 2.2-3707.1 (posting of minutes for state boards and commissions), 2.2-3710 (voting), and 2.2-3708 and 2.2-3708.1 (electronic communication meetings) will be conducted.

The Subcommittee began its review of § 2.2-3712—closed meeting procedures. Staff provided the legislative history of this section, noting that it was added to FOIA in 1989 and was amended in 1999, 2001, and 2012. The Subcommittee called for public comment. Dave Ress, a reporter with the *Daily Press*, advised the Subcommittee that on many occasions closed meeting procedures were not followed. Specifically, Mr. Ress indicated that it was his experience that many local public bodies strayed off of the topic for which the closed meeting was authorized. He also stated that many such bodies do not identify the subject matter of closed meetings with enough specificity. David Lacey, representing the VPA, distributed a draft to the Subcommittee that would require any public body holding a closed meeting to make an audio recording of the meeting and preserve the recording for at least one year. The VPA draft would also (i) add another component to the after closed meeting certification now required by FOIA to include certification that the meeting was recorded and (ii) provide that such audio recordings would be exempt from mandatory disclosure but that their production could be compelled and the recordings used as evidence in a proceeding to enforce FOIA.¹⁶ Megan Rhyne, Executive Director of VCOG, told the Subcommittee that she favored the VPA draft. Ms. Rhyne noted that this concept was initiated by VCOG in 2012. She advised that several states required some form of recording of closed meeting discussions, including Arkansas, Illinois, Kansas, Massachusetts, North Carolina, South Carolina, and Wyoming. Ms. Rhyne also advised the Subcommittee that the clarification of the purpose versus the subject of a closed meeting was needed. John

¹⁵ Dooley (Chair), Landon, Selph, Porto, King-Casey.

¹⁶ The VPA draft is available on the FOIA Council website.

Edwards, publisher of the *Smithfield Times* and an original member of the FOIA Council, advised the Subcommittee that the concept of recording closed meeting discussions was first considered in 1989 by a joint subcommittee created by the General Assembly to study FOIA. Mr. Edwards indicated that there was no consensus around this idea and that the certification of closed meetings by members of the public body convening the meeting was the compromise that was added to FOIA in 1989. Mark Flynn, representing VML, advised that VML was opposed to the idea of requiring closed meetings to be recorded. Mr. Flynn stated that the real issue is compliance and there is already a remedy in FOIA for violations. In addition, the courts have in camera powers for members under oath to state what happened in a closed meeting. He indicated that some localities do not have recording equipment. Phyllis Errico, Virginia Association of Counties, next testified and advised that she was in agreement with the comments made by Mr. Flynn. Kathleen Dooley, chair of the Subcommittee, indicated that the VPA draft raised two distinct issues—the clarity of subsection A of § 2.2-3712 as written and the recording of closed meetings. Council staff was asked to relay its experience with the former. Alan Gernhardt, Council staff, indicated that there is significant confusion with regard to the requirement of a statement of subject and a statement of purpose. Mr. Gernhardt suggested that perhaps only the subject of the closed meeting and the relevant Code citation (§ 2.2-3711, which identified the purposes authorized for closed meetings) would be sufficient. He indicated that the purpose is the "why" and the subject is the "what" of a closed meeting. Maria Everett, Council staff, indicated that in her experience the "subject" of a closed meeting was frequently missing in closed meeting motions and the minutes of the open meeting memorialize the violation. She indicated that to many people, subject and purpose mean the same. Ms. Everett suggested that perhaps a different word than "subject" be used that may be clearer. She said she would research other states' law on this issue, especially those several states that have FOIA councils. Ms. Dooley agreed with staff that "subject" and "purpose" may appear to some to have the same meaning. Ms. Dooley, without objection, requested staff to do the suggested research and to prepare a rewrite of A of § 2.2-3712 in light of the discussion. Subcommittee member John Selph stated that with audio recordings, the speaker is not readily identifiable. Ms. Dooley inquired how such minutes/recordings would be approved by the public body holding the closed meeting. Ms. Errico answered that to do so would be a release of those minutes, which under the VPA draft was not required. Ms. Errico added that how minutes are taken may be an issue. She averred that there is utility in the minutes only if they are a verbatim transcript. Council member Marisa Porto advised that FOIA already addresses minutes of closed meetings, stating that minutes may be taken but are not required. The Subcommittee by consensus agreed to carry over these deliberations until the next Subcommittee meeting.

Old Business

The Subcommittee again discussed the "context draft," initially suggested by staff, to provide more context in certain open meeting exemptions that merely reference existing FOIA record exclusions. At previous meetings, the Subcommittee discussed the appropriateness of amending such open meeting exemptions to contain more information, to include the identity of the public body(s) to which the exemption applies and a general description of the subject matter of the excluded records/topic for discussion in a closed

meeting in addition to the citation to the applicable records exemption. A staff-prepared draft was again reviewed by the Subcommittee. David Dowling, Deputy Director, Department of Conservation and Natural Resources, advised the Subcommittee that the context draft as it related to the resource management plan program (subdivision 46 of § 2.2-3711) did not accurately reflect the nature of the records that could be discussed in a closed meeting. Mr. Dowling suggested that the language be changed to read "[D]iscussion or consideration of personal and proprietary records related to the resource management plan program and excluded from this chapter pursuant to (i) subdivision 25 of § 2.2-3705.6 or (ii) subsection E of § 10.1-104.7." No other comment or suggestion was made on the context draft. The Subcommittee directed staff to make the change to the draft as suggested by Mr. Dowling and post it on the Council website to receive further comment. The Subcommittee again deferred action on this draft until its next meeting in order to allow ample opportunity for reflection and public comment.

With regard to the following open meeting exemptions, the Subcommittee had recommended no change to existing law unless the Records Subcommittee in its review of the applicable records exemptions recommended that the records exemptions be amended. To date, the Subcommittee has not received any communication from the Records Subcommittee.

- A 28 (PPEA & PPTA records)
- A 33 (telecom or cable TV)
- A 34 (wireless service authorities)
- A 40 (economic development) of records excluded under subdivision 3 of § 2.2-3705.6

The next meeting of the Meetings Subcommittee is scheduled for Wednesday, November 4, 2015, at 11:00 a.m. in Richmond. There being no further business, the meeting was adjourned.

November 4, 2015

The Subcommittee held its sixth meeting of the 2015 interim on November 4, 2015. All Subcommittee members were present, with the exception of Frosty Landon.¹⁷ The purpose of the meeting was to continue the study of FOIA in accordance with HRJ 96. As per the study plan adopted by the Council, with the completion on August 19, 2015, of the review of open meeting exemptions found in § 2.2-3711, the Subcommittee undertook the review of related meeting provisions, specifically § 2.2-3712 (closed meeting procedures). Kathleen Dooley, Subcommittee Chair, announced that at future meetings of the Subcommittee, review of §§ 2.2-3707 (notice of meetings, etc.), 2.2-3707.01 (meetings of the General Assembly), 2.2-3707.1 (posting of minutes for state boards and commissions), 2.2-3710 (voting), and 2.2-3708 and 2.2-3708.1 (electronic communication meetings) will be conducted.

¹⁷ Dooley (Chair), Selph, Porto, King-Casey.

The Subcommittee continued its review of § 2.2-3712—closed meeting procedures—and discussion concerning the VPA draft requiring the recording of closed meetings submitted for the Subcommittee's consideration at its meeting on September 30, 2015. The agenda indicated that staff provided research on other states' laws that require the recording of closed meetings. This research was provided by VCOG and was the subject of testimony at the last Subcommittee meeting by Megan Rhyne of VCOG. Phyllis Errico and Roger Wiley, representing local public bodies, objected to having VCOG do the research for the Subcommittee, stating that it was an incomplete picture of what other states do. They stated that it was important to include the states that do not require the recording of closed meetings. Ms. Dooley, chair of the Subcommittee, advised that there was no attempt to mislead, as the source of the research was properly attributed. David Lacey, representing the VPA, indicated that the VCOG research at least showed precedent that other states do require recordings/minutes of a closed meeting. Ginger Stanley of the VPA advised that a more comprehensive list of other states was provided to the Subcommittee earlier and that this list was obtained from the Reporters Committee for Freedom of the Press. Speaking to the VPA draft, Ms. Errico stated that the Virginia Association of Counties opposed the requirement for recording or having minutes of closed meetings. She noted that recordings are not required for any open meeting. Ms. Errico stated that there is no way to ensure the confidentiality of these recordings and that she believed that any such requirement was tantamount to an opportunity for mischief. Dave Ress, a reporter with the *Daily Press*, advised that he supports the VPA draft and relayed his experiences with obtaining closed meeting minutes. He gave an example in which a public body's attorney was not present at a meeting but afterward collected notes from the participating members and released those notes after determining that the closed meeting should have been open. Mr. Ress noted that attorneys are not always present, however, and the closed meeting provisions could be abused. Ms. Dooley opened the floor for public comment. Sandi McNinch of the Virginia Economic Development Partnership Authority indicated that the authority does not record the open meetings, so requiring the recording of a closed meeting presents a practical problem. Mr. Lacey stated that VPA was not opposed to requiring minutes only of closed meetings (as opposed to recording closed meeting discussions). Ms. Errico stated that sometimes discussions in closed meetings involve records that are confidential—student records and real estate deals—and indicated that disclosure of same would hurt the public position. Cindy Berndt, Department of Environmental Quality (DEQ), stated that DEQ used to take minutes of a closed meeting but that the relevant DEQ board did not approve these minutes. This practice is no longer followed. Mr. Wiley indicated that some closed meetings are quasi-judicial, and, as an example, he cited student and public employee disciplinary matters, where the closed meeting is held because the public body is anticipating litigation. Mary Jo Fields, VML, stated that, from a practical perspective, who takes the minutes affects the quality of the minutes, especially when the clerk or other staff is not present at the closed meeting. Chris McGee, Virginia College Savings Plan, stated that trade secrets are sometimes the topic of a closed meeting and thus need to be considered in these discussions. He stated that minutes wherein trade secrets are discussed opens up the public body to liability if the information is leaked or otherwise made public. Mr. Wiley pointed to the last sentence in the VPA draft—" [A] recoding made pursuant to this subsection shall not be subject to the disclosure provisions of this chapter, but its production

may be compelled , and the recording used as evidence, in a proceeding to enforce the provisions of this chapter"—and stated that this would apply not only to FOIA cases but also to other actions, including defamation suits. Ms. McNinch offered that the VPA draft requiring certification by the members of the public body that a recording was made was flawed in that the members would not be privy to whether a recording was being made or not.

Ms. Dooley stated that it was her belief that the VPA draft had been thoroughly vetted and asked for any motions from the Subcommittee. Ms. Porto made a motion to accept the VPA draft. There was no second to this motion, so the motion failed. Mr. Selph then moved to table consideration of the VPA draft. There was no second to this motion, so the motion failed. Ms. Porto moved that the VPA draft be accepted but with the requirement that minutes be taken only at closed meetings. Mr. Selph seconded this motion for purposes of discussion. Ms. Porto stated that the draft as amended by her motion balances the public's right to know against the need of government to function. She stated that she has faith in the judiciary to make the right decision in the event of litigation. Ms. Dooley indicated that she opposed the motion, stating that accountability is the issue and she believed there are already checks in place, namely, the specific requirements for a closed meeting motion, the option to take minutes of closed meetings under current law, and the required certification by the members of the public body holding the closed meeting. Ms. Dooley advised that she believed, in addition to the issues with the VPA draft already raised (i.e., disciplinary matters and trade secrets), that the candor of the discussions would be compromised. She also called attention to the proliferation of records and how they may impose liability in the above-named contexts. Mr. Selph, a member of the Board of Pharmacy, stated that the board considers disciplinary matters and that the minutes of those discussions are not very accurate, given the variety in style, content, and detail depending on who takes the minutes. Mr. Selph added that closed meeting minutes are not transcripts of the discussions and that he was opposed to the VPA draft in either form. Finally, Mr. Selph agreed that accountability measures were already in place. By a vote of 1 to 2, the motion failed to pass.¹⁸

The Subcommittee next considered a draft prepared by staff meant to help clarify the requirements to identify the subject and purpose of a closed meeting as required under subsection A of § 2.2-3712. At its last meeting, the Subcommittee was informed that, in practice, there was considerable confusion in differentiating between subject and purpose in motions to convene closed meetings. In the requirement to identify the purpose of a closed meeting, the draft refers to subsection A of § 2.2-3711, which states that "Public bodies may hold closed meetings only for the following purposes" and then lists the various closed meeting exemptions. The draft also eliminates the current reference to § 2.2-3707 because that section does not contain any closed meeting exemptions. It also adds references to "other provision[s] of law," recognizing that outside of FOIA there are other laws that provide exceptions to open meeting requirements. The draft also contains a provision concerning making recordings of closed meetings under subsection I of § 2.2-3712. The

¹⁸ Voting aye: Porto; voting nay: Dooley and Selph.

Subcommittee, by consensus, indicated it favored the draft amendments to subsection A of § 2.2-3712 but not the amendments to subsection I.

With regard to subsection B of § 2.2-3712, which allows interviews of chief executives to be held at undisclosed locations within 15 days after an announcement at an open meeting, staff noted that local government attorneys had asked whether a motion to convene a closed meeting was still necessary. Staff opined that this subsection supersedes the need for a closed meeting motion. The Subcommittee agreed there was no need to amend this subsection at this time.

Ms. Dooley invited any additional public comment on § 2.2-3712 and closed meeting procedure. Mr. Ress stated that closed meetings are common but that they should be the exception. He stated that currently certification of a closed meeting is the only accountability but he knows of instances where the certification was wrong. There was no other comment.

The Subcommittee indicated that it would reconvene in March or April of 2016 to continue its study in accordance with the Council-approved study plan. There being no further business, the meeting was adjourned.

Work of the Meetings Subcommittee—Year Three, 2016

April 11, 2016

The Subcommittee held its first meeting of the 2016 interim on April 11, 2016. All Subcommittee members were present.¹⁹ The purpose of the meeting was to continue the study of FOIA in accordance with HJR 96. As per the study plan adopted by the Council, with the completion of the review of (i) open meeting exemptions found in § 2.2-3711 and (ii) § 2.2-3712 (closed meeting procedures), the Subcommittee began review of § 2.2-3707 (notice of meetings, etc.).

Staff provided the Subcommittee with the legislative history of § 2.2-3707 (notice of meetings, etc.), which was part of the original enactment of FOIA in 1968 (chapter 479, Acts of Assembly of 1968). Staff advised that the meeting notice provision has been amended many times since 1968, with the last amendment in 2015 (chapter 131 of the Acts of Assembly of 2015). The Subcommittee discussed subsection A of § 2.2-3707, which provides: "All meetings of public bodies shall be open, except as provided in § 2.2-3707.01 and § 2.2-3711." Mary Yancey Spencer of the Virginia State Bar (VSB) advised that VSB committees operate under the Rules of Virginia Supreme Court and inquired whether these Rules are as otherwise provided by law. Staff answered that the Rules of Virginia Supreme Court are law, except when in conflict with the Code of Virginia, in which case the Code of Virginia controls.

¹⁹ Dooley (Chair), Selph, Landon, Porto, and King-Casey.

There being no further comment, the Subcommittee discussed subsection B of § 2.2-3707, which provides: "No meeting shall be conducted through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or transact public business, except as provided in § 2.2-3708, 2.2-3708.1 or as may be specifically provided in Title 54.1 for the summary suspension of professional licenses." The only discussion relative to subsection B was whether group emails and group texts are included in the phrase "other communication means." Staff averred that such emails and texts were included. The Subcommittee by consensus agreed to move the last sentence of subsection B²⁰ to provisions in § 2.2-3707 relating to agendas.

The Subcommittee moved next to subsection C, which specifies when and where notice is required to be given, including the posting of notice on the websites for state public bodies. Staff explained that public bodies in some localities use large, multi-room meeting facilities and questioned whether the specific location of the meeting (i.e., the room number) should be identified in the notice. Ms. Dooley responded that this issue may be best handled by a FOIA Council opinion or in one of the Council's educational materials on public meetings. The Subcommittee concurred. Staff then raised the issue that FOIA does not require an agenda and the only reference in FOIA to an agenda is found in subsection F of § 2.2-3707, which requires that at least one copy of any nonexempt agenda materials be available for public inspection. Staff stated that it advises as a best practice that an agenda accompany the meeting notice. Staff also observed that while the last sentence of the subsection requires certain public bodies to give notice of whether public comment will be received and, if so, approximately when during the meeting, as a practical matter it made more sense for this provision to be included on the agenda rather than in the meeting notice. Mark Courtney of the Department of Professional and Occupational Regulation and Roger Wiley, Esq., who represents many localities, both advised that in many instances notices of regular meetings are given for an entire year and as such there are no agendas for future meetings at the time when the notice is given. The Subcommittee next discussed where notices are published—specifically, in "a prominent public location where notices are regularly posted." Staff questioned where such a location is in large jurisdictions and for state public bodies. Mr. Wiley stated that he believes this provision is backwards, meaning that in 2016 there should be website posting first and if there is no website, then notice should be posted to a bulletin board. Ms. Porto advised that many citizens do not check the Internet as a first step. David Lacey, representing the VPA, opined that where notice is posted seems to be working and he has heard little issue with this provision. Several members of the public commented that smaller localities do not yet have websites and any posting requirement would need to take that fact into account. Additionally, public bodies like economic development authorities and local electoral boards likewise do not have websites and so instead post notice on the "parent" body website. Further, for state public bodies there are a number of different websites such as the Commonwealth Calendar and Regulatory Town Hall where notices are posted. After lengthy discussion about the availability of state and local government

²⁰ "Notices for meetings of state public bodies on which there is at least one member appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received."

websites and correct identification of a central Commonwealth website, the Subcommittee directed staff to draft a proposal to address the issues raised as described above.

Subsection D of § 2.2-3707 (notice of special or emergency meetings) was the next topic of discussion. Megan Rhyne of VCOG expressed concern that when meetings are continued, there is no requirement for additional notice of the continued meeting, other than an announcement of same at the meeting itself. After a brief discussion of this issue, the Subcommittee agreed that the provision addressing notice of special and emergency meetings should be amended to include written notice of a continued meeting.

With regard to subsection E of § 2.2-3707 (requested personal meeting notice), there was agreement that there were no problems with this subsection and that it should remain as written.

Subsection F of § 2.2-3707 (availability of agenda materials) was next discussed by the Subcommittee. Staff advised the Subcommittee that it recommends, when available, that the agenda accompany the meeting notice. As noted above, this cannot be done when notice of regular meetings is given on a calendar year basis. The Subcommittee agreed with staff that a copy of the agenda, in addition to the agenda materials, should be available for public inspection. As a result, the Subcommittee agreed to amend subsection F to include that a copy of the proposed agenda be available when agenda materials are available for public inspection. The Subcommittee also agreed that the agenda should include whether or not public comment will be received as currently stated in subsection C (discussed above).

The Subcommittee recommended the deletion of subsection G—"The notice provisions of this chapter shall not apply to informal meetings or gatherings of the members of the General Assembly"—as this provision is obsolete because of the enactment in 2005 of § 2.2-3707.01, which specifies special meeting requirements for the General Assembly.

The Subcommittee next considered subsection H of § 2.2-3707 ("Any person may photograph, film, record or otherwise reproduce any portion of a meeting required to be open."). There was no issue raised with this subsection as written, and, as a result, no change was recommended.

Subsection I of § 2.2-3707 (meeting minutes) was the next topic of discussion. Staff noted that in 2004 (c. 730) requirements for the content of meeting minutes was added, and the Council has written several formal opinions on this provision, as well as included guidance in educational materials on the content of minutes. Ms. Rhyne of VCOG indicated that the content of meeting minutes varies widely; some minutes are almost a verbatim transcript, others are cryptic, and most almost never include any public comment made at a meeting. The Subcommittee directed staff to bring copies of relevant advisory opinions to the next Subcommittee meeting.

With the completion of the initial review of § 2.2-3707, the Subcommittee turned its attention to the next agenda item—the "context draft". At previous meetings, the Subcommittee discussed whether the current meeting exemptions that reference existing

FOIA record exemptions should be amended to include the identity of the public body(s) to which the exemption applies and a general description of the subject matter of the excluded records/topic for discussion in a closed meeting in addition to the citation to the applicable records exemption. A draft was prepared by staff, discussed by the Subcommittee, and posted on the Council website to receive further comment. The Subcommittee again deferred action on this draft to allow ample time for review and reflection by interested parties. As a result, no action to date on this approach has been taken by the Subcommittee.

The next meeting of the Subcommittee is scheduled for Monday, June 6, 2016, in Richmond. There being no further business, the meeting was adjourned.

May 4, 2016

The Subcommittee held its second meeting of the 2016 interim on May 4, 2016. All Subcommittee members were present, except Mr. Landon and Ms. King-Casey.²¹ The purpose of the meeting was to continue the study of FOIA in accordance with HJR 96. As per the study plan adopted by the Council, with the completion of the review of (i) open meeting exemptions found in § 2.2-3711, (ii) § 2.2-3712 (closed meeting procedures), and (iii) § 2.2-3707 (notice of meetings, etc.) the Subcommittee began review of § 2.2-3707.1 (posting of minutes for state boards and commissions) and § 2.2-3710 (voting). Staff advised the Subcommittee of the legislative history of § 2.2-3707.1 (posting of minutes for state boards and commissions), which was enacted in 2002 (c. 580) and amended again in 2006 (cc. 474 and 595) and 2007 (c. 300). The Subcommittee discussed why this section was limited to deliberative bodies in the executive branch. Staff averred that at the time of enactment, it was felt that there was more interest in executive branch agencies, as their actions affect more people. Dave Ress, a reporter with the *Daily Press*, noted that many localities in the Hampton Roads area routinely post their minutes. Megan Rhyne of VCOG concurred with Mr. Ress but added that the postings are not usually done in a timely manner. There was discussion about the proper nomenclature for identifying specific websites. Staff noted that in some cases FOIA speaks to "public government websites" while in others it refers to the "Commonwealth Calendar." The Subcommittee directed staff to prepare a draft amending this section to include all state public bodies and local governing bodies, including school boards, but to require posting only upon approval of the minutes for such local governing bodies. This limitation for local governing bodies and school boards was acknowledgment of the fact that such local governing bodies meet monthly and, as a practical matter, draft minutes are prepared in time for approval at the next meeting.

The Subcommittee then began review of § 2.2-3710, which sets forth voting requirements for deliberative bodies. Staff provided the legislative history of § 2.2-3710, which was originally enacted in 1987 (c. 71) and amended in 2000 (c. 932), 2001 (c. 710), and 2002 (c. 491). Mr. Ress expressed concern that some public bodies do not comply with the letter or spirit of FOIA in that individual members meet serially on a one-to-one basis and then, at a later time, the entire public body votes on the matter without discussion. This practice adversely impacts the public by functionally eliminating the deliberative process on a particular issue.

²¹ Dooley (Chair), Selph, and Porto.

Staff noted that the Virginia Supreme Court in the case of *Hill v. Fairfax County School Board*, 284 Va. 306, 727 S.E.2d 75 (2012), held that serial one-on-one meetings by individual members of a public body are permissible under FOIA because a meeting is defined as the informal gathering of three or more members of the body. Ms. Rhyne advised the Subcommittee that while the practice may be permissible, the public she hears from perceive it as a violation of their right to know. Roger Wiley, Esq., stated that the practice varies with every topic and he believes that there is no way to write a general rule. He noted that some localities have policies in place regarding who can act on particular matters. For example, some localities authorize their attorney to agree to settlement up to a certain amount but require the governing body to approve higher amounts. Mr. Wiley advised the Subcommittee that any restriction on one-on-one discussions by individual members of a public body could have First Amendment implications. Ms. Dooley, chair of the Subcommittee, suggested that if a citizen has concerns, they may be better addressed to the public body directly. There being no further discussion, the Subcommittee by consensus agreed not to recommend any change to § 2.2-3710.

The Subcommittee turned its attention to the next agenda item—the "context draft." At previous meetings, the Subcommittee discussed whether the current meeting exemptions that reference existing FOIA record exemptions should be amended to include the identity of the public body(s) to which the exemption applies and a general description of the subject matter of the excluded records/topic for discussion in a closed meeting in addition to the citation to the applicable records exemption. A draft was prepared by staff, discussed by the Subcommittee, and posted on the Council website to receive further comment. At today's meeting, the Subcommittee reviewed the context draft and made the following revision discussed below. Action was again deferred on this draft to allow ample time for review and reflection by interested parties. As a result, no action to date on this approach has been taken by the Subcommittee. The revisions to the draft agreed to by the Subcommittee are:

- Revise the draft to incorporate 2016 amendments made to FOIA that impact § 2.2-3711 (open meeting exclusions);
- Delete the proposed language in subdivision A 11 of § 2.2-3711 (discussion of tests, etc.) appearing after "§ 2.2-3705.1"²² and insert a period;
- Delete the proposed language in subdivision A 40 of § 2.2-3711²³ (discussion of economic development records) and replace with "relating to economic development"; and
- Delete the proposed language in subdivision A 47 of § 2.2-3711²⁴ (discussion by the Alcoholic Beverage Authority [to come into existence on July 1, 2018]) and also to delete "or subdivision 34 of § 2.2-3705.7, relating to marketing and operational strategies."

²² "...relating to the evaluation of (i) any student or any student's performance; (ii) any employee's or employment seeker's qualifications or aptitude for employment, retention, or promotions; or (iii) qualifications for any license or certificate issued by a public body."

²³ "relating to business, trade, or tourism development or retention"

²⁴ "(ii) proprietary information, trade secrets, financial records, and (iii) contract cost estimates"

The Subcommittee next reviewed the draft prepared by staff amending § 2.2-3707, as directed by the Subcommittee at its April 11, 2016, meeting. Dave Ress of the *Daily Press* suggested that the contents of an agenda be dictated by statute. Subcommittee members Mr. Selph and Ms. Dooley both responded that such a provision would be difficult to enforce and that they did not believe that the law should dictate agenda content. They noted that agenda items usually reflect matters needing action or at least discussion as they arise. In reviewing the proposed draft, the Subcommittee made the following revisions:

- Change the term "public government website" to "publicly available website" in subsection C, relating to posting of meeting notices;
- Clarify the locations where physical notice is to be posted;
- Change "[N]otice " to ""[t]he proposed agenda" in the last sentence in subsection F (which was moved from subsection C); and
- Keep working on the best manner to replace the term "Commonwealth Calendar."

The next meetings of the Subcommittee are scheduled in Richmond for Monday, June 6, 2016; Monday, July 18, 2016; and Thursday, August 11, 2016. There being no further business, the meeting was adjourned.

June 6, 2016

The Subcommittee held its third meeting of the 2016 interim on June 6, 2016. All Subcommittee members were present, except Mr. Landon and Ms. King-Casey.²⁵ The purpose of the meeting was to continue the study of FOIA in accordance with HJR 96. As per the study plan adopted by the Council, with the completion of the review of (i) open meeting exemptions found in § 2.2-3711, (ii) § 2.2-3712 (closed meeting procedures), (iii) § 2.2-3707 (notice of meetings, etc.), and § 2.2-3707.1 (posting of minutes for state boards and commissions) and § 2.2-3710 (voting), the Subcommittee began review of § 2.2-3707.01 (meeting of the General Assembly), and § 2.2-3708 (electronic communication meetings) and § 2.2-3708.1 (participation in meetings in event of emergency or personal matter, etc.).

Staff advised the Subcommittee of the legislative history of § 2.2-3707.01 (meetings of the General Assembly), which was enacted in 2004 (c. 768) and amended again in 2005 (c. 352). Ginger Stanley, Executive Director of the VPA, advised the Subcommittee that this section was highly negotiated, especially the codification of public access to joint committees of conference. She indicated that, as a result of the enactment of § 2.2-3707.01, the budget conference committee is no longer a matter of hide and seek, and she advised that, in practical terms, access to this and other conference committees works very well. Roger Wiley, Esq., stated that the process has improved considerably with regard to the budget conference committee but that, recently, access to the conference committee for the ethics bills has been more difficult, notwithstanding the requirements of FOIA. Megan Rhyne, Executive Director of VCOG, told the Subcommittee that Virginia is unusual in a good way in that the Virginia General Assembly is subject to FOIA, whereas in the majority

²⁵ Dooley (Chair), Selph, and, Porto.

of states the legislature is not subject to FOIA. Based on the discussions, the Subcommittee took no action to revise § 2.2-3707.01.

The Subcommittee next turned its attention to § 2.2-3708 (electronic communication meetings). Staff again provided the legislative history for this section, noting that it was enacted in 1984 (c. 252) and amended numerous times since then. Staff advised that the Joint Commission on Technology and Science felt it unnecessary to receive annual electronic communication meeting (e-meetings) reports because the FOIA Council already receives them and the filing of two reports is unnecessary. Ms. Rhyne again raised the issue of continued meetings and renewed her request that continued meetings be noticed in the same way as any other meeting. The Subcommittee had previously recommended that required notice under § 2.2-3707 should apply to continued meetings and therefore directed staff to make the corollary changes to the e-meeting provisions in § 2.2-3708. The Subcommittee will review staff-prepared drafts on these issues at its next meeting on July 18, 2016.

The Subcommittee then reviewed the provisions of § 2.2-3708.1 (participation in meetings in event of emergency or personal matter, etc.). Several issues were raised through public and staff comment. These issues related to (i) the redundancy of the terminology "emergency or personal matter," as personal matters subsume emergencies; (ii) FOIA's definition of a regional public body, which was felt to be imprecise and confusing; and (iii) the limitation on the number of e-meetings a member can participate in during any calendar year (two or 25 percent of the meetings, whichever is less), which is difficult to apply numerically. The Subcommittee discussed these issues at length and directed staff to prepare a draft to correct these deficiencies for review at the July 18, 2016, meeting of the Subcommittee.

The Subcommittee turned its attention to the next agenda item—the "context draft." At previous meetings, the Subcommittee discussed whether the current meeting exemptions that reference existing FOIA record exemptions should be amended to include the identity of the public body(s) to which the exemption applies and a general description of the subject matter of the excluded records/topic for discussion in a closed meeting in addition to the citation to the applicable records exemption. A draft was prepared by staff, discussed by the Subcommittee, and posted on the Council website to receive further comment. At today's meeting, the Subcommittee again deferred action on this draft to allow ample time for review and reflection by interested parties. As a result, no action to date on this approach has been taken by the Subcommittee. The Subcommittee, however, directed staff to ensure that the report of the FOIA Study pursuant to HJR 96 to the Governor and the General Assembly includes a note of explanation as to why the context draft, if recommended by the Subcommittee and ultimately by the FOIA Council, was done. The report should note that it was not to expand or contract any authority granted pursuant to corollary FOIA record exclusion but merely to provide context to the reader of generally what and to whom the exclusion applied.

The Subcommittee next reviewed the draft prepared by staff amending § 2.2-3707, as directed by the Subcommittee at its April 11 and May 4, 2016, meetings. The Subcommittee voted unanimously to recommend the draft, as amended.

Next, the Subcommittee reviewed proposed amendments to § 2.2-3707.1, website posting of meeting minutes. At its May 4, 2016, meeting, the Subcommittee had directed staff to prepare a draft amending this section to require posting of meeting minutes for all state public bodies and local governing bodies, including school boards, but to require posting only for approved minutes. This limitation for local governing bodies and school boards was acknowledgment of the fact that such local governing bodies and school boards meet monthly and, as a practical matter, draft minutes are prepared in time for approval at the next meeting. The discussion at today's meeting included the potential difficulty for legislative branch agencies to comply with posting minutes within the statutory time frame, due to the substantial difference in staffing levels for legislative branch agencies as compared to executive branch agencies, as well as the fact that minutes are generally not approved by legislative agencies. Staff provided a listing of all legislative bodies subject to FOIA meeting provisions for the Subcommittee's review. The Subcommittee discussed keeping the current posting requirement to executive branch agencies and, for other branches of government, requiring posting of final minutes on their respective public websites. Further, the Subcommittee considered increasing the time period for posting final minutes from three to five working days. Alternatively, the Subcommittee considered a delayed effective date of 2020 for the required posting of minutes by local governing bodies and legislative branch agencies. Ms. Stanley stated that VPA's preference was for the delayed effective date. The Subcommittee directed staff to sync up the posting of notices with the posting of minutes for the Subcommittee's review at the July 18, 2016, meeting. However, the Subcommittee took no further action on the proposed amendments.

The next meetings of the Subcommittee are scheduled for Monday, July 18, 2016, and Friday, August 11, 2016, both in Richmond. There being no further business, the meeting was adjourned.

July 18, 2016

The Subcommittee held its fourth meeting of the 2016 interim on July 18, 2016. All current Subcommittee members were present.²⁶ The purpose of the meeting was to continue the study of FOIA in accordance with HJR 96.

As per the study plan adopted by the Council, the Subcommittee to date has completed review of the following Code sections:

- § 2.2-3711(open meeting exemptions),
- § 2.2-3712 (closed meeting procedures),
- § 2.2-3707 (notice of meetings, etc.),
- § 2.2-3707.1 (posting of minutes for state boards and commissions),
- § 2.2-3707.01 (meeting of the General Assembly),

²⁶ Dooley (Chair), King-Casey, and Porto, who participated telephonically in accordance with § 2.2-3708.1.

§ 2.2-3708 (electronic communication meetings),
§ 2.2-3708.1 (participation in meetings in event of emergency or personal matter,
etc.), and
§ 2.2-3710 (voting).

The Subcommittee began this meeting with further review of the context draft. At previous meetings, the Subcommittee discussed whether the current meeting exemptions that reference existing FOIA record exemptions should be amended to include the identity of the public body(s) to which the exemption applies and a general description of the subject matter of the excluded records/topic for discussion in a closed meeting, in addition to the citation to the applicable records exemption. A draft was prepared by staff, it was discussed and edited several times by the Subcommittee, and each version was posted on the Council website to receive further comment. Chairman Dooley expressed her surprise that this more user-friendly draft could actually be accomplished, despite her earlier concern that such an attempt would not reach fruition due to unintended consequences. Noting that there had been more than sufficient time for public review and comment on the context draft, the Subcommittee voted unanimously to recommend the context draft to the Council. The Subcommittee directed staff that the final report for the study should note that its purpose was not to expand or contract any authority granted pursuant to corollary FOIA record exclusions but merely to provide context to the reader of generally to what and to whom the exclusion applied.

The Subcommittee next turned its attention to a matter unresolved from the June 6, 2016, meeting. The issue was the website posting of minutes under § 2.2-3707.1 by public bodies. At its May 4 and June 6, 2016, meetings, the Subcommittee had directed staff to prepare a draft amending § 2.2-3707.1 to require posting of meeting minutes for all state public bodies and local governing bodies, including school boards, but to require posting only for approved minutes. This limitation for local governing bodies and school boards was acknowledgment of the fact that such local governing bodies and school boards meet monthly and, as a practical matter, draft minutes are prepared in time for approval at the next meeting. The discussion at today's meeting again included the potential difficulty for legislative branch agencies to comply with posting minutes within the statutory time frame due to the substantial difference in staffing levels for legislative branch agencies as compared to executive branch agencies, as well as the fact that minutes are generally not approved by legislative agencies.

The Subcommittee called for public comment on this issue. Phyllis Errico for VACo and VML repeated her concerns regarding the ability of local public bodies to comply with such a requirement. Ms. Errico stated that, in many cases for local bodies, there is no in-house staff. She noted that, ultimately, minutes are posted on available websites. Ms. Errico stated that FOIA already provides a right of public access to documents and that citizens can make a FOIA request for minutes before they are posted. Essentially, she explained, the imposition of a requirement for posting of minutes was an unfunded mandate because it required local public bodies to invest in technology they did not have or had decided was not a good allocation of their funds, given the totality of circumstances facing them.

Donna Sayegh, a citizen from Portsmouth, told the Subcommittee that liaisons from Portsmouth City Council to other Portsmouth public bodies do not report on their activities. She also noted that there is too much secrecy in Portsmouth that does not comport with FOIA. As an example, she cited an instance where the procurement official would not tell the city council why two vendors had been denied contracts. She also questioned the hefty charges imposed by the city for FOIA requests.

Dave Ress of the *Daily Press* pointed out that the proposed draft would not require the investment in technology if a local public body had not already done so. He stated that the draft contained the phrase "...on it public website, if any." As it relates to state public bodies, Mr. Ress stated, he likes the current draft.

Megan Ryne, Executive Director of VCOG, suggested addressing the stated deficiencies by requiring website posting but without a time limit or, alternatively, allowing a longer time limit in which to post minutes.

Subcommittee member King-Casey stated that she had concerns for localities because in many cases they do not have the resources to comply. She said she was not sure that additional time posting would solve the problem.

Roger Wiley, Esq., told the Subcommittee that the posting of approved minutes was not the problem—the problem was the imposition of a specific time limit in which to do it.

Alan Gernhardt, Council staff, advised the Subcommittee that at previous meetings where this issue has been discussed, the Virginia State Bar (VSB), an agency in the judicial branch of government, has factored prominently in the discussion because it has a large number of committees and the proposed expansion of website posting of minutes to other branches of state government would pose burdens on those myriad VSB committees. Mr. Gernhardt also told the Subcommittee that striking the words "in the executive branch of state government" would create a question of this section's application to the judicial branch and interpretation of such a change would result in less rather than more clarity to FOIA.

Chairman Dooley proposed leaving § 2.2-3707.1 limited only to public bodies in the executive branch of state government because of concerns about setting up more opportunity for violations of FOIA and because, given HB 61 (2015 and 2016, Morris), which attempted to make violations of FOIA a criminal penalty, this was not a preferred path. She stated that she believed that the suggested expansion beyond the executive branch of state government would create a problem where no problem currently existed. She noted that minutes in most cases are ultimately posted and that under FOIA a specific request can be made for those minutes. She suggested a better approach was "best practice" advice offered by the Council rather than a statutory change. Ms. King-Casey stated that she shared Ms. Dooley's concerns. Ms. Porto said that there should be an opportunity for compromise, although she was unsure of what that compromise might look like.

Ms. Rhyne of, VCOG again spoke and requested the Subcommittee to keep the website posting of notices for meetings parallel with such posting for meeting minutes. She reminded the Subcommittee that it had recommended website posting for meeting notices. She stated that, in 2016, people expect these things to be online.

At the conclusion of the public comment and extensive Subcommittee discussion on this issue, the Subcommittee agreed to defer further consideration of website posting of meeting minutes until new Subcommittee members are appointed. Ms. Dooley noted that with the expiration of Messrs. Selph and Landon's terms on the Council and the Subcommittee, it would be better to have more Subcommittee members to weigh in on the discussion. The Subcommittee requested staff to contact Chairman LeMunyon with a request that he appoint two new members to the Subcommittee to fill the vacancies left by Messrs. Selph and Landon.

The Subcommittee next reviewed its proposed amendments relating to §§ 2.2-3708 and 2.2-3708.1 (electronic communication meetings) agreed to at the June 6, 2016, meeting. Staff reminded the Subcommittee of its recommended amendments from that meeting and indicated where those amendments can be found in the proposed draft. The recommended amendments relate to (i) the elimination of the redundancy of the terminology "emergency or personal matters," because personal matters subsume emergencies; (ii) the elimination of the requirement that public bodies conducting electronic communications meetings (e-meetings) pursuant to § 2.2-3708 file an annual report to JCOTS, because the FOIA Council already receives them and the filing of two reports is unnecessary; (iii) the revision of the definition of "regional public body"; (iv) the limitation on the number of e-meetings a member can participate in during any calendar year (two or 25 percent of the meetings, whichever is less), which is difficult to apply numerically; and (v) providing notice of e-meetings in the same way as for any other meeting.²⁷ Mr. Wiley commented that the revised definition of "regional public body" in the draft is workable. Mr. Ress suggested that limitation for remote participation in a meeting by a member under § 2.2-3708.1 be kept at 25 percent of the meetings annually. Mr. Wiley responded that the Fairfax County Board of Supervisors meets 50 times per year and Mr. Ress' suggestion would lead to expansion of the ability of members to participate in a meeting remotely—a result that Mr. Wiley did not believe would be the one Mr. Ress sought. The Subcommittee discussed the staff-prepared drafts at length and voted 2 to 0²⁸ to recommend the draft to the FOIA Council.

The next meeting of the Subcommittee is scheduled for Thursday, August 11, 2016, in Richmond. There being no further business, the meeting was adjourned.

²⁷ The Subcommittee had previously recommended that required notice under § 2.2-3707 should apply to continued meetings and therefore directed staff to make the corollary changes to the e-meeting provisions in § 2.2-3708.

²⁸ Ms. Porto did not vote on this issue, as she had terminated her participation in the meeting due to a scheduling conflict.

August 11, 2016

The Subcommittee held its fifth meeting of the 2016 interim on August 11, 2016. All current Subcommittee members were present.²⁹ The purpose of the meeting was to continue the study of FOIA in accordance with HJR 96.

The first order of business was the consideration of HB 698 (Kory, 2016) and HB 757 (R. Bell, 2016) referred by the General Assembly. Both Delegates Kory and Bell were unable to attend this meeting, and the Subcommittee deferred consideration of these bills until the Subcommittee's next meeting on September 19, 2016.

The Subcommittee next turned its attention to a matter unresolved from its previous two meetings. The issue was the website posting of minutes under § 2.2-3707.1 by public bodies. At its May 4 and June 6, 2016, meetings, the Subcommittee directed staff to prepare a draft amending § 2.2-3707.1 to require posting of meeting minutes for all state public bodies and local governing bodies, including school boards, but to require posting only for approved minutes. This limitation for local governing bodies and school boards was acknowledgment of the fact that such local governing bodies and school boards meet monthly and, as a practical matter, draft minutes are prepared in time for approval at the next meeting. The discussion at today's meeting again included the potential difficulty for legislative branch agencies to comply with posting minutes within the statutory time frame due to the substantial difference in staffing levels for legislative branch agencies as compared to executive branch agencies, as well as the fact that minutes are generally not approved by legislative agencies. Staff advised that FOIA Council Chair, Delegate LeMunyon, had suggested that instead of delineating between branches of government, the Council should perhaps look at the function of a public body to obtain a better indicator of when minutes should be posted. Staff told the Subcommittee that Delegate LeMunyon had suggested that the public might be most interested in public bodies with regulatory authority that directly affect the public and those with the authority to spend public money. Staff pointed out that most public bodies have the authority to spend money and suggested that this criterion would not have the desired effect. The Subcommittee called for public comment on this issue. Megan Rhyne, Executive Director of VCOG, told the Subcommittee that she had done a survey of the 10 biggest and smallest localities in Virginia and the results indicated that ultimately all of the agendas and minutes were posted and current. She noted that SB 89 (c. 403, 2016) requires (i) the posting of minutes of a local electoral board's meetings on the local electoral board's website or the official website of the county or city when such means are available and (ii) that minutes of meetings are required to be posted as soon as possible but no later than one week prior to the following meeting of the electoral board. After further discussion, the Subcommittee deferred action on this draft.

The Subcommittee next took up review of § 2.2-3700, the policy statement of FOIA. Staff advised the Subcommittee of the legislative history of FOIA and that, in 1999, the policy statement was significantly revised after a joint subcommittee study of the General Assembly to what appears in the law today. Dave Ress, a reporter with the *Daily Press*,

²⁹ Dooley (Chair), King-Casey, and Porto.

advised the Subcommittee that Virginia has lost sight of the purpose of FOIA, noting that the public's right to know is a fundamental right and that complying with FOIA is a basic obligation of government. Mr. Ress opined that the policy of FOIA found in § 2.2-3700 should be revised to include these two very important concepts.

Bill Farrah of the American Civil Liberties Union expressed his concern that local governments fail to comply with closed meeting procedures by not including a statement of the subject of the closed meeting as required by FOIA. He noted that citizens have the right to sue a public body for violations of FOIA but that there is no remedy to fix the action that was taken at a meeting where the violation occurred.

Subcommittee Chair Kathleen Dooley reminded the Subcommittee that the FOIA Council has prepared a document that outlines in great detail the requirements for a proper motion to close a meeting. She asked the Subcommittee whether, in response to Mr. Ress' comments, stronger language is needed in the policy statement of FOIA. Subcommittee member Marisa Porto asked if staff had any recommendations. Staff advised that it did not.

Staff brought to the Subcommittee's attention an issue that was recently reported in the newspaper concerning a subcommittee of a local governing body sending and receiving texts during the course of the subcommittee's meeting. Staff advised that sidebar discussions that may occur at public meetings are readily witnessed by those in attendance but that when text messages are used, they are not visible to the public. Staff noted that technology is frequently ahead of the law and that, in this instance, the text messages concerning public business would be public records and subject to FOIA. However, in a meetings context, such messages appear to be meetings within a meeting under certain circumstances. Ms. Dooley asked for comment from the Subcommittee. Ms. Porto indicated that within the last year, when reporters have asked for text messages sent and received during public meetings, often they have been told that those messages were not retained and/or that the text messages were not sent/received on a public phone. Staff interjected that clearly that response was incorrect under the Virginia Public Records Act. Staff arrayed several options for the Subcommittee's consideration. These options included (i) requiring public bodies to adopt a policy governing the use of email and/or text messages during meetings, (ii) prohibiting the use of email and/or text messages during meetings, and (iii) requiring that any electronic communication relating to an item of public business before the public body that is sent or received during the course of a meeting be read aloud and included in the minutes of that meeting.

The Subcommittee asked for public comment on this issue. Ms. Rhyne of VCOG stated that the real question was how to address text messages for meetings and records. She suggested that perhaps it is a records management question and covered under the Virginia Public Records Act, which deals with retention of public records. Ms. Dooley suggested that the rule might be that no texting is allowed if the text relates to an item of public business before the body. Ms. Porto was curious about how other states address this issue. Ms. Rhyne responded that she had contacted colleagues in other states and that, to her knowledge, no states have addressed it. Subcommittee member Shawri King-Casey stated that this issue raised a combination of technology and legal questions. Ms. Dooley summarized the

problem by noting that FOIA policy is to allow people to observe the workings of government but, as a practical matter, people cannot observe text messages during a meeting. The Subcommittee took the matter under advisement and will consider this issue at future meetings.

Staff also discussed with the Subcommittee the definition of "public records" found in § 2.2-3701 of FOIA and noted that some of the terminology appeared obsolete. Specifically, "... photostatting, photography, magnetic impulse, optical or magneto-optical form..." may need to be either updated or deleted. The Subcommittee took no action, but wanted to allow public comment at a future meeting.

Ms. Dooley invited further public comment. Mr. Ress expressed that he had had a problem with subsection B of § 2.2-3710 because it allowed local school boards (and other bodies) to discuss issues and reach decisions by speaking one by one with each other outside of public meetings, leading to "rocket docket" meetings where decisions were made with little discussion in public. Ms. Rhyne suggested that a solution might be to adopt language similar to that used in Florida to ban email between members during meetings by stating that the law is to be construed so as to frustrate all evasive devices. Staff informed the subcommittee that there is similar language in Virginia's Alcoholic Beverage Control laws concerning a "shift or device to evade" the restrictions of those laws. The Subcommittee decided to carry this issue over until its next meeting.

The next meeting of the Subcommittee is scheduled for Monday, September 19, 2016, in Richmond. There being no further business, the meeting was adjourned.

September 19, 2016

The Subcommittee held its sixth meeting of the 2016 interim on September 19, 2016.³⁰ The purpose of the meeting was to continue the study of FOIA in accordance with HJR 96.

The first order of business was the consideration of HB 698 (Kory, 2016) and HB 757 (R. Bell, 2016) referred by the General Assembly. Both Delegates Kory and Bell were again unable to attend this meeting, and the Subcommittee deferred consideration of these bills until the Subcommittee's next meeting on October 17, 2016.

The Subcommittee next turned its attention to a matter unresolved from its previous three meetings. The issue was the website posting of minutes under § 2.2-3707.1 by public bodies. At its May 4, June 6, and August 11, 2016, meetings, the Subcommittee directed staff to prepare a draft amending § 2.2-3707.1 to require posting of meeting minutes for all state public bodies and local governing bodies, including school boards, but to require posting only for approved minutes. This limitation for local governing bodies and school boards was acknowledgment of the fact that such local governing bodies and school boards meet monthly and, as a practical matter, draft minutes are prepared in time for approval at the next meeting. The discussion at today's meeting again included the potential difficulty for

³⁰ Dooley (Chair), King-Casey, Porto, and Stern were present. Mr. Coleburn was absent.

legislative branch agencies to comply with posting minutes within the statutory time frame due to the substantial difference in staffing levels for legislative branch agencies as compared to executive branch agencies, as well as the fact that minutes are generally not approved by legislative branch boards, councils, and commissions.

The Subcommittee called for public comment on this issue. Phyllis Errico on behalf of VACo and VML reiterated local governments' objections to the proposed draft. She stated that the draft presents real problems for many localities who have (i) no IT staff, (ii) limited websites that are operated by a third-party vendor on a contractual basis, or (iii) no website of their own but instead have a website that is hosted on the website of another entity, whether public or private. Ms. Errico again told the Subcommittee that the draft is an unfunded mandate on localities and suggested that localities be removed from the purview of the draft. In response to questions regarding whether the draft requires posting only if a locality has a website, Ms. Errico noted that the draft mandates a certain level of technology and IT staffing. The Subcommittee inquired whether, if there were a population threshold in the draft, local government concerns would be alleviated. Ms. Errico responded that such an approach may not be workable. Ms. Porto asked whether necessary provisions could be included in such contracts with third-party IT vendors. Ms. Errico stated that such an approach would force localities to make difficult choices about allocation of resources. Megan Rhyne, Executive Director of VCOG, reminded the Subcommittee that she had done a survey of the 10 biggest and smallest localities in Virginia and the results indicated that ultimately all of the agendas and minutes were posted and current. She noted that SB 89 (c. 403, 2016) requires (i) the posting of minutes of a local electoral board's meetings on the local electoral board's website or the official website of the county or city when such means are available and (ii) that minutes of meetings be posted as soon as possible but no later than one week prior to the following meeting of the electoral board.

Staff offered that the issue of requiring a certain level of technology and current provisions of FOIA is a broader issue than just website posting of minutes and suggested that it may not be best done on a piecemeal basis but rather via a review of the larger technology issues using a more holistic approach. Scott Berg, a citizen from Portsmouth, remarked that FOIA does not define "website" and there is a difference between having an Internet presence like Facebook or Google Plus and a website. Dave Ress, a reporter with the *Daily Press*, stated that subsection B of the draft clearly states "...on a website, if available." Ms. Errico responded that if there is no time limit specified for posting, the phones at VACo and VML as well as at the FOIA Council will ring off the hook because of localities inquiring how to comply with the draft if enacted.

After further discussion, the Subcommittee agreed that the preferred language to use was "official public government website" when referring to websites. Staff pointed out that the draft did not address regional public bodies. David Blount of the Thomas Jefferson Planning District spoke on behalf of regional public bodies and stated that his planning district had a website but that it was maintained by a third-party vendor. He explained that there are 21 planning district commissions (PDCs) in Virginia and urged the Subcommittee to be cautious in light of the impact of this issue on regional bodies. Mr. Blount also pointed out that while many PDCs meet monthly, the frequency of meetings increases at budget time

and the timing of posting minutes becomes more difficult at that time. Ms. Dooley, Chair of the Subcommittee, stated that even with posting after approval of minutes, there still may be a need for flexibility. The Subcommittee sought suggestions from staff as it relates to regional public bodies, and staff suggested that consideration of them be deferred to 2017. The Subcommittee agreed with the staff suggestion. Ms. Porto noted that notwithstanding the discussion, minutes are required and must be available upon request.

Ultimately, the Subcommittee directed staff to amend the draft (LD 17100057D) as follows:

- Subsection A—keep current law, which requires posting of minutes by state public bodies in the executive branch of state government, but update the "Commonwealth Calendar" language to "a central electronic calendar maintained by the Commonwealth."
- Subsection B—for other state public bodies, require posting of minutes on their respective websites and on a central electronic calendar maintained by the Commonwealth. No requirement for posting draft minutes, only final minutes.
- Subsection C—for local governing bodies and school boards, posting of minutes is required on such bodies' "official public government website, if available." The Subcommittee asked staff to recommend language in the draft for the timing of posting of these minutes, if feasible.

The Subcommittee next revisited its prior review of § 2.2-3700, the policy statement of FOIA. Mr. Ress again advised the Subcommittee that Virginia has lost sight of the purpose of FOIA, noting that the public's right to know is a fundamental right and that complying with FOIA is a basic obligation of government. Mr. Ress opined that the policy of FOIA found in § 2.2-3700 should be revised to include these two very important concepts. Staff noted that in FOIA training, staff spends considerable time talking about the policy of FOIA and the two rules that FOIA provides for when a public body is in doubt—i.e., default to openness and construe exclusions from openness narrowly. When asked for comment, staff opined that the policy statement of FOIA appeared clear on its face and staff could not suggest any language that would clarify.

Staff again brought to the Subcommittee's attention the issue of a member of a public body sending and receiving texts during the course of the public body's meeting. Staff advised that sidebar discussions that may occur at public meetings are readily witnessed by those in attendance but that when text messages are used, they are not visible to the public. Staff noted that technology is frequently ahead of the law and that, in this instance, the text messages concerning public business would be public records and subject to FOIA. However, in a meetings context, such messages appear to be meetings within a meeting under certain circumstances. Given the direction from the chair of the FOIA Council for Subcommittees to complete their work before the Council's October 17, 2016, meeting, the Subcommittee deferred consideration of this issue until 2017.

The Subcommittee next reconsidered its recommendation to require public notice for continued meetings to include a corresponding amendment to § 15.2-1416, which authorizes local governing bodies to adjourn their meetings from time to time, without

further notice to the public, until the work of the body is complete. Given the Subcommittee's prior recommendation that notice of continued meetings be given under FOIA, amendment of § 15.2-1416 is necessary to make this section consistent with the Subcommittee's recommendation (LD 17100047D). The Subcommittee unanimously agreed to amendment of § 15.2-1416.

The next meeting of the Subcommittee is scheduled for Monday, October 17, 2016, in Richmond. There being no further business, the meeting was adjourned.

October 17, 2016

The Subcommittee held its seventh and final meeting of the 2016 interim on October 17, 2016.³¹ The purpose of the meeting was to continue the study of FOIA in accordance with HJR 96.

The first order of business was the consideration of HB 698 (Kory, 2016) and HB 757 (R. Bell, 2016) referred by the General Assembly. Both Delegates Kory and Bell were again unable to attend this meeting; however the Subcommittee asked for public comment on these bills. Prior to any public comment, Subcommittee member Stern suggested that a better approach to HB 698 or HB 757 would be that no public body could take formal action without providing an opportunity for public comment. Megan Rhyne, Executive Director of VCOG, told the Subcommittee that she believed that Mr. Stern's idea was a good one. Dick Hammerstrom on behalf of VPA stated that many times citizens have a petition that they wish to present during the course of a public meeting, but because there is no requirement for public comment, they are denied the opportunity. David Blount of the Thomas Jefferson Planning District Commission, and also speaking unofficially on behalf of the VML and Virginia Association of Counties (VACo), responded to Mr. Stern's suggestion by stating that there are many provisions in local government law (Title 15.2 of the Code of Virginia) that require public hearings before official action can be taken by local public bodies. He stated that the real issue is how a public body moves through its agenda and otherwise manages meeting procedures. Mr. Blount stated that he did not favor HB 757 and was unsure that HB 698 would improve matters. Chair Dooley then requested additional comment from members of the Subcommittee.

Ms. Porto averred that there were too many procedural issues with HB 757 as raised by all factions and therefore suggested that the Subcommittee not recommend HB 757. With regard to HB 698, Ms. Porto observed that this approach was more acceptable to the parties present at today's meeting. Mr. Stern said that he agreed with Ms. Porto and suggested that public comment may not be necessary at every meeting but may be required before any official action be taken by a public body. By consensus, the Subcommittee agreed not to recommend HB 757 because of the practical problems it presented as well as the belief that it was tantamount to the micromanagement of meeting procedures. Ms. Dooley, speaking to HB 698, reiterated that there are many statutes that require public hearing by local public bodies (i.e., those regarding rezoning, adoption of budgets, capital improvements, tax increases, and adoption of ordinances), and she stated that she was reluctant to advance HB

³¹ Dooley (Chair), Porto, and Stern were present. Ms. King-Casey and Mr. Coleburn were absent.

698 because it was too broad and the concerns raised about specific public bodies could be addressed without affecting all public bodies, most of which routinely provide a public comment period even though it is not required. Ms. Dooley added that her final concern was that FOIA is about access and public comment is not an access issue. She repeated that she supports the idea that where important decisions are being made, an opportunity for public comment should be given. However, she suggested that the focus should be on specific public bodies where the concern lies rather than on crafting a law that applies to all public bodies. Further public comment was requested. Roger Wiley, Esq., for VML and VACo stated that he agrees with Ms. Dooley and noted that neither bill limits public comment to the topic being discussed by public body. Dave Ress of the *Daily Press*, responding to Mr. Wiley's comments, stated that by limiting the topic of public comment, a public body may miss the informing quality that a public body may consider at some later date. Because this was the final meeting of the Subcommittee as directed by Delegate LeMunyon, chair of the FOIA Council, the Subcommittee referred HB 698 back to the full FOIA Council without recommendation for consideration at the Council's next meeting on October 17, 2016.

The Subcommittee next turned its attention to a matter unresolved from its previous four meetings. The issue was the website posting of minutes under § 2.2-3707.1 by public bodies. At its May 4 and June 6, 2016, meetings, the Subcommittee had directed staff to prepare a draft amending § 2.2-3707.1 to require posting of meeting minutes for all state public bodies and local governing bodies, including school boards, but to require posting only for approved minutes. This limitation for local governing bodies and school boards was acknowledgment of the fact that such local governing bodies and school boards meet monthly and, as a practical matter, draft minutes are prepared in time for approval at the next meeting. The discussion at today's meeting again included the potential difficulty for legislative branch agencies to comply with posting minutes within the statutory time frame due to the substantial difference in staffing levels for legislative branch agencies as compared to executive branch agencies, as well as the fact that minutes are generally not approved by legislative branch boards, councils, and commissions.

The Subcommittee recalled the public comment offered on this issue at each of its previous meetings, namely, the draft presents real problems for many localities who have (i) no IT staff, (ii) limited websites that are operated by a third-party vendor on a contractual basis, or (iii) no website of their own but instead have a website that is hosted on the website of another entity, whether public or private; an additional criticism was that the draft imposes an unfunded mandate on localities. Ms. Porto suggested that because (a) there remain many questions about this issue, (b) the posting of minutes is essentially a technology issue, and (c) FOIA addresses more than just website posting of minutes, this issue should not be resolved on a piecemeal basis but, rather, the larger technology issues should be reviewed using a more holistic approach, as the FOIA Council will undertake to do in 2017. Ultimately, the Subcommittee by consensus agreed with Ms. Porto's suggestion and directed staff to amend the draft (LD 17100057D) to keep current law, which requires posting of minutes by state public bodies in the executive branch of state government, but to update the "Commonwealth Calendar" language to "a central electronic calendar maintained by the Commonwealth."

The Subcommittee next took action on its recommendation to require public notice for continued meetings to include a corresponding amendment to § 15.2-1416, which authorizes local governing bodies to adjourn their meetings from time to time, without further notice to the public, until the work of the body is complete. Given the Subcommittee's prior recommendation that notice of continued meetings be given under FOIA, amendment of § 15.2-1416 is necessary to make this section consistent with the Subcommittee's recommendation (LD 17100047D). The Subcommittee unanimously agreed to amendment of § 15.2-1416 to be included in LD 17100047.

The Subcommittee asked for any further public comment. Mr. Ress noted that while there was no time to do so this year, § 2.2-3703, addressing public bodies excluded from FOIA, should be revisited, specifically the exclusions for clerk of court's records and voter registration records. He noted that Virginia is one of very few states that exempt voter registration records from disclosure.

Because of time limitations due to the convening of the FOIA Council meeting at 1:30 p.m., the Subcommittee took no action on the remaining agenda items. The Subcommittee did review Senator Surovell's draft (LD 17100846), relating to the imposition of additional penalties for members of a public body improperly certifying a closed meeting, but the Subcommittee by consensus agreed that there were many concerns with this draft and, due to today's time constraints, took no action on the draft.

Ms. Dooley thanked everyone present for their participation and hard work. The meeting was adjourned.

PART II--RECORDS SUBCOMMITTEE

Work of the Records Subcommittee—Year One, 2014

May 14, 2014

The Records Subcommittee (the Subcommittee) held its first meeting on May 14, 2014. Subcommittee members Ashby, Hamlett, and Oksman were present; Mr. Tavenner was absent. The Subcommittee began the meeting by electing Mr. Tavenner as chair and Mr. Ashby as vice-chair by unanimous vote. Staff then presented a brief review of HJR 96, which directs the FOIA Council to conduct a three-year study of FOIA, and the study plan adopted by the FOIA Council at its meeting on April 22, 2014. HJR 96 directs the FOIA Council to examine all of the exemptions in FOIA, as well as the organization and structure of FOIA. At its meeting in April, the FOIA Council established the Subcommittee with the goal of studying three types of records exemptions in 2014: the exemptions of general application in §§ 2.2-3705.1 and 2.2-3705.8, the proprietary records exemptions in § 2.2-3705.6, and the exemptions for specific public bodies and other limited exemptions in § 2.2-3705.7.

Staff then presented a brief review of HB 339 (Anderson) and SB 387 (Reeves), identical bills concerning certain proprietary records of the Department of Rail and Public Transportation (DRPT) that were referred to the FOIA Council by the 2014 Session of the General Assembly. Staff indicated that there was agreement on these bills during the 2014 Session of the General Assembly, but it turned out that was not the case. Bethany Wolfe spoke on behalf of DRPT to inform the Subcommittee that the goal of the bills was to amend the current state exemption to match existing federal law. She noted that ridership information was of concern to Amtrak due to competition with other vendors, and that federal law exempts information on what is being carried by Norfolk Southern and CSX as freight carriers. Craig Merritt, representing VPA, observed that fundamentally the bills were an attempt to put Amtrak on the same footing as a private rail company and to conform Virginia FOIA to federal law. He stated that the Senate substitute version of the bill was acceptable to VPA but it is not clear what federal law protects. He noted that DRPT interprets the federal exemptions more broadly than VPA does.

The Subcommittee next began discussing how it would implement the study plan. It was suggested that the Subcommittee address one topic per meeting and give those interested the opportunity to submit written comments before each meeting. Staff suggested that, at the state level, letters be sent to advise agencies that would be impacted of the Subcommittee's work plan and schedule. Staff noted that representatives of the Virginia Association of Counties (VACo) and VML were present and could notify their constituent member localities directly. It was suggested that proprietary records be addressed later in the year due to the complex issues they present. After further discussion, the Subcommittee decided to hold four additional meetings. The first meeting will address the exemptions of general applicability and exceptions thereto found in §§ 2.2-3705.1 and 2.2-3705.8. The second meeting will address the exemptions for specific public bodies and other limited exemptions in § 2.2-3705.7. The third meeting will address the proprietary records exemptions in § 2.2-3705.6. The fourth meeting will cover any other remaining topics that need to be addressed.

Mr. Ashby opened the floor to public comment. Mr. Merritt suggested it might be useful to discuss the objectives of FOIA policy before plunging into specific exemptions. As an example, he noted current policies of protecting a business's trade secrets and the negotiating and bargaining positions of both businesses and public bodies, versus the competing policy of protecting only the public body's position in the interest of taxpayers. He expressed the concern that if the study begins with details, there may be no sense of what each exemption is being measured against, what is consistent with policy, and what are the overall objectives of the study. The Subcommittee generally agreed that governing principles would be helpful, and it expressed concern over the limits of the language of HJR 96.

Megan Rhyne of VCOG noted that three of the four members of the Subcommittee were from state agencies, that local government and the press were well represented at the meeting, but that the biggest problems she hears about are from citizens regarding the application of particular exemptions, particularly those for working papers, personnel, and legal advice. She noted that the Subcommittee might not get an equivalent quantitative

input from citizens. She further agreed there should be a discussion of policy and direction, and she suggested the use of informal work groups for more input.

The Subcommittee then discussed concerns over policy and whether further guidance was needed from the FOIA Council as a whole. Ms. Hamlett stated that she believes FOIA policy dictates that government be as open and responsive as possible while still engaging in cost-effective transactions. She noted that it is problematic when private vendors do not want to work with government out of fear their records will be disclosed. She also noted that some exemptions are based on concerns for personal information and privacy. Mr. Oksman suggested deferring any decision on policy until a legislative member of the FOIA Council can provide guidance on the underlying principles of FOIA. Staff observed that the statutory authority of the FOIA Council already gives it the authority to study all of FOIA even without HJR 96 and stated that staff would contact the legislative members of the FOIA Council. In response to Mr. Ashby, Mr. Merritt noted some particular policy concerns such as having measures in place by which to judge exemptions, addressing changes in technology, and weighing convenience for the government against favoring greater access to the public. Staff observed that FOIA was written in 1968 and does not address the consequences of technological changes, such as the cost of retrieving electronic records, but that the definition of "public records" is broad enough to account for changing technology.

The Subcommittee then discussed scheduling future meetings, including the possibility of scheduling a full FOIA Council meeting in June to address policy questions and provide further guidance to the Subcommittee. Staff was directed to poll for future meeting dates. The meeting was then adjourned.

August 25, 2014

The Subcommittee held its third meeting on August 25, 2014. Subcommittee members Tavenner (Chair), Ashby, Hamlett, Jones, and Oksman were present. The purpose of the meeting was to continue the study of records exemptions under HJR 96.

The meeting began with consideration of a draft that would combine into one subdivision the provisions of the personnel records exemption³² with the limitations on that exemption found later in FOIA.³³ The draft also adds "name" to the list of items that must be released.³⁴ The purpose is to put all of the personnel records exemptions into one location for clarity and ease of use without making any substantive changes. After reading the draft language, the Subcommittee voted unanimously to recommend it.

The Subcommittee at its previous meeting requested sample language that would clarify the exemption for written advice of legal counsel and attorney-client privilege. Mr. Jones indicated that that language was not ready for consideration today.

³² Subdivision 1 of § 2.2-3705.1.

³³ Subsection A of § 2.2-3705.8.

³⁴ Names are required to be released under existing law, but that requirement is not explicitly stated.

The Subcommittee then turned to the exemption for personal information provided to a public body for the purpose of receiving electronic mail from the public body (a.k.a. the "anti-spam" exemption). The draft would eliminate the reference to the definition of "personal information" in § 2.2-3801 and instead exempt "personal contact information." Mark Flynn of VML asked if "personal contact information" would include business contact information as well. Ms. Hamlett asked about contact information for members of public bodies. Staff stated that when the exemption was added, the issue addressed was citizens' contact information, and staff noted that members of public bodies should have public contact information. Roger Wiley, a former FOIA Council member representing local government interests, observed that at the local level an employee's home and personal contact information could be protected as personnel records and that the same could apply to board and commission members. Ms. Hamlett disagreed based on court precedent, stating that public officers are not employees. After further discussion, the Subcommittee voted to add language to the draft indicating that it was intended to apply to personal contact information, including home or private business information, furnished by citizens. The first vote was a tie (Mr. Oksman did not vote initially), but upon a second vote the motion carried 3-2 (members Ashby, Hamlett, and Oksman voted aye; members Jones and Tavenner voted nay).

The Subcommittee then began its consideration of the records exemptions in § 2.2-3705.7 (exclusions to application of chapter; records of specific public bodies and certain other limited exemptions). Staff provided a brief legislative history as each exemption was considered.

Subdivision 1 of § 2.2-3705.7 is an exemption enacted as part of the original FOIA in 1968. The original version, which exempted several different types of records, has been amended many times over the years. The current exemption addresses several types of tax records but also mentions scholastic records. Staff noted that the word "scholastic" appears to have been left from the original exemption as an oversight, as there is now a separate exemption for scholastic records.³⁵ Staff also noted that given the list of tax items in this exemption, "scholastic" is a non sequitur. After brief discussion and supporting comments from Craig Merritt on behalf of VPA and Mr. Flynn, the Subcommittee voted unanimously to remove the word "scholastic" from this exemption.

Subdivision 2 of § 2.2-3705.7 is also an exemption enacted as part of the original FOIA in 1968. It exempts the working papers and correspondence of certain government officials and employees. Laura Fornash of UVA and Karah Gunther of VCU both noted the importance of this exemption to university presidents in working through drafts and difficult management decisions. Megan Rhyne of VCOG noted that at the local level this exemption is used by multiple parties, such as mayors and city managers or superintendents and school board chairs. She said that at the state level the exemption was given overly broad interpretation, especially by legislators. Mr. Merritt noted that while "Office of the Governor" is defined in the exemption, there is no equivalent definition for the Lieutenant

³⁵ Subdivision 1 of § 2.2-3705.4.

Governor or Attorney General; he also asked about the breadth of the term "correspondence," given that it is not defined although the term "working papers" is defined. Staff observed there were not as many inquiries regarding the Lieutenant Governor or Attorney General and that at least one circuit court has used the dictionary definition of "correspondence" as "written communications" or the "exchange of letters."³⁶ After further discussion about the breadth of the exemption and its application, Mr. Jones moved to eliminate the word "correspondence," but the motion failed for lack of a second. The Subcommittee agreed to carry over consideration of this exemption.

Subdivision 3 of § 2.2-3705.7 exempts library records that can be used to identify both (i) any library patron who has borrowed material from a library and (ii) the material such patron borrowed. Staff noted that both elements must be present for the exemption to apply. The Subcommittee, Mr. Flynn, Mr. Wiley, and Ginger Stanley of VPA discussed the application of the exemption, noting that it would not protect a computer search but would protect electronic materials borrowed and that there had been no complaints from libraries about this exemption. There was no further comment.

Subdivision 4 of § 2.2-3705.7 exempts certain contract cost estimates and other records of the Virginia Department of Transportation (VDOT). Staff explained that the exemption was enacted in 1981 to protect the public purse in the procurement setting. A representative from VDOT stated that the agency uses the exemption to withhold engineering analyses and to protect the amounts VDOT is willing to pay, because otherwise bidders could manipulate the bids. Ms. Stanley asked about the monitoring program mentioned in the exemption; the Subcommittee moved on to consider other exemptions so that VDOT staff could check on the answer to this inquiry. At the end of the meeting, the Subcommittee returned to this topic, and VDOT stated that the program was to monitor bids and compare them to cost estimates. The Subcommittee did not recommend any changes to this exemption.

Subdivision 5 of § 2.2-3705.7 exempts lists of owners of bonds issued by a political subdivision. The Subcommittee at this time briefly discussed and clarified that if an exemption was considered but there were no comments or suggestions for change, then the recommendation would be to keep the current exemption without amendment. The Subcommittee then returned to consideration of subdivision 5. Mr. Ashby asked what the public interest was in this exemption. Mr. Wiley stated that if the information was not confidential, people would not be as willing to buy bonds. Mr. Merritt indicated most bond owners were in brokerage accounts now anyway. Mr. Wiley agreed, stating he was not sure that a locality would even have access to the list. The Subcommittee did not recommend any changes to this exemption.

³⁶ Staff was referring to *Richmond Newspapers, Inc. v. Casteen*, 42 Va. Cir. 505, 506-507 (City of Richmond 1997) (stating that correspondence "has a common meaning. It is unnecessary to resort to principles of statutory construction to determine what is meant. It is defined as the 'Interchange of written communications. The letters written by a person and the answers written by the one to whom they are addressed.' Black's Law Dictionary (6th ed. 1990), p. 344. Also 'communications by exchange of letters; letter writing.' Webster's New Twentieth Century Dictionary, unabridged (2d ed. 1983).").

Subdivision 6 of § 2.2-3705.7 exempts records relating to financial disclosures by members of the General Assembly. Staff stated that the exemption was enacted in 1986 and has not been amended. The public policy is to make financial disclosures public, but the records exempted are those submitted when a member is called before an ethics panel. There is a corresponding meetings exemption as well. The Subcommittee and interested parties discussed whether the exemption would need to be amended due to the formation of the new Virginia Conflict of Interest and Ethics Advisory Council.³⁷ The Subcommittee decided to carry over consideration of this exemption in order to gather more information on this topic.

Subdivision 7 of § 2.2-3705.7 exempts public utility customer account information. Staff noted that the current exemption requires the release of the amount "paid" for utility service but not the amount charged for such service, which has led to some confusion in application regarding unpaid utility bills. After some discussion of the basis of the exemption to protect customer privacy, the Subcommittee agreed without objection to amend the exemption to cover the amount paid or the amount charged.

Subdivision 8 of § 2.2-3705.7 exempts personal information filed with the Virginia Housing Development Authority or a local housing and redevelopment authority. After staff recited the legislative history of the exemptions enactment in 1988 and two subsequent amendments, there were no comments regarding this exemption.

Subdivision 9 of § 2.2-3705.7 exempts hazardous waste facility siting records. Staff noted there is a corresponding meetings exemption but there is no such facility in Virginia. Cindy Berndt of the Department of Environmental Quality (DEQ) stated that there is a statutory mandate to have a hazardous waste siting program and the exemption exists to protect local governments' bargaining positions. She observed there is still a requirement to publish notice of intent, to hold a public hearing, and to obtain all of the necessary environmental permits. She was unsure of the notice period but stated it was at least 30 days. There were no additional comments.

Subdivision 11 of § 2.2-3705.7 exempts certain game-related records of the Virginia Lottery. Staff stated that this exemption was created to protect proprietary records and the public purse; the exemption was enacted in 1989 and was subsequently amended this past regular session to reflect the Virginia Lottery's change of name.³⁸ The Subcommittee confirmed that the exemption is limited and that records would be disclosed under certain conditions. There was no further comment.

Noting that it had taken up subdivision 11 out of order, the Subcommittee next addressed subdivision 10 of § 2.2-3705.7, which exempts records regarding certain plant and animal species, natural communities, caves, and significant historic and archaeological sites. Representatives of the Department of Game and Inland Fisheries and the Department of Conservation and Recreation both expressed the importance of this exemption to their

³⁷ 2014 Acts of Assembly, cc. 792 and 804 (codified at Va. Code §§ 30-355 through 30-358).

³⁸ 2014 Acts of Assembly, c. 225.

work, stating that it helps with economic development and in protecting both landowners and resources. There was no additional comment.

Subdivision 12 of § 2.2-3705.7 exempts certain investment-related records of VRS, UVA, and VCSP. Staff stated that the exemption was added in 1993 to protect the public purse and proprietary records and that it has been amended three times. Robert Schultze, Director of VRS, stated that this exemption, along with subdivision 25, were meant to help protect aspects of the investment portfolios of VRS and the other entities, especially regarding private equity investments, which give the highest rate of return. Mr. Schultze further stated that VRS had been shut out by their highest performing private investment manager because of a lack of FOIA protections in 2005–2006. Afterward this exemption was amended and subdivision 25 was added to protect information provided by private partners; Mr. Schultze said he worked with VPA on the language for both exemptions. Mr. Schultz informed the Subcommittee that every state that invests in private equity has an exemption like this one, and he noted that VRS is still subject to oversight by the Joint Legislative Audit and Review Committee (JLARC). Ms. Fornash of UVA and Chris McGee, General Counsel for VCSP, agreed that the same concerns applied to their institutions. There were no additional comments.

Subdivision 16 of § 2.2-3705.7 exempts certain records of the DEQ, the State Water Control Board, the State Air Pollution Control Board, or the Virginia Waste Management Board relating to enforcement actions. Ms. Berndt stated that this exemption concerns the enforcement strategies of DEQ regarding regulatory programs, permits, and other things and that the records become public once enforcement is completed. There were no additional comments.

Subdivision 18 of § 2.2-3705.7 exempts certain records of the Virginia Lottery (Lottery) concerning retailers and individual game winners. Amy Dilworth spoke on behalf of the Lottery, stating that this exemption helps strengthen the perception of the integrity of the Lottery and shows that real people do win. Ms. Stanley noted that VPA agreed with the state agency about this exemption. There were no further comments.

Subdivision 25 of § 2.2-3705.7 exempts certain records of VRS, a local retirement system, or of VCSP relating to certain investment strategies, investment managers, or trade secrets. This exemption was already discussed in conjunction with subdivision 12. Ms. Fornash asked why UVA had not been added to this exemption, since UVA was included with subdivision 12; no one knew the answer. Mr. McGee noted that VCSP was added in 2009. There were no additional comments.

Mr. Tavenner asked if there were any additional comments or questions from the Subcommittee or the public; there were none. The Subcommittee decided to have staff poll members for future meeting dates. The meeting was then adjourned.

November 5, 2014

The Subcommittee held its fourth meeting on November 5, 2014. Subcommittee members Tavenner (Chair), Jones, and Oksman were present (members Ashby and Hamlett were absent). The purpose of the meeting was to continue the study of FOIA records exemptions in accordance with HJR 96.

After the call to order and introductions, the Subcommittee decided to take up matters on the printed agenda out of order, beginning with item #3 (new business); to continue implementation of the Subcommittee's work plan; and to return to item #2 (old business) at the end. Staff read the language of each exemption considered and gave a brief legislative history of each. The first six exemptions considered are of more general application or refer to prohibitions found outside of FOIA. The 12 that follow apply only to specific types of records and specific agencies. Each exemption is addressed separately below.

Exemptions of general application or that make reference to a prohibition outside of FOIA:

Subdivision 17 of § 2.2-3705.7 was enacted in 2000. It exempts records related to the operation of toll facilities that identify an individual, vehicle, or travel itinerary. There were no comments or recommendations for change.

Subdivision 22 of § 2.2-3705.7 was enacted in 2004 and amended in 2007 and 2013. It exempts certain records of state or local park and recreation departments and local and regional park authorities to the extent such records contain information identifying a person under the age of 18 years. Ginger Stanley of VPA said that VPA had opposed the 2013 amendment because it changed the "opt-out" provision to an "opt-in" provision, which goes counter to the FOIA principle that all public records are open to disclosure by default. She stated that VPA had worked with Virginia Beach on this legislation, that it was modeled on Florida law, that it is the only "opt-in" provision in Virginia FOIA, and that VPA still believes the change made in 2013 is not a good rule. Megan Rhyne of VCOG agreed, stating that VCOG also opposed the 2013 amendment because it changed the basic presumption of FOIA that public records are open. Mark Flynn of VML stated that similar information could be withheld at a library and that it was analogous to taking advantage of a public offering. There were no additional comments or recommendations for change.

Subdivision 24 of § 2.2-3705.7 was enacted in 2005. It exempts records of the Judicial Inquiry and Review Commission made confidential by § 17.1-913. There were no comments or recommendations for change.

Subdivision 26 of § 2.2-3705.7 was enacted in 2007. It exempts records of the Department of Corrections (DOC) made confidential by § 53.1-233; such records concern the identities of persons who conduct executions. Michele Howell spoke on behalf of DOC, stating that DOC uses this exemption and wants it to remain as it is. There were no additional comments or recommendations for change.

Subdivision 30 of § 2.2-3705.7 was enacted in 2012. It exempts names, physical addresses, telephone numbers, and email addresses contained in correspondence between an individual and a member of a public body of the locality in which the individual is a resident, unless the correspondence relates to the transaction of public business. Roger Wiley, an attorney representing local government and a former FOIA Council member, stated that the exemption as written does nothing and there is no point keeping it. Ms. Stanley agreed. Mr. Flynn observed it may do more mischief than it helps. The Subcommittee members voted unanimously to recommend that this exemption be eliminated.

Subdivision 33 of § 2.2-3705.7 was enacted in 2014. It exempts records created or maintained by or on behalf of the judicial performance evaluation program related to an evaluation of any individual justice or judge made confidential by § 17.1-100. There were no comments or recommendations for change.

Exemptions specific to particular types of records and specific agencies:

Subdivision 13 of § 2.2-3705.7 was enacted in 1993. It exempts names and addresses of subscribers to *Virginia Wildlife* magazine published by the Department of Game and Inland Fisheries (DGIF). Mr. Jones inquired whether this level of specificity was needed. Mr. Wiley asked whether there were any other agencies that publish magazines, and why this one was singled out. Phil Smith of DGIF stated that it was probably the result of a complaint about the receipt of solicitations, and that the release of this information may be a disincentive to subscribe to the magazine. He further stated that while the exemption used to be used regularly, there had been no requests for this information in several years. In response to an inquiry from Mr. Tavenner, Mr. Smith indicated he did not know what percentage of subscribers chose to "opt-out" using this exemption. Ms. Stanley stated that VPA had wondered about this exemption, and she requested that it be deleted. Mr. Oksman observed there may be right-to-privacy issues raised and that a right of access cannot translate into an invasion of privacy. Mr. Smith stated that DGIF gets requests for and releases its entire database of licensing information regularly and does get complaints from citizens about it. He confirmed for the Subcommittee that hunting and fishing license information is open, while subscriber information for the magazine is exempt. Staff observed that there is no general privacy exemption but all such exemptions are in the context of specific records. Staff further noted that when citizens interact with government it is still public business and that generally it is a false idea that such interactions are private. Mr. Smith stated that data aggregators buy the license information, and that 23 out of 50 states release it. The Subcommittee then voted unanimously to recommend that this exemption be eliminated.

Subdivision 14 of § 2.2-3705.7 was enacted in 1995. It exempts financial, medical, rehabilitative, and other personal information concerning applicants for or recipients of loan funds submitted to or maintained by the Assistive Technology Loan Fund Authority (ATLFA). Sandra Prince, Executive Director of ATLFA, had submitted written comments by email expressing the desire of ATLFA that the exemption remain as it is currently written. There were no additional comments or recommendations for change.

Subdivision 15 of § 2.2-3705.7 exempts various records of the VCUHSA. The exemption was enacted in 1996 and amended in 2000 to reflect the name change when the Medical College of Virginia Hospitals Authority became VCUHSA. Karah Gunther, representing VCU and VCUHSA, stated that they wanted to keep the current exemption but might propose legislation to add VCU to it because of shared governance and management between VCU and VCUHSA. Ms. Gunther stated she had spoken with VPA about the proposal and would bring it before the full Council at its next meeting. Mr. Wiley stated that he recalled that when this exemption was originally adopted it was heavily negotiated and all parties were comfortable with it at the time. There were no additional comments or recommendations for change.

Subdivision 19 of § 2.2-3705.7 exempts certain records of the Board for Branch Pilots relating to chemical or drug testing. It was enacted in 2003. Mark Courtney of the Department of Professional Occupational Regulation spoke in favor of keeping this exemption as it is currently written. There were no additional comments or recommendations for change.

Subdivision 20 of § 2.2-3705.7 exempts certain records pertaining to examinations of holder records pursuant to the Uniform Disposition of Unclaimed Property Act. It was enacted in 2003. Vicki Bridgeman, Director of the Division of Unclaimed Property, spoke in favor of keeping the exemption, stating that losing the exemption would take the surprise away from audits. Staff noted that there is also a different confidentiality provision for records required to be furnished to the Division of Unclaimed Property found outside of FOIA at § 55-210.24:2. There were no additional comments or recommendations for change.

Subdivision 21 of § 2.2-3705.7 exempts certain records of the Virginia Department of Emergency Management or a local governing body relating to citizen emergency response teams. It was enacted in 2004. Mr. Flynn stated that the exemption was needed so that response teams would not have to answer phones while responding to emergencies. There were no additional comments or recommendations for change.

Subdivision 23 of § 2.2-3705.7 exempts certain records submitted for inclusion in the Statewide Alert Network administered by the Department of Emergency Management. It was enacted in 2005. There were no comments or recommendations for change.

Subdivision 27 of § 2.2-3705.7 exempts certain records maintained by the Department of the Treasury or participants in the Local Government Investment Pool. It was enacted in 2008. Mr. Wiley observed that a general exemption covering financial account and routing numbers had been passed more recently,³⁹ and he asked whether this more limited exemption was still necessary. Bill Watt of the Department of the Treasury stated that the exemption was meant to protect wire transfers and that the Department would need time to review the matter to determine if subdivision 27 was no longer necessary. The

³⁹ Subdivision 13 of § 2.2-3705.1 (2010 Acts of Assembly, c. 553).

Subcommittee agreed by consensus to defer consideration of this exemption until its next meeting.

Subdivision 28 of § 2.2-3705.7 exempts certain personal information concerning residents or patients of the Department of Veterans Services Care Centers. Subdivision 29 of § 2.2-3705.7 exempts certain records maintained in connection with fundraising activities by the Veterans Services Foundation (VSF). Both exemptions were enacted in 2009. Steven Combs, Director of Policy & Planning at the Department of Veterans Services (DVS), spoke in favor of keeping both exemptions, stating that they were used by VSF when it raises funds to support DVS activities. Mr. Wiley asked why VSF is different from private foundations that are not subject to FOIA, such as those that support public institutions of higher education. Mr. Combs stated that VSF is different because it was created in the Code as a state body and its funds go through the state treasury, so it is subject to FOIA even though it operates like a nonprofit organization. There were no additional comments or recommendations for change.

Subdivision 31 of § 2.2-3705.7 exempts certain records of the Commonwealth's Attorneys' Services Council (CASC); it was enacted in 2013. Jane Chambers of the CASC spoke in favor of keeping the current exemption. There were no other comments or recommendations for change.

Subdivision 32 of § 2.2-3705.7 exempts certain records provided to the Department of Aviation by other entities of the Commonwealth in connection with the operation of aircraft, where the records would not be subject to disclosure by the entity providing the records. Mr. Flynn stated that he represented local airports and that this exemption would not apply to them. Staff noted that the exemption concerned records given to the Department of Aviation by other agencies, such as records about the Governor's travel itinerary or transporting prisoners for DOC, and allowed the Department of Aviation to maintain the confidentiality of such records. There were no other comments or recommendations for change.

Consideration of draft legislation:

The Subcommittee then returned to the second item on the agenda, the consideration of draft legislation previously requested. Mr. Jones indicated that his draft regarding the exemption for written advice of legal counsel, currently codified as subdivision 2 of § 2.2-3705.1, was not yet ready. At Mr. Jones' request, the Subcommittee chose to defer consideration of this exemption. The Subcommittee next considered whether the draft designed to protect citizens from unsolicited electronic mail (the "anti-spam" exemption, subdivision 10 of § 2.2-3705.1) needed to address other forms of social media such as Facebook and Twitter, but it was pointed out that those are substantively different, as they are ultimately controlled by third-party private companies, and public bodies do not maintain distribution lists equivalent to those used for electronic mail. The Subcommittee then voted unanimously in favor of recommending the proposed redraft of this "anti-spam" exemption. The next agenda item was subdivision 7 of § 2.2-3705.7, concerning access to public utility customer account information. It was pointed out that the Subcommittee had

already agreed at its meeting in August to recommend a draft that would amend the exemption to require the release of the amount of money charged for utility services as well as the amount of money paid, so no further consideration was needed today.

Another question raised was whether the Subcommittee should recommend that separate legislation be introduced each year as suggestions for changes were made or whether it should instead recommend a single piece of legislation at the end of the three-year study that incorporates all of the suggested changes. Out of concern that bringing legislation piecemeal each year might then require further changes as the study continues, the Subcommittee agreed by consensus that it would be better to bring a single omnibus bill at the end of the three-year study.

Mr. Tavenner asked if there were any additional comments or questions from the Subcommittee or the public; there were none. The Subcommittee decided to have staff poll members for dates for the next meeting to be held after the 2015 Session of the General Assembly has adjourned sine die. The Subcommittee meeting was then adjourned.

Work of the Records Subcommittee—Year Two, 2015

May 11, 2015

The Subcommittee held its first meeting of the 2015 interim on May 11, 2015, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Tavenner (Chair), Ashby (Vice-Chair), Hamlett, and Oksman were present; Mr. Jones was absent.

After the meeting was called to order, staff presented a brief review of the Subcommittee's work thus far. HJR No. 96 directs the FOIA Council to conduct a three-year study of FOIA examining all of the exemptions in FOIA, as well as the organization and structure of FOIA. In 2014, the Records Subcommittee began its consideration of the records exemptions in FOIA by considering §§ 2.2-3705.1 (exemptions of general application), 2.2-3705.8 (limitation on record exclusions), and 2.2-3705.7 (records of specific public bodies and certain other limited exemptions).

The Subcommittee then considered old business. It deferred consideration of the exemption for written advice of legal counsel, subdivision 2 of § 2.2-3705.1, as Mr. Jones had expressed particular concern about this exemption last year but was unable to attend today's meeting. The Subcommittee also deferred consideration of the working papers and correspondence exemption, subdivision 2 of § 2.2-3705.7, as it is expected that at its next meeting, the FOIA Council will refer to the Subcommittee two relevant bills from the 2015 Session of the General Assembly.

The Subcommittee next considered subdivision 27 of § 2.2-3705.7, an exemption for certain records maintained by the Department of the Treasury (Treasury) or participants in the Local Government Investment Pool. The Subcommittee deferred consideration of this exemption last year in order to determine whether it was still necessary given the exemption

for account and routing numbers enacted in 2010.⁴⁰ Treasury representatives pointed out that subdivision 27 covers other sensitive information such as authorized signatories, email and mailing address, tax identification numbers, and other information not covered under the exemption for account and routing numbers, and therefore both exemptions should be kept. Roger Wiley, an attorney representing local government and a former FOIA Council member, and Bill Watt from Treasury agreed that the exemption is not meant to conceal the fact that funds are invested, but only to protect information that is required to be provided. Mr. Wiley suggested the possibility of amending the general exemption for account and routing numbers to include the other sensitive information, as part of the purpose of the study is to eliminate single-entity exemptions. He expressed that such sensitive information would be relevant to any bank or investment account and should be protected regardless of who holds it. It was agreed that Mr. Wiley would work with Treasury to come up with proposed language for the Subcommittee's consideration.

The Subcommittee then considered subdivision 6 of § 2.2-3705.1, an exemption for certain vendor proprietary information software. The Subcommittee deferred consideration of this exemption in 2014 in order to study it in conjunction with other proprietary records exemptions in § 2.2-3705.6, which is the first section to be considered in 2015. Craig Merritt, speaking on behalf of VPA, reminded the Subcommittee that VPA had submitted a white paper last year that proposed using a generic proprietary records exclusion rather than the many exemptions in current law that are limited to individual entities. Mr. Wiley stated his agreement, and he pointed out that FOIA is criticized by the media for having too many exemptions. Staff noted that the term "trade secrets" is defined under the Uniform Trade Secrets Act (UTSA) (Code § 59.1-336 et seq.), but the term "proprietary" has no statutory definition. The Virginia Supreme Court recently held that "proprietary" should be given its ordinary meaning: "a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls."⁴¹ Staff noted that the statutory definition of "public record" expresses similar concepts in the part referring to records "prepared or owned by, or in the possession of a public body or its officers, employees or agents."⁴² Staff also noted that in the procurement context, there are three different types of proprietary records exempted.⁴³ Mr. Ashby noted the lack of uniformity in the use of the term. Mr. Merritt recommended that "proprietary" stop being used incorrectly, as it merely refers to an ownership interest, not a confidence. In response to inquiries from Mr. Ashby, Sandi McNinch of the Virginia Economic Development Partnership (VEDP) stated that the idea of having a single generic exemption would be acceptable as long as it covers everything that needs to be protected. She further observed that subdivision 3 of § 2.2-3705.6 works well for VEDP as it is currently written. After some further discussion, the Subcommittee agreed to have staff and interested parties form a work group to study the issue of proprietary records and trade secrets in depth and come up with a proposal.

⁴⁰ Subdivision 13 of § 2.2-3705.1.

⁴¹ *American Tradition Institute v. Rector and Board of Visitors of the University of Virginia*, 287 Va. 330, 341, 756 S.E.2d 435, 441 (2014) (quoting *Green v. Lewis*, 221 Va. 547, 555, 272 S.E.2d 181, 186 (1980)).

⁴² Va. Code § 2.2-3701.

⁴³ See subdivision 11 of § 2.2-3705.6.

The Subcommittee directed staff to poll for future meeting dates. The meeting was then adjourned.

June 18, 2015

The Subcommittee held its second meeting of the 2015 interim on June 18, 2015, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Ashby (Vice-Chair), Hamlett, and Oksman were present; Mr. Tavenner (Chair) and Mr. Jones were absent.

After members were introduced and the meeting was called to order, the Subcommittee began discussing the exemption for written advice of legal counsel and attorney-client privileged records, subdivision 2 of § 2.2-3705.1. Staff presented a brief legislative history of the exemption, which was first enacted in 1982 and subsequently amended in 1989, 1999, 2000, and 2002. Originally the exemption applied to written advice of local government attorneys, but over the years its application was expanded to include state and regional bodies as well; there were also several technical changes. As further background, staff also shared excerpts from two opinions of the Supreme Court of Virginia setting forth the elements of attorney-client privilege at common law, as quoted in Freedom of Information Advisory Opinion 04 (2011). Staff also noted that because Mr. Jones was unable to attend today's meeting, he submitted written comments (incorporated herein by reference) expressing his concerns about misunderstanding and overly broad usage of this exemption. The comments concluded that these concerns would be addressed best through education and enforcement rather than legislative change. The Subcommittee then opened the matter to general discussion.

Dave Ress, a reporter with the *Daily Press*, and Roger Wiley, an attorney representing local government and a former FOIA Council member, discussed how this exemption is really in two parts, one for the written advice of legal counsel and the other for records deemed attorney-client privileged at common law. Their conversation noted that generally the attorney-client privilege covers communications from client to attorney, while the written-advice-of-counsel aspect of the exemption would cover written communications flowing from attorney to client. They also discussed the public policy merits of keeping such legal advice confidential versus making it public. Ms. Hamlett stated that in her experience representing state agencies, she needed to be able to communicate with the client confidentially and such confidential communications helped protect the public purse. She and Mr. Wiley agreed that some communications might come out during litigation, and that completed contracts should be open, but not the discussion of legal matters leading up to a contract. Mr. Ashby observed there is a balance in the policy judgment that having candid, frank legal advice may sometimes override the public's general right to know. Staff noted that generally the client holds the privilege and may waive the privilege, but professional legal ethics require the attorney to maintain confidentiality. Craig Merritt, speaking on behalf of VPA, stated that the intention of the 1999 revision was to give public bodies and their attorneys the same protections others would have. He also said, regarding subdivisions 2 and 3 of § 2.2-3705.1, which address attorney-client privileged records and

work product records, respectively, that the concepts are well-understood and he does not know why one would change them for the sake of change. Mr. Wiley further observed that in the meetings context, the lawyer does not necessarily have to be present and written legal advice may avoid the need for a closed meeting. There was no further comment on this matter; as there was no motion, the Subcommittee took no action.

The Subcommittee next considered the working papers and correspondence exemption, subdivision 2 of § 2.2-3705.7. Staff reviewed the legislative history of this exemption, which was part of FOIA when it was first enacted in 1968. The exemption was amended in 1974, 1977, 1991, 1992, 1994, 1999, 2010, 2011, and 2013. The amendments generally added to the list of officials who could use the exemption, defined certain terms used in the exemption, and made various technical changes. The FOIA Council at its last meeting referred to the Subcommittee HB 1722 (Ramadan) and SB 893 (Petersen) from the 2015 Session of the General Assembly, identical bills that would have eliminated the working papers and correspondence exemption for the president or other chief executive officer of any public institution of higher education in Virginia. Staff observed that presidents and chief executive officers of public institutions of higher education had been added to the exemption with the 1974 amendment.

Mr. Ashby began the discussion by asking if other states had equivalent exemptions. Megan Rhyne of VCOG stated that there were various versions in different states but Virginia is the only one with an exemption for university presidents. Mr. Ashby asked if the Subcommittee members had any comments or questions; there were none, so he opened the floor to public comment. Ms. Rhyne related that in the past there was a problem with overuse of a "Governor's Working Papers" stamp and merely sending records to the office of an official named in the exemption, and the 1999 revision was to help address these problems. She stated that under the current version there are still problems with the exemption being used too broadly, for example, by being used to withhold all correspondence of named officials, Governor's calendars, and other records. She further stated that the exemption extends to hundreds of people and effectively removes them all from public accountability. She offered two recommendations for narrowing the exemption: (1) make it apply to correspondence only if it is related to working papers and (2) have either a timed release or require that once a decision or announcement is made, the records should be released.

Mr. Ashby stated that he did not support the idea of a timed release, and he asked whether presidents of public institutions of higher education currently release records once finished with them. Staff reminded the Subcommittee that once a working paper is disseminated beyond a named official's personal or deliberative use, it is no longer exempt from mandatory disclosure. In response to Mr. Ashby's inquiries, a representative of the Library of Virginia stated that working papers that have been released by presidents of public institutions of higher education go into the archives at the Library and that the public can access them there.

Mr. Wiley asked why university presidents should be treated differently than other public officials, and he noted that everything Ms. Rhyne said would apply to the Governor and other named officials as well. Kay Heidbreder, University Legal Counsel for Virginia Tech,

noted that a modern university is like a small city; it is more complex than many small towns, and thus university presidents should be treated the same as chief executives of localities. She informed the Subcommittee that a president is involved in bringing in new businesses, expanding businesses, and engaging in other economic development matters; forging strategic partnerships with other universities both within and outside of Virginia; and spearheading organizational changes, enrollment growth plans, and other matters that require the ability to think through issues before being challenged regarding them.

Patrick Wilson, a reporter with the *Virginian Pilot*, stated that if universities are more complex than localities, then there should be more sunlight and public input to help with considering issues pertaining to them. He set forth an example of Norfolk City Schools, stating that the superintendent withholds all correspondence, that the school system is one of the lowest scoring in the state, and that it missed a deadline for federal money. He questioned, given the list of officials who can use the working papers and correspondence exemption, who is left from whom the public can get records. He stated that the broad use of this exemption goes against FOIA principles.

Mr. Ress also provided examples of records he felt should have been disclosed but were withheld: four consultant reports on a Hampton aquatic center, communications from department heads to a city manager regarding capital needs, and a funding request from the Virginia Air and Space Center in Hampton regarding a city-funded venture. He related that there is confusion regarding what qualifies as a working paper, and he gave as an example the withholding of student activity funds raised by students (note that both Mr. Wiley and staff indicated that such records would not be working papers). Mr. Ress provided examples from other states: in California, there was an issue regarding access to the Governor's appointment book that resulted in a 2004 amendment requiring its release; in Delaware, the state supreme court ruled there was no executive privilege for any official except the governor; and in Massachusetts, there is no executive privilege, and an exemption for draft records no longer applies once a decision has been reached. Mr. Ress suggested changing the definition of "working papers" to read "by or exclusively for" one of the named public officials.

Mr. Merritt stated that the idea of "working papers and correspondence" is one concept but that it has been interpreted as two separate things, leaving "correspondence" untethered. He suggested that "correspondence" should be defined just as "working papers" is, and he provided sample language to that effect. As background, staff noted that the term "working papers" is defined in the exemption, but the term "correspondence" is not. While there does not appear to be any precedent from the Supreme Court of Virginia, the term "correspondence" has been given its common meaning as "the interchange of written communications" in at least two circuit court cases.⁴⁴ Mr. Wiley mentioned that former Chief Justice Carrico stated in a case⁴⁵ prior to those cases that the intent was to protect not

⁴⁴ *Richmond Newspapers, Inc. v. Casteen*, 42 Va. Cir. 505, 506-507 (Circuit Court of the City of Richmond 1997); *Redinger v. Casteen*, 35 Va. Cir. 380, 385 (Circuit Court of the City of Richmond 1995) (both cases quoting Black's Law Dictionary (6th ed. 1990) at 344).

⁴⁵ *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219, 409 S.E.2d 136 (1991) (note that Mr. Wiley was the attorney of record for Mr. Taylor in this case).

only the recipient, but also the sender, such as when a citizen has written to the Governor or state legislators. He further observed that local governing bodies do not have the same protections and citizens are often surprised when their letters to local officials are made public.

After some further discussion, Mr. Merritt suggested eliminating "and correspondence" from the exemption, noting that correspondence that fits the definition of "working papers" would still be protected. Mr. Ashby asked if there were any comments regarding either the bills referred to or more broadly, and he stated that he was not prepared to make a motion at this time. Mr. Oksman stated that he also was not ready to make a motion but that he would like documentation regarding abuses of the exemption. Ms. Rhyne provided Mr. Oksman with written examples; Mr. Oksman asked if these examples characterized as "abuses" were things not allowed under current law. Ms. Rhyne stated that some were flat-out abuses, such as claiming the exemption after sharing records beyond the bounds of persons covered by the exemption, but others were allowed uses, as the exemption has been applied and expanded over the years. She gave the example of working papers held by the Governor's Uranium Mining Commission in 2012, which were exempt but of intense public interest. She stated that the exemption has been used to cover so many important issues it has become a catchall. Mr. Oksman indicated he would like to hear more examples in which the exemption allows something to be withheld that should not be withheld.

Mr. Ashby asked if anyone representing the college and university presidents would like to speak as to why they should be treated the same or differently. Laura Fornash of UVA stated on behalf of those present that they would like to prepare further and speak to the issue at a future meeting. Mr. Ashby indicated he would like to see more about why the exemption came about, as a matter of policy. He asked if there were any motions on the matter; there were none.

Staff then reminded the Subcommittee that the Subcommittee had directed the formation of a Proprietary Records Work Group consisting of staff and interested parties to study the various exemptions for proprietary records and trade secrets in § 2.2-3705.6 and elsewhere in FOIA. Additionally, staff reminded the Subcommittee that the next set of exemptions to be studied, as per the study plan, would be the public safety exemptions found in § 2.2-3705.2.

The Subcommittee scheduled its next meeting to be held at 10:00 a.m. on Wednesday, July 22, 2015, noting that the full FOIA Council is scheduled to meet that afternoon. The Subcommittee meeting was then adjourned.

July 22, 2015

The Subcommittee held its third meeting of the 2015 interim on July 22, 2015, to continue the three-year study of FOIA directed by HRJ 96. Subcommittee members Tavenner (Chair), Hamlett, Jones, and Oksman were present; Mr. Ashby (Vice-Chair) was absent.

After members were introduced and the meeting was called to order, the Subcommittee resumed its previous discussion of the exemption for working papers and correspondence, subdivision 2 of § 2.2-3705.7. Staff reminded the Subcommittee that the FOIA Council at its last meeting referred to the Subcommittee HB 1722 (Ramadan) and SB 893 (Petersen) from the 2015 Session of the General Assembly, identical bills that would have eliminated the working papers and correspondence exemption for the president or other chief executive officer of any public institution of higher education in Virginia. Staff observed that presidents and chief executive officers of public institutions of higher education had been added to the exemption with the 1974 amendment. Elizabeth Kersey, representing Old Dominion University (ODU), advised that the president of ODU was also the president of the Council of Presidents. Ms. Kersey provided the Subcommittee with a letter signed by all of the presidents of public institutions of higher education stating their opposition to HB 1722/SB 893 and the reasons therefor. A copy of the letter from the Council of Presidents appears on the FOIA Council's website. Craig Merritt, speaking on behalf of VPA, said that the objective of the exemption is to protect the executive deliberative process and that the concern of VPA was over the use of the term "correspondence" to protect records that were not part of that deliberative process. Carlos Hopkins, counsel to the Governor, observed that there are many policy discussions conducted via email. Mr. Tavenner observed that all correspondence of the officials listed in the exemption is currently exempt regardless of the nature of the correspondence. Mr. Merritt suggested changes to the definition to tie the term "correspondence" to the concept of deliberative process. Laura Fornash from UVA stated that UVA uses the exemption only for policy discussions, not to protect all of the UVA president's email. Dave Ress, a reporter for the *Daily Press*, stated that the whole exemption is broadly applied to keep records out of the hands of the public. He handed out copies of his comments comparing several different states and how they handle similar records (incorporated by reference and available on the FOIA Council website).

Delegate Ramadan next spoke specifically to his bill, HB 1722. He urged the elimination of the entire exemption but in particular the part including university presidents because they are not elected officials or staff to elected officials. He said that from his experience on the Board of Visitors for George Mason University he did not see anything that needed to be shielded. He noted no other state agency or department head has the same protections, and he asserted that universities should not be treated differently, because public universities are state agencies. He responded to four points made in the Council of Presidents' letter by stating as follows: (1) universities are not like cities and university presidents are not like mayors because universities are academic communities and their presidents are not elected; (2) regarding presidents being involved in bringing in new businesses, there are other exemptions in FOIA to cover competitive deals and trade secrets and such a role is a secondary one for presidents; (3) regarding strategic partnerships with others in-state and out-of-state, if they are strategic the public should know about them, and no other state has the same protections, so records out-of-state are not protected on the other side; and (4) regarding presidents' involvement in organizational issues such as enrollment growth plans, of course they should be involved but it should be a public process. Delegate Ramadan concluded by stating he saw no reason for the exemption and, as it was a bipartisan bill (SB

893 introduced by Senator Petersen was identical to HB 1722), he hoped the Subcommittee would recommend it.

Mr. Ress noted that when other states addressed similar exemptions, their exemptions applied only to the state governor. Marisa Porto, who is a newly appointed member of the FOIA Council, as well as President of VPA and Vice President of Content for the *Daily Press*, stated that this exemption is routinely used overbroadly. Megan Rhyne of VCOG handed out a chart she had prepared that listed examples of ways the working papers exemption had been used. In further discussion, Mr. Tavenner observed that there were two issues being discussed: (1) the inclusion of university presidents in the exemption and (2) the use of the term "correspondence" in the exemption. Roger Wiley, a former FOIA Council member and an attorney representing local government, pointed out that while removing university presidents would not affect local government, the Subcommittee should consider the practical and potentially negative consequences of removing the term "correspondence." Mr. Ress suggested considering opening up papers after a decision was reached. Turning specifically to HB 1722, Mr. Jones noted that Virginia is the only state that gives this type of exemption to university presidents, and he asked how it works for other states. Ms. Rhyne stated that while Virginia is the only state with this type of exemption for university presidents, in many states universities are not covered by freedom of information laws at all. There was some further discussion about whether there were academic freedom considerations at issue and whether keeping or removing university presidents from the exemption would make the governance of public universities more or less political. After further discussion, Mr. Jones moved to recommend HB 1722/SB 893 by striking the language including university presidents from the working papers and correspondence exemption. The motion died for lack of a second. The Subcommittee then directed staff to prepare a draft that would move the term "correspondence" within the definition of "working papers" for consideration at the next Subcommittee meeting. The Subcommittee next considered certain records maintained by the Department of the Treasury or participants in the Local Government Investment Pool (§ 2.2-3705.7(27)). At its last meeting, the Subcommittee deferred consideration of this exemption in order to determine whether it was still necessary, given the exemption for account and routing numbers enacted in 2010 (§ 2.2-3705.1(13)). At the Subcommittee's May meeting, it was agreed that Treasury officials and local government representatives would discuss the possibility of eliminating the more specific exemption (§ 2.2-3705.7(27)) if the general exemption for account and routing numbers (§ 2.2-3705.1(13)) were amended to protect additional information and, if so, what additional information would need to be protected. Unfortunately, there was a Department of the Treasury board meeting at the same time as this meeting, and, as a result, no representatives of the Department of the Treasury were available. The Subcommittee again deferred consideration of this exemption.

The Subcommittee next considered open meeting exemptions referred by the Meetings Subcommittee because the meeting exemption contained only a cross reference to the corollary record exemption. The first such exemption was for certain records of the VRS, a local retirement system, the rector and visitors of UVA, or the VCSP relating to the acquisition, holding, or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated

securities exchange. The Subcommittee considered this exemption last year and recommended leaving it unchanged. However, a proposal to amend the corresponding closed meeting exemption, § 2.2-3711(A) (20), was brought before and recommended by the Meetings Subcommittee. The amendment of the meetings exemption would require a corresponding amendment of the records exemption. The amendments would allow the existing exemptions to be used in the case of local boards that invest funds for post-retirement benefits other than pensions. Mr. Wiley explained that these investments are the equivalent to investments made by the VRS, but on a local level. The Subcommittee voted unanimously to make a corresponding amendment of the records exemption.

The Subcommittee next revisited the personnel records exemption. Last year, the Subcommittee voted to recommend combining the provisions of the personnel records exemption, § 2.2-3705.1(1), with the limitations to that exemption found at § 2.2-3705.8(A), so that all of the provisions concerning personnel records could be found in one statutory provision. In its consideration of the personnel exemption for closed meetings, the Meetings Subcommittee heard a proposal to open to the public performance reviews of local chief executives and school superintendents. The Meetings Subcommittee rejected this proposal but after much discussion voted to ask staff to prepare a draft for consideration by the Records Subcommittee that would amend the personnel records exemption to open to the public the terms of dismissal of such chief executive officers unless ordered otherwise by a court. Mr. Ress stated that it had been his suggestion to open to the public deliberations when senior executives were up for disciplinary matters or performance reviews as a matter of public accountability. When asked about the scope of the suggestion, Mr. Ress said it started at the local government level but, from looking at other states, he felt it should also include state department heads and include performance reviews, resignations, terminations, and records antecedent to a decision not to review.

Mr. Wiley said that at the local government level not including schools, administrative officials serve at the pleasure of the governing body, have no fixed terms, and can be fired for any reason or no reason. He observed that requiring these processes to be public may introduce items into the record that may or may not be real reasons, as well as open the door to litigation such as defamation suits. He agreed that the records should be open as to severance benefits, leave amounts, etc., but that governing bodies should preserve the ability to give no reason at all. Mark Flynn of VML agreed, noting that he had been involved in such lawsuits and that the public pays for it. Ms. Porto noted there are states where everything is open for all employees except health records and personal contact information, and those states are able to function. Mr. Tavenner noted that personnel evaluations would be written differently if the author(s) knew the evaluations would be subject to public disclosure and that, for many officials and employees, there are no written evaluations anyway. After further discussion, the Subcommittee and staff considered what a draft would entail in detail: what type of records would be covered, to whom it would apply, how it could be worded, and how it might interact with current law and practice. Mr. Tavenner asked if there were any motions; there were none.

Staff provided the Subcommittee with a progress report on the work of the Proprietary Records Work Group, created at the direction of the Subcommittee to consist of staff and

interested parties to study the various exemptions for proprietary records and trade secrets in § 2.2-3705.6 and elsewhere in FOIA. It was suggested that the many specific exemptions in current law for various types of records containing trade secrets and proprietary information might be consolidated into one or more exemptions of general application. The Work Group has met twice, on June 18 and July 21, 2015, and is considering a draft that provides a general exemption that may be used by any public body to the extent that a portion of such records contains proprietary information or trade secrets. The draft is still under discussion at the Work Group level. The Work Group also recommended a draft to address copyright-protected records. The Subcommittee took no action.

Continuing with the implementation of Subcommittee work plan, the Subcommittee considered the following records exemptions:⁴⁶

- Confidential records, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses (§ 2.2-3705.2(1)). The Subcommittee by consensus will recommend no change in the exemption.
- Certain portions of engineering and construction drawings and plans (§ 2.2-3705.2(2)). Craig Merritt, representing the VPA, pointed out that there was certain overlap between this exemption and subdivisions 4, 6, and 14 set out below. It was suggested that staff develop a chart comparing subdivisions 2, 4, 6, and 14 of 2.2-3705.2 to show where there is redundancy or overlap to enable the Subcommittee to remove the redundancies and craft a clearer exemption. Accordingly, the Subcommittee deferred consideration of this exemption until its next meeting on August 18, 2015.

Staff noted that the application of subdivision 6 is currently before the Supreme Court of Virginia in the case of *Surovell v. Department of Corrections*. Staff told the Subcommittee that it will keep them updated on this case.

- Certain records of security systems used to control access to or use of any automated data processing or telecommunications system (§ 2.2-3705.2(3)). Without objection or public comment, the Subcommittee made no recommendation for any change to this exemption.
- Plans and information to prevent or respond to terrorist activity or cyber attacks, and certain records concerning antiterrorism and cybersecurity planning and protection (§ 2.2-3705.2(4)). As noted above, the Subcommittee directed staff to develop a chart comparing subdivisions 2, 4, 6, and 14 of 2.2-3705.2 to show where there is redundancy or overlap so as to enable the Subcommittee to remove the redundancies and craft a clearer exemption. Accordingly, the Subcommittee deferred consideration of this exemption until its next meeting on August 18, 2015.
- Certain records of the security aspects of a railroad system safety program plan, and certain records of an ongoing investigation of a rail accident or other incident

⁴⁶ No recommendation for change was the consensus of the Subcommittee where there was no public or other comment on a specific exemption.

- threatening railway safety (§ 2.2-3705.2(5)). Bethany Wolfe of the Department of Rail and Public Transportation stated that the Department would like to keep the exemption as it is, and in response to a question from Mr. Ress, she pointed out that federal law is controlling. The Subcommittee made no recommendation for any change to this exemption.
- Certain records that would jeopardize the security of any governmental facility, building, or structure or the safety of persons using such facility, building, or structure if disclosed (§ 2.2-3705.2(6)). As noted above, the Subcommittee directed staff to develop a chart comparing subdivisions 2, 4, 6, and 14 of 2.2-3705.2 to show where there is redundancy or overlap so as to enable the Subcommittee to remove the redundancies and craft a clearer exemption. Accordingly, the Subcommittee deferred consideration of this exemption until its next meeting on August 18, 2015.
- Records of school safety audits (§ 2.2-3705.2(7)). The Subcommittee noted that this exemption refers to § 22.1-279.8, which requires the results of a school safety audit to be made public within 90 days of completion. Without objection or public comment, the Subcommittee made no recommendation for any change to this exemption.
- Expired exemption (§ 2.2-3705.2(8)). The Subcommittee by consensus recommended the deletion of this expired exemption.
- Certain records of the Commitment Review Committee concerning the mental health assessment of an individual subject to commitment as a sexually violent predator (§ 2.2-3705.2(9)). Ms. Rhyne stated that an equivalent meetings exemption had been recommended by the Meetings Subcommittee.⁴⁷ Without objection, the Subcommittee made no recommendation for any change to this exemption.
- Certain subscriber data provided by a telecommunications carrier to a public body that operates a 911 or other emergency dispatch or notification system, if the data is in a form not made available by the telecommunications carrier to the public generally (§2.2-3705.2(10)); certain subscriber data collected by a local governing body; and other identifying information of a personal, medical, or financial nature provided to a local governing body in connection with a 911 or other emergency dispatch or notification system, if such records are not otherwise publicly available (§ 2.2-3705.2(11)). Staff explained that these exemptions protect unpublished telephone numbers, whether the number was given from a carrier to a public body or gathered by the public body itself. Without objection or public comment, the Subcommittee made no recommendation for any change to these exemptions.

Certain records of the VMAC or certain other public bodies concerning federal military and national security base closure, realignment, or relocation (§ 2.2-3705.2(12)). The Subcommittee deferred consideration of this exemption, as no representative of the VMAC was present.

- Certain records as determined by the State Comptroller that describe the design, function, operation, or implementation of internal controls over the Commonwealth's financial processes and systems, and the assessment of risks and vulnerabilities of those

⁴⁷ Subdivision A 31 of § 2.2-3711 allowing closed meetings for certain discussions of the Commitment Review Committee.

- controls (§ 2.2-3705.2(13)). The Subcommittee deferred consideration of this exemption until its next meeting on August 18, 2015.
- Certain records relating to STARS or any other similar local or regional public safety communications system (§ 2.2-3705.2(14)). As noted above, the Subcommittee directed staff to develop a chart comparing subdivisions 2, 4, 6, and 14 of 2.2-3705.2 to show where there is redundancy or overlap so as to enable the Subcommittee to remove the redundancies and craft a clearer exemption. Accordingly, the Subcommittee deferred consideration of this exemption until its next meeting on August 18, 2015.
- Records of a Fire/EMS company or department that disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties (§ 2.2-3705.2(15)). Without objection or public comment, the Subcommittee made no recommendation for any change to this exemption.
- Certain records of hospitals and nursing homes that reveal the disaster recovery plans or the evacuation plans for such facilities in the event of fire, explosion, natural disaster, or other catastrophic event (§ 2.2-3705.2(16)). Without objection or public comment, the Subcommittee made no recommendation for any change to this exemption.
- The Subcommittee asked for public comment, but there was none made at this time, as public comment was taken throughout the meeting on a per exemption basis.

The next meeting of the Subcommittee is scheduled to be held at 10:00 a.m. on Tuesday, August 18, 2015. There being no further business, the Subcommittee meeting was adjourned.

August 18, 2015

The Subcommittee held its fourth meeting of the 2015 interim on August 18, 2015, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Tavenner (Chair), Hamlett, Jones, and Porto were present; Mr. Ashby (Vice-Chair) was absent.

After members were introduced and the meeting was called to order, the Subcommittee resumed its previous discussion of the exemption for working papers and correspondence, subdivision 2 of § 2.2-3705.7. Staff reminded the Subcommittee that at its last meeting, a motion was made to recommend the language of HB 1722 (Ramadan) and SB 893 (Petersen) from the 2015 Session of the General Assembly, identical bills that would have eliminated the working papers and correspondence exemption for the president or other chief executive officer of any public institution of higher education in Virginia, but that motion died for lack of a second. However, staff was directed to draft an amendment that would eliminate "correspondence" from the exemption but to amend the definition of "working papers" to include correspondence. The Subcommittee reviewed the draft prepared by staff, and the discussion centered on a staff-recommended change in the definition of "working papers": the striking of the word "or" in the phrase "personal or deliberative use." Staff noted that this was done for discussion purposes, as the term "personal" used in conjunction with "correspondence" was unclear.

It was agreed by all in attendance at the meeting that the purpose of the exemption was to create a zone of privacy for the deliberative use of the official to whom the working paper privilege applies. In this context, the words "personal use" are meant to refer to use of the record by the individual who holds the exemption. The alternative interpretation would be a distinction between what is "personal" and what is "public." It was agreed that this was not the proper interpretation because the definition of "public records" already limits the application of FOIA to records "in the transaction of public business." After extensive discussion about how a court would interpret that amendment, and stating that the goal was to clarify the exemption without changing it, the Subcommittee voted 3 to 1 to keep the phrase "personal or deliberative use."⁴⁸ Mr. Tavenner called for additional public comment on the draft. Ms. Porto shared notes she had received from Dave Ress, a reporter with the *Daily Press*, suggesting that the exemption should be amended so that once a decision was reached, the exemption would no longer apply. A motion was made to continue this idea at the next meeting of the Subcommittee, but the motion failed by tie vote.⁴⁹ The Subcommittee then voted unanimously to recommend the draft as amended to the FOIA Council.

The Subcommittee next revisited the exemption for certain records maintained by the Department of the Treasury or participants in the Local Government Investment Pool (LGIP) that relate to information required to be provided by such participants to the Department of the Treasury to establish accounts (§ 2.2-3705.7(27)). Tim Wilhide, Department of the Treasury, told the Subcommittee that he managed the LGIP and the records contain sensitive information, including tax identification numbers. Mr. Wilhide stated that the Department of the Treasury was not in favor of being the conduit to release this type of information. Chris McGee of the VCSP advised that he agreed with the Department of the Treasury's position. There was no further public comment. The Subcommittee made no recommendation to change the existing exemption.

The Subcommittee next considered the exemption for the records that describe the design, function, operation, or implementation of internal controls over the Commonwealth's financial processes and systems, and the assessment of risks and vulnerabilities of those controls, including the annual assessment of internal controls mandated by the State Comptroller (§ 2.2-3705.2(13)). Randy McCabe, State Comptroller, advised the Subcommittee that internal controls protect the financial assets of the Commonwealth and this is the Commonwealth's standard practice in both the public and private sectors. Staci Henshaw, Deputy Auditor of Public Accounts, agreed with Mr. McCabe. There was no public comment. The Subcommittee made no recommendation to change the existing exemption.

The Subcommittee then revisited the records exemption for the VMAC or certain other public bodies concerning federal military and national security base closure, realignment, or relocation (§ 2.2-3705.2(12)), which had been deferred from the previous meeting of the Subcommittee. Jaime Areizaga-Soto, Deputy Secretary of Veterans and Defense Affairs,

⁴⁸ All members present voted in favor of the motion except for Ms. Porto, who voted against the recommendation.

⁴⁹ Ms. Porto and Mr. Jones voted in favor, Mr. Tavenner and Ms. Hamlett voted against.

advised the Subcommittee that the VMAC works with the Department of Defense concerning Ft. Belvoir and the Pentagon and an executive summary is provided at the end of each year that describes the activities of the VMAC. Mike Coleman, also with the Secretary's office, told the Subcommittee that the VMAC is trying to identify assets of the defense industry and military installations and that a portion of the exemption is to protect trade secrets provided to the VMAC in carrying out its mission. He acknowledged that, to date, the VMAC has not seen any records containing trade secrets. Mr. Coleman indicated that because there may be high-level discussion with the military industry, it was the position of the Secretary to keep the exemption as currently written, even though there may be overlap with other FOIA exemptions for trade secrets. Ed Jones explained to the Subcommittee that at Dahlgren, there is a lot of work done by private defense contractors and while that part of the exemption has not been used, it easily could be. Mr. Tavenner stated that the issue is not whether the exemption has been used but, rather, if it is needed. There was no public comment. The Subcommittee made no recommendation to change the existing exemption. Before moving to the next item of business, Craig Merritt, representing the VPA, inquired whether, if the Proprietary Records Work Group is able to craft a general trade secret exemption, it would be acceptable to the VMAC if the trade secrets portion of their exemption would be eliminated. Mr. Coleman responded that that would be acceptable but that VMAC would like to see a cross-reference in this exemption to any general trade secret exemption.

The next agenda item was the review of the staff-prepared comparison chart relating to the various public safety exemptions found in § 2.2-3705.2, including subdivisions 2 (portions of engineering and construction drawings and plans), 4 (terrorism and cybersecurity plans), 6 (security of governmental facilities, buildings, and structures, and safety of persons using them), and 14 (STARS or any other similar local or regional public safety communications system). Staff advised that, in the course of preparing the comparison, it became apparent that there was significant overlap between the exemptions. Roger Wiley, representing local governments, told the Subcommittee that this public safety exemption should include protection at all levels of government and for private buildings and facilities as well. Ms. Porto indicated that she would be interested in consolidating the above exemptions, as long as the law did not change. Ed Jones suggested that staff prepare a draft, based on what was revealed by the comparison chart, for the Subcommittee's review at its next meeting. Mr. Tavenner indicated that with the exemption for STARS (subdivision 14 of § 2.2-3705.2), if the exemptions were combined, it may not be helpful to law-enforcement agencies. Currently, all protected material is articulated under subdivision 14 as it relates to STARS, and it may be more useful to keep it that way. The Subcommittee directed staff to prepare the draft suggested by Mr. Jones consolidating repetitive portions of subdivisions 2, 4, 6, and 14 of § 2.2-3705.2.

Staff provided the Subcommittee with a progress report on the work of the Proprietary Records Work Group, created at the direction of the Subcommittee to consist of staff and interested parties to study the various exemptions for proprietary records and trade secrets in § 2.2-3705.6 and elsewhere in FOIA. It was suggested that the many specific exemptions in current law for various types of records containing trade secrets and proprietary information might be consolidated into one or more exemptions of general application. The Work

Group met on June 18, July 21, and August 18, 2015, and is considering a draft that provides a general exemption that may be used by any public body to the extent that portions of such records contain proprietary information or trade secrets. The draft is still under discussion at the Work Group level.

The Subcommittee also considered an issue raised by David Ogburn, representing Verizon, at the last FOIA Council meeting on July 22, 2015. Mr. Ogburn suggested that the term "telecommunications carrier" may be outdated as used in the exemptions concerning 911 and E-911 dispatch records found in subdivisions 10 and 11 of § 2.2-3705.2. The Subcommittee had previously considered these exemptions without recommending any changes. As Mr. Ogburn was not present at today's meeting, the Subcommittee asked staff to invite him to attend the next Subcommittee meeting to present his concerns regarding these exemptions.

The Subcommittee then considered new business and began discussion of the following exemptions:

- Investigations of applications for licenses and permits, and of licensees and permittees, of certain agencies (§ 2.2-3705.3(1)). Amy Dilworth of the State Lottery, Mike Menefee of the Department of Agriculture and Consumer Services, and Eddie Wirt of the Department of Alcoholic Beverage Control (ABC) all spoke in favor of keeping this exemption as it is currently written. In response to questions from Mr. Merritt, the Subcommittee was informed that ABC uses this exemption for approximately 6,500 applications for licenses per year, roughly 60 percent of which are temporary licenses. There were no other comments, and the Subcommittee recommended no changes to this exemption.
- Active investigations being conducted by the Department of Health Professions (DHP) or by any health regulatory board in the Commonwealth (§ 2.2-3705.3(2)). Jaime Hoyle of DHP stated that the exemption is used to protect highly sensitive information in investigations regarding physical health, mental health, and substance abuse information concerning health professionals. The Subcommittee was informed that there is a public hearing prior to a final decision, at the conclusion of which any orders, sanctions, and notices are made public, including any order stating there will be no sanctions. There were no other comments, and the Subcommittee recommended no changes to this exemption.
- Active investigations of individual employment discrimination complaints (§ 2.2-3705.3(3)). Mr. Wiley pointed out that this exemption and the one just discussed both refer to "active" investigations but seem to differ regarding what must be released once the investigation is closed. Staff noted there are similar provisions regarding what is to be released from completed investigation reports in several of the exemptions being studied, but they all use slightly different language. Staff also noted there may be other applicable exemptions and prohibitions on the release of certain records found outside of FOIA, such as in Title 54.1. Mr. Merritt noted that if one cross-referenced each of the FOIA exemptions for administrative investigation records to other Code sections, the substantive language found outside FOIA may drive the differences. The Subcommittee and interested parties further discussed whether cross-references should be added, noting

- the fact that agencies typically know the exemptions that apply to them both within FOIA and outside of it, but that it can be difficult for the public to know agency-specific exemptions outside of FOIA. Owing to the monumental nature of the task of looking to cross-reference every exemption outside of FOIA, it was suggested that perhaps at the conclusion of the three-year study, the FOIA Council might want to begin examining the exemptions section by section in smaller one-year studies. There were no further comments and no motions for change regarding subdivision 3.
- Active investigations being conducted by the Department of Medical Assistance Services (DMAS) (§ 2.2-3705.3(4)). Nancy Malczewski of DMAS informed the Subcommittee that DMAS uses this exemption when auditing providers and that it can be used for cost-settlement reports. Without the exemption, providers could find out beforehand that they are going to be audited. Ms. Malczewski stated that if fraud is found, the investigation is referred to the Attorney General and that final letters are released to the public after audits are completed. After some further discussion of the process and public hearings involved, there were no recommendations for any changes to this exemption.
- Investigations or conciliation processes involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3705.3(5)). Tom Payne of the OAG stated that the exemption protects information before and after an investigation, as many employee witnesses are employed by respondents who are being investigated and retaliation is a concern. He also explained that DHRM handles complaints from state employees while OAG handles complaints from others, which is why this exemption is needed in addition to subdivision 3 (discussed above). Mr. Payne further stated that OAG has a work share agreement with the federal Equal Employment Opportunity Commission that also makes this exemption necessary. There were no other comments, and the Subcommittee recommended no changes to this exemption.
- Certain studies and investigations by the Virginia Lottery (§ 2.2-3705.3(6)). Ms. Dilworth spoke in support of keeping this exemption, stating that its use often involves crime by a retailer and investigations in conjunction with local law enforcement. In response to questions, she stated that records become public if charges are brought and the case is public but, depending on circumstances, records may not become public otherwise, for example, if the case is closed or the prosecutor is waiting to bring charges later. There were no other comments, and the Subcommittee recommended no changes to this exemption.

The Subcommittee asked for public comment, but there was none made at this time, as public comment was taken throughout the meeting on a per exemption basis. The meeting was then adjourned.

As expected, the Subcommittee did not have enough time to consider all of its new business. The following exemptions will be discussed at the next meeting of the Subcommittee.

- Certain audit investigation records (§ 2.2-3705.3(7));
- Certain records of DHRM with respect to employment dispute resolution (§ 2.2-3705.3(8));
- The names, addresses, and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints or complaints relating to the Uniform Statewide Building Code or

- the Statewide Fire Prevention Code made to a local governing body (§ 2.2-3705.3(9));
- Active investigations being conducted by the Department of Criminal Justice Services regarding private security services, special conservators of the peace, bail bondsmen, and bail enforcement agents (§ 2.2-3705.3(10));
- Board of Education review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees (§ 2.2-3705.3(11));
- Certain records of the Board of Education related to the denial, suspension, or revocation of teacher licenses (§ 2.2-3705.3(12));
- Records, notes, and information provided in confidence and related to an investigation by the Attorney General regarding the Tobacco Master Settlement Agreement and related matters (§ 2.2-3705.3(13)).

The next meeting of the Subcommittee is scheduled to be held at 1:30 p.m. on Wednesday, October 7, 2015.

October 7, 2015

The Subcommittee held its fifth meeting of the 2015 interim on October 7, 2015, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Tavenner (Chair), Ashby (Vice-Chair), Jones, and Porto were present; Ms. Hamlett and Ms. King-Casey were absent.

After members were introduced and the meeting was called to order, the Subcommittee discussed a draft prepared by staff based on the comparison chart distributed at the August meeting relating to the various public safety exemptions found in § 2.2-3705.2, including subdivisions 2 (portions of engineering and construction drawings and plans), 4 (terrorism and cybersecurity plans), 6 (security of governmental facilities, buildings, and structures, and safety of persons using them), and 14 (STARS or any other similar local or regional public safety communications system). Staff reminded the Subcommittee that, in the course of preparing the comparison, it became apparent that there was significant overlap between the exemptions, and staff pointed out that drafting notes had been left in the draft to help make it easier to understand. Dave Ress, a reporter with the *Daily Press*, handed out an alternative proposal he had prepared. He noted that the recent decision of the Supreme Court of Virginia in *Department of Corrections v. Surovell* indicated that redaction would not be required unless the exemption included the word "portions," and therefore his draft had been prepared with that word in recognition of the court's decision. The Subcommittee decided to post both drafts on the FOIA Council website to give interested parties time to consider them further before making any decision on whether to recommend them.

The Subcommittee next considered an issue raised by David Ogburn, representing Verizon, at the FOIA Council meeting on July 22, 2015. The Subcommittee had raised the issue at its August meeting, but Mr. Ogburn was unable to attend that day. Mr. Ogburn was present today, and he suggested that the term "telecommunications carrier" may be outdated as used in the exemptions concerning 911 and E-911 dispatch records found in subdivisions 10

and 11 of § 2.2-3705.2. He stated that the term refers to someone certified by the SCC to provide local telecommunications or switched telephone services, but most service providers today use Voice Over IP technology, which is not certified by the SCC. After brief discussion, the Subcommittee voted unanimously to recommend amending these exemptions by using the term "communication services provider" as defined in Code § 58.1-647 in place of the term "telecommunications carrier."

Next, staff provided the Subcommittee with a progress report on the work of the Proprietary Records Work Group, created at the direction of the Subcommittee to consist of staff and interested parties to study the various exemptions for proprietary records and trade secrets in § 2.2-3705.6 and elsewhere in FOIA. It was suggested that the many specific exemptions in current law for various types of records containing trade secrets and proprietary information might be consolidated into one or more exemptions of general application. The Work Group met on June 18, July 21, and August 18, 2015, and it considered multiple versions of several different draft proposals: 1) an exemption for trade secrets provided to a public body, 2) an exemption for trade secrets generated by a public body, 3) an exemption for certain financial records, and 4) a liability-shifting provision addressing situations in which a public body is brought to court over records that a third party has designated as proprietary or trade secrets. While it had considered all of these drafts and various related issues at length and in depth, the Work Group had not reached a consensus on any recommendations. Craig Merritt, speaking on behalf of VPA, stated that there was no consensus and that some exemptions were unique and unlikely to change, but he felt there could be progress on others, particularly in regard to trade secrets and financial information submitted by private entities to public bodies. Mr. Merritt distributed a proposed draft for further consideration. Mr. Tavenner asked if the Work Group had identified specifically which exemptions would be affected if one or more generic exemptions were enacted, and he was informed that the Work Group had not done so. Phil Abraham of the Vectre Corporation, representing transportation clients, noted that the exemption for public-private procurement transactions (subdivision 11 of § 2.2-3705.6) is very different from others, and he agreed that the Work Group should identify which existing exemptions would and would not be affected if one or more generic exemptions were enacted. Mr. Ress spoke to the importance of the concept of having a generic trade secrets exemption that also ensures the public's right to know, and he distributed a proposed draft for consideration. The Subcommittee considered whether to take up the matter directly or whether it would be worthwhile to ask the interested parties to continue meeting as a work group. The Subcommittee voted unanimously to ask the Work Group to meet again.

The Subcommittee then considered new business, continuing its consideration of administrative investigation exemptions with discussion of the following exemptions:

- Certain audit investigation records (§ 2.2-3705.3(7)). Without objection, the Subcommittee deferred consideration of this exemption until its next meeting at the request of Staci Henshaw of the Auditor of Public Accounts. Affected parties stated that they would have a proposal ready at the next meeting that addresses the issue of what is an "investigation" covered by the exemption.

- Certain records of with respect to employment dispute resolution (§ 2.2-3705.3(8)). Sara Wilson, Director of DHRM, stated that this exemption is meant to protect personal privacy in the employment dispute resolution process. In discussion with the Subcommittee and Mr. Ress, she related that the hearing process is not public but the result is public. Roger Wiley, an attorney representing local government and a former FOIA Council member, pointed out that the same type of proceedings happen at the local level and are covered by the general personnel records exemption (§ 2.2-3705.1(1)). Ms. Wilson noted that this exemption was originally specific to the Department of Employment Dispute Resolution (EDR), which was a separate agency that then became a division of DHRM. After some further discussion, the Subcommittee voted unanimously to have staff meet with the interested parties as a work group to consider whether the DHRM-specific exemption was needed or whether the matters addressed were already covered by the personnel records exemption.

The names, addresses, and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints or complaints relating to the Uniform Statewide Building Code or the Statewide Fire Prevention Code made to a local governing body (§ 2.2-3705.3(9)). Mr. Wiley stated that this exemption is used often at the local level and that it encourages people to come forward with complaints while protecting them from potentially violent reactions. Mark Flynn of the VML concurred, stating that the exemption is often used to try to keep the peace among neighbors. Mr. Ress and Mr. Merritt brought up the issue of the right to confront one's accuser. Mr. Wiley stated that the complaint leads to an inspection and that enforcement is based on the inspection and the inspector's testimony, not on the complaint. The subject of the complaint would have the right to confront the inspector and challenge the inspector's testimony. Mr. Flynn noted that because many of these violations are criminal misdemeanors, the criminal records exemptions also apply. Phyllis Errico of VACo stated that she has handled hundreds of these matters and the harm in releasing the information outweighs the general right to know who is the complainant. She stated that the complaint-driven process is better than having roving patrols looking for violations. Mr. Jones stated that while he may agree with the balance struck and understands the legal argument, it bothered him to think a public investigation would be triggered by an anonymous complaint. The Subcommittee voted unanimously to defer consideration of this exemption until its next meeting.

- Active investigations being conducted by the DCJS regarding private security services, special conservators of the peace, bail bondsmen, and bail enforcement agents (§ 2.2-3705.3(10)). Teresa Gooch of DCJS stated that the exemption protects active investigations and allows complainants and subjects to fully respond and that once an investigation is completed, it becomes open to the public. The Subcommittee, Mr. Ress, Mr. Merritt, and Ms. Gooch discussed examples of how the exemption might be used, and they confirmed that, under the current language of the exemption, records become open once the investigation is no longer active. In the discussion the Subcommittee also confirmed that, for purposes of this FOIA study, the lack of a motion by the Subcommittee would mean that the Subcommittee recommends keeping the exemption as written and moving on to the next topic. There was no motion on this exemption.

- Board of Education review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees (§ 2.2-3705.3(11)) and certain records of the Board of Education related to the denial, suspension, or revocation of teacher licenses (§ 2.2-3705.3(12)). Wendell Roberts and Mona Siddiqui of OAG and Patricia Potts and Susan Williams of the Department of Education (DOE) all spoke to both of these exemptions. They discussed various reasons teacher licenses might be revoked and the process for revocation, noting that a subject teacher has access rights as a matter of due process and that the teacher licensing investigation exemption also includes a public right to know. Mr. Roberts suggested that the test security exemption, subdivision 11, could be improved. He noted that testing irregularities may include such things as fire drills during a test and do not necessarily indicate improper conduct but that in such a case there would be an investigation to determine whether students need to be re-tested. Mr. Roberts indicated that when subdivisions 11 and 12 are read together, the test security exemption would require investigation results to be released after the investigation was concluded, but that report also may be referred to in an ongoing licensing investigation by a different division within DOE, which would be exempt under subdivision 12.

After further inquiry and discussion of the process, the Subcommittee was informed that, under current law, a report might be exempt under subdivision 11, then open for some period of time after the test security investigation is completed, and then exempt again under subdivision 12 while a licensing investigation is conducted. The OAG and DOE representatives suggested that such reports should remain exempt until both investigations are complete. Mr. Ress suggested that a parent might then find out that students were being re-tested but would not know why. Staff pointed out that like other FOIA exemptions, these exemptions are discretionary, not prohibitory, and schools could state why and/or release redacted versions of the records. Mr. Merritt pointed out that these exemptions deal with different purposes: subdivision 11 deals with systemic integrity of the testing process, while subdivision 12 deals with discipline, due process, and protecting the reputation of accused teachers. He stated that VPA would oppose putting these exemptions "back-to-back." The Subcommittee noted that both exemptions use language stating that "this subdivision shall not prohibit the disclosure of records" but that this phrasing does not make sense because these exemptions are discretionary anyway, not prohibitory. The Subcommittee voted unanimously to have staff prepare drafts correcting this language in both exemptions.

Records, notes, and information provided in confidence and related to an investigation by the Attorney General regarding the Tobacco Master Settlement Agreement and related matters (§ 2.2-3705.3(13)). Susan Curwood of the Tobacco Enforcement Unit of OAG stated that this exemption applies to two different paths of investigation. One is under the Tobacco Master Settlement Agreement (1998) to ensure that manufacturers are accurately reporting and depositing money, collecting taxpayer documents, and auditing tax stamping agents, etc. She indicated that this path is predominantly civil and regulatory and can lead to filing a civil suit to collect money. The other path deals with cigarette trafficking and tax evasion and involves gathering tax returns, sales tax exempt permits, financial account information, and other information that ultimately goes to law enforcement as criminal

matters. She indicated that both paths involve tax information that is protected under § 58.1-3 outside of FOIA and both involve information from manufacturers, wholesalers, distributors, and retailers. Ms. Curwood, Mr. Ress, the Subcommittee, and staff discussed whether this exemption is needed in light of the exemption at § 2.2-3705.7(1) that refers to § 58.1-3, and they decided that this exemption covers some records not covered under § 58.1-3. The Subcommittee made no motion regarding this exemption.

Next, the Subcommittee considered bills referred by the FOIA Council from the 2015 Session of the General Assembly as follows:

HB 1776 (Albo)/SB 1032 (McDougle) - Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority (Authority), created by the bill. The bill contains numerous technical amendments. The bill has a delayed effective date of July 1, 2018, except that the provisions of the thirteenth and fourteenth enactments become effective July 1, 2015. The thirteenth enactment clause directs the FOIA Council to study the provisions of the bill that would amend § 2.2-3705.7 by creating a new records exemption for certain records of the Authority. Kristina Stoney of the OAG spoke on behalf of ABC, noting that the effectiveness of the bill could not be measured since it does not go into effect until 2018 and ABC has not yet developed the marketing or operational strategies the exemption is designed to protect. Ginger Stanley of the VPA noted that there were grave concerns about the bill during session, but the compromise was to send it to the FOIA Council for study. Staff noted that ABC did not originally request the exemption—others asked for it, but staff could not recall why they had done so. Ms. Porto stated that she found it impossible to accept an exemption for something when the reason for the exemption is unknown. Ms. Stoney suggested deferring consideration in order to allow time to contact the patrons of the bill. Ms. Stanley observed that VPA is not opposed to what ABC wanted to do generally and that, as far as she knew, no one opposed removing the exemption—they just did not want to derail the bill during session. After further discussion, the Subcommittee voted unanimously to send this exemption to the Proprietary Records Work Group for further consideration.

SB 1166 (Hanger) - Public service corporations; access to public records. Makes a public service corporation subject to the public records provisions of the FOIA with respect to any project or activity for which it may exercise the power of eminent domain and has filed or prefiled for a certificate or other permitting document. Staff noted that the patron of the bill was invited but unable to attend today's meeting. Mr. Ogburn stated that he had opposed this bill during session and continued to do so because it is overly broad as it applies to any public service corporation that may exercise the power of eminent domain, regardless of whether the corporation in question actually exercises that power. Megan Rhyne of VCOG stated that, with the power of eminent domain granted by the General Assembly, there can be strings attached, such as disclosure of records related to the use of that power. In response to the Subcommittee, staff indicated that the bill was not drawn narrowly to only address public service corporations when the power of eminent domain is actually used. Staff also observed that the bill does not fit within the current enforcement provisions of FOIA, as it does not address the venue to petition a public service corporation for a violation. Mr. Ress stated that records regarding the exercise of the power of eminent

domain ought to be public and the bill should be amended as needed to achieve that end. Mr. Ogburn stated that he would have no objection to a bill limited to a specific project, but that is not this bill. The Subcommittee decided to have staff invite the patron of the bill to come to the next Subcommittee meeting to address these questions and concerns.

The next meeting of the Subcommittee is scheduled to be held at 1:30 p.m. on Wednesday, November 18, 2015.

November 18, 2015

The Subcommittee held its sixth meeting of the 2015 interim on November 18, 2015, to continue the three-year study of FOIA directed by HJR 96. All Subcommittee members were present.

After members were introduced and the meeting was called to order, the Subcommittee discussed a draft prepared by staff based on the comparison chart distributed at the August meeting relating to the various public safety exemptions found in § 2.2-3705.2, including subdivisions 2 (portions of engineering and construction drawings and plans), 4 (terrorism and cybersecurity plans), 6 (security of governmental facilities, buildings, and structures, and safety of persons using them), and 14 (STARS or any other similar local or regional public safety communications system). This public safety consolidation draft had been presented at the October 7, 2015, Subcommittee meeting, but the Subcommittee deferred consideration to give interested parties more time to consider it. Dave Ress, a reporter with the *Daily Press*, noted that language stating that the exemption does not prohibit disclosure should be changed to state that it does not authorize withholding, because FOIA generally does not prohibit disclosure. David Lacey, speaking for the VPA, pointed out additional old language that needed to be fixed. Staff noted that the change from "shall not prohibit the disclosure" to "shall not authorize the withholding" needs to be a global change in FOIA, as similar language appears in many exemptions. The Subcommittee voted unanimously in favor of this global change. Dan Wilson of the Virginia State Police recommended adding the term "transmitter sites" to the exemption for STARS and similar communications systems. The Subcommittee directed staff to prepare a new draft reflecting these changes for consideration at its next meeting.

Next the Subcommittee heard about the progress of the Proprietary Records Work Group from staff, Ginger Stanley of the VPA, and Phil Abraham of the Vectre Corporation. They stated that the Work Group had by consensus agreed that certain exemptions should not be affected if a generic exemption for trade secrets is adopted: the exemptions for economic development (subdivision 3 of § 2.2-3705.6), public-private procurement transactions (subdivision 11 of § 2.2-3705.6), and exemptions for certain investment entities such as VRS and VCSP (subdivisions 12 and 25 of § 2.2-3705.7). The Work Group had also agreed to include trade secrets, certain financial records, and other records that affect the competitive position of a private entity within the ambit of a generic exemption. The work group will continue studying these exemptions next year after the adjournment of the 2016 Session of the General Assembly.

Staff then reported that the DHRM Records Work Group had recommended eliminating subdivision 8 of § 2.2-3705.3, an exemption for certain employment dispute resolution records that is limited to DHRM. The Work Group had determined that the records exempted are already exempt under the general exemption for personnel records (subdivision 1 of § 2.2-3705.1), making the more specific exemption redundant and unnecessary. The Subcommittee voted unanimously in favor of eliminating this exemption.

The Subcommittee then returned to consideration of certain administrative investigation exemptions begun at its last meeting on October 7, 2015, with discussion of the following exemptions:

- Certain audit investigation records (§ 2.2-3705.3(7)). Without objection, the Subcommittee again deferred consideration of this exemption until its next meeting at the request of Staci Henshaw of the Auditor of Public Accounts. Affected parties stated that they were working on a proposal that addresses what is an "investigation" covered by the exemption.
- Certain records of DHRM with respect to employment dispute resolution (§ 2.2-3705.3(8)). As stated above, the Subcommittee recommended striking this exemption.
- The names, addresses, and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints or complaints relating to the Uniform Statewide Building Code or the Statewide Fire Prevention Code made to a local governing body (§ 2.2-3705.3(9)). At its last meeting, the Subcommittee heard from interested parties that this exemption is used often in situations involving feuding neighbors, but others stated they felt it was inappropriate because one should have a right to confront someone making a complaint. At that time, the Subcommittee deferred it for further consideration. Today, having had time to consider it, the Subcommittee did not recommend any changes to this exemption.
- Board of Education review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees (§ 2.2-3705.3(11)) and certain records of the Board of Education related to the denial, suspension, or revocation of teacher licenses (§ 2.2-3705.3(12)). At its last meeting on October 7, 2015, the Subcommittee had heard from Wendell Roberts and Mona Siddiqui of the OAG and Patricia Potts and Susan Williams of the DOE regarding both of these exemptions. At that meeting, the Subcommittee noted that both exemptions use language stating that "this subdivision shall not prohibit the disclosure of records" but that this phrasing does not make sense because these exemptions are discretionary anyway, not prohibitory (this same issue was noted regarding the public safety consolidation draft above). The Subcommittee had voted unanimously to have staff prepare a draft correcting this language in both exemptions. Staff presented that draft today, and the Subcommittee recommended adopting it.

Next, the Subcommittee considered bills referred by the FOIA Council from the 2015 Session of the General Assembly as follows:

HB 1776 (Albo)/SB 1032 (McDougle) - Eliminates the Alcoholic Beverage Control (ABC) Board and replaces it with the Virginia Alcoholic Beverage Control Authority (Authority), created by the bill. The bill contains numerous technical amendments. The bill has a delayed effective date of July 1, 2018, except that the provisions of the thirteenth and fourteenth enactments become effective July 1, 2015. The thirteenth enactment clause directs the FOIA Council to study the provisions of the bill that would amend § 2.2-3705.7 by creating a new records exemption for certain records of the Authority (subdivision 34 of that section). The new exemption had been considered by the Subcommittee at previous meetings and concern was expressed that it provides a record exemption to cover marketing and operational strategies that are not yet known for an agency that does not yet exist. Staff presented a chart comparing this new ABC exemption to existing exemptions for proprietary records, trade secrets, financial records, cost estimates, marketing and operational strategies, and other "earmarking" provisions for designating which records are to be protected. Considering that the need for this exemption is only speculative at this time, and noting that this exemption or one like it may be added if the need arises, the Subcommittee voted unanimously to strike this exemption.

SB 1166 (Hanger) - Public service corporations; access to public records. Makes a public service corporation subject to the public records provisions of FOIA with respect to any project or activity for which it may exercise the power of eminent domain and has filed or prefiled for a certificate or other permitting document. Staff noted that the patron of the bill was invited but unable to attend today's meeting. Mr. Lacey stated that VPA does not favor recommending this bill. Mr. Ress expressed that an entity exercising the power of eminent domain should be treated as a public body and that he would like to hear from the SCC. Megan Rhyne of VCOG spoke in favor of the bill, stating that records concerning the power of eminent domain should be open to the public. She also noted that concerns had been expressed at the committee level over unintended consequences and that the bill may cover too much. Mr. Abraham stated that the bill needs a lot of work. Mr. Ashby stated that he understands and supports the concept behind the bill. The Subcommittee voted unanimously to recommend that no action be taken on the bill.

The Subcommittee then asked for public comment. Mr. Ashby referred to an editorial that appeared in the *Daily Press* that was critical of the FOIA Council's study of FOIA under HJR 96. Noting that he did not mean his comments to be taken negatively toward Mr. Ress or Ms. Porto, Mr. Ashby stated that, since the Subcommittee started this process, it has been open and collaborative. He pointed out that the Subcommittee has deferred consideration of exemptions to allow parties to do more research and to give a "fair shake" to all involved. He concluded that the editorial's insinuation that the Subcommittee is "spineless" is unfair.

The Subcommittee directed staff to poll members for a date for its next meeting, to try for the first week in April 2016 (after the 2016 Session of the General Assembly adjourns). There being no further business at this time, the meeting was adjourned.

Work of the Records Subcommittee—Year Three, 2016

April 11, 2016

The Subcommittee held its second meeting of the 2016 interim on May 9, 2015, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Ashby (Vice-Chair), Hamlett, Jones, Porto, and Vucci were present; Ms. King-Casey was absent.

After members introduced themselves, the Subcommittee elected Mr. Ashby as chair and Mr. Jones as vice-chair. Staff then described the provisions of the "consolidation draft" that amends four current public safety exemptions that use very similar language. This draft was first presented last year, but the Subcommittee has not yet taken action on it. The Subcommittee directed staff to keep the draft posted on the FOIA Council website and that, if there was no objection, the Subcommittee would recommend the draft at its next meeting.

Next, the Subcommittee heard from Staci Henshaw with the Auditor of Public Accounts (APA) regarding the audit investigations exemption, subdivision 7 of § 2.2-3705.3. Ms. Henshaw informed the Subcommittee that, after she spoke to other public bodies listed in the exemption, it became apparent that in order to clarify the exemption, it would be necessary to separate the existing exemption into multiple exemptions. She stated that this separation would be needed because of the different tasks and functions performed by the various public bodies currently covered. June Jennings, the State Inspector General, agreed, noting that careful consideration would be needed because of the different missions performed by different entities. Hal Greer of JLARC agreed that the existing language could be improved. In further discussion, it was suggested that the three state agencies mentioned might work together but that local auditors and auditors working in the higher education context might have different concerns. Ms. Porto asked why certain audits would be exempt. Ms. Henshaw replied with examples such as incidents of fraud, following rules of evidence, protecting the identity of people coming forward, that regular audits may change to something else (i.e., fraud or criminal investigations) as information is uncovered, and that APA wishes to put out only good information rather than preliminary information that may be subject to change. Mr. Greer also noted that JLARC often conducts performance reviews, which are not necessarily "investigations," and that the exemption language should better reflect what the agencies actually do. The Subcommittee directed staff and interested parties to further discuss this exemption in a work group and report back.

Next, staff reported that the Proprietary Records Work Group had met on June 18, July 21, August 18, and November 10, 2015, and again on March 24, 2016. The meetings were the result of an earlier directive to staff by the Subcommittee to meet with interested parties as the Proprietary Records Work Group to study the various exemptions for proprietary records and trade secrets in § 2.2-3705.6 and elsewhere in FOIA. It was suggested that the many specific exemptions in current law for various types of records containing trade secrets and proprietary information might be consolidated into one or more exemptions of general application. The Work Group considered several drafts but did not reach consensus on a recommendation. At its most recent meeting, the Work Group determined it was unlikely to reach consensus on a recommendation, and therefore it recommended that the

Subcommittee take up the various proprietary records and trade secrets exemptions for consideration one by one, in the same manner as it has studied all of the other exemptions to date. It was further suggested that these exemptions be considered later this summer so that all affected agencies may be contacted. As part of its work plan, the Subcommittee agreed to continue going through the exemptions in numerical order, including the exemptions for proprietary records and trade secrets.

The Subcommittee then turned to new business, the consideration of the various education-related records exemptions in § 2.2-3705.4. The Subcommittee considered the exemptions in numerical order. Staff provided a brief legislative history of each exemption as it was brought up before the Subcommittee. The Subcommittee confirmed that it would continue to follow its standard procedure thus far: if there were no comments about an exemption or proposed amendments, the Subcommittee would recommend no changes to that exemption.

Subdivision 1 of § 2.2-3705.4, the scholastic records exemption, was enacted as part of the original FOIA in 1968, and it has been amended several times since. This exemption both protects privacy and guarantees access to students' own records, either to the student or to the student's parents or guardians. There were no comments about this exemption.

Subdivision 2 of § 2.2-3705.4 provides an exemption for certain confidential statements and letters of recommendation held by educational institutions. This exemption was enacted in 1975 and amended in 2014. Roger Wiley, an attorney representing several local government bodies, pointed out that all public bodies should be treated the same way, and he stated that, in his opinion, there should be no access to letters of recommendation in the employment context. In further discussion, it was noted that generally public employees have the right to see their own personnel records, which may include letters of recommendation, as opined in Freedom of Information Advisory Opinion 03 (2005). Additionally, the Government Data Collection and Dissemination Practices Act (GDCDPA) treats these records differently, as per subsection B of § 2.2-3806, which states that "nothing in this chapter shall be construed to require an agency to disseminate any recommendation or letter of reference from or to a third party that is a part of the personnel file of any data subject." The Subcommittee directed staff to prepare a draft to reconcile these various provisions for consideration at the next meeting.

Subdivision 3 of § 2.2-3705.4 was enacted in 2006 to exempt from mandatory disclosure certain records of the Brown v. Board of Education Scholarship Committee. There were no comments about this exemption.

Subdivision 4 of § 2.2-3705.4 was enacted in 1982 and amended in 1984. It exempts certain proprietary records concerning study or research on medical, scientific, technical, or scholarly issues. The Supreme Court of Virginia recently addressed this exemption in detail in the case *American Tradition Institute v. Record and Visitors of the University of Virginia*, 287 Va. 330, 756 S.E.2d 435 (2014). There were no comments about this exemption.

Subdivision 5 of § 2.2-3705.4 was enacted in 1996 and amended in 2002 to exempt from mandatory disclosure certain records of UVA or the University of Virginia Medical Center

or Eastern Virginia Medical School regarding proprietary, business-related information. Sally Barber of UVA stated that UVA is actually comprised of three agencies: the academic university in Charlottesville, the Medical Center, and UVA-Wise. She informed the Subcommittee that the Medical Center has "codified autonomy" and competes with private businesses. She also pointed out that the records exemption uses language almost identical to the meetings exemption (subdivision A 22 of § 2.2-3711), which has already been recommended without change by the Meetings Subcommittee. She asked that the records exemption also remain unchanged. There were no further comments about this exemption.

Subdivision 6 of § 2.2-3705.4 was enacted in 1997 and amended in 1999 and 2000. It exempts certain personal information provided to VCSP. Chris McGee of VCSP stated that the exemption currently speaks to account owners, but VCSP also has similar types of personal information for beneficiaries (i.e., children), authorized individuals (usually an adult who is not an account owner, such as a spouse or grandparent), and designated survivors. He asked that the exemption be amended to protect the personal information of these individuals as well. There were no further comments on this exemption. The Subcommittee directed staff to prepare a draft as described for the Subcommittee's consideration at its next meeting.

Subdivision 7 of § 2.2-3705.4 was enacted in 2008 to exempt certain fundraising records concerning identifiable or prospective donors to public institutions of higher education. Kathryn Jarvis of UVA stated that she was part of the team that crafted this legislation in 2008, working with VPA. She stated that only 1% of FOIA requests UVA has received concern donor gifts and that the reasons donors may want anonymity include humility, identity theft, avoiding "spammers," having a child at the university, having been a patient at the Medical Center, and other reasons. She told the Subcommittee that, since July 2014, only 1.2% of gifts were made anonymously, for a total of less than 5% of the money coming into UVA, and that UVA wishes to maintain the current exemption. Laura Fornash, also of UVA, added that the board of visitors is made aware of any gift over \$10,000, including the identity of the donor. Mr. Jones asked if there were any issues regarding the wording of the exemption, and Ms. Jarvis stated there were not. There were no further comments about this exemption.

Subdivision 8 of § 2.2-3705.4 exempts certain records of threat assessment teams of public institutions of higher education. This exemption was enacted in 2010, and it was amended this year so that, effective July 1, 2016, the exemption will also apply to threat assessment teams established by local school boards. There were no comments about this exemption.

Mr. Ashby opened the floor to any additional comments from the Subcommittee or the public; there were none. The Subcommittee scheduled its next three meetings to be held at 10:30 a.m. on Monday, May 9; 10:30 a.m. on Monday, June 22; and 10:30 a.m. on Wednesday, July 20, 2016. There being no further business on the agenda, the meeting was then adjourned.

May 9, 2016

The Subcommittee held its second meeting of the 2016 interim on May 9, 2015, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Jones (Vice-Chair), Porto, and Vucci were present; Mr. Ashby (Chair), Ms. Hamlett, and Ms. King-Casey were absent.

The members of the Subcommittee introduced themselves, with Mr. Jones acting as chair. Recognizing that the Subcommittee lacked a quorum and therefore could not vote to take any actions, but that many agency representatives and other interested parties were in attendance, Mr. Jones opened the floor to receive public comment. Craig Merritt, representing VPA, observed that many of the exclusions in the health and social services section, § 2.2-3705.5, are cross-references to other statutes that set out the rules of confidentiality for the records at issue, which makes the FOIA exemptions hard to understand without reading the referenced statutes. He also noted that many of these exclusions use repetitious language dealing with two general concepts: (1) the confidentiality of individual patient information and (2) the unlimited nature of public access to statistical and aggregate information. He also observed that there appeared to be some "issue creep" in the use of proprietary and trade secrets language in this section.

Staff reminded the Subcommittee that it had recommended a global change in the language of FOIA to replace exclusion language that currently states that "nothing shall be construed to prohibit" the release of certain records with language requiring affirmative disclosure. Staff related that the proposed global change may have unintended consequences and suggested adding it to the agenda for the next meeting. Staff also reminded the Subcommittee that, at its last meeting, it had suggested that staff and interested parties meet as a work group on the audit records exclusion found at subdivision 7 of § 2.2-3705.3. Staff informed the Subcommittee that it had heard from one interested party who was contacting others to propose amendments to the exclusion and that a work group meeting should be held before the June 22, 2016, meeting of the Subcommittee.

There being no further comment, the meeting was then adjourned. The next meeting of the Subcommittee is scheduled to be held at 10:30 a.m. on Wednesday, June 1, 2016.

June 1, 2016

The Subcommittee held its third meeting of the 2016 interim on June 1, 2016, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Ashby (Chair), Jones (Vice-Chair), King-Casey, Porto, and Vucci were present; Ms. Hamlett was absent.

The meeting began with consideration of the public safety consolidation draft, which seeks to reduce or eliminate redundant language used in current subdivisions 2, 4, 6, and 14 of § 2.2-3705.2. This draft has been considered previously by the Subcommittee without a decision whether to recommend it. After staff presented and explained the draft, the Subcommittee discussed some of the technical language used. Dave Ress, a reporter with the *Daily Press*, asked why things such as records of elevators were protected when they

would be visible in the building itself and in building plans. He also asked what is different about "cybersecurity" as opposed to terrorist response plans. Staff replied that cybersecurity has to do with access codes and that exemption (4) regarding terrorist response plans was originally enacted after 9/11. Tom Lambert of the Virginia State Police related that what needs to be protected includes records that would reveal things such as how to shut a building down and trap people inside. Ms. Porto noted that some of these things might already be public in other venues, such as building plans for private and commercial buildings. She noted that it made no sense to exempt items already public elsewhere but that she was not suggesting that records be made public that are not already public. Mr. Jones asked staff to have someone from the Secretariat of Public Safety and Homeland Security speak to the Subcommittee about these issues. Ginger Stanley of VPA observed that this exemption was passed after 9/11 and now that the Commonwealth has had years of experience with it, it is appropriate to consider if it needs to stay as broad as it is. Noting the provision concerning the release of records after a catastrophic event such as a fire, Mr. Ashby asked how that release works in practice. Ms. Stanley, Dick Hammerstrom (formerly an editor with the *Free Lance-Star*), and staff related examples such as building inspection reports and other records that were released after catastrophic events such as fires had occurred in buildings. After further discussion, the Subcommittee members indicated they would like to hear from a representative of the Secretary of Public Safety and Homeland Security before making a recommendation on this draft.

The Subcommittee next considered the draft prepared regarding letters of recommendation. At its last meeting, the Subcommittee identified a discrepancy between the way letters of recommendation are treated in regard to students or employees of educational agencies or institutions (subdivision 2 of § 2.2-3705.4), other public employees under the personnel records exemption (subdivision 1 of § 2.2-3705.1), and all data subjects under the Government Data Collection and Dissemination Practices Act (subsection B of § 2.2-3806). The Subcommittee directed staff to prepare a draft that would reconcile these provisions such that letters of recommendation would be exempt from mandatory disclosure in all cases. Michelle Gowdy of the VML stated that the draft would encourage people to be honest and frank when making recommendations, which they might not be if they knew the subject of the letters would be able to read them. Ms. Porto reminded all present of the purpose of the study in the context of openness versus privacy, noting that the purpose was not "to keep stupid in the room" out of fear of what the public might think. Mr. Ress raised the issue that "personnel record" is not defined in the law and that there seemed to be a fundamental flaw in confusing what is personal with what is personnel. David Lacy, representing the VPA, indicated that he shared this concern and also noted that the writer of a recommendation letter would not be the custodian of it, and since the custodian would have discretion to release personnel records, such letters might be released even if they were exempt. After further discussion among the members and interested parties, Megan Rhyne of VCOG informed the Subcommittee that about half of the other states do not define personnel records, and of the rest that do define the term, some do so by saying what is exempt and others do so by saying what is not exempt. She also informed the Subcommittee that many use a test to weigh the public interest and right to know against protecting the privacy of the subject of personnel records. The Subcommittee then directed staff to amend the draft for further consideration at the next meeting.

The Subcommittee then considered the draft excluding from mandatory disclosure certain personal information held by VCSP. At the last Subcommittee meeting, Chris McGee of VCSP stated that the current exemption (subdivision 6 of § 2.2-3705.4) addresses personal information of account holders, but VCSP also has personal information of beneficiaries, authorized individuals, and designated survivors. The Subcommittee directed staff to prepare a draft adding these individuals to the existing exemption. Mr. McGee stated that the purpose of the amendment is to make clear that personal information from all of these individuals is protected, particularly in light of concerns about identity theft. There were no additional comments from the Subcommittee or the public. The Subcommittee voted unanimously to recommend the draft.

The next topic for consideration was the global language change found in HB 817 (2016), which goes into effect July 1, 2016. Last year, the 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. Staff observed that in some instances the prior language ("nothing...shall prohibit") could be interpreted to mean that the public body can release certain records, but does not have to do so, whereas the new language requires release. For some exemptions this change does not appear to cause any issues, but for others it might. Ms. Rhyne stated that it had always been her understanding that the prior language meant that records must be released. Phyllis Errico of VACo stated that she would like more research regarding any unintended substantive changes. The Subcommittee decided to revisit this topic at its next meeting.

The Subcommittee then turned to consideration of the exclusions set out in § 2.2-3705.5 addressing health and social services records. Staff provided a brief legislative history of each exclusion and noted that most of these exclusions were cross-references to other provisions of law outside FOIA that made the records either exempt from mandatory release or prohibited from disclosure. Following its established practice, the Subcommittee considered each exclusion in turn and if no comment was made, then no changes were recommended to that exclusion.

Subdivision 1 of § 2.2-3705.5 is the general exclusion for health records, and it cross-references Code § 32.1-127.1:03 outside of FOIA. There were no comments or recommendations for change regarding this exemption.

Subdivision 2 of § 2.2-3705.5 excludes from mandatory disclosure certain exam or licensure applications and scoring records maintained by the Department of Health Professions (DHP). Ms. Rhyne pointed out that the second sentence of the exemption is duplicative of the procedures for requesting records and charging for costs set out in § 2.2-3704. The

Subcommittee voted unanimously to eliminate this duplicative language from the exemption.

Subdivision 3 of § 2.2-3705.5 excludes from mandatory disclosure certain records concerning adult services, adult protective services, the Office of the State Long-Term Care Ombudsman, and social services. Staff noted that this exclusion cross-references certain provisions of Title 51.5 and § 63.2-104, which is also cross-referenced again in subdivision 14 of § 2.2-3705.5. Mr. Ress noted that the areas covered by the exemption are very broad and shrouded in secrecy. Mr. Ashby agreed, but he noted that this Subcommittee is not the right forum for addressing those areas because they lie outside of FOIA and the Subcommittee is limited to considering FOIA. Ms. Stanley noted there was a time when the General Assembly tried to cross-reference access provisions in FOIA in order to make them easier to find. Staff noted that while some of the relevant provisions in Title 63.2 are cross-referenced in this exclusion and in subdivision 14, there are other access limitations in Title 63.2 that are not cross-referenced in FOIA. Mr. Ress questioned how inconsistent cross-references might be interpreted by a court, and Mr. Jones pointed out that the law loses clarity when it is inconsistent. There was no motion by the Subcommittee at this time.⁵⁰

Subdivision 4 of § 2.2-3705.5 excludes from mandatory disclosure certain records furnished to the Department of Social Services or the OAG related to certain investigations or litigation. This exclusion cross-references provisions in Titles 63.2, 8.01, and 32.1. There were no comments or recommendations for change regarding this exemption.

Subdivision 5 of § 2.2-3705.5 excludes from mandatory disclosure certain records collected for the designation and verification of trauma centers and other specialty care centers within the Statewide Emergency Medical Services System. There were no comments or recommendations for change regarding this exemption.

Subdivision 6 of § 2.2-3705.5 excludes from mandatory disclosure certain reports and court documents relating to involuntary admission required to be kept confidential pursuant to § 37.2-818. There were no comments or recommendations for change regarding this exemption.

Subdivision 7 of § 2.2-3705.5 excludes from mandatory disclosure certain records formerly required to be submitted to the Commissioner of Health. Joe Hilbert of the Department of Health stated that this exclusion referred to a certificate of public need but the registration requirement was gone and the records covered had not been used since 1992. The Subcommittee voted unanimously to strike this exclusion.

Subdivision 8 of § 2.2-3705.5 excludes from mandatory disclosure certain information required to be provided to DHP by certain licensees pursuant to § 54.1-2506.1. Dr. David Brown of DHP stated that this exclusion covered workforce data and emergency contact information provided to DHP. In reply to an inquiry from Mr. Lacy, Dr. Brown confirmed that aggregate data would be open, and only individuals' data was excluded. Staff asked

⁵⁰ At this point in the meeting Mr. Ashby had to leave due to another commitment, and he passed the gavel to the vice-chair, Mr. Jones.

whether it might be possible to consolidate subdivisions 2 and 8, as both concerned records held by DHP. After further discussion, the Subcommittee directed staff to prepare such a draft.

Subdivision 9 of § 2.2-3705.5 excludes from mandatory disclosure certain records of a child fatality review team, family violence fatality review team, or adult fatality review team. This subdivision cross-references relevant provisions of Title 32.1. Mr. Ress noted that this exclusion covers very important data that he felt should be public, but he recognized that it was made confidential by provisions outside of FOIA. There were no other comments about this exclusion.

Subdivision 10 of § 2.2-3705.5 excludes from mandatory disclosure certain patient-level data collected by the Board of Health and not yet processed, verified, and released, pursuant to § 32.1-276.9. Mr. Ress noted that hospital cost review commission reports used to be open. Ms. Stanley stated that VPA opposed this law when it passed. There were no other comments about this exclusion.

Subdivision 11 of § 2.2-3705.5 excludes from mandatory disclosure certain information of the Health Practitioners' Monitoring Program Committee within DHP. The Subcommittee directed staff to incorporate this exclusion with the others concerning DHP, subdivisions 2 and 8.

Subdivision 12 of § 2.2-3705.5 excludes from mandatory disclosure certain grant application records submitted to the Commonwealth Neurotrauma Initiative Advisory Board. There were no comments or suggestions for change regarding this exclusion.

Subdivision 13 of § 2.2-3705.5 excludes from mandatory disclosure certain records copied, recorded, or received by the Commissioner of Health in the course of an examination, investigation, or review of a managed care health insurance plan licensee. The exclusion cross-references provisions of Title 32.1. Mr. Ress stated that this exclusion covers records of utilization review committees of regulated insurance companies and HMOs, records that are open in other states and that he felt should be public, but, again, he recognized these records are made confidential by other laws outside FOIA and beyond the scope of the Subcommittee's charge to review. Mr. Jones suggested that staff note in the final report for HJR 96 the Subcommittee's concern in terms of openness over these provisions that are beyond the scope of this study.

Subdivision 14 of § 2.2-3705.5 excludes from mandatory disclosure certain social services records required to be kept confidential pursuant to §§ 63.2-102 and 63.2-104. Noting the duplication of the cross-reference from subdivision 3 previously discussed, and that there were additional provisions in Title 63.2 that were not cross-referenced, the Subcommittee directed staff to prepare a draft that would reference the relevant chapter in Title 63.2 instead, in order to capture all of the relevant cross-references in one location.

Subdivision 15 of § 2.2-3705.5 excludes from mandatory disclosure certain records of the Prescription Monitoring Program in Title 54.1. The Subcommittee directed staff to add this

exclusion in a draft with the others applicable to DHP, subdivisions 2, 8, and 11, already discussed above.

Subdivision 16 of § 2.2-3705.5 excludes from mandatory disclosure records of the Virginia Birth-Related Neurological Injury Compensation Program required to be kept confidential pursuant to § 38.2-5002.2. There were no comments or suggestions for change regarding this exclusion.

Subdivision 17 of § 2.2-3705.5 excludes from mandatory disclosure certain information of the State Health Commissioner relating to the health of any person or persons subject to an order of quarantine or an order of isolation, and it cross-references the relevant provisions of Title 32.1. Mr. Ress observed that this exclusion does not "authorize the withholding of statistical summaries, abstracts, or other information in aggregate form."

Subdivision 18 of § 2.2-3705.5 excludes from mandatory disclosure certain records containing the names, addresses, or other contact information of persons receiving transportation services under Title II of the Americans with Disabilities Act (42 U.S.C. § 12131 et seq.) or funded by Temporary Assistance for Needy Families (TANF) created under § 63.2-600. There were no comments or suggestions for change regarding this exclusion.

Subdivision 19 of § 2.2-3705.5 excludes from mandatory disclosure records of certain health care committees and entities to the extent that they reveal information that may be withheld from discovery as privileged communications pursuant to § 8.01-581.17. There were no comments or suggestions for change regarding this exclusion.

The Subcommittee asked if anyone wished to make any public comment. There was no further comment, and the meeting was then adjourned. The next meeting of the Subcommittee is scheduled to be held at 10:30 a.m. on Wednesday, June 1, 2016.

June 23, 2016

The Records Subcommittee of the FOIA Council (the Subcommittee) held its fourth meeting of the 2016 interim on June 23, 2016, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Ashby (Chair), King-Casey, Porto, and Vucci were present; Mr. Jones (Vice-Chair) and Ms. Hamlett were absent.

The meeting began with consideration of a draft that would make several amendments to current Code § 2.2-3705.5 as discussed by the Subcommittee at its last meeting.⁵¹ Those changes include consolidating the various exclusions applicable to the Department of Health Professions (DHP) into one subdivision; clarifying a reference to social services laws outside FOIA that prohibit the release of certain records and striking a redundant reference to the same law in a different exemption; and striking an exemption for certain records regarding certificates of public need under a law that was repealed in 1992. Members of the

⁵¹ LD 171000067D.

Subcommittee, staff, Lisa Hahn of DHP, and Dave Ress, a reporter with the *Daily Press*, discussed the changes regarding DHP's exclusions and confirmed that they were meant to consolidate the exclusions into one area of the law, not to expand them or make other substantive changes. The Subcommittee then voted unanimously to recommend the draft to the full FOIA Council.

The Subcommittee next considered the public safety consolidation draft originally prepared by staff last year based on a chart comparing several public safety exemptions found in § 2.2-3705.2, including subdivisions 2 (portions of engineering and construction drawings and plans), 4 (terrorism and cybersecurity plans), 6 (security of governmental facilities, buildings, and structures, and safety of persons using them), and 14 (STARS or any other similar local or regional public safety communications system). Staff told the Subcommittee that the draft was written to consolidate similar language and eliminate redundancies and that it has been updated to reflect changes in the law that will go into effect as of July 1, 2016. The Subcommittee again deferred making a recommendation until it has had an opportunity to hear from representatives of the Secretariat of Public Safety and Homeland Security.

The Subcommittee then considered a draft prepared by staff addressing the treatment of letters of recommendation. Previously the Subcommittee identified a discrepancy between the way letters of recommendation are treated in regard to students or employees of educational agencies or institutions (subdivision 2 of § 2.2-3705.4), other public employees under the personnel records exemption (subdivision 1 of § 2.2-3705.1), and all data subjects under the Government Data Collection and Dissemination Practices Act (subsection B of § 2.2-3806). The Subcommittee directed staff to prepare a draft that would reconcile these provisions such that letters of recommendation would be exempt from mandatory disclosure in all cases. The Subcommittee also directed staff to prepare a definition of "personnel records." Staff noted that the definition in the draft was a combination of language from many sources and likely would need refining, but was presented in order to array options for discussion. Mr. Ress observed that the personnel exemption in current law is very broad and that defining "personnel records" presents a challenge in balancing privacy rights with the public interest in knowing how well public officials and employees do their jobs. He suggested that personal information of public officials and employees should be protected but job-related information concerning performance, evaluations, termination, and other issues should be made public. Ms. Porto stated she had experience in other states such as Florida where one could get copies of records such as resumes or applications for the top director job in a city. She also questioned the balance when some information being kept private under law is already in the public domain through social media. David Lacy, Esq., representing the VPA, reiterated the prior points about balance and stated that, under current law, if a public body does not want records to come out, it will withhold a record as a personnel record if it even mentions an employee. He suggested that the draft language was too broad in this regard. Looking at an alternative proposed by DHRM, Mr. Lacy stated that the draft language presented by DHRM was also too broad. Cindy Wilkinson of VRS noted that VRS records include not only retirees, but over 650,000 individuals, with very broad types of information, including divorce, beneficiary, optional life benefits, potentially vulnerable populations, disability, and survivor information. Mr. Ashby

expressed concern that more work needs to be done and suggested that a work group of staff and interested parties convene to work on language. The Subcommittee, interested parties, and staff agreed with this suggestion.

The Subcommittee next considered the global language change effected by HB 817 (2016) and SB 494 (2016). Last year the 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 last meeting asked staff to research any prior opinions interpreting this language. Staff described the issue using the "risk management" exemption, subdivision 9 of § 2.2-3705.1, as an example. The previous version of the exemption stated that "nothing in this subdivision shall prohibit the disclosure of information taken from inactive reports upon expiration of the period of limitations for the filing of a civil suit." The current language, as amended by HB 817/SB 494, states that "nothing in this subdivision shall authorize the withholding of information taken from inactive reports upon expiration of the period of limitations for the filing of a civil suit." Mr. Ress noted that all of the FOIA exemptions affected still have prefatory language granting the custodian discretion to release exempt records, but the amended language here appears to require release, which is confusing when the two are read together. The Subcommittee discussed the language and decided that it would like to hear from the agencies whose exemptions are affected. To that end, the Subcommittee directed staff to contact those agencies for comment.

The Subcommittee asked for public comment, but there was none. The next meeting of the Subcommittee is scheduled to be held at 10:30 a.m. on Wednesday, July 20, 2016. The Subcommittee directed staff to poll for meeting dates in August and September. The meeting was then adjourned.

July 20, 2016

The Subcommittee held its fifth meeting of the 2016 interim on July 20, 2016, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Jones (Vice-Chair), Hamlett, King-Casey, Porto, and Vucci were present; Mr. Ashby (Chair) was absent. Mr. Jones acted as chair in Mr. Ashby's absence.

The meeting began with consideration of the public safety consolidation draft originally prepared by staff last year based on a chart comparing several public safety exemptions found in § 2.2-3705.2, including subdivisions 2 (portions of engineering and construction drawings and plans), 4 (terrorism and cybersecurity plans), 6 (security of governmental facilities, buildings, and structures, and safety of persons using them), and 14 (STARS or any other similar local or regional public safety communications system). The draft was written to consolidate similar language and eliminate redundancies, and it has been updated to reflect changes in the law that went into effect as of July 1, 2016. Shawn Talmadge of the

Secretariat of Public Safety and Homeland Security addressed the Subcommittee, first noting that SB 645 (2016) had adopted the federal definition of "critical infrastructure" and added a provision for notification of the Secretary if someone requests such records. He stated that his expertise concerned addressing potential threats and that he would be happy to answer the Subcommittee's questions in that area, but he would need more time to consult legal counsel regarding the language of the proposed draft. Mr. Talmadge discussed with the Subcommittee items such as how records about an elevator shaft could pose a threat to safety and concerns regarding what information is already public (i.e., the location of public elevators in government buildings, what floors they reach, etc.) balanced against information that is not readily apparent (control features, whether the elevator is hydraulic or cable-operated, materials used in shaft construction, etc.). He indicated that building plans, for example, contain information that is not readily apparent and could be exploited by someone with nefarious intent. He also discussed coordination between the Secretariat and records custodians, relating an example where the various parties worked together to release information so a requester could be better prepared for an emergency. The Subcommittee deferred further consideration in order for Mr. Talmadge to have an opportunity to consult legal counsel.

The Subcommittee then considered a draft prepared by staff addressing the treatment of letters of recommendation, amended to reflect suggestions made by the Work Group. Previously the Subcommittee identified a discrepancy between the way letters of recommendation are treated in regard to students or employees of educational agencies or institutions (subdivision 2 of § 2.2-3705.4), other public employees under the personnel records exemption (subdivision 1 of § 2.2-3705.1), and all data subjects under the Government Data Collection and Dissemination Practices Act (subsection B of § 2.2-3806). The Subcommittee directed staff to prepare a draft that would reconcile these provisions such that letters of recommendation would be exempt from mandatory disclosure in all cases. The Subcommittee also directed staff to prepare a definition of "personnel records." After discussion at its last meeting, the Subcommittee directed staff and interested parties to convene a work group to work on language. Staff reported that the Work Group met on July 14, 2016, and had made some progress toward a definition of "personnel records" but had not reached a final recommendation and planned to meet again. Staff described how the current version of the draft, which was based on language originally suggested by DHRM, incorporated provisions setting out exceptions to the personnel records exemption and drew a distinction between personnel records and administrative investigation records. Staff announced that the work group had scheduled another meeting for August 4, 2016, and all interested parties are welcome to attend and participate. Ms. Porto noted that, regarding "payroll" records, proponents of open government want information not only about salaries but also things like liens for child support and whether an employee gets a car or other perks as a benefit, whereas the government side wants to withhold information on retirement benefits and employment dispute settlement contracts. Megan Rhyne of VCOG raised two issues: 1) whether to include dates of employment and 2) the fact that the definition of "personnel information" in the Government Data Collection and Dissemination Practices Act includes ancestry, which leads to the question of whether it could be used to track back to family members in government or with government contracts. Ms. Porto also reflected on situations where law-enforcement officers, teachers, or other

public employees were allowed to resign rather than being fired, which allowed those individuals to find positions in other jurisdictions or other states, but the prior issues followed them to their new jobs. She noted as an example that some other states made public allegations of sexual misconduct between teachers and underage students. Mr. Jones asked for public comment; there was none.

Agenda item number 3 concerned four bills referred for study from the 2017 Session of the General Assembly to the FOIA Council, which referred them to the Subcommittee for its consideration in conjunction with the HJR 96 study. In response to the Subcommittee's inquiry, staff related the understanding that the bills stemmed from requests for certain site plans concerning a data center to be built in Prince William County that were denied as economic development records. The bills addressed access to site plans as well as provisions concerning nondisclosure agreements (NDAs) as summarized below:

- **HB 280** Marshall RG—any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA.
NOTE: HB 280 would amend § 15.2-2259.
- **HB 281** Marshall, RG—Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of FOIA that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body.
NOTE: HB 281 would amend § 2.2-3705.6.
- **HB 282** Marshal, RG—Requires that a nondisclosure agreement by a public body be approved at an open meeting if it is to serve as the basis for an exclusion from the provisions of FOIA of confidential proprietary records of a private business. Such an approval must be renewed at least every three months at further open meetings if it is to continue to supply the basis for the FOIA exclusion.
NOTE: HB 282 would amend §§ 2.2-3705.6 and 2.2-3711.
- **HB 383** Marshall, RG—Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of FOIA that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body and provides that any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA.
NOTE: HB 383 would amend §§ 2.2-3705.6 and 15.2-2259.

The Subcommittee deferred making any recommendation on the bills because the bills' patron, Delegate Robert G. Marshall, was unable to attend. However, the Subcommittee did take comment from those interested. Ms. Hamlett noted that some of the bills affected the economic development exemptions for both records and meetings, subdivision 3 of §

2.2-3705.6 and subdivision A 40 of § 2.2-3711, respectively. Kara Hart of the Virginia Economic Development Partnership (VEDP) noted that HB 280 is directed only at local government, but the other three bills affect these economic development provisions. She stated that she could not speak for localities but that VEDP gets inquiries daily from national and international businesses and the information they need to share is commercially sensitive to the extent that they often work through consultants without even identifying the names of their businesses. Ms. Hamlett suggested inviting a local representative from Prince William County to speak to the bills as well as re-inviting Delegate Marshall. Mr. Ress observed that the records at issue are applications for site plans and zoning changes that come before public bodies at public hearings after a deal is already made. He stated that a risk of secrecy is having the public body act on something that affects the community without community input or awareness and that traditionally one would go to the planning commission office to see such plans. Roger Wiley, an attorney representing local government and a former FOIA Council member, noted that data centers are huge contributors to the local economy and that the project at issue is larger than usual. He stated that the meetings provisions of HB 282 would cause economic development to grind to a halt by requiring votes of the local governing bodies on NDAs but the other bills are more in line with what Mr. Ress mentioned as part of the public approval process. Specifically, Mr. Wiley stated that he felt HB 280 was unnecessary, as it is already the law, and that HB 281 and HB 383 would require records to be made public too early in the process, which would damage economic development efforts. Regarding HB 282, Ms. Hart noted that the VEDP board does not approve NDAs but, instead, NDAs are routine matters handled daily by staff. She noted that discussing NDAs at a public meeting would defeat the purpose of having NDAs because it would require public discussion of the proprietary information the NDAs seek to protect. The Subcommittee directed staff to invite Delegate Marshall and representatives of Prince William County to the next Subcommittee meeting.

The Subcommittee then turned to consideration of the exemptions for proprietary records and trade secrets found in § 2.2-3705.6. The Subcommittee last year asked staff and interested parties to meet as a work group to discuss the proprietary records and trade secrets exemptions, with the goal of drafting one or more general exemptions for these types of records. The Proprietary Records Work Group met four times in 2015 and once in 2016 to consider the issues involved and review several draft proposals, but it did not reach consensus on a recommendation for any new draft(s). At its last meeting, the Work Group recommended returning the subject matter to the Subcommittee. To begin consideration of these exemptions, staff provided a brief legislative history of the exemptions in § 2.2-3705.6 that are not limited in application to particular public bodies, by subdivision as follows:

- Financial statements not publicly available filed with applications for industrial development financings (§ 2.2-3705.6(2));
- Certain records used for business, trade and tourism development or retention, and certain records related to businesses that are considering locating or expanding in Virginia (§ 2.2-3705.6(3));
- Certain records relating to the Virginia Public Procurement Act (§ 2.2-3705.6(10));

- Certain records relating to the Public-Private Transportation Act of 1995 or the Public Private Education Facilities and Infrastructure Act of 2002 (§ 2.2-3705.6(11));
- Certain records relating to the grant of public utilities and other service franchises by localities (§ 2.2-3705.6 (13));
- Certain records relating to the provision of telecommunications and cable television services by localities (§ 2.2-3705.6(18)); and
- Certain records relating to the provision of qualifying communication services under the Virginia Wireless Service Authorities Act.

Ms. Hamlett noted that regarding subdivision 2, federal tax laws require a government issuer for tax-exempt bonds and that local industrial or economic development authorities act as a pass-through for that purpose. Mr. Jones asked if the work group had had differences of opinion on these exemptions. Staff related that the work group had primarily focused on trying to create a generic exemption for trade secrets and that agencies that would have been affected did not want to lose their own individualized exemptions. Ms. Porto reminded the Subcommittee that a goal of HJR 96 was to simplify FOIA, and to that end it would be useful to have a generic trade secrets exemption. Ms. Hamlett noted that it would take longer to reach agreement than the time remaining in the study, because while it seems intuitive to have one exemption, in practice each of the existing exemptions works differently. Mr. Jones and Ms. King-Casey suggested having the VPA resubmit its proposal regarding trade secrets, and David Lacy, Esq., agreed on behalf of the VPA. Mr. Lacy also noted the crux of the issue was raised by Justice Mims in his dissent in the case *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 287 Va. 330, 756 S.E.2d 435 (2014), that the real problem was that many exemptions use the same terms in different ways and are subject to different interpretations. Mr. Lacy further noted that agencies worry that if a generalized exemption for trade secrets is created, something currently protected might lose its status, but the idea is not to make any fundamental changes. Phil Abraham of the Vectre Corporation, representing transportation industry clients, stated that the issue goes beyond trade secrets and that his clients are concerned about any changes to the exemption regarding records under the Public-Private Transportation Act (PPTA) (subdivision 11). He noted that subdivision 11 works differently than many other exemptions, particularly by requiring agency review and determination of what records would be protected. He noted that his clients would also oppose the proposal regarding attorney fees in the VPA draft. Robert Bohannon, representing the Virginia Transportation-Construction Alliance, agreed with Mr. Abraham and noted that if existing protections were removed it would have a severe chilling effect on large projects such as those in Hampton Roads. The Subcommittee agreed to invite affected agencies and put this issue on the agenda for the next Subcommittee meeting.

Mr. Jones invited additional public comment, but there was none. The next meeting of the Subcommittee is scheduled to be held at 10:00 a.m. on Thursday, August 18, 2016. The Subcommittee also set a date to meet at 10:00 a.m. on Thursday, September 8, 2016. The meeting was then adjourned.

August 18, 2016

The Subcommittee held its sixth meeting of the 2016 interim on July 20, 2016, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Jones (Vice-Chair), King-Casey, Porto, and Vucci were present; Mr. Ashby (Chair) and Ms. Hamlett were absent. Mr. Jones acted as chair in Mr. Ashby's absence.

The meeting began with consideration of four bills referred for study from the 2017 Session of the General Assembly to the FOIA Council, which referred them to the Subcommittee for its consideration in conjunction with the HJR 96 study. The bills addressed access to site plans as well as provisions concerning NDAs as summarized below:

- **HB 280** Marshall RG—any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA.
NOTE: HB 280 would amend § 15.2-2259.
- **HB 281** Marshall, RG—Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of FOIA that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body.
NOTE: HB 281 would amend § 2.2-3705.6.
- **HB 282** Marshal, RG—Requires that a nondisclosure agreement by a public body be approved at an open meeting if it is to serve as the basis for an exclusion from the provisions of FOIA of confidential proprietary records of a private business. Such an approval must be renewed at least every three months at further open meetings if it is to continue to supply the basis for the FOIA exclusion.
NOTE: HB 282 would amend §§ 2.2-3705.6 and 2.2-3711.
- **HB 383** Marshall, RG—Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of FOIA that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body and provides that any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA.
NOTE: HB 383 would amend §§ 2.2-3705.6 and 15.2-2259.

The bills' patron, Delegate Robert G. Marshall, spoke to these bills via speakerphone. He stated as background that there is a controversy over a data center to be built in Haymarket six miles outside the industrial zone and that Virginia Dominion Power has stated it will require a 110-foot-high 220-volt power line. He stated that the Board of Supervisors of

Prince William County is limited by an NDA from stating which business is involved, but there is a high probability that it is Amazon. He said the purpose of the bills is not to prohibit NDAs or site plans, but to provide access and accountability to the public. He stated that HB 282, regarding meetings, should apply to the governing bodies of localities when discussing economic development that will affect property values. He also related that the SCC had recently stated that it favors underground power lines and that there was a similar problem in Loudoun County. Regarding NDAs, he stated, it is inappropriate for unelected officials to bind elected officials and, for accountability, elected officials should be required to vote on NDAs. Jeff Kaczmarek, Executive Director of Economic Development for Prince William County, stated that, from an economic development perspective, these bills impact sensitive company locations throughout the Commonwealth. He noted the competitive nature of the information technology industry and concerns over sensitive information and cybersecurity, including federal concerns such as military and classified information. He stated that anything beyond the disclosure necessary for good planning harms these operations from a security perspective and that companies choose locations based on risk assessments. He further stated that Virginia is in competition with other states, regions, and countries and needs to have a relationship of trust regarding confidentiality and security in order to compete, which is why companies require NDAs. Mr. Jones asked how other states handle such matters. Mr. Kaczmarek stated that treating records confidentially is taken as a given in the realm of economic development. In response to further inquiry, he stated that companies are aware of open government issues and address them through legal counsel. Delegate Marshall observed that Mr. Kaczmarek did not mention "Amazon" and noted that he was not opposed to the data center but that he objected to the overhead power lines outside of the industrial zone. He noted there would be no issue if the data center were in an industrial zone. Delegate Marshall also noted that government must comply with the Constitution and expressed concern over citizens' property rights.

When the floor was opened to public comment, Dave Ress, a reporter with the *Daily Press*, indicated that he has requested building permits and site plans in the past, and he stated that the fact that the economic development exemption is so extended to cover such permits and plans shows a real problem. Roger Wiley, Esq., speaking for Loudoun County, stated that there are many data centers in Loudoun County that are great corporate citizens bringing in tax revenue but that they use a lot of electricity. He indicated the problem is one of timing regarding the release of records during the rezoning process, in that eventually all the records will be made public, but if released too early they can have an adverse effect on a project. He also observed that while arguments could be made regarding whether a company's desire for secrecy is rational, it is nevertheless real, especially during the early stages of a project. Sandy McNinch of the VEDP stated that the need to get elected officials' approval on NDAs as proposed would significantly impact the ability to procure NDAs and bring companies to a community. She informed the Subcommittee that companies look for reasons to take communities off their list of potential locations, that the VEDP Board meets quarterly, and that VEDP cannot tell companies to wait for months for a decision. She stated that staff doing the day-to-day work needs to be able to enter NDAs. Delegate Marshall noted that HB 282, regarding voting on NDAs, would be limited to local governing bodies. Hearing no further public comment, the Subcommittee voted

unanimously to send these bills back to the FOIA Council for its consideration, but without a recommendation for action.

The Subcommittee next considered the public safety consolidation draft originally prepared by staff last year based on a chart comparing several public safety exemptions found in § 2.2-3705.2, including subdivisions 2 (portions of engineering and construction drawings and plans), 4 (terrorism and cybersecurity plans), 6 (security of governmental facilities, buildings, and structures, and safety of persons using them), and 14 (STARS or any other similar local or regional public safety communications system). The draft was written to consolidate similar language and eliminate redundancies, and it has been updated to reflect changes in the law that went into effect as of July 1, 2016. Shawn Talmadge of the Secretariat of Public Safety and Homeland Security addressed the Subcommittee at its last meeting and again today. He stated that he had reviewed the draft with legal counsel and expressed concern that the exemptions could put the public at risk because they are too specific. He suggested that the exemption should stop trying to list types of exempt information, because the information that needs protection changes. He suggested that the law should exempt any information that if disclosed would pose a risk to the public. He further stated that there should not be a requirement for those submitting records to invoke the exemption and identify which records are to be protected and why. Mr. Talmadge then said custodians should be educated to make informed decisions and that each agency should define what is critical, developing its policy in conjunction with the Secretariat. He also indicated that the requirement to produce records about the structural or environmental soundness of buildings, and about the performance of buildings after catastrophic events, was too broad and that such information would come out by other means anyway. He acknowledged in response to questions from the Subcommittee that his concerns went beyond the consolidation draft presented to the overall balance between transparency and security. The Subcommittee noted that the draft was meant only to reorganize and consolidate existing law without any substantive changes.

David Lacy, Esq., representing the VPA, noted that, without the carve-out for catastrophic events, such information about the performance of buildings would not necessarily be made public. Mr. Ress related a recent experience regarding a fire in the Hampton Roads Bridge Tunnel where people had to be evacuated and records were withheld pursuant to current subdivision 6 of § 2.2-3705.6 He noted that the clause regarding catastrophic events needed to be in the law in order for the public to obtain relevant information about what happened. Megan Rhyne of VCOG agreed with Mr. Lacy and Mr. Ress. She stated that while there is a level of trust built into FOIA, the recommendation to protect any information that could cause harm goes from trust to blind trust, and that is not the direction the law should take. Hearing no further public comment, the Subcommittee voted unanimously to send this draft to the full FOIA Council for its consideration, but without any recommendation for action.

Staff then provided a brief update on the progress of the personnel records work group, which met on July 14 and August 4, 2016, to consider adding a definition of "personnel records" to FOIA. The work group had considered several different approaches and draft proposals, but had yet to reach consensus on moving forward with specific language. The

work group plans to meet again at 1:30 p.m. on September 7, 2016, and all interested parties are invited to attend and participate.

Next, the Subcommittee revisited its recommendation last year to replace 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 last meeting asked staff to contact agencies whose exclusions have been affected by these changes so that the Subcommittee might hear directly from them. Staff sent a letter to the affected agencies asking for responses by July 29, 2016; four agencies provided written comments in reply, which are posted on the FOIA Council website. Mr. Lacy noted that only one agency quoted the amended language in its reply, which he felt signaled that any concerns expressed otherwise were merely hypothetical. The Subcommittee deferred further consideration and directed staff to extend the time period for agencies to respond.

The Subcommittee then turned to consideration of the exemptions for proprietary records and trade secrets found in § 2.2-3705.6. The Subcommittee last year asked staff and interested parties to meet as a work group to discuss the proprietary records and trade secrets exemptions, with the goal of drafting one or more general exemptions for these types of records. The Proprietary Records Work Group met four times in 2015 and once in 2016 to consider the issues involved and review several draft proposals, but it did not reach consensus on a recommendation for any new draft(s). At its last meeting, the work group recommended returning the subject matter to the Subcommittee. The Subcommittee began consideration of these issues at its meeting in July but deferred continued discussion in order to invite affected agencies to speak to their exemptions.

Anne Pace spoke and submitted written comments⁵² on behalf of the Commonwealth Health Research Board (CHRB) and stated that the CHRB wished to continue its current exemption for grant applications concerning research-related information (subdivision 17 of § 2.2-3705.6). Speaking to the same exemption, Bob Stolle of the Center for Innovative Technology (CIT), the nonprofit arm of the Innovation and Entrepreneurship Investment Authority (IEIA), stated that CIT also wished to maintain the current exclusion. He stated that CIT helps companies get products out of the lab and into the marketplace and that changing the exemption would compromise records and the quality of materials and proposals received. He stated that CIT tells applicants it will not disclose proposals, and he noted that there may also be outside investors and partners who would be affected by disclosure. In response to a question from Ms. Porto, he said that lists of awardees, the areas involved, and the amounts awarded are made public but not the specific technologies.

⁵² In addition to the comments received from various agencies for today's meeting, please note that written comments on the same topics were also submitted to the Proprietary Records Work Group for its meeting on March 24, 2016. All of the written comments received are posted on the FOIA Council website on the 2016 Subcommittees webpage.

Julie Grimes of OSIG stated that OSIG wishes to maintain its current exemption (subdivision 22 of § 2.2-3705.6) for certain records submitted to OSIG, and she provided written remarks detailing the reasons (herein incorporated by reference).

Jean Bass of the Virginia Resources Authority (VRA) indicated that VRA wishes to maintain its current exemption (subdivision 12 of § 2.2-3705.6), as VRA is involved with many other agencies and funds and performs credit review and analysis involving the financial records of private sector parties. VRA also submitted written comments (herein incorporated by reference).

Verniece Love stated that the Department of Small Business and Supplier Diversity (DSBSD) wishes to keep its current exemption (subdivision 20 of § 2.2-3705.6) and that otherwise businesses would not apply for certification. She said that DSBSD currently certifies approximately 13,000 businesses and that Governor McAuliffe by Executive Order had ordered 42% utilization of certified businesses. In reply to an inquiry, she stated that the categories used for assessments are made public.

Mr. Lacy stated that it sounds like everyone affected will request that their exemptions remain the same. He noted that VPA has submitted a white paper that was included with today's meeting materials and VPA recognizes the need to protect private entities' trade secrets. However, VPA is concerned about two main points: (i) that the current language is "loose" and subject to varying interpretations as stated by Justice Mims in *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 287 Va. 330, 756 S.E.2d 435 (2014), and (ii) that FOIA is being filled in and expanded by adding new exemptions in this section almost every session of the General Assembly. He went on to state that having a single, uniform exemption could help solve both of these problems, using the definition of "trade secrets" from the Uniform Trade Secrets Act (UTSA). Mr. Lacy also stated that the term "proprietary" does not mean "confidential" but only indicates some ownership interest. He recognized that the VPA proposal does vary regarding attorney fees but stated that there is a disconnect in current law where public bodies have to pay attorney fees with citizens' tax dollars if they lose a court case even though it is private entities that request secrecy. Additionally, he noted that the proposal recognizes there are occasions when information that does not meet the definition of "trade secrets" would need to be protected and that is when there should be individual exemptions for such information. In further discussion with Mr. Jones, Mr. Lacy expressed that the VPA proposal would be a new law but consistent with current law except for the part about attorney fees.

Bethany Thomas of the Department of Rail and Public Transportation (DRPT) spoke to subdivisions 6 and 9 of § 2.2-3705.6. She stated that DRPT was in favor of keeping the exemptions but recognized redundancies and a need to clean up the language of the exemptions. DRPT submitted written comments on these exemptions to the Proprietary Records Work Group in March 2016. Ms. Thomas stated that DRPT is not necessarily opposed to the concept of a general exemption for trade secrets, but it is focused at this time on amending the existing exemptions in current law.

Joanne Maxwell spoke on behalf of the Virginia Department of Transportation (VDOT), which also submitted written comments. She noted that VDOT had no issues with the DRPT submission in context but might have some technical tweaks to the proposed language (note that subdivision 9 applies to both DRPT and VDOT). Regarding the exemption for public-private procurement transactions (subdivision 11 of § 2.2-3705.6), Ms. Maxwell stated that the exemption needs to remain as is because it was a well negotiated compromise and nothing has changed that would favor amending the exemption. Additionally, she said she was unsure how the VPA draft would interact with other provisions in the Code (such as the procurement laws) and VDOT was concerned there may be unintended consequences. Further, she observed that the VPA proposal would leave out information generated by VDOT that are trade secrets or otherwise critical, which would hinder the agency's ability to negotiate current and future transactions. She stated that VDOT would defer to industry representatives to express private companies' interests in the same exemption. Phil Abraham of the Vectre Corporation spoke on behalf of private companies such as Transurban and others involved in large public-private transportation projects. He noted that the current exemption does not use the terms "proprietary" and "confidential," agency review is required for submitted information to be protected, and procurement law provides significant opportunities for public input. He stated that the problem with the VPA proposal is it goes beyond current law and the UTSA definition regarding ownership interests. He pointed out that a company may hold information it does not own, lease, or patent, such as alternative technical ideas, that it would still want protected. He also noted that not all information submitted is required to be submitted. Regarding the attorney fees provisions, he stated that his clients are concerned about them as proposed but would not have a problem with being added as a party.

Cindy Wilkinson of VRS stated that VRS has two exemptions in § 2.2-3705.7 and wants to make sure that the proposal for a generalized trade secrets exemption does not inadvertently affect those existing VRS exemptions. Specifically, she informed the Subcommittee that the concerns of VRS arose because subdivision 25 b of § 2.2-3705.7 refers to trade secrets and the VPA proposal addresses trade secrets "under this chapter," although the VPA white paper does recognize the different nature of investment exemptions such as those applicable to VRS.

Rob Bohannon, representing the Virginia Transportation Construction Alliance, echoed the concerns expressed by Ms. Maxwell and Mr. Abraham concerning subdivision 11. He stated that if current protections were removed, it would have a chilling effect on public-private procurement transactions by effectively "giving the playbook out" for such projects.

Sarah McCoy of the Port of Virginia stated that the Port Authority's exemption (subdivision 1 of § 2.2-3705.6) is really a reference to two exemptions in Title 62. She stated that the Port is in regular competition with private ports on the East Coast, has a positive impact on jobs and revenue, and needs to be able to preserve confidentiality in order to compete. The Port wishes to keep its exemption as it is.

Chris McGee of the Virginia College Savings Plan (VCSP) echoed the concerns expressed by VRS (subdivision 25 of § 2.2-3705.7 also applies to VCSP). He recognized the appeal and efficiency of having a uniform trade secrets exemption and suggested it deserves further discussion.

Bruce Harper of the Commercial Space Flight Authority (CSFA) stated that a universal trade secrets exemption might work depending on the language but that CSFA has similar concerns as the Port of Virginia regarding competition. CSFA submitted written remarks including an alternative proposal to amend its exemption (subdivision 24 of § 2.2-3705.6).

David Clarke, representing the Virginia Oil and Gas Association, stated that industry regulations were currently under review and will require submission of trade secrets, and that the Association would ask the legislature for an exemption. He supported the concept of a global exemption, noting that any time a new exemption is added it raises public concern. He suggested considering a prospective global exemption rather than one that replaces current exemptions. Regarding the VPA proposal, he said that VPA would need to flesh out the concept of ownership interests, and he suggested that courts be allowed to determine who should pay fees, and open up a shifting of fees to the requester if it was a frivolous request.

Ms. McNinch stated that VEDP wanted to keep the economic development exemption (subdivision 3 of § 2.2-3705.6) as it is currently, noting that the term "proprietary" is much broader than the definition of "trade secrets." As examples, she noted that the name of a company or how much of a product it sells may need to be protected in some transactions. She also expressed concern about the use of the term "required" in the VPA proposal, stating that companies are not "required" to give VEDP anything by law, but they need to share information with VEDP in order for VEDP to help them.

Mr. Wiley stated that he was in favor of having the discussion and sees the value in simplifying FOIA, but he observed that today's testimony demonstrates that anyone with a specific exemption wants to keep it. He noted that local government would like the liability shifting regarding attorney fees but private industry does not. He also stated that putting these provisions into a larger FOIA bill might put the whole bill in jeopardy.

After further discussion among the Subcommittee and interested parties, the Subcommittee voted unanimously to recommend that the FOIA Council study the concept of a uniform exemption for trade secrets next year but take no action at this time.

Mr. Jones invited any other public comment. Mr. Ress noted that agenda item number 4 also referred to law enforcement exemptions in § 2.2-3706. He stated that Virginia has an unusually broad exemption for criminal investigative records compared to other states. As examples, he noted that, under Virginia law, records of 30-year old homicides by a serial killer and the mass shooting at Virginia Tech nearly 10 years ago may still be withheld. The Subcommittee will carry this agenda item over to its next meeting, scheduled to be held at 10:00 a.m. on Thursday, September 8, 2016. The meeting was then adjourned.

September 8, 2016

The Subcommittee held its seventh meeting of the 2016 interim on July 20, 2016, to continue the three-year study of FOIA directed by HJR 96. Subcommittee members Hamlett, King-Casey, Porto, and Vucci were present; Mr. Ashby (Chair) and Mr. Jones (Vice-Chair) were absent. Mr. Hamlett acted as chair in their absence.

The Subcommittee chose to take up agenda item number 3 first, starting with consideration of the definition of "public record" in § 2.2-3701. Staff told the Subcommittee that the definition was amended in 2011 with the addition of the final sentence: "Records that are not prepared for or used in the transaction of public business are not public records." That language stemmed from a court case in Loudoun County and was intended as a clarification and restatement of existing law. However, experience has shown that the language may be subject to misinterpretation, especially as it refers to whether records are prepared or used in the transaction of public business, whereas the previous sentence refers to who prepared, owns, or possesses them in the transaction of public business. Because the final sentence of the definition was not intended to change the law and has been subject to misinterpretation, the Subcommittee voted unanimously to recommend striking it.

Next, the Subcommittee considered whether to add a definition of the term "custodian" to FOIA. Staff provided a background synopsis of how the term is used in FOIA currently, how it has been interpreted in prior advisory opinions, and a definition used in the Virginia Public Records Act, § 42.1-77 ("Custodian' means the public official in charge of an office having public records."). Ms. Hamlett noted it was not clear what impact it might have if the term were defined by statute, particularly regarding museums and foundations. Ms. Porto stated she had a potential conflict in that her media organization was currently involved in a litigation appeal to the Supreme Court of Virginia regarding a database held by the Office of the Executive Secretary, and the question of who is the custodian of the database is central to the case. The Subcommittee by consensus chose to defer further consideration of this issue until the Court decides whether to take the appeal, and if so, until the Court renders its decision in the case.

The Subcommittee next considered the procedural section for public records requests, § 2.2-3704, with an emphasis on spotting issues of concern rather than taking action today. Staff noted that some question whether the language "all public records shall be open to inspection and copying by any citizens" in subsection A means that a public body must send copies upon request, or merely allow a requester to come to the public body's offices to make copies. Staff informed the Subcommittee that staff advises sending copies upon request because it is the better option to fulfill the stated purposes of FOIA to inform the citizens of the Commonwealth about the operations of government. The Subcommittee asked to see draft language that would clarify this provision. David Lacy, representing the VPA, observed that the key words of limitation regarding media representatives in subsection A were that they have circulation in, or broadcast in or into, the Commonwealth, implying a presence here in Virginia. He stated that if Internet media is included, then the limitation might as well be removed entirely. Ms. Porto agreed that Internet-only media

raises further questions compared to traditional print media. Ms. Hamlett stated she did not want to change the original policy limitation. Regarding charges, staff noted that under subsection F a requester has a right to an estimate "in advance" but the statute does not state in advance of what, or provide for the five-working-day response time to be tolled after a public body provides the estimate and then waits to hear from the requester whether to proceed with the request. Under subsection H, regarding advance deposits, staff stated that the section requires the requester "to agree to payment," which has been interpreted as actually making payment of the deposit, but the language could be clarified. It was also observed that the charging provisions for topographical maps in subsection F were outdated and obsolete, given modern technology. Another technology issue arose with consideration of subsection G, looking at what is "format" versus "media" of electronic records, and various issues concerning databases such as when a body has a right of access but does not take possession or ownership of a database. Mr. Lacy noted that FOIA is clear regarding databases but in application public bodies do not consider FOIA. Additionally, it was suggested that a provision be added stating that a public body must consider FOIA when it acquires new technology, similar to an existing provision for the Department of General Services.⁵³ Regarding databases, Ms. Hamlett stated that public bodies still have possession of records in the "cloud." Megan Rhyne of VCOG also noted issues regarding whether a public body has possession of information in databases maintained by third party vendors such as red-light camera companies. Ms. Hamlett noted that it would be related to the issue of custody. Staff related an example where a public body took possession of a database temporarily, extracted some information, and deleted the rest. A requester who sought the full database was told the public body did not have it. Ms. Porto stated specific language was needed to deal with the issue. Staff noted that the treatment and use of text messages and social media raised additional concerns regarding both records and meetings provisions in FOIA.

The Subcommittee next considered § 2.2-3706 regarding criminal and other law-enforcement records. Staff described the legislative history of the section, noting that some version of the criminal investigative records exemption has been in the law since its enactment in 1968. Staff noted that there were differences in opinion regarding fundamental policy choices, particularly regarding whether the exemption for criminal investigative files should be limited to "active" investigations. Bills introduced in 2010, 2011, and 2012 that would have limited this exemption to active or ongoing investigations led to a study of this section by the Criminal Records Subcommittee of the FOIA Council from 2010 through 2012. That study culminated in a reorganization of the section recommended by the FOIA Council and enacted by the General Assembly in 2013. Staff also informed the Subcommittee that the 2016 Session of the General Assembly had referred to the FOIA Council for study HB 432 (Villanueva), which would also have limited this exemption to "active" investigations, but the Council had yet to act on it.

⁵³ "The regulations adopted by the Division shall: ... Require that before any public body procures any computer system, equipment or software, it shall consider whether the proposed system, equipment or software is capable of producing products that facilitate the rights of the public to access official records under the Freedom of Information Act (§ 2.2-3700 et seq.) or other applicable law." Subdivision B 2 of § 2.2-1111.

The Subcommittee invited public comment regarding this section. Captain Fertig of the Chesterfield County Police Department informed the Subcommittee that sometimes cases may be declared "inactive" or "cleared" but are later reopened as new information becomes available, and the release of details of an investigation could taint such a case. Charlene Hinton of the Petersburg Police Department stated that, even in closed cases, the release of the criminal investigative file could jeopardize the safety and privacy of persons mentioned in the file. Dan Wilson of the State Police agreed, and he used the Virginia Tech shootings as an example, stating, for example, that the investigative file of that incident included sensitive photos withheld for the protection of victims and witnesses and their families. He noted that witness information can often be extrapolated from other information in a file even if names are redacted, and part of the reason to withhold some information is to avoid re-victimizing victims. Ms. Porto noted that the Virginia Tech case has been closed for some time, and he asked whether any part of the file could be released, as it may be beneficial. Mr. Wilson said yes, but the Virginia Tech "file" is actually a room full of bankers' boxes, and the first step is determining whether the State Police have what the requester wants. He also noted that the parents of victims are especially impacted and do not want to see these records on the Internet. Ms. Hamlett observed that there would also be tactical information in the file. Captain Burke of the Portsmouth Police Department noted that the criminal investigative file exemption allows for discretionary release, and he provided an example where Portsmouth police worked with a requester to release some information regarding a high-profile homicide case. Dave Ress, a reporter with the *Daily Press*, stated that Virginia's exemption is much broader than other states' exemptions and that other states say what is open and what is not. Regarding the shootings at Virginia Tech, he said the big question is whether officials did their jobs correctly. Dick Hammerstrom, who holds positions with both VPA and VCOG, suggested that criminal investigative files should be withheld only where they would cause jeopardy to a case. He noted that in his experience as a former editor of the *Free Lance-Star*, he had seen requests denied not based on FOIA so much as because public officials were angry with the media. Ms. Hamlett observed that, if law enforcement had to provide a reason for withholding, that itself may be a "tell" that causes jeopardy to a case. Ms. Rhyne stated that the issue is staged as law enforcement versus the media, but there are other parties with interests in these records such as family members, academics, advocacy groups, and victims. She further observed that, in general, the exemption is used as a blanket rule to deny all requests for criminal investigative files. She noted that in contrast to the lack of information about the Virginia Tech shootings, Connecticut has set up a website with records regarding the Sandy Hook shootings, including a redaction log stating what has been withheld and why as per law.

Ms. King-Casey and Mr. Vucci had to leave the meeting due to other pressing business. Ms. Hamlett and Ms. Porto decided to end the meeting, as there was no longer a quorum of the full Subcommittee present, with direction to staff to look at Connecticut law regarding criminal investigative files. Staff gave a brief review of the information items in agenda item #2, all of which will be subject to further consideration by the Subcommittee at its next meeting on September 29, 2016, or by the full FOIA Council at its meeting on September 19, 2016. The meeting was then adjourned.

PART III--WORK OF THE FOIA COUNCIL

September 19, 2016

The Council held its third meeting of the 2016 interim on September 19, 2016.⁵⁴ 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 HJR 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. The Council also welcomed its newest members William "Billy" Coleburn, editor of the *Courier Record* in Blackstone, appointed by the Senate Committee on Rules for a term of four-years, and Michael Stern, Esq., citizen member appointed by the Speaker of the House of Delegates for a term of four-years.

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 therefore review of Delegate Pogge's HB 334 and HB 336⁵⁵ would be deferred until the next Council meeting. Additionally, Delegate Villanueva (HB 432) and Senator Garrett (SB 678) were unable to attend this meeting; therefore, consideration of their bills was also deferred until the October 17, 2016, meeting.

Delegate Morris, patron of HB 61 (2016), attended the meeting and advised the Council that his bill was in response to public bodies deliberately failing to respond to any citizen requests for records under FOIA. He noted that this bill has been introduced in the last two sessions and what he offered today is a far cry from the Class 1 misdemeanor penalty for willful and knowing violations of FOIA from previous years. He stated that the current form of his bill does not require mandatory termination of public officers or employees for willful and knowing violations but is permissive. Chairman LeMunyon arrayed the Council's options as it related to Delegate Morris's bill. Namely, the Council could (i) recommend HB 61 to the 2017 Session of the General Assembly, (ii) take no action, or (iii) decide not to recommend the bill as presented by Delegate Morris. Delegate LeMunyon asked staff to do

⁵⁴ Council members Delegate LeMunyon (Chair), Treadway, Dooley, King-Casey, Porto, Vucci, Coleburn, and Stern were present; members Senator Stuart (Vice-Chair), Hamlett, and Jones were absent.

⁵⁵ **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.

additional research about the termination of public officers and employees, given due process rights. The Council deferred further action on HB 61 until its October 17, 2016, meeting.

Before addressing SB 492, Senator Surovell discussed with the Council his legislative proposal aimed at alleged abuses of public bodies using closed meetings. Senator Surovell specifically mentioned the case of the Prince William Board of Visitors voting to raise their salaries across the board, following discussion of the matter improperly in a closed meeting. He noted that three months ago the city council of Fairfax discussed in a closed meeting the issue of when to hold general elections. He also mentioned that the Board of Visitors of the University of Virginia held a closed meeting about the consolidation of certain reserve funds for which the stated purpose of the closed meeting motion was personnel and regulatory matters. Senator Surovell stated that his proposal would authorize a judge in a FOIA case to impose a \$500 monetary penalty against each member of a public body who certified that a closed meeting was proper when in fact the member knew that the closed meeting was held in violation of FOIA. He noted that bad publicity alone does not work to curtail these FOIA abuses. The Council noted that this proposal needed some further work and asked staff to prepare a new draft addressing certain technical fixes to be considered at the next meeting of the Council in October.

Turning to SB 492,⁵⁶ Senator Surovell told the Council that family members of victims are routinely denied access to completed unattended death investigations and cited the case in Virginia Beach where the parents were denied access to records concerning the death of their son by suicide. He noted that when the parents filed a FOIA petition, the Virginia Beach Circuit Court ruled in favor of the City and that the Virginia Supreme Court denied the writ for further review. Senator Surovell indicated that he was trying to get closure for the families in instances like this. The chairman called for public comment. Dan Wilson, Department of State Police, told the Council that the bill does not say that a crime has been committed. Dave Ress, a reporter with the *Daily Press*, commented that the Virginia Beach police never release any information and described this as a fundamental problem with FOIA in that discretionary exemptions are treated as mandatory. Megan Rhyne of VCOG told the Council that her organization had filed an amicus brief in the case and therefore is in favor of SB 492. Council member Kathleen Dooley suggested that the bill be amended to define "immediate family." The Council deferred further consideration on SB 492 until its next meeting in October.

HJR 96 Study Subcommittee Reports

The Meetings Subcommittee has held five meetings in the 2016 interim (April 11, May 4, June 6, July 18, and August 11, 2016) to continue its study of meetings law under FOIA and the general provisions of FOIA. The Meetings Subcommittee has finished its study of meeting exemptions, meeting procedural matters and electronic meetings and has moved on

⁵⁶ SB 492 Summary: Limits the application of the criminal investigative file exemption by providing that nothing in FOIA shall be construed to authorize the withholding of information from the records of completed unattended death investigations from immediate family members of the victim, provided that (i) such information is in a form that does not reveal the identity of persons supplying information or other individuals involved in the investigation and (ii) the immediate family members of the victim have been ruled out as suspects.

to consider more general issues no longer limited to meetings issues, such as definitions and general provisions, in order to complete the HJR study.

The Records Subcommittee has held seven meetings so far in the 2016 interim (April 11, May 9, June 1, June 23, July 20, August 18, and September 8, 2016), to continue its study of records exemptions as directed by HJR 96. To date, the Subcommittee has considered all of the records exemptions in FOIA, the definition of public records, and the procedure for making and responding to a request for public records. Additionally, the Council had asked the Subcommittee to consider four bills from the 2016 Session of the General Assembly offered by Delegate Robert G. Marshall that concern nondisclosure agreements and access to certain site plans.⁵⁷ The background to these bills concerned a site being built in Prince William County and the County's denial of certain records related to the site. Delegate Marshall, representatives of Prince William County, and other interested parties spoke to the bills before the Subcommittee. After consideration, the Subcommittee referred the bills back to the Council without making any recommendation for action. The Council deferred consideration of the bills until its meeting on October 17, 2016, because Delegate Marshall was unable to attend today's meeting. At previous meetings, the Auditor of Public Accounts, OSIG, and JLARC had discussed removing themselves from a current administrative investigation exemption⁵⁸ and creating a new exemption that better reflects the work of these agencies. They plan to present a draft to the Subcommittee at its next meeting. The Subcommittee also had two work groups meet separately to examine issues related to (1) proprietary records and trade secrets, and (2) personnel records, respectively. The proprietary records work group met four times in 2015 and once in 2016 but was unable to reach consensus and therefore recommends that the issues raised be studied further. The Subcommittee adopted this recommendation and in turn recommended that the Council take no action regarding proprietary records and trade secrets this year but continue its work in this area next year, particularly in regard to drafting a general exemption for trade secrets. The personnel records work group met three times this year to consider amendments to the personnel records exemption, particularly the possibility of defining what are "personnel records," but was unable to reach consensus to move forward this year. Other pending matters include further consideration of access to criminal investigative files, the procedure for making and responding to a records request, and possible unintended consequences from

⁵⁷ **HB 280** Marshall RG—any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA. *NOTE: HB 280 would amend § 15.2-2259.*

HB 281 Marshall, RG—Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of FOIA that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body. *NOTE: HB 281 would amend § 2.2-3705.6.*

HB 282 Marshall, RG—Requires that a nondisclosure agreement by a public body be approved at an open meeting if it is to serve as the basis for an exclusion from the provisions of FOIA of confidential proprietary records of a private business. Such an approval must be renewed at least every three months at further open meetings if it is to continue to supply the basis for the FOIA exclusion. *NOTE: HB 282 would amend §§ 2.2-3705.6 and 2.2-3711.*

HB 383 Marshall, RG—Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of FOIA that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body and provides that any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA. *NOTE: HB 383 would amend §§ 2.2-3705.6 and 15.2-2259.*

⁵⁸ Subdivision 3 of § 2.2-3705.3.

the "global language change" enacted this year with HB 817/SB 494 (certain exemptions had phrasing stating that "nothing ... shall prohibit" disclosure or release of certain records, which was amended to require release of those records). The Subcommittee plans to meet again on September 29, 2016, to complete its work.

Other Business

The Council next reviewed the draft consolidating certain public safety FOIA exemptions into one exclusion (LD 17100035). This draft was referred from the Records Subcommittee without recommendation. Staff advised that despite several attempts to get comment from the Secretariat of Public Safety and Homeland Security on whether this consolidation draft correctly reflected current law and made no substantive changes, this specific question has not been answered. Instead, the response that has been made is that the FOIA exclusion for cybersecurity, critical infrastructure, and other records related to terrorism planning and response was in need of revision. Given the length of the draft, the Council decided to defer consideration of the draft until Council members had more time to review the draft and material prepared by staff to assist in understanding why the consolidation had been proposed. The Council also deferred consideration of the working papers draft recommended previously by Records Subcommittee (LD 17100581), as well as the proprietary records and trade secrets draft proposed by the VPA.

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 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 ongoing fashion in order to 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.

Records Subcommittee Recommendations

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

- **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).
- **Department of Health Professions and certain social services records.** Consolidates the various record exclusions for the Department of Health Professions into one exclusion. The bill also consolidates the record exclusions for certain social service records into one exclusion. The bill contains several technical amendments as either cross-reference changes or deletion of obsolete exclusions. (LD 17100067D).

Following review of the above drafts, the Council voted unanimously, by a vote of 8 to 0, to recommend them to the 2017 Session of the General Assembly as part of the omnibus study draft(s) that will be recommended by the Council.

Meetings Subcommittee Recommendations

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

- **Open meeting exemptions; providing context for those meeting exemptions that cross-reference corollary records exemptions ("Context Draft").** Makes technical corrections to several meeting exemptions to provide context for those meeting exemptions that cross-reference corollary records exemptions. (LD 17100049D)
- **Electronic communication meetings; remote participation by electronic communication means by members of public bodies.** Clarifies the notice requirement for special, emergency, or continued meetings held as electronic meetings. The bill removes the requirement that the annual report for public bodies holding electronic communication meetings be sent to the Joint Commission on Technology and Science. The bill also removes the term "emergency" as a condition of a member's remote participation in a meeting of the public body, as that term is included in the current use of the term "personal matters." (LD 1710176D)

All of the above Meetings Subcommittee recommendations were approved by the Council unanimously by a vote of 8 to 0.

Public Comment

Bill Richardson, of Virginia Cure, told the Council that he was a member of the Governor's Parole Review Task Force in 2015, which made certain recommendations. He stated that he supports modification of the Parole Board's FOIA exemption. Mr. Richardson stated that he wanted more transparency in the process undertaken by the Parole Board, not information on specific cases. He suggested the total elimination of the total FOIA exemption for the Parole Board found in § 2.2-3703 and was in favor of making the Parole Board subject to FOIA for records only and granting exclusions from release for specific case file records of the Parole Board. Alternatively, he supported HB 397 (Delegate Hope) from the 2012 session.⁵⁹ Chairman LeMunyon suggested that if Mr. Richardson wanted a recommendation from the Council, he should talk with Delegate Hope about his preferred approach and bring the issue back to the Council at its October meeting.

Dave Ress of the *Daily Press* advised the Council that much progress had been made in addressing FOIA concerns during the course of the HJR 96 study but that several issues remain, namely, access to criminal investigative records, the scope of the working papers

⁵⁹ HB 397 Summary: Requires guidance documents of the Parole Board to be available as public records under FOIA. The bill has a delayed effective date to give the Council an opportunity to review the legislation and report on its implementation.

exclusion, and the scope of the personnel records exclusion. Mr. Ress indicated that all of the above issues are resolvable with a bit more work.

Cindy Wilkinson of VRS told the Council that VRS had submitted written comment on the HJR 96 study overall. Ms. Wilkinson indicated that VRS still had concerns regarding ensuring that investment information remained protected records, interpretation of the personnel records exclusion, and the protection of proprietary records and trade secrets.

The last item of business discussed by the Council was raised by staff and concerned how Council members would like to be notified of formal advisory opinions issued by the executive director. In the past, Council members referred to the Council's website to read these opinions. Given that two members had been recently appointed to the Council, staff inquired whether Council members would like an email advising them of the posting of an opinion or would prefer a copy of the opinion itself. Council members Mark Vucci, Sandra Treadway, Michael Stern, and Billy Coleburn indicated that they would prefer an email notifying them that a new opinion had been posted. The remainder of the Council elected to continue their practice of checking the Council's website periodically.

Delegate LeMunyon asked if there was any other business or additional public comment. There was none. The next meeting of the Council is scheduled for Monday, November 21, 2016, at 1:30 p.m. in Richmond. There being no further business, the meeting was adjourned.

November 21, 2016

The Council held its fifth meeting of the 2016 interim on November 21, 2016.⁶⁰ 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 HJR 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. After being called to order and introducing the members present, the Council welcomed a new staff attorney, Jessica L. Budd, who will also staff the House General Laws Committee when the General Assembly is in Session.

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

Delegate Hope spoke to the Council about access to certain records of the Virginia Parole Board, which he had originally introduced in his House Bill 397 (2012).⁶¹ He stated that the goal of the legislation was to ensure that guidance and policy documents would be posted publicly on the Parole Board's website. He noted that the change was a recommendation of the Governor's Parole Review Commission and that he would like the Council to

⁶⁰ Council members Delegate LeMunyon (Chair), Dooley, Hamlett, Porto, Stern, Treadway, and Vucci were present; members Senator Stuart (Vice-Chair), Coleburn, Jones, and King-Casey were absent.

⁶¹ This topic was listed on the agenda as item #4 and was taken up out of order. HB 397 (2012) was studied by the Council in 2012, but no action was taken at that time because the interested parties had indicated they would work together to reach a resolution.

recommend language identical to HB 397 (2012) for the 2017 Session of the General Assembly. Ms. Dooley noted that Delegate Hope had spoken at the Council's last meeting and a representative of the Parole Board had then stated that such records were already made public. Delegate Hope replied that in 2012 he knew that not all such documents were posted publicly and that his bill would require that every such document be posted. The Council then voted unanimously (7-0) to recommended Delegate Hope's proposal to the 2017 Session of the General Assembly.

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

Delegate Robert G. Marshall appeared by teleconference to address his House Bills 280, 281, 282, and 383.⁶² He stated that the bills' genesis is a proposed data center in Haymarket that would be built in a rural and residential no-growth zone several miles outside of an industrial area. He indicated the plan appears to involve building 110-foot towers with high voltage power lines near residential areas, and he wanted the affected citizens to be able to find out more information. He also told the Council that it is believed that Amazon is the company that is building the data center and that Delegate Marshall and Senator Black had tried to contact Jeff Bezos, the owner of the company, but had not been able to do so. He further stated that the County of Prince William would not provide certain records or confirm that the company involved is Amazon, citing the economic development exemption (subdivision 3 of § 2.2-3705.6) and a nondisclosure agreement. Delegate Marshall further said that in order to eliminate most opposition to the bills, the legislation could be limited to a data center of greater than 50,000 square feet with a line extension greater than one mile and a power line of 220 or more kilovolts. Mr. Stern asked if the legislation could address only this one instance since it appears to be the concern. Delegate Marshall stated that adding the proposed conditions would have that effect. He also said that, otherwise, if nothing is done, this situation would set a precedent for all of Virginia. Ms. Porto asked about HB 282, which would require nondisclosure agreements to be voted on by public bodies in order to be approved and re-approved every three months. Delegate Marshall said that currently nondisclosure agreements are often approved by employees rather than

⁶² **HB 280** Marshall RG—any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA. *NOTE: HB 280 would amend § 15.2-2259.*

HB 281 Marshall, RG—Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of FOIA that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body. *NOTE: HB 281 would amend § 2.2-3705.6.*

HB 282 Marshal, RG—Requires that a nondisclosure agreement by a public body be approved at an open meeting if it is to serve as the basis for an exclusion from the provisions of FOIA of confidential proprietary records of a private business. Such an approval must be renewed at least every three months at further open meetings if it is to continue to supply the basis for the FOIA exclusion. *NOTE: HB 282 would amend §§ 2.2-3705.6 and 2.2-3711.*

HB 383 Marshall, RG—Removes any building permit submitted to a locality for final approval from an exclusion from the provisions of FOIA that otherwise protects confidential proprietary records of a private business pursuant to a nondisclosure agreement made with a public body and provides that any proposed plat, site plan, or plan of development that is officially submitted to the local planning commission for approval shall be considered a public record subject to disclosure under FOIA. *NOTE: HB 383 would amend §§ 2.2-3705.6 and 15.2-2259.*

elected officials, but he believes such agreements should be approved by elected officials for greater accountability to the public and because elected officials should not be bound by hired staff.

The Council then asked to hear from Prince William County. Jeff Kaczmarek, Executive Director of the Prince William County Department of Economic Development, stated that from an economic development perspective, these bills would have a broad impact on all of Virginia. He pointed out that the technology sector and data centers particularly are highly sensitive to data disclosure, as their data often involves the military, defense industry, or private businesses. He stated that data centers are a quickly growing industry in Virginia and the key is site selection. He pointed out that companies look at other states and always have alternative sites available, so these bills would have a chilling effect across Virginia. Mr. Stern asked how the legislation proposed would compromise data. Mr. Kaczmarek stated it was a question of timing regarding how much data was released at what stage in the process, as more data is always released as a project moves further through the processes of planning, zoning, and regulation. Ms. Dooley indicated that Fredericksburg had just made an announcement regarding Strangeways Brewing Company opening a new location in the City. She said that if City Council had had to vote publicly to approve "a nondisclosure agreement with Strangeways Brewing," it would have ruined the deal. She also noted that site plans submitted for approval are already public record and that security plans for a data center would be exempt from disclosure. Mr. Kaczmarek added that Prince William County signs nondisclosure agreements with all sorts of companies, not just data centers. Delegate Marshall said that the County took another position and did not disclose requested records, and he again pointed out that, if the bills are limited to data centers, other objections would no longer apply.

When the floor was opened to public comment, Dave Ress, a reporter with the *Daily Press*, stated how astonishing it is that a senior member of the House of Delegates must put in a bill to say site plans submitted for approval are public, and that it points to underlying FOIA problems. Megan Rhyne, Executive Director of VCOG, pointed out that nondisclosure agreements should be public, much as sealing orders in a court case are public. Kara Hart of VEDP told the Council that nondisclosure agreements are standard and expected in economic development deals. Additionally, she noted that deals often move quickly and the VEDP Board only meets quarterly, so requiring the Board to vote on nondisclosure agreements is not practical. In reply to a question from Delegate LeMunyon, Ms. Hart also pointed out that the economic development exemption requires a promise of confidentiality from the public body, which takes the form of a nondisclosure agreement. Roger Wiley, Esq., speaking on behalf of Loudoun County, stated that Loudoun County also has data centers and also opposes these bills. He suggested the possibility that the request for site plans was denied early in the process before they were submitted for approval. He also pointed out that FOIA exemptions are discretionary, and nondisclosure agreements are used to commit public bodies to using the exemptions. Delegate Marshall responded that he agreed in principle, but in fact he and others requested site plans at different stages in the process and were all denied. He also noted that if the data center was being built in an industrial area, there would be no objection.

Ms. Porto expressed concern for a balance between economic development needs and the citizens' right to know. She noted that it sounds like a large group of citizens in this instance were not given information they need to determine how this project will affect their lives. Ms. Dooley moved not to recommend the bills, noting that some of the materials addressed in the bills are already public, some of the materials might include security records, and, regarding nondisclosure agreements, it would not help to have public bodies vote to renew "nondisclosure agreements with unidentified companies for undisclosed reasons." Ms. Hamlett seconded the motion. Mr. Stern stated that he was unsure this approach was the right way to address the issue but that the issue should be addressed. Ms. Porto stated that she understood some of the material was supposed to be public already but, according to Delegate Marshall's testimony, that was not happening. She questioned how an ordinary citizen could get such records when a senior member of the House of Delegates cannot get them. The Council then voted on the motion to take no action. The motion passed 4-3 (Delegate LeMunyon, Ms. Dooley, Ms. Hamlett, and Mr. Vucci voted in favor; Ms. Porto, Mr. Stern, and Dr. Treadway voted against), and so the Council took no action on these bills.

Next, Delegate Pogge addressed her House Bill 336 (2016), which would have protected from mandatory disclosure library records that can be used to identify any library patron under the age of 18 years.⁶³ She stated that there had been a request for names and addresses of adults and minors who held library cards that resulted in the release of over 1,700 names and addresses of minors. She related that schools would not release the same records because they are exempt as scholastic records. Delegate Pogge also offered an amendment to simplify the bill by striking language concerning access when the subject is over 18 years of age. The stricken language matches language used in the scholastic records exemption, but it is unnecessary here because this change is only meant to address minors' records. Phil Abraham of the Vectre Corporation expressed support for the bill as amended on behalf of the Virginia Library Association. After a discussion of a further technical amendment, the Council voted unanimously (7-0) to recommend the bill as amended.

Delegate Pogge then addressed her House Bill 334 (2016), which would have provided 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. She said she introduced the bill because one of her constituents had had important information that affected her life and livelihood discussed in a closed meeting that was supposed to be an open meeting. Delegate Pogge said her goal was to give citizens some redress when public bodies do not follow the rules by allowing a court to invalidate actions of the public body. In response to questions from Mr. Stern regarding what criteria a court

⁶³ **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.

should take into account, Delegate Pogge replied that the court should look to whether the notice requirements were met, and she agreed there should be a time limit, such as 90 days, to invalidate actions. Mr. Ress stated that this is a good bill and noted it is only a small step in that if a violation is found, a court "may" invalidate an action but is not required to do so. Mr. Wiley stated that he understood what Delegate Pogge was trying to do but noted that if there is a 90-day waiting period, every lawyer will advise their clients they must wait the 90 days. He also stated that Mr. Stern's concerns were valid because the bill would give the judge discretion without guidance on how to use it. He further observed that the bill would affect state as well as local entities, that it could have huge financial consequences, and that a court already has remedies it can take when it finds that a public body has violated FOIA. Ms. Rhyne stated that VCOG was neither in favor nor opposed, and she noted that under opinions of the Attorney General, judges have discretion already. Delegates LeMunyon and Pogge further discussed the proposed time limit and concluded that 15 days should be enough. Ms. Porto moved to recommend the bill with an amendment to add a 15-day time limit to bring an action after a meeting has occurred. Ms. Dooley suggested adding an amendment in concept that the petitioner must identify the action to be invalidated. As an example, she pointed out that if there were 30 agenda items, it would raise the issue of whether all parties affected by all the agenda items would have to appear in court. The Subcommittee also discussed further the idea of adding criteria to guide the court's discretion. The Subcommittee then voted on the motion, which failed 4-3 (Delegate LeMunyon, Ms. Porto, and Dr. Treadway voted in favor; Ms. Dooley, Ms. Hamlett, Mr. Stern, and Mr. Vucci voted against).

Next, Delegate Kory presented her House Bill 698 (2016), which would have required that every public body afford an opportunity for public comment during any open meeting. She noted that an amended draft (LD 17101424D) had been prepared and distributed that would require public comment periods at a minimum of two meetings per year but that the draft would need to be amended further. Delegate Kory, Delegate LeMunyon, Mr. Vucci, and staff discussed a proposed amendment to the bill to require public comment at a minimum of six meetings held per year by any public body, if it holds that many, but to allow the public body to choose at which public meetings public comment would be heard if the public body has more than six meetings per year. Delegate Kory noted that most public bodies already allow public comment, but some do not, and the bill is trying to find a middle ground. The new draft also did not include language that had been included in the original bill that would have allowed a public body to adopt reasonable rules governing the public comment portion of the meeting, including imposing reasonable restrictions on time, place, and manner. The Subcommittee discussed putting this language back in the amended draft as a second amendment. Ms. Porto moved to recommend the bill with both amendments. Ms. Dooley indicated she was concerned about the language of the amendments, whether the bill properly fits within FOIA, and what a body that currently holds more than six meetings per year and allows public comment at all of them will do if the bill passes. For those reasons, she stated, she would not support the bill as amended at this time. Delegate LeMunyon asked if there was a second on the motion, but there was none and the motion failed. Delegate Kory stated that she would try to work further on the bill, to hear more comments and satisfy concerns regarding the proposal.

HJR 96 Study Subcommittee Recommendations

The Council next took up drafts recommended by the Subcommittees. Maria J.K. Everett, Executive Director of the Council, reviewed the draft legislation that has been recommended to date by both Subcommittees.⁶⁴ As a reminder, the Council has previously indicated that rather than introduce individual legislative recommendations as separate bills while the HJR 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 has heard the Subcommittee recommendations throughout this year in an ongoing fashion in order to 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. Note that both Subcommittees had completed their work and made their final reports to the Council as of the Council's meeting on October 17, 2016, and today's meeting is the last full Council meeting scheduled for 2016.

Records Subcommittee Recommendations

The first draft considered would amend certain provisions of § 2.2-3704 relating to the procedure for making and responding to a records request (LD 17100765D). Changes made by this draft include the following: clarifying that public bodies cannot require citizens to come in to the public bodies' offices to make copies (amending subsection A); stating that a denial of a request in whole or in part must cite the Code section or other provision of law that allows the records to be withheld (amending subsection B), where the current law only says "Code section;" stating that if a requester asks for an estimate, then the time to respond is tolled after the estimate is provided until the requester states whether to proceed (amending subsection F); and clarifying that a public body may require a requester "to pay" an advance deposit if the estimate exceeds \$200, rather than merely "to agree to payment" as written in current law (amending subsection H). David Lacy, Esq., speaking on behalf of VPA, proposed a technical change to the amendment concerning the requester's right to inspect or obtain copies of public records, questioned the need for the amendment that would add a tolling provision when a requester seeks a cost estimate, and opposed the amendment that would require a requester to pay an advance deposit if it was over \$200, rather than to "agree to pay" as stated in current law. Ms. Porto moved to recommend the draft with the amendments suggested by Mr. Lacy.⁶⁵ The motion was seconded, and, after further discussion, it passed 6-1 (Ms. Hamlett voted against).

The Council next considered the draft that would revert the "global language change" effected by HB 817/SB 494 (LD 17100766D), which had been considered but not acted upon at the Council's last meeting. As a reminder, 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

⁶⁴ Each draft is identified by its Legislative Draft (LD) number for reference, and all are posted on the FOIA Council website.

⁶⁵ The technical change would be to strike the word "either" and replace the word "or" with "and by" on line 14. The other changes to the draft would be not to make the proposed changes on lines 61–63 and line 82 (i.e., to leave those provisions as they are in current law).

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. Staff related that the original language stating that certain records were not prohibited from release at first appeared ambiguous because FOIA does not prohibit release of records but, upon further consideration, that language actually meant that records were still exempt, but could be released. The change made by HB 817/SB 494, which would require release of these records, therefore appeared to be an inadvertent substantive change, and the Subcommittee recommended reverting the language of the affected exemptions. There was no further discussion of the issue, and the Council voted 5-1-1 to recommend (all in favor except for Ms. Porto, who voted against, and Ms. Dooley, who abstained).

Next, the Council considered the draft that would consolidate the current personnel records exemption (§ 2.2-3705.1(1)) with the exceptions to that exemption currently found in a different section (§ 2.2-3705.8(A)), and add names to the list of items that must be disclosed, corresponding with the long-standing interpretation of current law (LD 15100326D). Mr. Lacy suggested that the monetary terms of settlement agreements settling employment disputes should be open. Staff observed that, as written, the draft is only consolidating and expressing current law; it is not meant to make substantive changes. Additionally, under current law public bodies do not have to disclose such settlement agreements, but financial records showing the amounts paid are open. Mr. Wiley added that the Supreme Court of Virginia has stated in dicta that such payment records are open,⁶⁶ but he noted that those payments can include other things such as payments under severance agreements or for accumulated leave. Ms. Dooley commented that the draft makes a real improvement by moving all of the current provisions concerning personnel records into one section where people will find it. After further discussion, the Council voted unanimously (7-0) to recommend the draft.

The Council next addressed the recommendation to strike a current exemption (subdivision 30 of § 2.2-3705.7) that exempts certain correspondence of local officials if that correspondence is not a public record in the transaction of public business (LD 15101105D). It was pointed out that the current exemption does not really do anything, since FOIA applies only to public records anyway, and thus removing the exemption would have minimal practical impact. The Council deferred consideration of this recommendation briefly. When consideration resumed, Mr. Wiley stated that this is a bill that passed even though it does not do anything. The Council took no action at this time but again brought the matter up for further consideration later in the meeting. The Council then voted unanimously (7-0) to recommend striking this exemption.

The Council then considered the recommendation to strike a proprietary record exclusion for the Alcoholic Beverage Control Authority (subdivision 34 of § 2.2-3705.6) (LD 171001306D). Staff informed the Council that while this exemption is in current law, it does not become effective until July 1, 2018. Staff related that in 2018 the Alcoholic Beverage

⁶⁶ See *LeMond v. McElroy*, 239 Va. 515, 391 S.E.2d 309 (1990).

Control Authority will replace the current Department of Alcoholic Beverage Control and the Authority will operate more like a private business. The exemption was enacted in anticipation of the future needs of the Authority. The recommendation of the Records Subcommittee was to delete this exclusion because of concern that it covers proprietary records, trade secrets, financial records, cost estimates, and marketing and operational strategies that are not yet known for an agency that does not yet exist. The Council voted in favor of this recommendation unanimously (6-0).⁶⁷

Meetings Subcommittee Recommendation

Staff presented a draft that would separate the current "legal matters" exemption into two separate exemptions (LD 15100276D), which had already been approved by the Council in concept. Staff reminded the Council that the recommendation was to separate the two clauses of the current exemption, which address "actual or probable litigation" and "specific legal matters," respectively, without making substantive changes to what may be discussed in a closed meeting. The Council voted unanimously (7-0) to recommend the draft.

After reviewing the recommendations from both Subcommittees, Ms. Everett informed the Council that the recommendations would be incorporated into two omnibus draft bills, one encompassing the recommendations of the Records Subcommittee and the other encompassing recommendations of the Meetings Subcommittee. She also reminded the Council that, in addition to the Annual Report, there would also be a report on the HJR 96 study that explains the omnibus bills in detail.

Other Business

Staff raised the issue of whether school boards should be included in the requirement to post a statement of FOIA rights and responsibilities (§ 2.2-3704.1). The Council voted unanimously (7-0) to recommend that this amendment be added and incorporated into the omnibus legislation.

Staff also raised the issue of whether the policy statement of FOIA (§ 2.2-3700) should include a statement regarding the procurement of technology similar to language in § 2.2-1111, which applies to the Department of General Services (DGS).⁶⁸ Mr. Lacy encouraged the Council to adopt this language, and she stated that this is a huge issue because of the speed at which technology has developed since the 1900s. Mr. Wiley said he understood the problem and had had a problem with a state agency where software would not produce records, but he suggested that it be put off until next year. Ms. Rhyne agreed, and, as an example, she reminded the Council of when a school adopted a security system that checked visitors' identification, then later asked for an exemption for the records it kept. Ms. Porto suggested adding this to the study of technology issues next year, and the Council agreed by consensus.

⁶⁷ Ms. Dooley did not vote, as she was not seated when the vote was taken.

⁶⁸ Subsection 2 of § 2.2-1111 states that the regulations adopted by the DGS Division of Purchase and Supply shall, among other things "[R]equire that before any public body procures any computer system, equipment or software, it shall consider whether the proposed system, equipment or software is capable of producing products that facilitate the rights of the public to access official records under the Freedom of Information Act (§ 2.2-3700 et seq.) or other applicable law."

Staff next proposed a change in the Council's enabling legislation that would state that a member continues to serve until his or her successor is appointed. Ms. Everett pointed out that Mr. Ashby's term expired on July 1, 2016, and the vacancy has not been filled. She also stated that a Code search revealed 41 instances using similar language. After brief discussion, the Council voted unanimously (7-0) to recommend this change.

Chairman's List of Issues and Issues Continued to 2017 for Study

Delegate LeMunyon directed staff to add item #3 from his Chairman's FOIA Review Open Issues list, concerning the "vendor proprietary software" exemption (subsection 6 of § 2.2-3705.1) to the technology study next year. He also reminded the Council and those in attendance of other issues to be studied next year (item #10 on today's agenda), particularly that the Council would continue to study the exemptions for trade secrets and proprietary records.

Annual Legislative Preview, Part II

At its last meeting, the Council heard from Staci Henshaw, speaking on behalf of the Auditor of Public Accounts (APA), that the APA, the Office of the State Inspector General (OSIG), and the Joint Legislative Audit and Review Commission (JLARC), were still working with interested parties on a draft that would remove these agencies from their current administrative investigation exemption (subdivision 7 of § 2.2-3705.3) and create a new exemption in the same section that better reflects these agencies' actual work and duties. Staff reported that Ms. Henshaw had informed staff that, after much discussion and consideration of alternative language, the parties had decided not to move forward with the proposal this year.

Public Comment

Mr. Ress observed that today the Council heard from two legislators regarding patterns of flouting FOIA. He also posed several rhetorical questions: When members of the General Assembly ask what was the vote on the omnibus bills, what is the answer? When asked about the over 100 exemptions in FOIA, what records are protected, and what is the interest protected? He asked whether the Council members had read the omnibus bill, and how to reconcile parts that contradict each other, such as the treatment of personnel records and administrative investigation records. He also asked how the members of the Council would answer if asked in detail what is the balance between the public purpose served and the public right to know. He suggested the members ask themselves whether they can answer these questions.

Delegate LeMunyon reminded those present that the bills would be posted on the Council's website and comments were welcome. He then asked if there was any other business or additional public comment. There was no further public comment, but in light of Mr. Ress' concerns, Ms. Dooley suggested the Council meet again solely to vote on the omnibus legislation as amended to include the recommendations made today. That meeting was set for 1:30 p.m. on Monday, December 5, 2016. There being no further business, the meeting was adjourned.

December 5, 2016

The Council held its final meeting of the 2016 interim on December 5, 2016.⁶⁹ This meeting was held to conduct a final review of the two omnibus legislative proposals by the Council as part of concluding the study of FOIA pursuant to HJR 96.

Staff led the Council in a line-by-line review of two omnibus legislative proposals. Each legislative proposal represents the consolidation of each of the Council's two subcommittees' recommendations made during the course of the HJR 96 Study (2014–2016). Staff noted that each recommendation incorporated in the omnibus drafts had been previously approved by the Council. Staff told the Council that each omnibus draft had been annotated to assist the Council and interested parties in understanding when each specific recommendation was approved, including citing the legislative draft (LD) identification number of the recommended change before incorporation into the omnibus draft, the date when recommendation was adopted by the respective subcommittee, and the date the recommendation was approved by the Council. A legislative tracking document was also made available to assist in this review process; it is attached to this report as Appendix M and has been made available on the Council's website. Staff noted that there were several changes needed in each document, ranging from merely technical fixes to inclusion of part of a recommendation that was inadvertently left out of the omnibus draft. The Council voted unanimously to amend both drafts as suggested by staff. The Council discussed whether the changes to the working papers exemption should have a second enactment clause clarifying that the changes do not apply retroactively, but no motion was made on this issue. The Council asked for public comment on whether other changes were needed to the drafts. Dave Ress, a reporter with the *Daily Press*, addressed the amendment to the working papers and correspondence exemption in the records draft (LD 17100968D). He suggested that the words "including correspondence" be stricken from the amended definition of "working papers" because it might be misused by someone claiming that all of his correspondence is a working paper. The Council voted 8-1 to adopt this recommendation (Ms. Hamlett voted against). There was no public comment regarding the meetings draft (LD 17101247D). The Council voted 9 to 0 to recommend each draft, as amended, to the 2017 Session of the General Assembly.

The Council next identified the issues that either were studied without reaching a consensus on how to move forward, or were not able to be examined due to the time constraints imposed by HJR 96, but which issues would be carried over until 2017 for further study.

Public Comment

The Council then asked for public comment. Mr. Ress stated that he believed that the suggested revisions for correspondence and working papers, as well as the requirement for notice of continued meetings, were improvements to FOIA. Mr. Ress indicated, however, that there were still several issues that had not been addressed, including access to criminal

⁶⁹ Council members Delegate LeMunyon (Chair), Treadway, Hamlett, Dooley, Jones, Porto, Vucci, Coleburn, and Stern were present; members Senator Stuart (Vice-Chair) and King-Casey were absent.

investigative records and the total exemption from FOIA for the Parole Board and other public bodies. Mr. Ress complained that other states' FOIA laws were generally not considered as part of the study, nor did the chairman's charge of zero-based exemption review ever reach fruition. Dick Hammerstrom, a member of the VPA as well as VCOG, told the Council that while this study and previous FOIA studies in 1989 and 1999 made improvements to FOIA, he was disappointed that study of public access to law-enforcement records (§ 2.2-3706) was not accomplished. Mr. Hammerstrom stated that he did not favor waiting another 10 years to fix FOIA. Katrina Dix, education reporter with the *Free-Lance Star*, encouraged the Council to remember the underlying reason for FOIA. She stated that both the public and the government do not understand it, and, as a result, the citizens are not served. She opined that citizens do not care about the technicalities of the law but they do care about the results of the law.

Other Business

Chairman LeMunyon noted that he believed that two-thirds of all FOIA exemptions protect the personal information of citizens and businesses. He stated that, over time, the law has changed to protect the privacy of citizens but not government processes. Delegate LeMunyon stated that there are many tough calls in enacting FOIA exemptions. For example, information contained in personnel records weighs the privacy of individual employees against the public's right to know. The same is the case with regard to certain law-enforcement records. He reiterated that FOIA is a balancing act of competing interests.

Council member Porto requested staff to distribute a *Daily Press* editorial critical of the work of the Council. Ms. Porto stated that the editorial says it all.

Council member Jones thanked Delegate LeMunyon and staff for navigating through a complex path. Mr. Jones stated that his takeaway from the three-year study was that there were improvements to FOIA being recommended but that he recognized it is an ongoing process. Mr. Jones stated that the Council has shown openness to examine the tougher issues and suggested that this dialogue continue.

In closing, Delegate LeMunyon thanked staff for its work and noted that, of the several bodies on which he serves, the Council is the most active. He asked staff to advise Council members when the omnibus bills will be heard by Subcommittee No. 2 of the House Committee on General Laws.

The first meeting of the Council in 2017 was scheduled for Tuesday, March 7, 2017, at 1:30 p.m. in Richmond. There being no further business, the meeting was adjourned.

FINAL LEGISLATIVE RECOMMENDATIONS OF THE COUNCIL (as introduced)

HB 1540

SUMMARY TEXT:

Virginia Freedom of Information Act (FOIA); public access to records of public bodies.

Clarifies the definition of public record. The bill also (i) defines "personal contact information" that is excluded from FOIA's mandatory disclosure provisions in certain cases; (ii) clarifies that a requester has the right to inspect records or receive copies at his option; (iii) clarifies language in certain record exclusions under FOIA that certain records may be disclosed at the discretion of the custodian; (iv) consolidates the personnel record exclusion with the limitation on the application of that exclusion, and specifically clarifies that the name, in addition to position, job classification, and salary, of a public employee is public information as per opinions of the Attorney General and the FOIA Council; (v) eliminates, effective July 1, 2018, the exclusion for the Alcoholic Beverage Control Authority relating to operating and marketing strategies; (vi) eliminates the exclusion for correspondence of local officials as unnecessary; (vii) consolidates various public safety exclusions relating to building plans and drawings and critical infrastructure into a single exclusion; (viii) eliminates the exclusion for administrative investigations of the Department of Human Resource Management, as the exclusion is already covered under the personnel records exclusion; (ix) expands the exclusion for personal information provided to the Virginia College Savings Plan to cover qualified beneficiaries, designated survivors, and authorized individuals, which terms are defined in the bill; (x) consolidates the various record exclusions for the Department of Health Professions and the Department of Health into single exclusions for each Department; (xi) clarifies certain Department of Social Services exclusions; (xii) provides an exclusion for local finance boards that provide postemployment benefits other than pensions; and (xiii) eliminates the record exclusion for *Virginia Wildlife Magazine*. The bill also eliminates the correspondence exclusion for certain state and local officials. The bill contains numerous technical amendments. This bill is a recommendation of the Freedom of Information Advisory Council pursuant to the HJR 96 FOIA study (2014–2016).

HB 1540

SUMMARY TEXT:

Virginia Freedom of Information Act (FOIA); public access to meetings of public bodies.

Revises FOIA's various open meeting exemptions relating to legal matters, litigation, certain museums, and the Virginia Commonwealth University Health System Authority. The bill also (i) clarifies where meeting notices and minutes are to be posted, (ii) requires copies of proposed agendas to be made available, (iii) eliminates reporting to the Joint Commission on Science and Technology when a state public body convenes an electronic communication meeting, and (iv) makes technical corrections to several open meeting exemptions to provide context for those meeting exemptions that currently only cross-

reference corollary records exemptions. The bill also clarifies closed meeting procedures. The bill contains numerous technical corrections. This bill is a recommendation of the Freedom of Information Advisory Council pursuant to the HJR 96 FOIA study (2014–2016).

CONCLUSION

Continuation of Study Issues to 2017:

Despite a very active three years of study, the Council was unable to achieve the goals set out in its original study plan. This was due in part to the time constraints imposed by HJR 96 and in part by the lack of consensus among interested parties concerning larger issues related to personnel records and proprietary and trade secret records. The Council, however, is committed to a complete review of all of the provisions of FOIA and has declared that the following issues will be considered during the 2017 interim:

- The proprietary records and trade secrets draft proposed by the Virginia Press Association. *Note: The Council recommended that study of § 2.2-3705.6 (proprietary record exclusions) be carried over to 2017, as efforts were unsuccessful in reaching consensus to create a general exemption for trade secrets and proprietary records;*
- Review of FOIA provisions in light of the advancement in technology;
- 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." It is believed that inclusion of this statement in FOIA as part of its policy statement would enhance compliance with the redaction rule of FOIA;*
- Definitions;
- Vendor proprietary information software is exempt from release under § 2.2-3705.1(6), vis a vis the exemption for software "developed by or for a state agency..." in § 2.2-3705.1(7);
- Website posting of notice and minutes (§§ 2.2-3707 and 2.2-3707.1);
- Texting among members during public meetings and its impact on open meeting provisions;
- Access to law-enforcement records (§ 2.2-3706);
- Personnel records (§ 2.2-3705.1);
- Enforcement of FOIA; penalties for violations; and
- Reorganization of FOIA--*Examine the organizational structure of FOIA and make recommendations to improve its readability and clarity.*

The Council would like to express its gratitude to all who participated in the work of Council for their hard work and dedication.

Respectfully submitted,

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

APPENDICES FOR FINAL HJR 96 REPORT

NOTE ON APPENDICES:

The following appendices reflect the public comments made to the two Subcommittees, the various workgroups created by the Subcommittees, and the Council. These appendices also include the work considered, proposed, or discussed during the course of the three-year HJR 96 study, which were not incorporated into the final legislative recommendations of the Council.

Individual versions of drafts recommended by the Subcommittees and ultimately approved by the Council are not included in these appendices as such drafts were consolidated into the final two omnibus bills recommended by the Council to the 2017 Session of the General Assembly, which appear as Appendix O.

There is no appendix for the 2016 Meetings Subcommittee Materials as all recommendations of the Subcommittee were included in the Council-approved omnibus meetings bill (HB 1540).

APPENDIX A

HOUSE JOINT RESOLUTION NO. 96 (2014)

Directing the Virginia Freedom of Information Advisory Council to study all exemptions contained in the Virginia Freedom of Information Act to determine the continued applicability or appropriateness of such exemptions and whether the Virginia Freedom of Information Act should be amended to eliminate any exemption from the Virginia Freedom of Information Act that the Virginia Freedom of Information Advisory Council determines is no longer applicable or appropriate. Report.

Agreed to by the House of Delegates, February 5, 2014
Agreed to by the Senate, February 25, 2014

WHEREAS, in enacting the Virginia Freedom of Information Act (FOIA) (§ 2.2-3700 et seq. of the Code of Virginia), the Virginia General Assembly determined that "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government"; and

WHEREAS, the General Assembly further determined in enacting FOIA that its provisions "shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government"; and

WHEREAS, the General Assembly conducts a routine study of FOIA through the creation of a joint subcommittee every 10 years to ensure that the nomenclature and substantive provisions of FOIA are up-to-date; and

WHEREAS, the last joint subcommittee study of FOIA was pursuant to HJR 187 in 1998, which study led to the creation of the Virginia Freedom of Information Advisory Council (FOIA Council) in 2000 as well as a substantive rewrite of FOIA; and

WHEREAS, the citizens of the Commonwealth have a substantial interest in continuing to secure access to the records and meetings of Virginia governmental entities at all levels; and

WHEREAS, the FOIA Council serves as the clearinghouse for public access issues to the General Assembly, by keeping abreast of trends, developments in judicial

decisions, and emerging issues related to FOIA and access generally; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia Freedom of Information Advisory Council be directed to study all exemptions contained in FOIA to determine the continued applicability or appropriateness of such exemptions and whether the Virginia Freedom of Information Act should be amended to eliminate any exemption from FOIA that the FOIA Council determines is no longer applicable or appropriate. In conducting its study, the FOIA Council shall also examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA. The FOIA Council shall consider comment from citizens of the Commonwealth; representatives of state and local governmental entities; broadcast, print, and electronic media sources; open government organizations; and other interested parties.

All agencies of the Commonwealth shall provide assistance to the FOIA Council for this study, upon request.

The FOIA Council shall complete its meetings by November 30, 2016, and shall submit to the Governor and the General Assembly an executive summary and a report of its findings and recommendations for publication as a House or Senate document as provided in § 30-179 of the Code of Virginia. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports no later than the first day of the 2017 Regular Session of the General Assembly and shall be posted on the General Assembly's website.

#

APPENDIX B

CONTENTS:

1. Proposed Study Plan by Year and Code Section; and
2. Virginia Press Association Comments Regarding Principles To Be Considered During Study Under HJR 96, July 2014

1. Proposed Study Plan By Year And Code Section

PROPOSED STUDY PLAN BY YEAR AND CODE SECTION		
2014 Records	2.2-3705.1.	Exclusions to application of chapter; exclusion of general application to public bodies.
	2.2-3705.6.	Exclusions to application of chapter; proprietary records and trade secrets.
	2.2-3705.7.	Exclusions to application of chapter; records of specific public bodies and certain other limited exemptions.
	2.2-3705.8.	Limitation on record exclusions.
2014 Meetings	2.2-3707.	Meetings to be public; notice of meetings; records; minutes.
	2.2-3707.01.	Meetings of the General Assembly.
	2.2-3707.1.	Posting of minutes for state boards and commissions.
	2.2-3708.	Electronic communication meetings; applicability; physical quorum required; notice; report.
	2.2-3708.1	Participation in meetings in event of emergency; certain disabilities; distance from meeting location for certain public bodies.
	2.2-3709.	Expired.
	2.2-3710.	Transaction of public business other than by votes at meetings prohibited.
	2.2-3711.	Closed meetings authorized for certain limited purposes.
	2.2-2712.	Closed meetings procedures; certification of proceedings.
2015 Records #1	2.2-3705.2.	Exclusions to application of chapter; records relating to public safety.
	2.2-3705.3.	Exclusions to application of chapter; records relating to administrative investigations.

2015 Records #2	2.2-3705.4.	Exclusions to application of chapter; educational records and certain records of educational institutions.
	2.2-3705.5.	Exclusions to application of chapter; health and social services records.
2016 General Provisions	2.2-3700	Short title; policy.
	2.2-3701.	Definitions.
	2.2-3702.	Notice of chapter.
	2.2-3703.	Public bodies and records to which chapter inapplicable; voter registration and election records; access by persons incarcerated in a state, local, or federal correctional facility.
	2.2-3704.	Public records to be open to inspection; procedure for requesting records and responding to request; charges.
	2.2-3704.1.	Posting of notice of rights and responsibilities by state public bodies; assistance by the Freedom of Information Advisory Council.
	2.2-3713.	Proceedings for enforcement of chapter.
	2.2-3714.	Violations and penalties.

#

2. VIRGINIA PRESS ASSOCIATION COMMENTS REGARDING PRINCIPLES TO BE CONSIDERED DURING STUDY UNDER HJR 96

VIRGINIA PRESS ASSOCIATION COMMENTS REGARDING PRINCIPLES TO BE CONSIDERED DURING STUDY UNDER HJR 96

**Submitted to the Records and Meetings Subcommittees
of The Virginia Freedom of Information Advisory Council**

July 8, 2014

This paper is a brief statement of general principles that the Virginia Press Association encourages the subcommittees to consider as they perform the work authorized by House Joint Resolution 96. We have intentionally avoided a section-by-section analysis of the Virginia Freedom of Information Act (the "Act" or "VFOIA"). Such a presentation would be too lengthy and detailed to serve a practical purpose. Moreover, it would obscure the necessary work of measuring all rules that limit access to government records and meetings against core principles.

Below in Part I we discuss general tests to which all VFOIA provisions should be put. They focus on clear drafting and consistency with other provisions of law. In

Part II we comment on the scope of the Act. The remaining sections, Parts III through IX, are a series of comments on key topics. The vast majority of exclusions to the Act can be associated with one of the topics discussed. In each section we identify in simple terms what a provision in that category seeks to accomplish and what interests it seeks to balance. Where current law presents challenges, we attempt to identify them. The paper frequently speaks in terms of records, but the comments apply with equal force to associated closed meeting rules.

This paper does not discuss access procedures. Many current concerns relate to process more than they relate to substantive rules. Should the subcommittees include procedural improvements to the Act in its work, VP A will address procedural aspects of the Act in a separate submission.

The Virginia Press Association trusts that this paper will encourage critical thinking by the members of the subcommittees and facilitate their work.

I. General Principles

In assessing the continued viability of any provision of Virginia's FOIA, the Council should ask the following questions:

- 1) How does the language square with the Act's stated policy of encouraging "every opportunity to citizens to witness the operations of government"?
- 2) Is the language easy to understand and apply, or does it create gray areas of interpretation that invite disagreements?
- 3) Does the original rationale for the language still stand, or has it weakened or disappeared since the language was adopted?
- 4) Have changes in technology rendered the language obsolete?
- 5) Is the language consistent with other provisions of the Act, or does the imprecise use of words and phrases generate ambiguities?
- 6) Is the language necessary in light of other provisions in the Code?
- 7) Is the language necessary in light of federal statutes or regulations that establish a controlling rule of public access?
- 8) Is the language redundant? Does it repeat concepts that are already found in the Act?
- 9) Should discretionary "exclusions" be supplanted in some cases by clear cut but narrower exemptions?

II. Scope of the Act

The Act should apply to every public body. "Public body" must be defined broadly to include every entity established by the state's constitution or statutes, and all subordinate entities, agents and employees that perform either governmental or proprietary functions of the entity. The touchstones are whether (a) the entity is created by law, or is a delegee of an entity created by law, to carry out a public purpose, (b) public funds are flowing through the entity to support its operations in any way, or (b) the entity is disbursing public funds.

Judicial bodies and the SCC should not be excluded from the Act. However, to the extent that a court or an administrative agency is engaged in the adjudication of specific cases or controversies, the case files generated by those controversies, and the proceedings held by those entities, are subject to separate rules of access governed by constitutional principles, applicable statutes other than FOIA, and the rules of the particular tribunal. VFOIA is irrelevant to the discovery process in any adjudication by a court or administrative agency. Moreover, records generated by judges or persons performing a judicial function that contain information relating to their deliberative processes should not be available to the public.

III. Privileges and quasi-privileges recognized by law

Certain communications are recognized as confidential by the common law, by statute or by rule. Some are based on a policy of encouraging candid communication by the privilege holder and some are based on concepts of privacy. The latter are discussed more fully in the next section.

Policy-based privileges that occur frequently in seeking access to public records include:

- 1) the attorney-client privilege, which is held by the client, and may only be waived by the client;
- 2) the protection of the work-product of a party, its attorneys and its experts or consultants engaged in litigation;
- 3) the deliberative process privilege, which protects senior policy makers by creating a zone of confidentiality for the candid assessment of facts in advance of making a final decision

Public bodies, and individuals involved in their governance, are fully entitled to the protections of the attorney-client privilege. The privilege protects communications between the decision-makers in public bodies and their counsel to the full extent recognized by law, but to no greater extent. Records of a public body, its attorneys, or its investigators that contain information qualifying as work product

under rules of court, where litigation is either pending or anticipated (for example when a public body is on notice of a claim), should be subject to protection and not disclosed pursuant to VFOIA.

The attorney-client and work product privileges should not be employed as a cover for communications or facts that are not within the scope of those protections. The mere presence of a lawyer in a discussion or as a party to a public record does not give rise to a privilege. A public body should never characterize a matter as attorney-client privileged simply because a lawyer was present while it was discussed. Moreover, records that are otherwise public records do not lose their status as such simply because they are gathered or reviewed by an attorney, including a prosecutor, for any purpose.

Any person or entity that voluntarily submits privileged material to a public body waives all privileges attaching to the submitted material, and the material is fully subject to FOIA unless otherwise exempt. Any person or entity that submits privileged material to a public body under legal compulsion must identify privileged material with specificity at the time it is submitted so that the public body may withhold it in response to FOIA requests.

Deliberative process privileges such as "working papers" protections are subject to abuse. If permitted, they must be confined to a small number of senior decision-makers, and limited as to their scope and duration, establishing a limited zone of privacy to facilitate decision making. Once a decision has been made on a particular matter, the deliberative process is over, the privilege should cease, and all records relevant to the decision must be made public.

IV. Personal privacy

Personal privacy is not a principle of broad application. Our constitutional law has largely limited the privacy concept to (1) protection of one's home and private spaces from warrantless searches and seizures, and (2) matters involving private sexual conduct. Other privacy protections have been developed through statutory law.

Privacy concerns relevant to public access fall into the following major categories:

- 1) *Personal identifying information.* This includes the protection of information that can be used to hijack an individual's identity, such as social security numbers or fingerprints or unique biometric data. There should be clear protection against the disclosure of such material.
- 2) *Personal financial information.* This is information that would permit an intrusion into the private financial affairs of an individual by disclosing credit card, banking account, or brokerage account information. There should be

- 3) clear protection against unauthorized access to such accounts or access to personal financial transactions unrelated to the conduct of public business.
- 4) *Personal health information.* This is patient-specific medical or financial information gathered by entities that directly provide or directly pay for the individual's medical care. Since the passage of HIPAA, this area is covered comprehensively by federal law and state efforts to overlay those rules are of dubious value.

Note that these concepts relate to the protection of information that is associated with identifiable individuals. Exemptions that reach more broadly than necessary to protect this core interest are suspect. Individual data is often aggregated by public bodies for the purpose of studying trends, developing policy or anticipating budgetary requirements. There is no basis for adopting FOIA exemptions that mask general government policymaking activities based on the aggregation and analysis of data as long as individual identities are disconnected from the disclosure of private facts. If there are concerns about the categories of data collected by government, those are not freedom of information issues. If there is "over collection" of information by public bodies, there is a need for greater transparency into what has been collected.

V. Procurement and Financial Matters

Virginia's public procurement laws generally govern the manner in which information relating to purchasing activities by public bodies is disclosed. Competitive bidding and competitive negotiation are traditional procurement techniques, and the governing statutes provide for post-procurement public access to information. Public-private partnerships are not transparent, and VP A predicted when the public-private partnership statutes and their associated FOIA exclusions were adopted that the lack of transparency would become a source of problems. Those concerns remain and there is evidence that they are well-founded.

FOIA exemptions limiting the release of procurement information should serve two purposes: (1) to facilitate a fair competitive process among bidders or offerors, and (2) to protect the financial interests of taxpayers. FOIA laws need not facilitate the opportunity available to any particular bidder, and the argument that FOIA laws prevent qualified bidders from participating in transactions with public bodies has never been credibly documented. Every bidder is entitled to be on a level playing field and to have its trade secrets protected in the process. (See Part XIII below regarding trade secrets). Beyond that there is no obligation to an entity that will be paid with public dollars, and everyone who does business with the government must understand that transparency goes hand in hand with the receipt of public dollars.

FOIA exemptions that protect procurement transactions must be designed to prevent disclosure of (1) bid information prior to bid award and (2) information that

would disadvantage the public body during the conduct of a competitive negotiation. Details of contract negotiations, to the extent their release would disadvantage the public body, should be maintained in confidence until the contract is executed or performance under the contract commences, whichever occurs first.

Procurement is an area where exclusions have proliferated under VFOIA. Conceptually, these exclusions could be consolidated into an omnibus exclusion for procurement transactions that would apply to all public bodies.

Other financial matters concern the concept of the "investment of public funds." The core principle is that public bodies charged with placing public money into investment vehicles of one kind or another have a fiduciary duty to the public. The performance of such investments must be closely monitored, and exclusions from public access should operate only to protect forward-looking, strategic decisions concerning purchases or sales that might influence the market adversely if disclosed.

One recurring problem is that public bodies engaged in procurement transactions confuse all manner of expenditures with the "investment" of public funds. "Investment" is a term of art relating to financial transactions in stocks, bonds, options, commercial paper or other similar investment vehicles. It is not the procurement of paper towels in bulk for the school system.

VI. Law Enforcement

Law enforcement-related exemptions must recognize the extraordinary importance of transparency into the operation of agencies that exercise significant, immediate and consequential coercive power over citizens. Over the last decade, law enforcement data gathering and mining have become more extensive and intrusive, facilitated by state-level entities such as the Virginia State Police Fusion Center. Weaponry and tactics used by local police are increasingly militarized and expensive. The ability of law enforcement, in discussing public access to information, to articulate nuanced policy positions that distinguish common street crime, organized criminal activity, and threats to national security has all but disappeared.

Two areas present recurring problems: (1) the simple failure to provide timely information with regard to everyday criminal activities in Virginia's communities, and (2) the failure of law enforcement entities to acknowledge that all criminal investigations are not "ongoing" forever. Compliance with Virginia law regarding the former is spotty; efforts to address the latter are nonexistent.

These issues and others were addressed recently by the Council, and the resulting changes to the relevant provisions of VFOIA did not resolve them. They may be beyond the scope of the present study, but there remains a compelling need to strike a more rational balance that encourages transparency by law enforcement entities.

VII. Public Safety

This issue is distinct from law enforcement. It involves the protection of information that would permit access to critical infrastructure and information technology systems. It involves the protection of tactical plans that have been developed to respond to significant threats to public safety such as a terrorist attack. The law was significantly amended after the September 2001 attacks on New York City and Washington, D.C., but the provisions are verbose and contain redundancies.

This may present an opportunity to create a unified exclusion relating to the protection of all-public infrastructure and information systems.

VIII. Trade Secrets and Intellectual Property

VFOIA is rife with exclusions that protect sensitive business information. The proliferation of these provisions, all of which aim at the same general objective, has led to the development of conflicting language and unintended ambiguities. The recent Virginia Supreme Court decision in *American Tradition Institute v. Rector and Visitors of the University of Virginia*, Record No. 130934 (2014), illustrates the point. In that case, the loose application of the word "proprietary" throughout VFOIA led to problems of statutory interpretation.

A comprehensive trade secrets provision applicable to all public bodies should be considered, and the numerous, inconsistent exclusions for confidential business information of various kinds should be stricken.

Note that Virginia has an expansive statutory definition of a "trade secret":
"Trade secret" means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

- 1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and*
- 2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*

Va. Code Section 59.1-336 (definitional part only). This definition is a useful basis for rules governing access to records. Business entities are familiar with this concept and adept at interpreting it. Importing it into VFOIA will eliminate needless wrangling over what is "proprietary" or "confidential."

Two different scenarios must be addressed: (1) where a *public body* is engaged in research and development activities that require the protection of intellectual

property so that it may be exploited under the rules that generally govern the marketplace; and (2) where a *private entity* delivers sensitive intellectual property or a qualifying trade secret to a public body for a purpose contemplated by governing law. A suggested model of such provisions follows.

1. ***Protection of trade secrets submitted to a public body.*** *A record delivered or transmitted to a public body by an entity that is not a public body under this Chapter may be withheld in whole or in part to the extent that:*
 - a) *the record contains information in which the submitting entity has an ownership interest;*
 - b) *the submitted information contains a "trade secret" of the submitting entity as defined in the Uniform Trade Secrets Act, Va. Code Section 59.1-336, et seq.;*
 - c) *the record was delivered or transmitted to the public body (i) in compliance with a statute, regulation or other law of the United States or the Commonwealth, or (ii) as a required component of a submission made in connection with a public procurement, public financing or economic development transaction; and*
 - d) *the information that the submitting entity seeks to protect was clearly and specifically identified by the submitting entity as a trade secret at the time of its delivery or transmission to the public body, such identification being a representation by the submitting entity that it has made a good faith effort only to designate as trade secrets those portions of the submission that are entitled to protection under the law.*

In the event a public body, in response to a request under this Chapter, denies access to a public record or a portion of a public record on the ground that the requested information has been identified by the submitting entity as a trade secret and the requester challenges the characterization of the withheld information as a trade secret, the public body must notify the submitting entity within two work days of the challenge made by the requester. If the submitting entity and the requester are unable after conferring to reach agreement on the proper designation of the material in dispute, or the submitting entity refuses to confer with the requester, the requester may bring an action under this Chapter to require the public body to produce the requested material, and shall name as a defendant in the action the submitting entity. If as a result of the action the court requires that the public body produce material that has been improperly designated as a trade secret by the submitting entity, any award of attorneys' fees in favor of the requester shall be paid by the submitting entity and not by the public body.

1. ***Protection of trade secrets created by a public body.*** *A record created by a public body may be withheld in whole or in part to the extent that the record:*
 - a) *was created by the public body or by an employee or agent of the public body, in connection with or for the purpose of conducting academic, medical or scientific*

- b) *research or commercially exploiting such research for the financial benefit of the public body;*
- c) *contains (1) a "trade secret" as defined in the Uniform Trade Secrets Act, Va. Code Section 59.1-336, et seq., or material that would qualify as a "trade secret" were the public body a private business entity, or (2) is the personal working papers of a professor, instructor, researcher or student; and*
- d) *has not been the subject of any prior publication, been patented, or otherwise been disclosed in any manner that is inconsistent with the continued need to shield the information from public disclosure.*

Nothing in this provision shall be construed to require the production of computer software in the possession of a public body that is (a) otherwise available to the public as a product offered on a commercial basis, (b) designed for the specific use of the public body in carrying out its operations, or (c) an operating system that is being used to conduct the regular business of the public body.

IX. Personnel matters

The public has a strong interest in the performance of all individuals who are working on their behalf and paid with tax dollars. The most fundamental principle is that all financial transactions involving public employees must be open to scrutiny. This includes salaries, benefits, bonuses, vacation and overtime, and expense reimbursements for every person employed by government. It also includes all payments of any kind made to public employees as part of any severance package or in settlement of a dispute. There is no privacy or other interest sufficiently compelling to trump full disclosure of money spent by a public body on its employees.

There must necessarily be a zone of confidentiality in which the management of a public body is able to address performance with individual public employees. To that end, individual personnel files should receive reasonable protection. Two exceptions to this principle are important.

First, the more senior a public employee, the greater and more direct the public interest in his or her performance. There is no reason to hide discussions concerning the hiring, performance or dismissal of a superintendent who answers directly to an elected school board, or a chief of police or senior law enforcement officer. Increased accountability should go hand in hand with the higher level of influence a public employee wields in his or her work. The hiring, discipline and firing of senior officials should have minimal secrecy.

Second, with regard to any employee, a charge of criminal activity, malfeasance, misuse of public funds, or any other allegation that goes to the integrity of government operations, must be resolved in the open. Personnel-related

investigations must protect confidential informants, as well as the reputation of the accused person. However, to make such a charge is serious, and a resolution favorable to the employee should be public in order to vindicate the employee publically. If the charge proves to be warranted, its resolution and the resulting employee discipline should be available for scrutiny to ensure the integrity of the process.

CONCLUSION

The Virginia Press Association has maintained an ongoing interest in the development of the Act, in order to ensure the fullest possible participation by Virginia's citizens in their government. We look forward to the continued discussion of matters that will come before the Committee during the current study.

#

APPENDIX C

Study Guidance Memorandum to Subcommittee Members

MEMORANDUM

TO: Members, Records Subcommittee and Meetings Subcommittee

FROM: Senator Richard Stuart, Chair, FOIA Council
Delegate Jim LeMunyon, Vice-Chair, FOIA Council

DATE: June 10, 2014

SUBJECT: HJR 96 (2014), Study Plan and Scope; additional direction

Thank you for having already held your first meeting and electing the chairs of the respective subcommittees. This undertaking will necessarily involve a long process of review and it is good to know the subcommittees are off to such a quick start. Following your first meeting on May 14, 2014, staff alerted us about your concerns as to the scope of the FOIA study pursuant to HJR 96. As you will recall, the FOIA Council adopted a study plan as to scope of the study as well as a proposed timetable. A copy of the study plan is attached for your reference. Please note that in addition to HJR 96, the statutory authority of the FOIA Council as found in § 30-179 specifically provides that as part of reporting its annual activities, the FOIA Council include any recommendations for changes in the law. While HJR 96 may lay out more specific goals to be achieved in this study, it must be read in conjunction with the authority of the FOIA Council pursuant to § 30-179 to be the clearinghouse for FOIA and related access issues. While we do not believe that basic policy as expressed in § 2.2-3700 needs any change, the remainder of the Act should be reviewed as part of our work.

We are aware that a specific issue raised was how, when reviewing exemptions, the standard expressed in the HJR 96 for applicability or appropriateness should be measured. While the adopted study plan gives some guidance, we suggest the following measuring sticks. For applicability, review of FOIA exemptions should be from a "zero-based FOIA approach" by assuming that all records 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.

It is our belief that this memorandum will provide the necessary guidance for the subcommittees to move forward in their deliberations. As such, no additional meeting of the FOIA Council appears to be necessary. We look forward to hearing your respective progress reports at the next FOIA Council meeting on Tuesday, July 8, 2014.

Sincerely,

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line extending to the right.

Senator Richard H. Stuart

A handwritten signature in black ink, featuring a large, stylized initial 'J' followed by a series of loops and a long horizontal line extending to the right.

Delegate James M. LeMunyon

APPENDIX D

2014 MEETINGS SUBCOMMITTEE MATERIALS

CONTENTS:

1. Remarks Submitted by the University of Virginia Medical Center November 5, 2014; and
2. Remarks Submitted by the Virginia Department of Veterans Services, November 3, 2015.

1. Remarks Submitted by the University of Virginia Medical Center November 5, 2014

Thank you Mr. Chairman, Mr. Vice Chair and members of the Subcommittee for allowing me to speak today on behalf of the University of Virginia Medical Center. I am Sally Barber, Special Advisor to the Executive Vice President for Health Affairs at UVA. I speak in support of maintaining the exemption in Section 2.2-3711(A)(22) as it relates back and supports two other key provisions of the *Virginia Code*, specifically Sections 23-77.3 and 23-77.4. We are handing you copies of those two Code sections for your reference.

The General Assembly enacted *Code Sections* 23-77.3 and 23-77.4 in 1994 and 1996, respectively, to recognize the unique role that the UVA Medical Center has in support of the missions of medical and health sciences education and research of the University of Virginia, and the need for the Medical Center to remain economically viable, with the ability to participate in joint ventures, partnerships, contracts and other cooperative arrangements that are reflective of changes in health care delivery. Further the General Assembly recognized that running a hospital and related health care enterprise requires specialized management, with prompt decision making authority in order to conduct the business of the Medical Center in an efficient, competitive manner. Specifically, the General Assembly said that it "finds that the ability of the Medical Center" to "remain economically viable" and thus support the University of Virginia "**is heavily dependent upon its ability to compete with other providers of health care that are not subject to the requirements of law applicable to agencies of the Commonwealth.**"

One of the requirements of law that other providers of health care are "not subject to" is FOIA. The General Assembly enacted Section 2.2-371 1 (A)(22) in 1996 because it recognized that the Medical Center could not operate successfully in the health care marketplace if its proprietary information were made publically available. Section 2.2-3711(A)(22) exempts those portions of meetings "in which there is discussed proprietary, business related information pertaining to the operations of the Medical Center, including its business development or marketing strategies and its activities with existing or future joint venturers, partners, or other parties with whom the Medical Center has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information

would be harmful to the competitive position of the Medical Center." Clearly the General Assembly understood that in order to give full meaning to Sections 23-77.3 and 23-77.4, an exemption under FOIA for this proprietary information of the Medical Center was needed and appropriate, to place the Medical Center on an equal footing with privately owned hospitals and health care entities. The exemption remains necessary today just as it was in 1996 in order for the Medical Center to continue to compete with other hospitals and health care entities in a constantly evolving health care industry.

Thank you for your time. I will be happy to answer any questions.

Code of Virginia

11/4/2014

Title 23. Educational Institutions

Chapter 9. University of Virginia

§ 23-77.3. Operations of Medical Center.

A. In enacting this section, the General Assembly recognizes that the ability of the University of Virginia to provide medical and health sciences education and related research is dependent upon the maintenance of high quality teaching hospitals and related health care and health maintenance facilities, collectively referred to in this section as the Medical Center, and that the maintenance of a Medical Center serving such purposes requires specialized management and operation that permit the Medical Center to remain economically viable and to participate in cooperative arrangements reflective of changes in health care delivery.

B. Notwithstanding the provisions of § 32.1-124 exempting hospitals and nursing homes owned or operated by an agency of the Commonwealth from state licensure, the Medical Center shall be, for so long as the Medical Center maintains its accreditation by a national accrediting organization granted authority by the Centers for Medicare and Medicaid Services to ensure compliance with Medicare conditions of participation pursuant to § 1865 of Title XVIII of the Social Security Act (42 U.S.C. § 1395bb), deemed to be licensed as a hospital for purposes of other law relating to the operation of hospitals licensed by the Board of Health. The Medical Center shall not, however, be deemed to be a licensed hospital to the extent any law relating to licensure of hospitals specifically excludes the Commonwealth or its agencies. As an agency of the Commonwealth, the Medical Center shall, in addition, remain (i) exempt from licensure by the Board of Health pursuant to § 32.1-124 and (ii) subject to the Virginia Tort Claims Act (§ 8.01-195.1 et seq.). Further, this subsection shall not be construed as a waiver of the Commonwealth's sovereign immunity.

C. Without limiting the powers provided in this chapter, the University of Virginia may create, own in whole or in part or otherwise control corporations, partnerships, insurers or other entities whose activities will promote the operations of the Medical Center and its mission, may cooperate or enter into joint ventures, with such entities and government bodies and may enter into contracts in connection therewith. Without limiting the power of the University of Virginia to issue bonds, notes, guarantees, or other evidence of

indebtedness under subsection D in connection 'with such activities, no such creation, ownership or control shall create any responsibility of the University, the Commonwealth or any other agency thereof for the operations or obligations of any such entity or in any way make the University, the Commonwealth, or any other agency thereof responsible for the payment of debt or other obligations of such entity. All such interests shall be reflected on the financial statements of the Medical Center.

D. Notwithstanding the provisions of Chapter 3 (§ 23-14 et seq.) of this title, the University of Virginia may issue bonds, notes, guarantees, or other evidence of indebtedness without the approval of any other governmental body subject to the following provisions:

1. Such debt is used solely for the purpose of paying not more than 50 percent of the cost of capital improvements in connection with the operation of the Medical Center or related issuance costs, reserve funds, and other financing expenses, including interest during construction or acquisitions and for up to one year thereafter;
2. The only revenues of the University pledged to the payment of such debt are those derived from the operation of the Medical Center and related health care and educational activities, and there are pledged therefor no general fund appropriation and special Medicaid disproportionate share payments for indigent and medically indigent patients who are not eligible for the Virginia Medicaid Program;
3. Such debt states that it does not constitute a debt of the Commonwealth or a pledge of the faith and credit of the Commonwealth;
4. Such debt is not sold to the public;
5. The total principal amount of such debt outstanding at any one time does not exceed \$25 million;
6. The Treasury Board has approved the terms and structure of such debt;
7. The purpose, terms, and structure of such debt are promptly communicated to the Governor and the Chairmen of the House Appropriations and Senate Finance Committees; and
8. All such indebtedness is reflected on the financial statements of the Medical Center.

Subject to meeting the conditions set forth above, such debt may be in such form and have such terms as the board of visitors may provide and shall be in all respects debt of the University for the purposes of §§ 23-23, 23-25, and 23-26.

1994.c.621; 2003.c.701; 2014, c. 320.
Code of Virginia
11/4/2014
Title 23. Educational Institutions

Chapter 9. University of Virginia

§ 23-77.4. Medical center management.

A. The General Assembly recognizes and finds that the economic viability of the University of Virginia Medical Center, hereafter referred to as the Medical Center, together with the requirement for its specialized management and operation, and the need of the Medical Center to participate in cooperative arrangements reflective of changes in health care delivery, as set forth in § 23-77.3, are dependent upon the ability of the management of the Medical Center to make and implement promptly decisions necessary to conduct the affairs of the Medical Center in an efficient, competitive manner. The General Assembly also recognizes and finds that it is critical to, and in the best interests of, the Commonwealth that the University continue to fulfill its mission of providing quality medical and health sciences education and related research and, through the presence of its Medical Center, continue to provide for the care, treatment, health-related services, and education activities associated with Virginia patients, including indigent and medically indigent patients. Because the General Assembly finds that the ability of the University to fulfill this mission is highly dependent upon revenues derived from providing health care through its Medical Center, and because the General Assembly also finds that the ability of the Medical Center to continue to be a reliable source of such revenues is heavily dependent upon its ability to compete with other providers of health care that are not subject to the requirements of law applicable to agencies of the Commonwealth, the University is hereby authorized to implement the following modifications to the management and operation of the affairs of the Medical Center in order to enhance its economic viability:

B. Capital projects; leases of property; procurement of goods, services and construction.

1. Capital projects.

a. For any Medical Center capital project entirely funded by a nongeneral fund appropriation made by the General Assembly, all post-appropriation review, approval, administrative, and policy and procedure functions performed by the Department of General Services, the Division of Engineering and Buildings, the Department of Planning and Budget and any other agency that supports the functions performed by these departments are hereby delegated to the University, subject to the following stipulations and conditions: (i) the Board of Visitors shall develop and implement an appropriate system of policies, procedures, reviews and approvals for Medical Center capital projects to which this subdivision applies; (ii) the system so adopted shall provide for the review and approval of any Medical Center capital project to which this subdivision applies in order to ensure that, except as provided in clause (iii), the cost of any such capital project does not exceed the sum appropriated therefor and that the project otherwise complies with all requirements of the Code of Virginia regarding capital projects, excluding only the post-appropriation review, approval, administrative, and policy and procedure functions performed by the Department of General Services, the Division of Engineering and Buildings, the Department of Planning and Budget and any other agency that supports the functions

performed by these departments; (iii) the Board of Visitors may, during any fiscal year, approve a transfer of up to a total of 15 percent of the total nongeneral fund appropriation for the Medical Center in order to supplement funds appropriated for a capital project or capital projects of the Medical Center, provided that the Board of Visitors finds that the transfer is necessary to effectuate the original intention of the General Assembly in making the appropriation for the capital project or projects in question; (iv) the University shall report to the Department of General Services on the status of any such capital project prior to commencement of construction of, and at the time of acceptance of, any such capital project; and (v) the University shall ensure that Building Officials and Code Administrators (BOCA) Code and fire safety inspections of any such project are conducted and that such projects are inspected by the State Fire Marshal or his designee prior to certification for building occupancy by the University's assistant state building official to whom such inspection responsibility has been delegated pursuant to § 36-98.1. Nothing in this section shall be deemed to relieve the University of any reporting requirement pursuant to § 2.2-1.13. Notwithstanding the foregoing, the terms and structure of any financing of any capital project to which this subdivision applies shall be approved pursuant to § 2.2-2416.

b. No capital project to which this subdivision applies shall be materially increased in size or materially changed in scope beyond the plans and justifications that were the basis for the project's appropriation unless: (i) the Governor determines that such increase in size or change in scope is necessary due to an emergency or (ii) the General Assembly approves the increase or change in a subsequent appropriation for the project. After construction of any such capital project has commenced, no such increase or change may be made during construction unless the conditions in (i) or (ii) have been satisfied.

2. Leases of property.

a. The University shall be exempt from the provisions of § 2.2-1149 and from any rules, regulations and guidelines of the Division of Engineering and Buildings in relation to leases of real property that it enters into on behalf of the Medical Center and, pursuant to policies and procedures adopted by the Board of Visitors, may enter into such leases subject to the following conditions: (i) the lease must be an operating lease and not a capital lease as defined in guidelines established by the Secretary of Finance and Generally Accepted Accounting Principles (GAAP); (ii) the University's decision to enter into such a lease shall be based upon cost, demonstrated need, and compliance with guidelines adopted by the Board of Visitors which direct that competition be sought to the maximum practical degree, that all costs of occupancy be considered, and that the use of the space to be leased actually is necessary and is efficiently planned; (iii) the form of the lease is approved by the Special Assistant Attorney General representing the University; (iv) the lease otherwise meets all requirements of law; (v) the leased property is certified for occupancy by the building official of the political subdivision in which the leased property is located; and (vi) upon entering such leases and upon any subsequent amendment of such leases, the University shall provide copies of all lease documents and any attachments thereto to the Department of General Services.

b. Notwithstanding the provisions of §§ 2.2-1155 and 23-4.1, but subject to policies and procedures adopted by the Board of Visitors, the University may lease, for a purpose consistent with the mission of the Medical Center and for a term not to exceed 50 years, property in the possession or control of the Medical Center.

c. Notwithstanding the foregoing the terms and structure of any financing arrangements secured by capital leases or other similar lease financing agreements shall be approved pursuant to § 2.2-2416.

3. Procurement of goods, services and construction.

Contracts awarded by the University in compliance with this section, on behalf of the Medical Center, for the procurement of goods; services, including professional services; construction; and information technology and telecommunications, shall be exempt from (i) the Virginia Public Procurement Act (§ 2.2-4300 et seq.) except as provided below; (ii) the requirements of the Division of Purchases and Supply of the Department of General Services as set forth in Article 3 (§ 2.2-1109 et seq.) of Chapter 11 of Title 2.2; (iii) the requirements of the Division of Engineering and Buildings as set forth in Article 4 (§ 2.2-1129 et seq.) of Chapter 11 of Title 2.2; and (iv) the authority of the Chief Information Officer and the Virginia Information Technologies Agency as set forth in Chapter 20.1 (§ 2.2-2005 et seq.) of Title 2.2 regarding the review and approval of contracts for (a) the construction of Medical Center capital projects and (b) information technology and telecommunications projects; however, the provisions of this subdivision may not be implemented by the University until such time as the Board of Visitors has adopted guidelines generally applicable to the procurement of goods, services, construction and information technology and telecommunications projects by the Medical Center or by the University on behalf of the Medical Center. Such guidelines shall be based upon competitive principles and shall in each instance seek competition to the maximum practical degree. The guidelines shall implement a system of competitive negotiation for professional services; shall prohibit discrimination because of race, religion, color, sex, or national origin of the bidder or offeror in the solicitation or award of contracts; may take into account in all cases the dollar amount of the intended procurement, the term of the anticipated contract, and the likely extent of competition; may implement a prequalification procedure for contractors or products; may include provisions for cooperative procurement arrangements with private health or educational institutions, or with public agencies or institutions of the several states, territories of the United States or the District of Columbia; shall incorporate the prompt payment principles of §§ 2.2-4350 and 2.2-4354; and may implement provisions of law. The following sections of the Virginia Public Procurement Act shall continue to apply to procurements by the Medical Center or by the University on behalf of the Medical Center: §§ 2.2-4811, 2.2-4315, and 2.2-4342 (which section shall not be construed to require compliance with the prequalification application procedures of subsection B of § 2.2-4317), 2.2-4330, 2.2-4331 through 2.2-4341, and 2.2-4367 through 2.2-4377.

C. Subject to such conditions as may be prescribed in the budget bill under § 2.2-1509 as enacted into law by the General Assembly, the State Comptroller shall credit, on a monthly basis, to the nongeneral fund operating cash balances of the University of Virginia Medical

Center the imputed interest earned by the investment of such non general fund operating cash balances, including but not limited to those balances derived from patient care revenues, on deposit with the state Treasurer.

1996. cc. 933. 995; 2002, cc. 574, 602; 2004, c. 145; 2010. CC. 136, 145.

#

**2. Remarks Submitted by the Virginia Department of Veterans Services,
November 3, 2015.**

Department of Veterans Services

John L. Newby II
Commissioner

Telephone: (804) 786-0286
Fax: (804) 786-0302

November 3, 2014

Maria J.K. Everett, Executive Director and Senior Attorney
Alan Gernhardt, Staff Attorney
Virginia Freedom of Information Advisory Council
201 North 9th Street Richmond, Virginia 23219

Dear Ms. Everett and Mr. Gernhardt:

At its meeting on November 5, 2014, the Records Subcommittee of the Virginia Freedom of Information Advisory Council will consider one exemption related to the Department of Veterans Services (DVS) and one related to the Veterans Services Foundation (VSF). At its meeting the same day, the Meetings Subcommittee will consider one VSF-related exemption.

Please find attached two short papers reflecting the position of the DVS and the VSF on the exemptions. A representative of DVS and VSF will attend both meetings to provide any additional information needed by the Subcommittee members.

If there are any questions, please contact the VSF Executive Director, Mr. Jack Hilgers, at 804-382-3715 or Jack.Hilgers@dvs.virginia.gov, or the DVS Director of Policy & Planning, Mr. Steven Combs, at 804-786-0294 or Steven.Combs@dvs.virginia.gov.

Sincerely,

John L. Newby II

Cc: Richard A. Schollmann
Chairman, Veterans Services Foundation Board of Trustees

Two Enclosures

AN EQUAL OPPORTUNITY EMPLOYER
900 East Main Street, Richmond, Virginia 23219
www.dvs.virginia.gov

Department of Veterans Services (DVS) and Veterans Services Foundation (VSF)

input for

Virginia Freedom of Information Advisory Council - Meetings Subcommittee -
11/5/2014

Veterans Services Foundation tVSFI Exemption

2.2-3711 (43). *Discussion or consideration by the Board of Trustees of the Veterans Services Foundation of records excluded from this chapter pursuant to subdivision 29 of § 2.2-3705.7.*

Rationale: This section was part of 2009 HB 2639 that originally contained the words in subdivision 29 of § 2.2-3705.7 *Records maintained in connection with fundraising activities by the Veterans Services Foundation pursuant to § 2.2-2716 to the extent that such records reveal the address, electronic mail address, facsimile or telephone number, social security number or other identification number appearing on a driver's license, or credit card or bank account data of identifiable donors, except that access shall not be denied to the person who is the subject of the record Nothing in this subdivision, however, shall be construed to authorize the withholding of records relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor **unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation.** The exclusion provided by this subdivision shall not apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the foundation for the performance of services or other work or (ii) the terms and conditions of such grants or contracts.*

The House General Laws subcommittee recommended deleting the words in bold and the full committee concurred. That phrase was the main purpose behind including subdivision 43 in § 2.2-3711 as evidenced by the VSF Board not exercising this exemption since 2009 because VSF could not assure donors of anonymity.

The deletion of the phrase from the 2009 legislation has placed a severe limit on VSF attracting 1) anonymous donors, and 2) donors who desire to name VSF or a specific veterans program as a beneficiary in their will or trust and keep that bequest confidential.

Based on actual VSF experience regarding donor anonymity, a legislative proposal will be submitted for action by the 2015 General Assembly to add the words originally proposed in

2009 by adding the words in italics as follows to §2.2-3705.7.29 " ... and terms of the pledge or donation or the identity of the donor *unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation.*" It is consistent with the fundraising confidentiality contained in §2.2-3705.4.7.

VSF Position: Do not delete this exemption from the Code. Amend the *Code of Virginia* as noted above.

APPENDIX E

2015 MEETINGS SUBCOMMITTEE MATERIALS

Contents:

1. Proposed Rewrite of Personnel Meeting Exemption;
2. Review of Meeting Exemption for Virginia Commonwealth University Health System Authority (Comparison To Other Existing Meeting Exemptions); and
3. VPA Suggested Draft concerning closed meeting minutes.

1. PROPOSED REWRITE OF PERSONNEL MEETING EXEMPTION

A BILL to amend and reenact § of the Code of Virginia, relating to the Virginia Freedom of Information Act; open meeting exemption for personnel discussions.

Be it enacted by the General Assembly of Virginia:

1. That § of the Code of Virginia is amended and reenacted as follows:

§ 2.2-3711. Closed meetings authorized for certain limited purposes.

A. Public bodies may hold closed meetings only for the following purposes:

1. Discussion, consideration, or interviews of prospective candidates for employment; assignment, or appointment; discussion or consideration of specific public officers, appointees, or employees of any public body for promotion, performance, demotion, salaries, disciplining, or resignation ~~of specific public officers, appointees, or employees of any public body~~; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in

the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board.

[NOTE: Remainder of draft not set out because there were no further amendments to this section.]

#

2. July 9, 2015 Review of Meeting Exemption for Virginia Commonwealth University Health System Authority (Comparison to Other Existing Meeting Exemptions) Source: FOIA Council 9 July 15.

§ 2.2-3711

23. In the case of the Virginia Commonwealth University Health System Authority, discussion or consideration of any of the following:

1. the acquisition or disposition of real or personal property where disclosure would adversely affect the bargaining position or negotiating strategy of the Authority;
2. operational plans that could affect the value of such property, real or personal, owned or desirable for ownership by the Authority;
3. matters relating to gifts, bequests and fund-raising activities;
4. grants and contracts for services or work to be performed by the Authority;
5. marketing or operational strategies where disclosure of such strategies would adversely affect the competitive position of the Authority;
6. members of its medical and teaching staffs and qualifications for appointments thereto; and
7. qualifications or evaluations of other employees.

This exemption shall also apply when the foregoing discussions occur at a meeting of the Virginia Commonwealth University Board of Visitors.

Comparison between VCUHSA Meeting Exemptions and Other Meeting Exemptions

VCUHSA Exemption	Related Meeting Exemption 2.2-3711	NOTES
No. 1 above: acquisition or disposition of real or personal property where disclosure would adversely affect the bargaining position or negotiating strategy of the Authority	3. the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.	This portion of VCUHSA exemption appears duplicative as to real property. No existing FOIA meeting exemption for sale or purchase of personal property.
No. 2: Operational plans that could affect the value of such property, real or personal, owned or desirable for ownership by the Authority		Unclear as to scope; need more information from VCUHSA

Comparison between VCUHSA Meeting Exemptions and Other Meeting Exemptions

VCUHSA Exemption	Related Meeting Exemption 2.2-3711	NOTES
<p>No. 3: matters relating to gifts, bequests and fund-raising activities;</p>	<p>No. 8: In the case of boards of visitors of public institutions of higher education, discussion or consideration of matters relating to gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants, and contracts made by a foreign government, a foreign legal entity, or a foreign person and accepted by a public institution of higher education in Virginia shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a political subdivision thereof; (ii) "foreign legal entity" means any legal entity created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such entity is composed of foreign persons or foreign legal entities, or any legal entity created under the laws of a foreign government; and (iii) "foreign person" means any individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.</p> <p>No. 9 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.</p>	<p>Same subject matter as other exemptions as noted, emphasis added.</p>

Comparison between VCUHSA Meeting Exemptions and Other Meeting Exemptions

VCUHSA Exemption	Related Meeting Exemption 2.2-3711	NOTES
<p>No. 4: grants and contracts for services or work to be performed by the Authority</p>	<p>No. 8 In the case of boards of visitors of public institutions of higher education, discussion or consideration of matters relating to gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants, and contracts made by a foreign government, a foreign legal entity, or a foreign person and accepted by a public institution of higher education in Virginia shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a political subdivision thereof; (ii) "foreign legal entity" means any legal entity created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such entity is composed of foreign persons or foreign legal entities, or any legal entity created under the laws of a foreign government; and (iii) "foreign person" means any individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.</p>	<p>Same subject matter as other exemption as noted, emphasis added.</p>

Comparison between VCUHSA Meeting Exemptions and Other Meeting Exemptions

VCUHSA Exemption	Related Meeting Exemption 2.2-3711	NOTES
<p>No. 5 : marketing or operational strategies where disclosure of such strategies would adversely affect the competitive position of the Authority</p>	<p>No. 22 Those portions of meetings of the University of Virginia Board of Visitors or the Eastern Virginia Medical School Board of Visitors, as the case may be, and those portions of meetings of any persons to whom management responsibilities for the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, have been delegated, in which there is discussed proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would adversely affect the competitive position of the Medical Center or Eastern Virginia Medical School, as the case may be.</p>	<p>Same subject matter as other exemptions as noted; emphasis added.</p>
<p>No. 6: members of its medical and teaching staffs and qualifications for appointments thereto</p>	<p>A1 Personnel: Discussion, consideration, or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining, or resignation of specific public officers, appointees, or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board.</p>	
<p>No. 7: qualifications or evaluations of other employees.</p>	<p>Same as above.</p>	<p>Duplicative of A 1.</p>

VCUHSA Exemption	Related Meeting Exemption 2.2-3711	NOTES
This exemption shall also apply when the foregoing discussions occur at a meeting of the Virginia Commonwealth University Board of Visitors.		Needs rewrite to limit scope of exemption vis a vis VCU Board of Visitors' discussion of Authority exempt topics; unintended consequences and misinterpretation possible.

#

3. VPA Suggested Draft concerning closed meeting minutes

1 § 2.2-3712. Closed meetings procedures; certification of proceedings.

2
3 * * * * *

4
5 D. At the conclusion of any closed meeting, the public body holding such meeting shall
6 immediately reconvene in an open meeting and shall take a roll call or other recorded vote to be
7 included in the minutes of that body, certifying that to the best of each member's knowledge (i)
8 only public business matters lawfully exempted from open meeting requirements under this
9 chapter, ~~and~~ (ii) only such public business matters as were identified in the motion by which the
10 closed meeting was convened were heard, discussed or considered in the meeting by the public
11 body, *and (iii) that the discussion during the closed meeting was recorded as required in*
12 *subsection I below*. Any member of the public body who believes that there was a departure from
13 the requirements of clauses (i), ~~and~~ (ii) *or (iii)* shall so state prior to the vote, indicating the
14 substance of the departure that, in his judgment, has taken place. The statement shall be recorded
15 in the minutes of the public body.

16
17 * * * * *

18
19 I. Minutes may be taken during closed meetings of a public body, but shall not be required. Such
20 minutes shall not be subject to mandatory public disclosure. *The public body shall make an audio*
21 *recording of the entirety of every meeting that is closed to the public under this section. The*
22 *public body shall use a means of recording that fully captures and can clearly reproduce all*
23 *statements made during the closed meeting. The public body shall preserve the recording for a*
24 *period no less than one year. A recording made pursuant to this subsection shall not be subject*
25 *to the disclosure provisions of this chapter, but its production may be compelled, and the*
26 *recording used as evidence, in a proceeding to enforce the provisions of this chapter.*

APPENDIX F

2014 RECORDS SUBCOMMITTEE MATERIALS

CONTENTS:

1. Comments from the Department of Veterans Services, November 2014;
and
2. Remarks Submitted by the Assistive Technology Loan Authority,
October 2014.

1. Remarks Submitted by the Department of Veterans Services.

Department of Veterans Services

John L. Newby II
Commissioner

Telephone: (804) 786-0286
Fax: (804) 786-0302

November 3, 2014

Maria J.K. Everett, Executive Director and Senior Attorney
Alan Gernhardt, Staff Attorney
Virginia Freedom of Information Advisory Council
201 North 9th Street Richmond, Virginia 23219

Dear Ms. Everett and Mr. Gernhardt:

At its meeting on November 5, 2014, the Records Subcommittee of the Virginia Freedom of Information Advisory Council will consider one exemption related to the Department of Veterans Services (DVS) and one related to the Veterans Services Foundation (VSF). At its meeting the same day, the Meetings Subcommittee will consider one VSF-related exemption.

Please find attached two short papers reflecting the position of the DVS and the VSF on the exemptions. A representative of DVS and VSF will attend both meetings to provide any additional information needed by the Subcommittee members.

If there are any questions, please contact the VSF Executive Director, Mr. Jack

Hilgers, at 804-382-3715 or Jack.Hilgers@dvs.virginia.gov, or the DVS Director of Policy & Planning, Mr. Steven Combs, at 804-786-0294 or Steven.Combs@dvs.virginia.gov.

Sincerely,

John L. Newby II

Cc: Richard A. Schollmann
Chairman, Veterans Services Foundation Board of Trustees

Two Enclosures

AN EQUAL OPPORTUNITY EMPLOYER
900 East Main Street, Richmond, Virginia 23219
www.dvs.virginia.gov

Department of Veterans Services (DVS) and Veterans Services Foundation (VSF)
input for
Virginia Freedom of Information Advisory Council - Meetings Subcommittee -
11/5/2014

Veterans Services Foundation tVSFI Exemption

2.2-3711 (43). *Discussion or consideration by the Board of Trustees of the Veterans Services Foundation of records excluded from this chapter pursuant to subdivision 29 of § 2.2-3705.7.*

Rationale: This section was part of 2009 HB 2639 that originally contained the words in subdivision 29 of § 2.2-3705.7 *Records maintained in connection with fundraising activities by the Veterans Services Foundation pursuant to § 2.2-2716 to the extent that such records reveal the address, electronic mail address, facsimile or telephone number, social security number or other identification number appearing on a driver's license, or credit card or bank account data of identifiable donors, except that access shall not be denied to the person who is the subject of the record Nothing in this subdivision, however, shall be construed to authorize the withholding of records relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation. The exclusion provided by this subdivision shall not apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the foundation for the performance of services or other work or (ii) the terms and conditions of such grants or contracts.*

The House General Laws subcommittee recommended deleting the words in bold and the full committee concurred. That phrase was the main purpose behind including subdivision 43 in § 2.2-3711 as evidenced by the VSF Board not exercising this exemption since 2009 because VSF could not assure donors of anonymity.

The deletion of the phrase from the 2009 legislation has placed a severe limit on VSF attracting 1) anonymous donors, and 2) donors who desire to name VSF or a specific veterans program as a beneficiary in their will or trust and keep that bequest confidential. Based on actual VSF experience regarding donor anonymity, a legislative proposal will be submitted for action by the 2015 General Assembly to add the words originally proposed in 2009 by adding the words in italics as follows to §2.2-3705.7.29 " ... and terms of the pledge or donation or the identity of the donor *unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation.*" It is consistent with the fundraising confidentiality contained in §2.2-3705.4.7.

VSF Position: Do not delete this exemption from the Code. Amend the *Code of Virginia* as noted above.

#

2. Remarks Submitted by the Assistive Technology Loan Fund Authority

November 5 FOIA Meeting

Prince, Sandra W. (ATLFA) <Sandra.Prince@atlfa.org> Tue, Oct 21, 2014 at 10:38 AM
To: ·foiacouncil@dls.virginia.gov" <foiacouncil@dls.virginia.gov>

Allen -Thanks for informing ATLFA about the November 5 meeting relating to our FOIA exemptions. As discussed by phone, we have a Loan Committee meeting of the Board of Directors on November 5 at 8:30 and will not be able to attend the meeting.

The Assistive Technology Loan Fund Authority will need for the existing language currently in FOIA to remain as is since it pertains to the following:

- Financial, medical, rehabilitative and other personal information concerning applicants for or recipients of loan funds submitted to or maintained by the Assistive Technology Loan Fund Authority under Chapter 11 (§ 51.5.5-53 et seq.) of Title 51.5 of the Code of Virginia
- Personnel records (§ 2.2-3705.1 (1) of the Code of Virginia)
- Records subject to attorney-client privilege (§ 2.2-3705.1 (2)) or attorney work product (§ 2.2-3705.1 (3))
- Vendor proprietary information (§ 2.2-3705.1 (6))
- Records relating to the negotiation and award of a contract, prior to a contract being awarded (§ 2.2-3705.1 (12))

Please let me know if you need additional information or have any questions regarding our request.

Thanks!

Sandra Prince

Executive Director

Assistive Technology Loan Fund Authority

1602 Rolling Hills Drive, Suite 107

Richmond, Virginia 23229

(804) 662-7021

Fax: (804) 662-9533

email: Sandra.Prince@atlfa.org

Confidentiality/Privacy Notice .. The documents included in this transmission may contain information that is confidential and/or legally privileged. If you are not the intended recipient, or the employee or agent responsible for delivering the information to the Intended recipient, you are hereby notified that any disclosure, copying, distribution, or action taken in reliance on the contents of these documents is strictly prohibited. If you have received this document in error, please notify the sender immediately to arrange for return or destruction of these documents.

#

APPENDIX G

2015 RECORD SUBCOMMITTEE MATERIALS

CONTENTS:

1. Working Papers Research Submitted by Megan Rhyne, VCOG, July 2015;
2. Working Papers Research/Comment Submitted by Dave Ress, Daily Press;
3. Working Papers and Correspondence Comment by the Council of President, July 21, 2015;
4. Comparison Chart of Public Safety Exclusions 2, 4, 6, and 14 of § 2.2-3705.2, August 2015, *Source: FOIA Council*
5. Draft of consolidation of Public Safety Exclusions 2, 4, 6, and 14 of § 2.2-3705.2 with drafting notes;
6. Comment on Public Safety Consolidation Draft, Dave Ress, Daily Press; and
7. Comparison Chart of proposed VA Alcoholic Beverage Control Authority Exemption, subdivision 34 of § 2.2-3705.7, FOIA Council staff, November 2015.

1. Working Papers Research Submitted by Megan Rhyne, VCOG, July 2015



PRESIDENT, Craig T. Fifer, Communications Director, City of Alexandria

VICE PRESIDENT, Dick Hammerstrom, Local News Editor, Free Lance-Star, Fredericksburg

SECRETARY, Olga Hernandez, Past President, League of Women Voters, Centreville

TREASURER: Paul Casalspi, IT Director, Library of Virginia, Richmond

PAST PRESIDENT, Dorothy Abernathy, Bureau Chief, The Associated Press, Richmond

Brian Eckert, Communications Director, Washington & Lee

Lou Emerson, FauquierNow.com

Paul Fletcher, Editor and Publisher, Virginia Lawyers Weekly, Richmond

Christopher Gatewood, owner, Threshold Counsel

Bob Gibson, The Sorensen Institute, Charlottesville

Mark Grunewald, Professor of Law, Washington & Lee, Lexington

Stephen Hayes, General Manager, WTVR-6, Richmond

Wat Hopkins, Professor of Communications Studies, Virginia Tech, Blacksburg

Forrest M. "Frosty" Landon, Roanoke

Jeff Lester, News Editor, The Coalfield Progress, Norton

Frank LoMonte, Director, Student Press Law Center

Lawrence McConnell, Editor, The Roanoke Times, Roanoke

Patricia O'Bannon, Henrico Board of Supervisors

Marisa Porto, VP Content, Daily Press

Melody Scalley, 1330 AM, 103.3 WESR FM, RFCradio.com, Eastville

Nancy Kent Smith, Vice President for News, WWBT-12, Richmond

Jeff South, Associate Professor, VCU School of Mass Communications, Richmond

Peter Easter, ex officio, Executive Director, Virginia Association of Broadcasters, Charlottesville

Ginger Stanley, ex officio, Executive Director, Virginia Press Association, Glen Allen

*Megan Rhyne
Executive Director, Williamsburg*

P.O. Box 2576
Williamsburg VA 23187
540.353.8264
vcog@opengovva.org
Twitter: @opengovva

Mr. Tim Oksman
Office of the Attorney General
900 E. Main St.
Richmond VA 23219

7 July 2015

Dear Mr. Oksman:

Thank you for the opportunity to share with you and the FOIA Council's subcommittee on records examples of the way the working papers exemption has been used over the past 12 years.

I have included a chart of examples taken from the Virginia Coalition for Open Government's archives of news stories and of questions submitted to us by citizens, press and government through our website. I've also included examples shared with me by a handful of reporters, examples taken from their own archives or from their personal recollections. I have noted the source for each story beside each general description and can provide specific links to stories upon request (though it must be noted that some links have since expired on the media outlets' websites).

As you correctly noted at the last subcommittee meeting, the problem is not in the complete misapplication of the working papers exemption. The problem has been in the over-extension of the exemption to cover more than what the drafters of the 1999 rewrite intended.

I hope these examples will aid in creating a better understanding of the wide-ranging circumstances in which the exemption is used and how the public is harmed by being left in the dark about important decisions, especially those decisions involving the expenditure of taxpayer dollars.

Again, thank you for making for our input. I look forward to further discussions on how we can strengthen the state's public records and meetings law.

All the best,

Megan Rhyne, Executive Director
Virginia Coalition for Open Government

www.opengovva.org

Table 1

Date &/or year	Use of exemption	Source	Note
January 2002	A state investigation of Eastern Virginia Medical School concluded that scientists did not break the state's anti-cloning law by using state funds for embryonic stem-cell research. The findings, however, will not be released to the public, said state Secretary of Health and Human Resources Louis F. Rossiter, who gave the report to then-Gov. Jim Gilmore on Sept. 10. After the terrorist attacks, "priorities shifted significantly, so it didn't seem necessary to release the report," Rossiter said Friday, one day before Gilmore left office. "It was a draft, it's considered the governor's working papers and, in fact, it no longer exists."	Daily Press archives	
May 2002	Former Gov. Jim Gilmore's administration ignored a study that showed privatizing aspects of highway construction were costing the state millions of dollars. Although the Virginia Department of Transportation report was completed in December 1999, it wasn't released until last month. When it was first completed, the Gilmore administration labeled it working papers of the governor, which prevented it from becoming a public document. A spokesman for the former governor said the report never reached Gilmore's office. Critics say somebody in the administration shelved the study because they disagreed with its findings.	Daily Press archives	
September 2002	Christopher Newport University would lose up to \$4.4 million in state money this school year and \$5.2 million next year under the worst-case scenario of the cost-cutting plans the school will submit today to the governor. And the worst is what CNU President Paul Tribble is expecting. ... He provided no details about the different cost-cutting plans, saying they are considered working papers and confidential -- the same response officials had when agencies submitted these kinds of plans in the past.	Daily Press archives	
April 2005	"Colonial Beach Council voted last Thursday evening to authorize Mayor and acting Town Manager Pete Bone to negotiate the sale of 1.5 acres of municipally owned boardwalk property to Monroe Point's CRV developers for the minimum price of \$755,000....When asked for copies of the three developers' proposals, Manager and Mayor Bone purported that the documents were working papers of the town and would not, accordingly, be made available for the public to review."	Journal Press news article	

Date &/or year	Use of exemption	Source	Note
February 2006	"The Times-Democrat...spent a substantial portion of Thursday afternoon and Friday -- even stretching into Tuesday -- trying to obtain the same documents that were presented to Fauquier Planning Commission members, as well as a copy of the PowerPoint presentation . . . The citation in law is loosely called the "working papers" exemption."	Times-Democrat news article	The paper is now defunct
June 2006	Old Dominion University cited the working papers exemption in response to a FOIA request for a report evaluating the continued viability of an environmental course the school had praised as innovative but students had said was "dull and preachy." The report was withheld in its entirety since it was prepared for the university president's personal or deliberative use	Virginian-Pilot news article	
April 2007	"Woodward filed suit in early March against the city for documents he requested related to an independent financial analysis the city commissioned late last year. Rather than initially providing the entirety of those requested documents to Woodward, city manager Jim Vacalis denied about 20 pages citing an exemption in the state open records law for "working papers." However, after some consideration by city officials, who said they wanted to go ahead and end the situation, they agreed to pay Woodward's legal fees."	Suffolk News Herald editorial	
October 2007	"Three Republican delegates have filed a request with the governor under the state's open records law for information on how he chose members of the Virginia Commission on Immigration. Dels. Todd Gilbert, R-Woodstock, Clifford L. "Clay" Athey Jr., R-Front Royal, and Bob Marshall, R-Manassas, wrote to Democratic Gov. Timothy M. Kaine on Friday, filing a Virginia Freedom of Information Act request asking for "copies of all letters, e-mails, phone messages" and other documents given to Kaine's office "to recommend candidates for appointment to the Commission on Immigration, regardless of whether they were finally appointed or not."...."I don't even know if that information is information that's covered under FOIA," [Delacey] Skinner said. "There's a great deal that goes on [in the secretary of the commonwealth's office] under the confidential governor's working papers."	Northern Virginia Daily news article	
November 2007	"William & Mary President Gene Nichol rejected an FOI bid to release e-mails between him and former President Timothy Sullivan because they are classified as "working papers."	Virginia Gazette news article	

Date &/or year	Use of exemption	Source	Note
November 2007	"The King George School Board has made a written request asking for a copy of the current draft revisions to an agreement between it and the Board of Supervisors that addresses the use of school buildings by the Parks & Recreation Department when classes are not in session.....David has said he is reviewing the proposed document. He has refused requests from The Journal to release the draft proposal to the public under the "working papers" exemption of the Virginia Freedom of Information Act."	Journal Press news article	
January 2008	William and Mary President Gene Nichol came under pressure late last year, after he rejected requests for copies of his e-mail correspondence with former President Timothy J. Sullivan. News media outlets and some alumni requested the information to determine when Nichol knew that a major donor decided to revoke \$12 million in pledges to the school. The donor told Sullivan of his decision and Sullivan e-mailed Nichol in December 2006, several months before Nichol announced the success of a \$500 million fundraising campaign. After that announcement, news of the donor's revoked pledges surfaced, and Nichol acknowledged that the withdrawn pledges had dropped the campaign below \$500 million. William and Mary officials cited the current exemption to state law in denying requests for Nichol's correspondence. In an attempt to quell the controversy, they eventually agreed to release the e-mail after receiving permission from Sullivan and the donor. Requests for additional presidential correspondence, however, were denied.	Daily Press archives	
February 2010	"Virginia Tech officials are declining to release initial findings of a U.S. Department of Education investigation into the university's Clery Act compliance during the April 16, 2007 campus shootings. According to documents obtained by the Collegiate Times, the Department of Education sent a request for documents to President Charles Steger on Sept. 4, 2007. The university complied on Oct. 3, 2007. Hincker said the university received initial findings from the Department of Education, "a couple weeks ago,"but will not release them, citing a Freedom of Information Act exception."	Collegiate Times news article	
August 2010	"I am trying to get email correspondence between the Virginia Department of Forestry and Governor McDonnell's office concerning a rulemaking procedure that's stalled. Their answer was that all the emails that pertained to this matter were Working Papers."	Citizen inquiry through VCOG's website	

Date &/or year	Use of exemption	Source	Note
March 2011	"The working papers exemption was intended to permit withholding public records necessary if releasing them would interfere with government function - not to give officials an excuse to deny requests, explained former Del. Chip Woodrum, a Roanoke-area Democrat."	Virginian-Pilot news article	
March 2011	"Rather than reacting with alarm to the excessive use of the working papers exemption, state lawmakers have chosen to expand it. Last year, they granted the exemption to clerks for the House of Delegates and the state Senate. The exemption has become a catch-all category for public officials looking for an easy way to say no to a Freedom of Information Act request. Virginia legislators need to tighten the exemption. Workable models are available in other states."	Virginian-Pilot editorial	
August 2011	"I asked for deliverable financial advisor service documents regarding the refinancing of a bond in the county of Goochland and was told that it fell under section 2.2-3705.7 (2) "Working Paper"."	Citizen inquiry through VCOG's website	
January 2012	"When does the "Governor's working papers" cease being "Governor's working papers." Various state agencies submitted 2%, 4% and 6% proposed budget reductions to the governor last year. The Governor has completed his budget and released. So, when do these submissions by the various agencies become available to the public?"	Citizen inquiry through VCOG's website	post-decision request
March 2012	"Gov. McDonnell's recently-formed Uranium Working Group is claiming the "working papers" exemption in 2.2-3705.7(2) to keep from disclosing the documents they're considering, at least until their recommendations go to the G.A. in December. But they are also only opening four of their meetings to the public between now and December, when they'll disclose their final report."	Citizen inquiry through VCOG's website	The working group was not subject to FOIA's meeting provisions because it was created by the governor. By using the working papers exemption here, the work group had no oversight.
March 2012	"In January, McDonnell formally announced his support for postponement and created a working group to study the issue further. In his announcement, he said, "I have directed the group ... to allow thorough opportunity for public participation in its work." The work group has other ideas. It invokes the oft-abused governor's working papers exemption to the Virginia Freedom of Information Act to keep its work out of the public eye."	Roanoke Times editorial	

Date &/or year	Use of exemption	Source	Note
March 2012	The Attorney General's office cited the working papers exemption as it related to the state's contract with Elizabeth River Crossings - a public-private deal that brought tolls to the Midtown Tunnel and Downtown Tunnel in Norfolk/ Portsmouth for transportation projects. The public was and remains widely opposed to this deal, and some argue the impact of the tolls has damaged the economy in Portsmouth.	Reporter's FOIA request correspondence	
April 2012	"Dan Holmes, director of state policy for the Piedmont Environmental Council, which opposes uranium mining, said the lack of transparency is most apparent when it comes to seeking correspondence between agencies working on the rules. Those communications are protected from public view because they are considered the governor's working papers."	Martinsville Bulletin news article	
October 2012	"I recently requested a document via a FOIA request, but was denied based on the "working papers" exemption. My request was for a copy of a report created by a consulting firm after interview and assessment of the Information Technology technology, in which I participated. We have never been made aware of the outcome or how our interviews have been used. I believe the clause above makes it possible for me to receive a copy as there have been several changes made which directly correlate to the information provided in the interviews. As well, these changes were not handled by the City Manager, thus, she must have shared the information within the local public body."	City employee's inquiry through VCOG website	Exemption used after material was disseminated.
December 2012	"Gov. Bob McDonnell told all state agencies last month to propose potential 4 percent cuts to their own fiscal 2014 budgets, citing economic uncertainty surrounding the so-called "fiscal cliff," along with Medicaid and state employee health-care costs that eat up a greater proportion of taxpayer dollars each year. A few short weeks later, agencies submitted their ideas, and the Department of Planning and Budget posted them online. But McDonnell's office made no such proposal for cutting its own budget — at least not publicly. Those details are rolled into a "working internal paper," McDonnell spokesman Paul Logan told Watchdog.org. The Virginia Freedom of Information Act conveniently guards "working papers" of the governor's office from the public."	watchdog.org news article	

Date &/or year	Use of exemption	Source	Note
March 2013	<p>"Advocates for lower Richmond water and sewer charges have thus far been stonewalled by the city administration in attempts to obtain a consultant's study that will be central to the utility rates the mayor will propose this month as part of the city budget. The city's Public Utilities Department has denied a Freedom of Information Act request from Charles Pool, an Oregon Hill resident who is among a chorus of city utility customers calling for lower base charges for water and wastewater, for the report by Raftelis Financial Consultants. Pool originally requested the information the city provided to Raftelis for the rate study but changed tack after the utilities told him the cost for preparing the report would be \$287.17. The cost of preparing the request would have included five hours of work, at \$46.31 per hour, by a utilities comptroller and two hours by a systems analyst at \$27.81 per hour. Daunted by the sticker price of his public records request, Pool asked for a copy of the report or a draft and was sent a letter signed by Mayor Dwight C. Jones. The letter, dated Jan. 8, nearly eight months after the city put out a request for proposals for the study, directed the city utilities department to "perform a cost of services study" and declared that "this study and all documents and correspondence associated with its creation shall be deemed confidential working papers of the mayor, intended for the personal and deliberative use of my staff and me."</p>	Richmond Times-Dispatch news article	
March 2013	<p>For more than 20 years, the City of Hampton and the Virginia Air and Space Center have had a unique relationship. An independent volunteer board runs the facility, but it does so inside a city-financed building using exhibits loaned and, in some cases, owned by NASA and the city. ... The center, like all nonprofit organizations, must file an "outside agency funding request" each year to receive city grants. The city provided applications filed by the center for fiscal years 2010, 2011, 2012 and 2013. Citing the "working papers" exemption to the state Freedom of Information Act, the city denied a request for the center's 2014 funding application.</p>	Daily Press news article	
March 2013	<p>Hampton declined a request for environmental studies of the former School for the Deaf Blind and Multi-disabled (a "Summary of PCB Findings and Recommendations for the VSDBH Facility" and "Draft Limited Air Quality Assessment Report.") on the grounds that they were working papers. The argument was that the reports "are subject to change," and so could be withheld until they are finalized.</p>	Reporter's personal experience	

Date &/or year	Use of exemption	Source	Note
May 2013	"I sent a FOIA to a County Supervisor asking for documents backing up his accusation that citizens were being simply obstructionist. The Supervisor refused response under the "thought process" exemption. He is not chairman of the board."	Citizen inquiry through VCOG's website	
November 2013	MEANWHILE, IN UTAH: "Utah lawmakers are taking a proactive approach to government transparency by opening their email accounts to the public. The state will launch an online repository in January that will house legislator correspondence on the Utah Legislature's website, giving citizens a closer look at the daily communications of their elected officials. The increased access was authorized by legislation signed by Utah Gov. Gary Herbert in March."	Governing magazine news article	
May 2014	"I submitted a request to the Attorney General's office for e-mail and phone records of AG Cuccinelli and his chief of staff for a period of about a week in 2012. I'm attaching the response I received. I have two main concerns about it. . . . b) The letter also tells me that most AG records are exempt from disclosure, including categorically all correspondence, and that 'this Office likely will exercise its discretion to withhold all such records.'"	Citizen inquiry through VCOG's website	
September 2014	CNU president Paul Tribble declined to release university documents about proposed budget cuts, saying they were working papers of the Governor.	Reporter's personal experience	
October 2014	On Oct. 30, the Daily Press submitted a request to City Manager Jim Bourey under the Freedom of Information Act seeking the full list of capital projects by Newport News city departments. City spokeswoman Kim Lee sent a reply rejecting the request in its entirety on Nov. 6, the last of the five business days the law gives the city to respond. Lee said the documents are "working papers" of the city manager, an exemption allowed under the state's FOIA law. Bourey said rejecting the request was his decision.	Daily Press news article	
December 2014	[In reference to the Rolling Stone article about gang rape at UVA]: "President Sullivan has asserted the blanket exemption protecting her from having to disclose any correspondence."	Reporter inquiry through VCOG's website.	

Date &/or year	Use of exemption	Source	Note
March 2015	"An application for funding for a multimodal transportation facility in downtown Roanoke identifies three potential sites for the combination train and bus station, but city officials caution that the information is highly preliminary and based on a cursory review by a consultant. Roanoke's application to the Virginia Department of Rail and Public Transportation seeks \$3.2 million to acquire land for the facility, which would in part serve as a hub for passengers traveling to and from Roanoke on Amtrak when passenger rail service returns to the city in 2017. The Roanoke Times obtained the application from DRPT. The city declined to release it, citing the Virginia Freedom of Information Act's exemption for making "working papers" public."	Roanoke Times news article	
May 2015	The Hampton City Attorney's Office declined to release four consultants' reports that could provide information about a proposed aquatics center, including documents identified as "Crossroads Initiative Update, Aquatics Facility Study, Hotel Market Study and Coliseum Central Market Study." Angenette Pase, Hampton's Freedom of Information Act coordinator, cited the law's "working papers" exemption for withholding the studies.	Reporter's personal experience	
June 2015	Gov. Terry McAuliffe commissioned a state report last year on the costs of in-sourcing versus hiring private contractors, with a particular focus on IT. It was due Oct. 1, 2014, but McAuliffe spokesman Brian Coy said the governor asked for more information before the report is finalized. The administration has refused to release the initial report, citing the working papers exemption in Virginia's Freedom of Information Act.	Reporter's FOIA request correspondence	

2. Working Papers Research/Comment Submitted by Dave Ress, Daily Press

The federal FOIA has a broad deliberative process exemption, but generally states, except for Virginia, are silent on this.

This seems mainly to fall to state courts, weighing the executive privilege issue. The guidance here is suggestive.

Alaska's Supreme Court recognized a limited "executive" or "deliberative process" privilege but describes the records at issue as involving advice, opinions and recommendations, in order to protect the deliberative and mental processes of decision-makers. 721 P.2d at 623. The Court in *CIG vs. Office of the Governor*. 923 P.2d 29 calls for a balancing test, to weigh the public right to know, in ordering permission to review budget documents.

The Delaware Supreme Court in *Figg v DDOT* ruled that there is no deliberative process exemption and that executive privilege applies only to the governor.

Massachusetts Supreme Judicial Court ruled that there is no executive privilege exemption and that the statute echoing federal FOIA's broad exemption for drafts and inter- intra-agency deliberative papers does not apply once a decision has been reached – in other words, after an action, you can get all the paperwork leading up to it, including any embarrassing deliberative stuff.

Babets v. Secretary of Executive Office of Human Services, 403 Mass. at 230, 526 N.E.2d 1261 (1988) (declining to create a "governmental" or "executive" privilege); *District Attorney for Norfolk v. Flatley*, 419 Mass. 507, 646 N.E.2d 127 (1995). The exemption for "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency" ends where the deliberative process is complete and the policy decided upon. Thereafter, the documents upon which it was based become public. *Babets*, supra, 403 Mass. 237, note 8.

Here's what statutes and state constitutions hold:

California All executives' records, as defined under Section 6252(e), are subject to the CPRA. Under the Constitutional Sunshine Amendment, "the writings of public officials and agencies" are open to public scrutiny. Cal. Const. Art. 1, § 3(b)(1).

Colorado

All records that are "for use in the exercise of functions required or authorized by law or administrative rule or involving the expenditure of public funds" are covered by the Act.

Delaware

The records of all functions of the executive branch are subject to the Act. See 29 Del. C. § 10002(e) (defining "public business").

Georgia

Records of the executive of public offices and departments fall under the definition of public records. See O.C.G.A. § 50-18-70(a).

Maine

All documents used in the transaction of public business are subject to its FOIA, and while it has working paper exemptions for college faculty and administrative committees and for specially-formed advisory committees, it does not specify an exemption for the governor, or municipal chief executives or school superintendents or for the presidents of colleges themselves.

Utah

GRAMA does not exempt any executive branch records from its scope, although it does restrict access to specific categories of records. For example, access is restricted to “records of the governor’s office, including budget recommendations, legislative proposals, and policy statements, that if disclosed would reveal the governor’s contemplated policies or contemplated courses of action before the governor has implemented or rejected those policies or courses of action or made them public.” Utah Code Ann. § 63G-2-305(29).

Exemptions similar to Virginia.

Louisiana

Records in the custody or control of the Governor and which are used in the discharge of his duties are exempt. La. Rev. Stat. Ann. § 44:5. This exemption extends to records of the Inspector General's Office, which is part of the Office of the Governor. Op. Att'y Gen. 92-128. Records of other executives are not exempt.

Mississippi

Records of a "public body" are covered. This does not include appointed or elected public officials or their employees. See Att'y Gen. May 15, 1984 to Griffith construing § 25-61-3(a).

COUNCIL OF PRESIDENTS

Virginia's Public Colleges and Universities

July 21, 2015

Virginia Freedom of Information Advisory Council
General Assembly Building, 2nd Floor
201 North 9th Street
Richmond, VA 23219

Dear Virginia Freedom of Information Act Records Subcommittee Members:

We write to you as members of the Council of Presidents, which includes all of the presidents and chancellors of Virginia's public institutions of higher education, to express to you our collective support for the presidential working papers and correspondence exemption as it is currently written in the *Code of Virginia* §2.2-3705.7.2. The members of the Council are united in our support for the current exemption for a number of important reasons as outlined below.

We understand and support the FOIA Council's role in evaluating current exemptions and eliminating unnecessary barriers to public transparency. Much of what we do should be and is in the public sphere. However, we believe that the removal of this exemption would hinder our ability to embrace reflective decision-making. The fundamental nature of the exemption is an expression of deliberative executive privilege that allows university presidents, among others, a zone of privacy when review, deliberation, and other subjective evaluation are required. The zone of privacy created by the exemption is critical because it encourages probing, candid exploration of alternatives in a way rarely feasible if the creative formulation of ideas and their critical evaluation must be attempted in public. The productive consideration of sensitive matters such as competitive financial negotiations, enrollment growth, internal structures and economic development initiatives, among many others, would be chilled by the loss of the exemption.

The exemption allows senior executives the confidentiality to obtain honest, unvarnished, comprehensive feedback from advisors, stakeholders and colleagues as a vital part of our decision-making process. As the law currently allows, neither university presidents nor those that advise us are inhibited in communication due to fear of our preliminary discussions becoming public and thus inaccurately reported, taken out of context, viewed as final when far from it, and quite possibly politicized. The law allows us to efficiently gather information, seek feedback, and reach conclusions. Removing the exemption impinges on an important ability to conduct a deliberative approach to reaching conclusions that affect our many stakeholders, including the public at large. And, it is important to remember that once a president makes a

decision based on confidential feedback provided under the exemption, that decision becomes public.

As university presidents and chancellors, we are responsible for managing the equivalent of small cities and towns with thousands of students, employees, acres of land and facilities ranging from on campus housing to laboratories, classroom buildings and in some cases hospitals. We confront a host of sensitive issues that require well-considered, careful decision-making. Our ability to protect the deliberative process is an important tool we use to manage our institutions and work in the best interest of the Commonwealth.

We ask that you consider these points as you evaluate the working papers and correspondence exemptions. Ultimately, we believe the elimination of this exemption would seriously impede our ability to manage our institutions in a wise, fiscally-prudent and efficient manner.

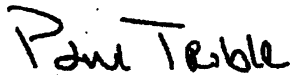
Yours truly,



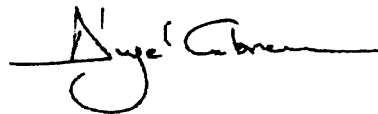
Mr. John R. Broderick (Chair)
Old Dominion University



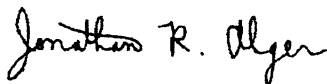
Mr. W. Taylor Reveley, III (Vice-Chair)
College of William and Mary



The Honorable Paul S. Tribble, Jr., President
Christopher Newport University



Dr. Angel Cabrera
George Mason University



Mr. Jonathan R. Alger, President
James Madison University



Dr. Edward Raspiller
John Tyler Community College

Dr. W. Taylor Reveley, IV
Longwood University



Mr. Eddie N. Moore, Jr
Norfolk State University

Dr. Angelina Godwin
Patrick Henry Community College

Ms. Penelope W. Kyle
Radford University

Dr. Elizabeth H. "Sissy" Crowther
Rappahannock Community College

Dr. Debbie L. Sydow
Richard Bland College

Dr. Alfred A. Roberts
Southside Virginia Community College

Dr. John T. Dever
Thomas Nelson Community College

Mr. Richard V. Hurley
University of Mary Washington

Dr. Teresa A. Sullivan
University of Virginia

Dr. Donna Price Henry
University of Virginia's College at Wise

Dr. Michael Rao
Virginia Commonwealth University

Dr. Glenn DuBois
Virginia Community College System

General J. H. Binford Peay, III
Virginia Military Institute

Dr. Timothy D. Sands
Virginia Polytechnic Institute & State University

Dr. Pamela Hammond
Virginia State University

4. Comparison Chart of Subdivisions 2, 4, 6, and 14 of § 2.2-3705.2 (Public safety exemptions) *Source: FOIA Council August, 2015*

§ 2.2-2705.2 (Public safety record exemptions)--Statute text

Subdivision #2:

Those portions of engineering and construction drawings and plans:

1. Submitted for the sole purpose of complying with the Building Code

- in obtaining a building permit
- that would identify specific trade secrets or other information
- the disclosure of which would be harmful to the competitive position of the owner or lessee
- However, such information shall be exempt only until the building is completed
- Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure

2. That reveal:

- critical structural components
- security equipment and systems
- ventilation systems
- fire protection equipment
- mandatory building emergency equipment or systems
- elevators
- electrical systems
- telecommunications equipment and systems, and other utility equipment and systems
 - submitted for the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.)
 - the disclosure of which would jeopardize the safety or security of any public or private commercial office, multifamily residential or retail building or its occupants in the event of terrorism or other threat to public safety
 - to the extent that the owner or lessee of such property, equipment or system in writing (i) invokes the protections of this paragraph; (ii) identifies the drawings, plans, or other materials to be protected; and (iii) states the reasons why protection is necessary
 - Nothing in this subdivision shall prevent the disclosure of information relating to any building in connection with an inquiry into the

performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event

Subdivision #4:

Plans and information to prevent or respond to terrorist activity or cyber-attacks:

- the disclosure of which would jeopardize the safety of any person, including
 - (i) critical infrastructure sector or structural components
 - (ii) vulnerability assessments
 - (iii) operational, procedural, transportation, and tactical planning or training manuals, and
 - (iv) staff meeting minutes or other records;
 - (v) engineering or architectural records, or records containing information derived from such records,
 - to the extent such records reveal the location or operation of:
 - security equipment and systems
 - elevators
 - ventilation
 - fire protection
 - emergency, electrical, telecommunications or utility equipment and
 - systems of any public building, structure or information storage facility, or telecommunications or utility equipment or systems; and
 - (vi) information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities or security plans and measures of:
 - an entity
 - facility
 - building structure
 - information technology system, or
 - software program
 - The same categories of records of any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection may be withheld from disclosure if :
 - such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism or cybersecurity planning or protection. Such statement shall be a public record and shall be disclosed upon request.
 - Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the structural or environmental soundness of any building, nor shall it prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

Subdivision #6:

- Engineering and architectural drawings,
- operational, procedural, tactical planning or training manuals, or
- staff meeting minutes or other records,
- the disclosure of which would reveal:
 - surveillance techniques,
 - personnel deployments,
 - alarm or security systems or technologies, or
 - operational and transportation plans or protocols,
 - to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.

Subdivision #14:

Documentation or other information relating to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system that:

- (i) describes the
 - design,
 - function,
 - programming,
 - operation, or
 - access control features of :
 - the overall system,
 - components,
 - structures,
 - individual networks, and
 - subsystems of the STARS or any other similar local or regional communications system or
- (ii) relates to radio frequencies assigned to or utilized by STARS or any other similar local or regional communications system,
 - code plugs,
 - circuit routing,
 - addressing schemes,
 - talk groups,
 - fleet maps,
 - encryption,
 - programming maintained by or utilized by STARS or any other similar local or regional public safety communications system;
- those portions of engineering and construction drawings and plans that reveal:
 - critical structural components,
 - interconnectivity,
 - security equipment and systems,
 - network monitoring,
 - network operation center,
 - master sites,

- ventilation systems,
- fire protection equipment,
- mandatory building emergency equipment,
- electrical systems, and other utility equipment and
- systems related to STARS or any other similar local or regional public safety communications system; and
- special event plans,
- operational plans,
- storm plans, or
- other pre-arranged programming,
- the disclosure of which would reveal:
 - surveillance techniques,
 - personnel deployments,
 - alarm or security systems or technologies, or
 - operational and transportation plans or protocols,
 - to the extent such disclosure would jeopardize the security of any governmental facility, building, or structure or the safety of any person.

SUBDIVISION 2	SUBDIVISION 4	SUBDIVISION 6	SUBDIVISION 14	NOTES
Those portions of engineering and construction drawings and plans	Plans and information to prevent or respond to terrorist activity or cyber-attacks:	<ul style="list-style-type: none"> • Engineering and architectural drawings, • Operational, procedural, tactical planning or training manuals, or • Staff meeting minutes or other records 	Those portions of engineering and construction drawings and plans	
<p>1. Submitted for the sole purpose of complying with the Building Code</p> <ul style="list-style-type: none"> • in obtaining a building permit • that would identify specific trade secrets or other information, • the disclosure of which would be harmful to the competitive position of the owner or lessee. • However, such information shall be exempt only until 	<ul style="list-style-type: none"> • Nothing in this subdivision shall be construed to prohibit the 			

SUBDIVISION 2	SUBDIVISION 4	SUBDIVISION 6	SUBDIVISION 14	NOTES
<p>the building is completed.</p> <ul style="list-style-type: none"> • Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure. 	<p>disclosure of records relating to the structural or environmental soundness of any building,</p> <ul style="list-style-type: none"> • Nor shall it prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event 			
<p>2. That reveal:</p> <ul style="list-style-type: none"> • critical structural components, • security equipment and systems, • ventilation systems, • fire protection equipment, • mandatory building emergency equipment or systems, • elevators, • electrical systems, • telecommunications equipment and systems, and • other utility equipment systems 	<p>the disclosure of which would jeopardize the safety of any person, including</p> <ol style="list-style-type: none"> i. critical infrastructure sector or structural components; ii. vulnerability assessments, iii. operational, procedural, transportation, and tactical planning or training manuals, and v. staff meeting minutes or other records; v. engineering or architectural records, or records containing information derived from such records, • to the extent such records reveal the location or operation of: <ul style="list-style-type: none"> ○ security equipment and systems, 	<p>the disclosure of which would reveal:</p> <ul style="list-style-type: none"> ○ surveillance techniques, ○ personnel deployments, ○ alarm or security systems or technologies, or ○ operational and transportation plans or protocols, ○ to the extent such disclosure would jeopardize the security of: <ul style="list-style-type: none"> ▪ any governmental facility, building or structure or ▪ the safety of persons using such facility, building or structure. 	<p>That reveal:</p> <ul style="list-style-type: none"> • critical structural components, • interconnectivity • security equipment and systems, • network monitoring, • network operation center, • master sites, • ventilation systems, • fire protection equipment, • mandatory building emergency equipment, • electrical systems, and other utility equipment and • systems related to STARS or any other similar local or regional public safety communications system; and <ul style="list-style-type: none"> ▪ special event plans, ▪ operational plans, ▪ storm plans, or ▪ other pre-arranged programming ▪ the disclosure of which would reveal: <ul style="list-style-type: none"> ✓ surveillance techniques 	

	<ul style="list-style-type: none"> ○ elevators, ○ ventilation, ○ fire protection, ○ emergency, electrical, telecommunications or utility equipment and ○ systems of any public building, structure or information storage facility, or telecommunications or utility equipment or systems; and • (vi) information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities or security plans and measures of: <ul style="list-style-type: none"> ○ an entity, ○ facility, ○ building structure, ○ information technology system, or ○ software program. 		<ul style="list-style-type: none"> ✓ personnel deployments, ✓ alarm or security systems or technologies, or ✓ operational and transportation plans or protocols, <p>to the extent such disclosure would jeopardize the security of any governmental facility, building, or structure or the safety of any person.</p>	
Submitted for the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.),				
	The same categories of records of any person or entity submitted to a public body for the purpose of antiterrorism		Documentation or other information relating to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety	

	<p>response planning or cybersecurity planning or protection may be withheld from disclosure if: such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with <u>reasonable particularity</u> why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism or cybersecurity planning or protection.</p> <p>Such statement shall be a public record and shall be disclosed upon request.</p>		<p>communications system that</p> <ul style="list-style-type: none"> • (i) describes the <ul style="list-style-type: none"> ○ design, ○ function, ○ programming ○ operation, or ○ access control features of: <ul style="list-style-type: none"> ▪ the overall system, ▪ components, ▪ structures, ▪ individual networks, and ▪ subsystems of the STARS or any other similar local or regional communications system or • (ii) relates to radio frequencies assigned to or utilized by STARS or any other similar local or regional communications system, <ul style="list-style-type: none"> ○ code plugs, ○ circuitry routing, ○ addressing schemes, ○ talk groups, ○ fleet maps, ○ encryption, ○ programming maintained by or utilized by STARS or any other similar local or regional public safety communications system 	
--	---	--	---	--

#

5. Draft of consolidation of Public Safety Exclusions 2, 4, 6, and 14 of § 2.2-3705.2 with drafting notes

A BILL to amend and reenact §§ 2.2-3705.2 and 2.2-3705.6 of the Code of Virginia, relating to the Virginia Freedom of Information Act; public safety exemptions; building plans, critical infrastructure.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3705.2 and 2.2-3705.6 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3705.2. Exclusions to application of chapter; records relating to public safety.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

DRAFTING NOTE: In an attempt to identify redundancies, the following identifies "source notes" to indicate to the reader from where the language was derived. Also, language in this PART I that appears in BOLD indicates that the language is redundant to earlier language.

PART I With Source Notes.

Those portions of (i) engineering, architectural, or construction drawings, (ii) operational, procedural, tactical planning or training manuals, (iii) staff meeting minutes, or (iv) other records that reveal:

1. (from #2) critical structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems;

2. (from #4) vulnerability assessments, the location or operation of **security equipment and systems, elevators, ventilation, fire protection, emergency, electrical, telecommunications or utility equipment** and systems of any public building, structure or information storage facility, or **telecommunications or utility equipment or systems**; and information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities or security plans and measures of an entity, facility, building structure, information technology system, or software program;

3. (from #6) surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols; or

4. (from #14) **critical structural components, interconnectivity, security equipment and systems, network monitoring, network operation center, master sites, ventilation systems, fire protection equipment, mandatory building emergency equipment, electrical systems, and other utility equipment** and systems related to STARS or any other similar local or regional public safety communications system; **and surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols;**

The disclosure of which would jeopardize:

(1) from #2-- the safety or security of any public or private commercial office, multifamily residential or retail building or its occupants;

(2) from #4-- the safety of any person;

(3) from #6-- the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure; or

(4) from #14--**the security of any governmental facility, building, or structure or the safety of any person.**

(from #2) Nothing in this subdivision shall prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

(from #4) Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the structural or environmental soundness of any building, nor shall it prevent the disclosure of **information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.**

NOTE: No such post-catastrophe language in #6 or #14.

PART II. PROPOSED NEW EXEMPTION ELIMINATING REDUNDANCIES, ETC FROM SUBDIVISIONS #s 2, 4, 6 AND 14 OF § 2.2-3705.2.

Those portions of (i) engineering, architectural, or construction drawings, (ii) operational, procedural, tactical planning or training manuals, (iii) staff meeting minutes, or (iv) other records that reveal:

1. Critical structural components, the location and operation of security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, utility equipment and systems, or other [systems of any public building, structure or information storage facility?];

2. Vulnerability assessments, information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities or security plans and measures of an entity, facility, building structure, information technology system, or software program; or

3. Surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols;

4. Interconnectivity, network monitoring, network operation center, master sites, and systems related to Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system.

The disclosure of which would jeopardize the safety or security of any person; governmental facility, building or structure or the safety of persons using such facility, building or structure; or public or private commercial office, multifamily residential or retail building or its occupants.

Nothing in this subdivision shall authorize the withholding of records relating to (a) the structural or environmental soundness of any such facility, building or structure or (b) an inquiry into the performance of that facility, building or structure after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

1. Confidential records, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses.

~~2. Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that would identify specific trade secrets or other information, the disclosure of which would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure. NOTE: Moved to proprietary records exemption (2.2-3705.6) b/c not a public safety exemption.~~

~~Those portions of engineering and construction drawings and plans that reveal critical structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems submitted for the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.), the disclosure of which would jeopardize the safety or security of any public or private commercial office, multifamily residential or retail building or its occupants in the event of terrorism or other threat to public safety, to the extent that the owner or lessee of such property, equipment or system in writing (i) invokes the protections of this paragraph; (ii) identifies the drawings, plans, or other materials to be protected; and (iii) states the reasons why protection is necessary.~~

~~Nothing in this subdivision shall prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.~~

3. Documentation or other information that describes the design, function, operation or access control features of any security system, whether manual or automated, which is

used to control access to or use of any automated data processing or telecommunications system.

~~4. Plans and information to prevent or respond to terrorist activity or cyber attacks, the disclosure of which would jeopardize the safety of any person, including (i) critical infrastructure sector or structural components; (ii) vulnerability assessments, operational, procedural, transportation, and tactical planning or training manuals, and staff meeting minutes or other records; (iii) engineering or architectural records, or records containing information derived from such records, to the extent such records reveal the location or operation of security equipment and systems, elevators, ventilation, fire protection, emergency, electrical, telecommunications or utility equipment and systems of any public building, structure or information storage facility, or telecommunications or utility equipment or systems; and (iv) information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities or security plans and measures of an entity, facility, building structure, information technology system, or software program. The same categories of records of any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism or cybersecurity planning or protection. Such statement shall be a public record and shall be disclosed upon request. Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the structural or environmental soundness of any building, nor shall it prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.~~

~~5.~~ 3. Information that would disclose the security aspects of a system safety program plan adopted pursuant to 49 C.F.R. Part 659 by the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency; and information in the possession of such agency, the release of which would jeopardize the success of an ongoing investigation of a rail accident or other incident threatening railway safety.

~~6. Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.~~

~~7.~~ 4. Security plans and specific assessment components of school safety audits, as provided in § 22.1-279.8.

Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the effectiveness of security plans after (i) any school building or property has been subjected to fire, explosion, natural disaster or other catastrophic event, or (ii) any person on school property has suffered or been threatened with any personal injury.

~~8. [Expired.]~~

~~9.~~ 5. Records of the Commitment Review Committee concerning the mental health assessment of an individual subject to commitment as a sexually violent predator under Chapter 9 (§ 37.2-900 et seq.) of Title 37.2; except that in no case shall records identifying the victims of a sexually violent predator be disclosed.

~~10.~~ 6. Subscriber data, which for the purposes of this subdivision, means the name, address, telephone number, and any other information identifying a subscriber of a telecommunications carrier, provided directly or indirectly by a telecommunications carrier to a public body that operates a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system, if the data is in a form not made available by the

telecommunications carrier to the public generally. Nothing in this subdivision shall prevent the release of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

~~11.7~~ Subscriber data, which for the purposes of this subdivision, means the name, address, telephone number, and any other information identifying a subscriber of a telecommunications carrier, collected by a local governing body in accordance with the Enhanced Public Safety Telephone Services Act (§ 56-484.12 et seq.), and other identifying information of a personal, medical, or financial nature provided to a local governing body in connection with a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system, if such records are not otherwise publicly available. Nothing in this subdivision shall prevent the release of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

~~12.8~~ Records of the Virginia Military Advisory Council or any commission created by executive order for the purpose of studying and making recommendations regarding preventing closure or realignment of federal military and national security installations and facilities located in Virginia and relocation of such facilities to Virginia, or a local or regional military affairs organization appointed by a local governing body, to the extent such records (i) contain information relating to strategies under consideration or development by the Council or such commission or organizations to prevent the closure or realignment of federal military installations located in Virginia or the relocation of national security facilities located in Virginia, to limit the adverse economic effect of such realignment, closure, or relocation, or to seek additional tenant activity growth from the Department of Defense or federal government or (ii) disclose trade secrets, as defined in the

Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided to the Council or such commission or organizations in connection with their work. In order to invoke the trade secret protection provided by clause (ii), the submitting entity shall, in writing and at the time of submission (a) invoke this exclusion, (b) identify with specificity the information for which such protection is sought, and (c) state the reason why such protection is necessary. Nothing in this subdivision shall be construed to authorize the withholding of all or part of any record, other than a trade secret that has been specifically identified as required by this subdivision, after the Department of Defense or federal agency has issued a final, unappealable decision, or in the event of litigation, a court of competent jurisdiction has entered a final, unappealable order concerning the closure, realignment, or expansion of the military installation or tenant activities, or the relocation of the national security facility, for which records are sought.

13.9. Documentation or other information as determined by the State Comptroller that describes the design, function, operation, or implementation of internal controls over the Commonwealth's financial processes and systems, and the assessment of risks and vulnerabilities of those controls, including the annual assessment of internal controls mandated by the State Comptroller, the disclosure of which would jeopardize the security of the Commonwealth's financial assets. However, records relating to the investigation of and findings concerning the soundness of any fiscal process shall be disclosed in a form that does not compromise internal controls. Nothing in this subdivision shall be construed to prohibit the Auditor of Public Accounts or the Joint Legislative Audit and Review Commission from reporting internal control deficiencies discovered during the course of an audit.

14.10. Documentation or other information relating to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system that (i) describes the design, function, programming, operation, or access control features of the overall system, components, structures, individual networks, and subsystems of the STARS or any other similar local or regional communications system or (ii) relates to radio

frequencies assigned to or utilized by STARS or any other similar local or regional communications system, code plugs, circuit routing, addressing schemes, talk groups, fleet maps, encryption, programming maintained by or utilized by STARS or any other similar local or regional public safety communications system; ~~these portions of engineering and construction drawings and plans that reveal critical structural components, interconnectivity, security equipment and systems, network monitoring, network operation center, master sites, ventilation systems, fire protection equipment, mandatory building emergency equipment, electrical systems, and other utility equipment and systems related to STARS or any other similar local or regional public safety communications system; and special event plans, operational plans, storm plans, or other pre arranged programming, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building, or structure or the safety of any person.~~

~~15.11.~~ Records of a salaried or volunteer Fire/EMS company or Fire/EMS department, to the extent that the records disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties.

~~16.12.~~ Records of hospitals and nursing homes regulated by the Board of Health pursuant to Chapter 5 (§ 32.1-123 et seq.) of Title 32.1 provided to the Department of Health, to the extent such records reveal the disaster recovery plans or the evacuation plans for such facilities in the event of fire, explosion, natural disaster, or other catastrophic event. Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the effectiveness of executed evacuation plans after the occurrence of fire, explosion, natural disaster, or other catastrophic event.

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-132.4 or 62.1-134.1.....

28. Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that would identify specific trade secrets or other information, the disclosure of which would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

#

6. Comment on Public Safety Consolidation Draft, Dave Ress, Daily Press

To replace the several public safety exemptions for information that could be used in terror or cyber attacks

Any portion of a public record that details security systems for a building, database, public utility or communications network if and only if release would jeopardize public safety, including that portion of a public record that includes plans or other information specifically intended to prevent or respond to criminal or terrorist activity or cyberattacks. In invoking this release, the custodian must make a finding that the specific information that is redacted from such a public record would jeopardize public safety. That finding shall be a public record subject to the provisions of this act and shall describe in sufficient detail the nature of criminal, terror or cyberattack threat involved. Nothing in the subdivision shall prevent the disclosure of information about the performance of a building or a security system after it has been subjected to a natural disaster, fire, explosion or other catastrophic event.

In addition to simplifying the exemption, this eliminates the peculiarity in FOIA that says evacuation plans of hospitals and nursing homes are exempt from release. This is in 2.2-3705.2 (16).

7. Comparison Chart of proposed VA Alcoholic Beverage Control Authority Exemption, subdivision 34 of § 2.2-3705.7, Source: *FOIA Council, November, 2015*

**Review of Record Exemption for
Virginia Alcoholic Beverage Control Authority
(§ 2.2-3705.7 (# 34); effective July 1, 2018)
(Comparison to Other Existing Record Exemptions)**

**November 18, 2015
Records Subcommittee
of the
FOIA Council**

I. § 2.2-3705.7 (# 34)

34. (Effective July 1, 2018) Records of the Virginia Alcoholic Beverage Control Authority to the extent such records contain (i) information of a proprietary nature gathered by or in the possession of the Authority from a private entity pursuant to a promise of confidentiality; (ii) trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), of any private entity; (iii) financial records of a private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; (iv) contract cost estimates prepared for the (a) confidential use in awarding contracts for construction or (b) purchase of goods or services; or (v) the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority.

In order for the records identified in clauses (i) through (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the Authority:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

The Authority shall determine whether the requested exclusion from disclosure is necessary to protect such records of the private entity. The Authority shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

II. Comparison between ABC Authority Record Exemption (2.2-3705.7 #34) and Other Record Exemptions

ABC Authority Exemption	Related Records Exemptions	NOTES
Records of the Virginia Alcoholic Beverage Control Authority to the extent such records contain:	-----	-----
(i) information of a proprietary nature gathered by or in the possession of the Authority from a private entity pursuant to a promise of confidentiality	No other generic <u>proprietary record</u> exemption in FOIA; current exemptions in 2.2-3705.6 are for specifically named public bodies or for a specifically named purpose (i.e. economic development).	Phrasing of other FOIA proprietary records exemptions read the same as for this ABC Authority exemption. See also work of Proprietary Records Workgroup in attempting to craft general proprietary records exemption. See also VA Sup. Ct decision in <i>American Tradition Institute</i> case.
(ii) trade secrets, as defined in the Uniform Trade Secrets Act (59.1-336 et seq.), of any private entity;	No other generic <u>trade secret</u> record exemption in FOIA; current exemptions in 2.2-3705.6 are for specifically named public bodies or for a specifically named purpose (i.e. economic development)	Phrasing of other FOIA trade secret exemptions read the same as for this ABC Authority exemption.
(iii) financial records of a private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise;	No other generic <u>financial record/balance sheet</u> record exemption in FOIA; current exemptions in 2.2-3705.6 are for specifically named public bodies or for a specifically named purpose (i.e. economic development)	Phrasing of other FOIA financial record/balance sheet exemptions read the same as for this ABC Authority exemption.
(iv) contract cost estimates prepared for the (a) confidential use in awarding contracts for construction or (b) purchase of goods or services;	Nothing in FOIA, other than 2.2-3705.1 (#8); but that is limited to real property. See also 2.2-4342 of VPPA-- "Cost estimates relating to a proposed procurement transaction prepared by or for a public body shall not be	ABC Authority is exempt from the VPPA; therefore 2.2-4342 inapplicable to ABC Authority.

	open to public inspection.	
(v) the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority	No other generic <u>marketing or operational strategies</u> exemption in FOIA; current exemptions in FOIA are for specifically named public bodies--see notes.	VCUHSA--2.2-3705.7 (#15) and 2.2-3711 (meetings) (#23) UVA/EVMS--2.2-3705.4 (#5) and 2.2-3711 (meetings) (#22)
EARMARKING:		
In order for the records identified in clauses (i) through (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the Authority: a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought; b. Identifying with specificity the data or other materials for which protection is sought; and c. Stating the reasons why protection is necessary.	Earmarking provisions found throughout FOIA record exemptions, especially in 2.2-3705.6--proprietary record exemptions. Specifically, subdivisions 11, 13, 18, 20, 22, 23, 24, 26, and 27 in 2.2-3705.6.	There are, however, minor variations in the phrasing of the various earmarking provisions in FOIA.
The Authority shall determine whether the requested exclusion from disclosure is necessary to protect such records of the private entity. The Authority shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.	Subdivisions 11, 22, 23, 24 in 2.2-3705.6. Subdivisions 25 in 2.2-3705.7	VRS, local retirement systems and VCSP

#

APPENDIX H

2016 RECORD SUBCOMMITTEE MATERIALS

Contents:

1. **Uniform Treatment of private Trade Secrets under FOIA Submitted by VPA, June 2016;**
2. **Research concerning treatment of letters of recommendation in FOIA and Government Data Collection and Dissemination Practices Act. *Source: FOIA Council, June 2016;***
3. **Proposed Draft concerning treatment of letters of recommendation in FOIA and Government Data Collection and Dissemination Practices Act;**
4. **Remarks Submitted by the Virginia Department of Aviation, August 2016;**
5. **Remarks Submitted by the Virginia Marine Resources Commission;**
6. **Remarks Submitted by the Virginia Resources Authority;**
7. **Remarks Submitted by the Virginia Commercial Space Flight Authority;**
8. **Remarks Submitted by the Virginia Department of Transportation;**
9. **Remarks Submitted by the Virginia Office of the Inspector General;**
10. **Remarks Submitted by the Commonwealth Health Research Board;**
11. **Remarks Submitted by the Virginia Department of Health;**
12. **Remarks Submitted by the Virginia Department of Conservation and Recreation; and**
13. **Remarks Submitted by the Attorney for the City of Hampton School Board.**

**1. Uniform Treatment of private Trade Secrets under FOIA Submitted by
VPA, June 2016**

**Uniform Treatment of Private Trade Secrets
Under the Virginia Freedom of Information Act**

*Submitted by the Virginia Press Association to the
Virginia Freedom of Information Advisory Council*

June 23, 2016

**Uniform Treatment of Private Trade Secrets
Under the Virginia Freedom of Information Act**

***Submitted by the Virginia Press Association to the
Virginia Freedom of Information Advisory Council***

As early as 1981, the General Assembly included provisions within the Virginia Freedom of Information Act ("FOIA" or the "Act") that sought to protect the trade secrets of private parties when those parties submitted information to public bodies. See 1981 Acts of Assembly ch. 464 (regarding coal shipment data submitted to the Virginia Port Authority). Simply put, an entity doing business is entitled under general principles of law to protect its trade secrets. Absent an articulated state policy that requires trade secret protection to be waived under specified circumstances, there is no reason to presume that a private entity forfeits trade secret protection when it submits a record containing protectable information to the government.

This principle has been recognized repeatedly by the General Assembly, and Va. Code § 2.2-3705.6 now contains twenty-seven (27) distinct exclusions that arguably concern private trade secret information placed in the hands of public bodies.¹ Unfortunately, these agency-specific exclusions treat exactly the same problem in inconsistent ways. This situation has arisen for a number of reasons:

¹ Other provisions of the Act employ language addressing trade secret-like protections. See Va. Code §§ 2.2-3701.1.6; 2.2-3705.4.5; 2.2-3705.5.4 and 12.

- There is confusion between the fundamental nature of private organizations, on the one hand, and governmental bodies, on the other; information generated by private entities is fundamentally different from information held by public entities.
- There is basic misunderstanding of the law of trade secrets and what it protects.
- Concepts of ownership (so-called "proprietary" interests) are confused with concepts of confidentiality.
- The inherently messy legislative process has, over the years, permitted rules for private trade secret protection to be conflated in the same statutory provisions with unrelated confidentiality principles that concern government deliberations.

This muddled approach has potentially costly consequences. First, the language of the statute is not a clear source of guidance to public employees, elected or appointed officials, private persons or businesses, or the lawyers who must advise them. Second, it makes judicial interpretation of any single provision a daunting task. In a recent concurrence, Supreme Court Justice William Mims pointed out that the Act uses the word "proprietary" in numerous places, and without consistency. Mims' intellectual candor reflects only the obvious -- rules of statutory interpretation cannot be rigorously applied to give a consistent meaning to the provisions of the Act that purport to protect sensitive private business information.

Virginia's FOIA needs more effective, user-friendly language to govern the protection of trade secrets. The non-FOIA legal principles concerning trade secret protection are well established and applied daily in business. Clarifying the Act to conform its protections to those recognized elsewhere in the law will encourage uniform practices. Importantly, it will reduce the likelihood of costly squabbles over

interpretation of the Act, squabbles that impose costs on both requesters and public bodies, but not on the private entities claiming trade secret status.

This white paper discusses some of the fundamental policy issues surrounding protection of trade secrets, identifies some of the weaknesses of current law, and describes a VPA proposal that focuses solely on the submission of trade secrets to public bodies by private entities.

Basic Principles of Trade Secret Protection

Both entrepreneurs and owners of established businesses need to protect confidential information that gives them a competitive advantage, ensuring that it is not stolen outright or placed into the public domain through sloppy practices. A wide variety of subject matter might be commercially sensitive to a business owner, including undisclosed knowhow about manufacturing processes, scientific research, customer lists developed at considerable cost, or strategic business plans.² The law recognizes this by providing protection for a broadly-defined body of information defined as “trade secrets.”

Virginia has adopted the Uniform Trade Secrets Act (“UTSA”), found at Va. Code § 59.1-336 *et seq.* (See Appendix 1.) Virginia Code § 59.1-336 defines the protected class of information:

“Trade secret” means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

² It is beyond the scope of this discussion to detail the various situations that private businesses face. Certainly the form of business entity is relevant to the degree of disclosure it must make about its operations. A small, closely-held company does not have the same public reporting obligations as a company that offers publicly-traded securities governed by federal or state securities laws.

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Note that the subject matter of protectable information is broadly defined. Of equal importance is the fact that the holder of information claimed as a trade secret must take reasonable steps under the circumstances to maintain the confidentiality of the trade secret. This tradeoff makes sense – if you claim that certain information is of critical importance to your business, surely you will take proper steps to protect it as you conduct your business.

If, despite reasonable efforts to protect a trade secret, the trade secret is misappropriated, that is, acquired by another through improper means, the UTSA provides remedies for that misappropriation.³ The remedies include entry of an injunction, an award of compensatory or punitive damages, and attorneys' fees.⁴

Study of Virginia's trade secrets statutes teaches that certain things must not be confused. It is implicit in the UTSA that a person or entity claiming the right to protect information as a "trade secret" must necessarily have the right to exclude others from having access to the information. This is typically understood as some form of ownership. The holder of the secret either (1) owns it outright because it was developed internally or (2) possesses the secret by legal means that allow it to exclude others from access – such as an exclusive license. This "proprietary" interest over

³ Both "misappropriation" and "improper means" are defined terms in the UTSA. See Va. Code § 59.1-336. (Appendix 1)

⁴ See Va. Code §§ 59.1-337, 338, 338.1.

information is a necessary precondition to claiming the information as one's own trade secret. For example, PepsiCo has no proprietary interest in the formula for Coca-Cola, a famous trade secret that has been held in confidence for decades by the Coca-Cola Company.

However, mere "proprietaryship" does not make information a trade secret. The information must also be commercially valuable, and its value must be derived from the fact that it is not known to the outside world. The disclosure of a true trade secret, in other words, causes commercial harm to its owner. To stay with the soft drink example, next week's delivery schedule of Coke from the manufacturer to the local supermarket may be of interest to Pepsi, but it may not rise to the level of a trade secret. The information probably could be ascertained by observing deliveries for a few weeks, and its disclosure, in any event, would probably be harmless to the Coca-Cola Company. Unlike the formula for Coca-Cola, that information probably does not warrant protection as a trade secret.

With a clear understanding of what trade secrets are, and what they are not, one may evaluate the effectiveness of the exclusions under the Act that purport to protect trade secrets. The Act should work in harmony with Virginia's USTA; it should not undermine the objectives of trade secrets law, or confuse trade secrets principles that are generally applied in business. The legislative objective in crafting trade secrets exclusions for the Act should be, unless waiver of such protection is specifically required by law, to provide a private entity with no *less* protection than it already possesses when it submits records to the government. By the same token, there is no reason to enact an exclusion from the Act that *elevates otherwise unprotected information* (not

qualifying as a trade secret) to a confidential status that it never possessed prior to its submission to the government.

The discussion below evaluates selected provisions set forth in Va. Code § 2.2-3705.6, measuring them against the objectives of clarity and consistency with trade secrets laws of general application. The discussion is not intended to be comprehensive, merely illustrative of key problems.

Features of Trade Secrets Provisions of the Act

Reading Virginia Code § 2.2-3705.6 from top to bottom immediately underscores the fact that the subsections of the statute present variations in the language describing what is protected. The verbal formulas include: "proprietary information," "confidential proprietary records," "proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections," "trade secrets or proprietary information," "confidential proprietary information or trade secrets," "confidential proprietary information," "information of a proprietary nature," "confidential proprietary records and trade secrets," "Trade secrets as defined in the Uniform Trade Secrets Act," and "information of a proprietary or confidential nature."

This mix of terminology raises a number of problems. First, applying the rules of statutory construction, all words must be given meaning, and words must be given their plain meanings when possible. As Justice Mims aptly pointed out, this portends nothing but trouble for future judicial interpretation:

. . . mindful of our canons of construction, this concurrence is warranted.

Under one canon, we presume that the General Assembly is aware of how we construe the terms it used in a statute and that it acquiesces in such constructions unless it subsequently enacts a corrective amendment. [citations omitted] Under another, we presume that when the General Assembly used a

word in multiple places within the same statutory scheme, it intended the word to have the same meaning in each unless another meaning is expressly provided. [citations omitted]

While I believe the court has accurately assessed the public policy underlying the legislature's enactment of Code § 2.2-3705.4.4, the exclusion at issue in this case, I observe that the word "proprietary" also occurs in Code §§ 2.2-3705.1(6), 2.2-3705.4(5), 2.2-3705.5(4) and (12), 2.2-3705.6(1), (3), (7), (8), (9), (10), (12), (13), (14), (17), (18), (19), (21), (25), and (27). I am not confident that the General Assembly intended the definition of "proprietary" we endorse today to apply equally to them all. However, only Code § 2.2-3705.1(6) provides an express definition clarifying legislative intent.

The majority opinion rightly deals only with the case, and code section, presently before the Court. However, I write separately to spotlight that the judicial canons of statutory construction will require us to extrapolate from this decision when we are called upon to decide future cases dealing with other code sections. I fear that such extrapolations may cause us to diverge from the General Assembly's true intent in such cases, if it does not provide clarification soon. "Proprietary" is susceptible to too many meanings to be used so broadly and so often in the Virginia Freedom of Information Act with no specific definition.⁵

This reflection on the state of the Act should be troublesome to the General Assembly. Even experienced counsel trying in good faith to interpret the "trade secrets" provisions in FOIA cannot read them in the context of a consistently-applied approach that promotes clear guidance to clients, either private or governmental.

⁵ *American Tradition Inst. v. Rector of the Univ. of Va.*, 287 Va. 330, 346-47, 756 S.E.2d 435, 444 (2014). In *American Tradition*, the Court interpreted an exclusion from the Act for certain information generated by faculty at institutions of higher education. See Va. Code § 2.2-3705.4.4. The Court's interpretation began with a discussion of the phrase "information of a proprietary nature." It conducted no textual analysis of other limiting language in subsection 4, and reached an outcome that purported, by negative implication, to reflect the intentions of the General Assembly. The interpretation included a fairly unremarkable definition of "proprietary" as a right associated with "ownership, title and possession." 287 Va. at 341, 756 S.E. 2d at 441.

The confusion created by repetition of the word "proprietary" is multiplied when it is combined with other words that have legal import, such as "confidential." See, e.g., Va. Code § 2.2-3705.6 subsections 3, 7, 8. Not everything that is proprietary is confidential; not everything that is both proprietary and confidential rises to the level of a trade secret. Yet, it is clear that a number of FOIA provisions simply use the vague phrase that something is "of a proprietary nature" as a proxy for claiming it as a "trade secret." See, e.g., Va. Code § 2.2-3705.6 subsections 14, 21, 25, 27. This encourages private parties, without rigorously determining whether submitted information is truly a trade secret, simply to submit records to public bodies with vague claims that they are "proprietary" and therefore excluded from disclosure under the Act. This puts enormous pressure on the receiving public body, which bears the risk of erroneous classification under FOIA. Moreover, when categories of records that are not commercially sensitive are withheld under ill-defined and arbitrary notions, public confidence in government and in the Act itself is undermined. Withholding "proprietary" information from public disclosure under FOIA is very difficult to justify if that information is not important enough to warrant legal protection as a trade secret in the normal course of business.

Further confounding matters is the use of both "trade secret" and "confidential proprietary records" references in the same subsection. Under canons of statutory interpretation, these terms must be given different meanings. It is not clear why trade secrets protection, already broad, needs to be conflated with language that can only make the scope of such exclusions broader and essentially boundless. See, e.g., Va. Code § 2.2-3705.6 subsections 12, 18, 19.

In addition to the chaotic terminology, certain subsections mix principles of trade secret protection with the closure of government deliberative processes. That is a functionally and legally distinct issue, and conflating it with private trade secrets protection in the same statute is simply confusing. See Va. Code § 2.2-3705.6 subsections 3 (private business development), 11 (PPTA/PPEA), 23 (Tobacco Region Revitalization Commission), 24 (Commercial Space Flight Authority). It may well be that the deliberative processes referenced in those provisions warrant secrecy, or temporary secrecy, for policy reasons unrelated to trade secret protection. If they do, they should be the subject of statutes that articulate those policies and describe them with precision.

VPA's Proposal

Appendix 1 is VPA's proposal for a comprehensive trade secrets statute. It would apply to all submissions of information to the government by non-governmental entities with legitimate claims to trade secret protection. Several points are noteworthy.

First, a very similar but not identical proposal was offered for consideration to the Virginia Freedom of Information Advisory Council work group studying Va. Code § 2.2-3705.6. The work group failed to reach consensus around the VPA proposal, or around other trade secrets proposals offered by staff.

Second, the VPA proposal does not address another scenario: the limited but significant circumstances under which public bodies are actors or potential actors in the commercial marketplace, and sometimes have trade secret concerns similar to those present in private enterprises. University scientific research is an obvious area of discussion, as public universities, including graduate programs and medical programs,

generate work that might be commercialized and may be entitled to intellectual property protection until it is made public in accordance with patent or copyright laws.

Third, enactment of a uniform trade secrets exclusion will require the identification of functions that may continue to warrant separate rules. Although it is beyond the scope of this paper, consideration must be given to special cases such as public entities that invest public employee funds for the payment of retirement benefits.

The VPA proposal has two main features.

First, it explains what is entitled to protection and how that protection must be invoked at the time a record is submitted to a public body. It is intended to track the scope of the USTA, and presumes that by adopting the USTA the General Assembly has defined the proper scope of trade secret protection in Virginia. It requires that information subject to a claim of protection be identified with specificity at the time it is submitted.

Second, it describes a process for enforcement of the Act and resolution of trade secret-based disputes in the event a requester does not acquiesce in a public body's assertion that information in a public record is a trade secret. Rather than placing the burden and expense of defending a claim for private trade secret protection on a public body, the proposal requires that the submitting entity be joined as a party to any action to enforce the Act. It requires further that, in the event the requester substantially prevails in litigation, the entity claiming trade secrets protection, and not the public body, must pay the attorneys' fees of the prevailing party.

Conclusion

The VPA respectfully submits this paper and its accompanying private trade secrets proposal to the Virginia Freedom of Information Advisory Council for consideration. VPA looks forward to further discussion of the principles that have been addressed in this paper.

June 23, 2016

Appendix 1

Virginia Press Association Proposed FOIA Exclusion for Trade Secrets Submitted to a Public Body

2.2-37xx. Protection of trade secrets submitted to a public body. *A record delivered or transmitted to a public body by a submitting entity that is not a public body as defined in this Chapter may be withheld in whole or in part to the extent that:*

- (a) the record contains information in which the submitting entity has an ownership interest;*
- (b) the submitted information qualifies as a "trade secret" of the submitting entity as defined in the Uniform Trade Secrets Act, Va. Code Section 59.1-336, et seq.;*
- (c) the submitting entity delivered or transmitted the record to the public body (i) in compliance with a statute, regulation or other law of the United States or the Commonwealth, or (ii) as a required component of a submission made in connection with a public procurement, public financing or economic development transaction; and*
- (d) the information that the submitting entity seeks to protect was clearly and specifically identified by the submitting entity as a trade secret at the time of its delivery or transmission to the public body, such identification being a representation by the submitting entity that it has made a good faith effort only to designate as trade secrets those portions of the submitted information that are entitled to protection under the Uniform Trade Secrets Act.*

In the event a public body, in response to a request under this Chapter, denies access to a public record or a portion of a public record on the ground that the requested information has been identified by the submitting entity as a trade secret and the requester challenges the characterization of the withheld information as a trade secret, the public body must notify the submitting entity within two work days of the challenge made by the requester. If the submitting entity and the requester are unable after conferring to reach agreement on the proper designation of the material in dispute, or the submitting entity refuses to confer with the requester, the requester may bring an action under this Chapter to require the public body to produce the requested material, and shall name as an additional defendant in the action the submitting entity. If as a result of the action the court requires that the public body produce material that has been improperly designated as a trade secret by the submitting entity, any award of reasonable costs and attorneys' fees to the requester pursuant to § 2.2-3713 shall be paid by the submitting entity and not by the public body.

2. Research concerning treatment of letters of recommendation in FOIA and Government Data Collection and Dissemination Practices Act, *Source: FOIA Council June 1016*

COV Provisions Regarding Access to Letters Of Recommendation

FOIA

§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Personnel information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such information shall be disclosed. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107.

4. Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by a public body.

As used in this subdivision, "test or examination" shall include (a) any scoring key for any such test or examination and (b) any other document that would jeopardize the security of the test or examination. Nothing contained in this subdivision shall prohibit the release of test scores or results as provided by law, or limit access to individual records as provided by law. However, the subject of such employment tests shall be entitled to review and inspect all records relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

§ 2.2-3705.4. Exclusions to application of chapter; educational records and certain records of educational institutions.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

2. Confidential letters and statements of recommendation placed in the records of educational agencies or institutions respecting (i) admission to any educational agency or institution, (ii) an application for employment or promotion, or (iii) receipt of an honor or honorary recognition.

GDCDPA

§ 2.2-3806. Rights of data subjects.

B. Nothing in this chapter shall be construed to require an agency to disseminate any recommendation or letter of reference from or to a third party that is a part of the personnel file of any data subject nor to disseminate any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by any public body.

As used in this subsection, "test or examination" includes (i) any scoring key for any such test or examination and (ii) any other document that would jeopardize the security of the test or examination. Nothing contained in this subsection shall prohibit the release of test scores or results as provided by law, or to limit access to individual records as provided by law; however, the subject of the employment tests shall be entitled to review and inspect all documents relative to his performance on those employment tests.

When, in the reasonable opinion of the public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. Minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

#

3. Proposed Draft concerning treatment of letters of recommendation in FOIA and Government Data Collection and Dissemination Practices Act.

A BILL to amend and reenact §§ 2.2-3705.1, 2.2-3705.4, 2.2-3705.8, and 2.2-3714 of the Code of Virginia, relating to the Virginia Freedom of Information Act; personnel records; letters of recommendation.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3705.1, 2.2-3705.4, 2.2-3705.8, and 2.2-3714 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies.

The following ~~records are~~ information is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Personnel ~~records containing~~ information concerning identifiable individuals, except that access that (i) is used or has been used to determine that individual's qualification for employment, promotion, assignment, or additional compensation, including evaluations and termination or other disciplinary actions; (ii) contains such individual's personal or demographic information; (iii) otherwise documents the employment relationship or (iv) would otherwise constitute an unwarranted invasion of such individual's personal privacy. Access, however, shall not be denied to the person who is the subject thereof. Nothing in this subdivision shall be construed to require access to any recommendation or letter of reference from a third party that is a part of the subject's personnel information.

Any person who is the subject of ~~any personnel record~~ such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, ~~the public body shall open such records for inspection and copying~~ such information shall be disclosed, except as otherwise provided in this subdivision.

No provision of this chapter or Chapter 38 (§ 2.2-3800 et seq.) shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes exempted under this

subdivision; (ii) records of the name, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body; or (iii) records of the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subdivision, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.

2. Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other records protected by the attorney-client privilege.....

[NOTE: Remainder of this section is not set out because there were no further amendments.]

§ 2.2-3705.4. Exclusions to application of chapter; educational records and certain records of educational institutions.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student; however, nothing in this subdivision shall be construed to require access to any recommendation or letter of reference from a third party that is a part of such scholastic record. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, that are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a state-supported institution of higher education, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying.....

[NOTE: Remainder of this section is not set out because there were no further amendments.]

§ 2.2-3705.8. Limitation on record exclusions for certain consultant's reports.

~~A. Neither any provision of this chapter nor any provision of Chapter 38 (§ 2.2-3800 et seq.) of this title shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1; (ii) records of the position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees.~~

~~The provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.~~

~~B. Nothing in this chapter shall be construed as denying public access to the nonexempt portions of a report of a consultant hired by or at the request of a local public~~

body or the mayor or chief executive or administrative officer of such public body if (i) the contents of such report have been distributed or disclosed to members of the local public body or (ii) the local public body has scheduled any action on a matter that is the subject of the consultant's report.

§ 2.2-3714. Violations and penalties.

In a proceeding commenced against any officer, employee, or member of a public body under § 2.2-3713 for a violation of § 2.2-3704, 2.2-3705.1 through ~~2.2-3705.8~~ 2.2-3705.7, 2.2-3706, 2.2-3707, 2.2-3708, 2.2-3708.1, 2.2-3710, 2.2-3711 or 2.2-3712, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such officer, employee, or member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than \$500 nor more than \$2,000, which amount shall be paid into the State Literary Fund. For a second or subsequent violation, such civil penalty shall be not less than \$2,000 nor more than \$5,000.

#

4. Remarks Submitted by the Virginia Department of Aviation, August 2016



COMMONWEALTH of VIRGINIA

Randall P. Burdette
Executive Director

Department of Aviation
5702 Gulfstream Road
Richmond, Virginia 23250-2422

V/TDD • (804) 236-3624
FAX • (804) 236-3635

ISO 9001:2008 Certified
IS-BAO Registered

August 10, 2016

Ms. Maria J. K. Everett, Esq.
Executive Director
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, Virginia 23219

Dear Ms. Everett,

We appreciate your invitation to attend the Records Subcommittee meeting on August 18, 2016 to discuss the importance of our FOIA exemption related to proprietary records and trade secrets and would be there, if at all possible. Unfortunately, the date coincides with the 42nd Annual Virginia Aviation Conference, which takes place August 16-19 in Hot Springs, Virginia. A Virginia Aviation Board Workshop takes place on August 18th which makes our attendance at the Records Subcommittee meeting in Richmond impossible. We would therefore like to request an opportunity to meet with the Records Subcommittee on another day to discuss our exemption. As Alan Gernhardt advised, we are resubmitting the original details regarding our exemption and we will provide any additional information to the group as needed.

The Virginia Department of Aviation has a Virginia Freedom of Information Act exemption (§ 2.2-3705.6 (27)) that protects "Information of a proprietary nature furnished by a licensed public-use airport to the Department of Aviation for funding from programs administered by the Department of Aviation or the Virginia Aviation Board, where if such information was made public, the financial interest of the public-use airport would be adversely affected."

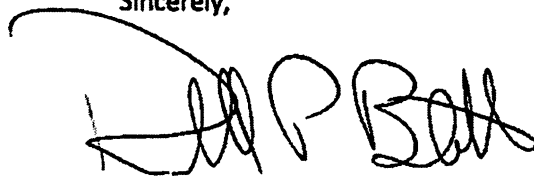
The Department of Aviation has multiple matching grant programs available to airports. Airport operators are required to provide documents such as appraisals, contract copies, receipts (for travel expenses, etc.) to the Department of Aviation in order to qualify for grant reimbursements. Often, because of our grant cycle, these submissions need to be made before the airport completes contract negotiations with airlines, landowners, or others. Because these documents are not academic and scientific research or are not provided from a private entity directly to the Department of Aviation, but from a public entity (airport) to a public entity (Department of Aviation) but related to the airport's interactions with a private entity there are no other exemptions that clearly protect them.



If this information is released prematurely - for example: if documents that identify an airline with whom an airport is negotiating for new or expanded service are released by the Department of Aviation before a final decision has been made by the airline – it could impact further negotiations and adversely affect that airport (and community).

Please contact us, if the Records Subcommittee has any questions or needs further information.

Sincerely,

A handwritten signature in black ink, appearing to read "Randall Burdette". The signature is written in a cursive style with a large, sweeping initial "R" that extends upwards and to the left.

Randall Burdette
Executive Director

Review of Department of Aviation FOIA Exemptions: Proprietary Records and Trade Secrets

Validity of DOAV Exemption

In response to the letter that came in with this request to review our agency's FOIA exemptions, we have reviewed the code and find that the Virginia Department of Aviation's exemption (§ 2.2-3705.6 (27)) is still valid and necessary to protect proprietary information submitted by airports (most publicly owned and a few privately owned) in support of funding from programs administered by the Department of Aviation or the Virginia Aviation Board, where if the records were made public, the financial interest of the airport would be adversely affected.

Comments on Work Groups Ideas

The letter shared that a work group, formed by the Records Subcommittee, believes that the Proprietary Records and Trade Secrets section might be consolidated into one or two general exemptions and the group had categorized these exemptions as follows:

"In general terms, the work group categorized the exemptions as those addressing proprietary records and trade secrets generated by a public body (such as academic and scientific research), proprietary records and trade secrets submitted to a public body by a private entity (the majority of the exemptions) and financial records of a private entity submitted to a public body that are not otherwise made public."

While these cover certain situations, we are not confident that they would allow the Department of Aviation to withhold documents covered in our current exemption. We (a public entity) receive documents from airports (mostly public entities) in support of our grant programs that may result in a negative financial impact on the airport if released prematurely. These public body records are not academic or scientific research but may be receipts or quotes for services, appraisals, or other documents provided by airports to our office in order to fulfill the requirements of our matching grant programs. Here are a couple of examples:

Example 1:

Airport X (a public owned, public use airport) is seeking additional airline service. They have applied and received an Air Service Development and Enhancement grant from the Virginia Department of Aviation. Funds are used to hire a consultant to assist them in putting together a presentation and making appointments to meet privately with a selected airline. Once the airline visit is completed, and often before the airport knows whether it succeeded in obtaining new or upgraded air service, the airport submits a request for reimbursement to the Department of Aviation's grant program. This request requires the submission of copies of contracts/invoices and travel receipts (including airline tickets, hotel invoices, etc.) associated with the visit that includes the name of the airline visited and their headquarters city. These documents need to be submitted so the agency can justify the grant reimbursement; however, if they are released to the public prior to the airline formally approving or declining new or expanded service, it may impact the airline's decision.

Example 2:

Airport Y, a general aviation airport in Virginia, is looking to lengthen/widen their runway and must purchase additional parcels of land to do so. The public entity operating the airport has obtained an appraisal for one parcel of land involved. A copy of this appraisal is submitted by the airport operator (public entity) to the Virginia Department of Aviation for review in support of a grant request. If an adjacent property owner, whose property is also in negotiations with the airport operator, submits a Virginia Freedom of Information Act request for all documents related to the runway extension project, providing the appraisal for the first parcel, would put the airport operator at a financial disadvantage in negotiating for the second parcel.

VPA Markup

In reviewing the VPA markup provided, the Department of Aviation's exclusion is marked out entirely. The only general language left is "memoranda, working papers or other records related to businesses that are considering relocating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where, if such records are made public, the financial interest of the public body would be adversely affected." This language is not a substitute for the Department of Aviation's current exemption and would not appear to allow the exemptions for both of the examples that I provided earlier.

In closing, we strongly encourage the working group to maintain the Virginia Department of Aviation's current exemption as written.

However, if the working group decides to draft one or two new Proprietary Records and Trade Secrets general exemptions in lieu of all current general and individual agency exemptions, we encourage them to draft those exemptions to include language that protects the financial interests of Virginia's public use airports when they submit required documents to our agency.

5. Remarks Submitted by the Virginia Marine Resources Commission

Mr. Gernhardt,

Please accept this as an agency comment on the FOIA exemption provided in § 2.2-3705.6.

Exclusions to application of chapter; proprietary records and trade secrets.

The pertinent clause is in bold.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-132.4 or 62.1-134.1.
2. Financial statements not publicly available filed with applications for industrial development financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.
3. Proprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.
4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992.

5. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § 28.2-204.

AGENCY COMMENT:

This FOIA exemption is intended to preserve from public release records pertaining to individuals' landings of seafood products. The agency collects a variety of harvest information necessary to formulate species management plans, to maintain sustainably managed harvests, and to monitor the harvest of quota-managed species to ensure those species are not overfished. To do so, all licensed commercial harvests are required to report their catches monthly. As a result, the agency possesses records that would reveal what a harvester caught, how much was caught, and when it was caught. Release of this information would allow anyone with knowledge of market prices to determine with a reasonable degree of certitude the annual income of every commercially licensed harvester, and would be akin to releasing to their annual incomes. The agency licenses more than 2,800 commercial harvesters in the Commonwealth of Virginia. The agency supports maintaining this FOIA exemption.

John M.R. Bull
Commissioner
Virginia Marine Resources Commission
757-247-2205

6. Remarks Submitted by the Virginia Resources Authority



Stephanie L. Hamlett
Executive Director

January 14, 2016

Maria J.K. Everett, Esq.
Executive Director/Senior Attorney
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, Virginia 23219

Re: Review of FOIA Exemptions

Dear Ms. Everett:

Thank you for your correspondence dated December 22, 2015 regarding proprietary exemptions and trade secrets. We appreciate the opportunity to comment.

The Virginia Resources Authority (VRA) is very concerned regarding the elimination of its exemption for proprietary records and trade secrets especially since there is no draft of a general exemption available to be considered.

As you may know, VRA is an independent political subdivision of the Commonwealth. Section 62.1-198 of the Virginia Code outlines VRA's purpose as follows:

"... to encourage the investment of both public and private funds and to make loans, grants, and credit enhancements available to local governments to finance water and sewer projects, land conservation or land preservation programs or projects, oyster restoration projects, drainage projects, solid waste treatment, disposal and management projects, recycling projects, energy conservation and energy efficiency projects, professional sports facilities, resource recovery projects, public safety facilities, airport facilities, the remediation of brownfields and contaminated properties including properties contaminated by drywall, the design and construction of roads, public parking garages and other facilities for public transportation by commuter rail, site acquisition and site development work for the benefit of economic development projects, technology, construction of local government buildings, including administrative and operations systems and other local government equipment and infrastructure, infrastructure for broadband services, recovered gas energy facilities, federal facilities or former federal facilities, and renewable energy projects ..."

1111 E. Main Street | 804.644.3100 Phone
Suite 1920 | 804.644.3109 FAX
Richmond, VA 23219 | www.VirginiaResources.org

Maria J.K. Everett, Esq.
January 14, 2016
Page 2

While VRA is not a state agency and receives no direct state appropriations, for organizational purposes, it is aligned with the Secretary of Commerce and Trade due to its economic development function. Not unlike the Virginia Economic Development Partnership, VRA does work with and receive information from private entities that include proprietary and trade secret information not otherwise available to the public. For example, VRA has an outstanding loan in its land conservation portfolio. The loan documents provide that we receive copies of financial statements of entities related to the borrower (but that have no outstanding loan with VRA). These financial statements can be very helpful in monitoring the loan. If, however, this information were required to be made public, it is unlikely the borrower would have ever agreed to the requirement in loan documents to provide it.

VRA would respectfully request that its exemption remain in place. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jean Bass", written in a cursive style.

Jean Bass
Director of Policy

cc: The Honorable Maurice Jones
Office of the Governor

Stephanie Hamlett
VRA Executive Director

Virginia’s All Payer Database was established in 2012 as a voluntary effort on the part of major Virginia-licensed health insurance companies and related organizations. The law states that “The purpose of the Virginia APCD is to facilitate data-driven, evidence-based improvements in the access, quality and cost of health care and to promote and improve public health through the understanding of health care expenditure patterns and the operation and performance of the health care system.” Va. Code § 32.1-276.7:1(A).

Key to stakeholder support of the APCD is the legislation’s protection of patient privacy, a multi-stakeholder governance structure to ensure appropriate use of the APCD and restrictions on the public release of actual paid amounts.

Removing the FOIA exemption could seriously harm the viability of the APCD by threatening:

- **Patient Privacy:** Patient privacy could be at risk because allowing individuals to gain access to the information through FOIA would permit avoidance of the governance structure that ensures appropriate access to APCD data through a fair review process and detailed Data Subscriber Agreements approved by the Commissioner of Health. These Data Subscriber Agreements place restrictions on the uses and disclosures of APCD data, as well as prescribe certain standards for maintaining the privacy and security of the data. Without the FOIA exemption, individuals could avoid this entire process – one that is designed to ensure the protection of sensitive patient data.
- **Ongoing Data Submission:** By removing the other restrictions on use of the APCD Data, payers would likely end their submission of data to the APCD. These payers are in a highly competitive industry, and the development of the governance structure and Data Subscriber Agreements described above was a contentious process. If payers feel that their competitive position could be harmed by allowing the public access to information that would not otherwise be freely available, they would very likely decline to continue participating in the APCD. Again, the APCD is designed to allow subscribers the ability to compare expenditure and use patterns and facilitate data-driven improvements in the quality of health care. This mission is dependent on the APCD’s ability to receive the data held by the payors, and in a voluntary program such as the Virginia APCD, deleting the FOIA exemption would prove disastrous.
- **Funding:** Virginia’s APCD is funded voluntarily. The FY 2017 budget is \$1,366,377 with almost all funds coming from nongovernment sources. For your convenience, we have provided a chart summarizing the APCD funding:

FY 2017 Virginia APCD Total Budget \$1,366,377		
Source	Total Amount	% of Budget
Participating health insurance companies	\$546,550	40
Hospitals/health systems	\$546,550	40
VHI	\$273,275	20
VDH- General Appropriations	\$ 25,000	N/A – GA approved 25K after 3 Year budget approved by funders.

Withdrawing the FOIA exemption would likely result in cessation of voluntary contributions from some organizations providing funding and a loss of the ability to offset some costs of the APCD through grants, and other sources. For example, Virginia Health Information (“VHI”) funds 20% of the APCD budget and receives a valuable source of income through fees on data subscriber access. If individuals who would otherwise be “data subscribers” could access the data through FOIA, VHI would lose a critical source of income and the funding, and therefore continuity, of the APCD would be in jeopardy.

In conclusion, Virginia’s APCD is a collaborative effort to help promote better health, better care and lower costs. Appropriate use, governance and funding are cornerstones of the effort and rely on the FOIA exemption to help ensure participation. Removal of FOIA exemptions would break the foundation of trust that led to the creation of Virginia’s APCD.

7. Remarks Submitted by the Virginia Commercial Space Flight Authority



VIRGINIA COMMERCIAL SPACE FLIGHT AUTHORITY

Maria J. K. Everett, Executive Director
Virginia FOIA Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, Virginia 23219

SUBJECT: Review of FOIA exemptions
Virginia Commercial Space Flight Authority

Dear Ms. Everett:

This letter is in response to your letter of December 22, 2015, which requested written comments or alternative proposals of the Virginia Commercial Space Flight Authority (VCSFA) for potential amendment of the Virginia Freedom of Information Act (FOIA), namely with respect to the exemption in VA CODE § 2.2-3705.6 ¶ 24.

A fundamental purpose of VCSFA is to promote economic and industrial development of the commercial space flight industry in the Commonwealth of Virginia. VA CODE § 2.2-2202. To this end, VCSFA is empowered to acquire property, develop facilities such as spaceports, and to charge fees for the use of such facilities. VA CODE § 2.2-2204.

The commercial space launch industry is highly competitive in both private and public domains. This explains why the existing VCSFA exemption in VA CODE § 2.2-3705.6 ¶ 24 refers multiple times to "...the financial interest or bargaining position of the Authority..." VCSFA's Mid-Atlantic Regional Spaceport (MARS) competes with state and private spaceports for the provision of spaceport launch services. In some cases, the competition may be exclusively spaceport against spaceport. More commonly, a spaceport competes with other spaceports as part of a team. MARS often operates within tiers of multiple private and public entities to form a competitive team. Records and information from both public and private entities may be combined for many reasons, including for use in estimates, competitive bids or proposals, feasibility studies, development of rates of both the public and private entities, negotiating subcontractor charges, etc. In some cases, technical trade secrets of a private entity may be combined with technical developments of VCSFA to form a technical solution at MARS that improves the bargaining position of VCSFA.

First, the draft created by the Virginia Press Association does not address the fact that VCSFA, as a public entity, operates on teams with private entities. The financial interest or bargaining position of the Authority can be adversely affected by disclosure of private records. Conceptually, a general exemption for proprietary records and trade secrets of a private entity might address some of the interests of a private entity in its dealings with a public entity. However, such an exemption would not address the valid policy interest of protecting "the financial interest or bargaining position" of VCSFA, in order to advance economic development in the Commonwealth. This valid policy interest is recognized by the existing

exemption and it should not be deleted or narrowed. Accordingly, VCSFA has attached is an alternative amendment to VA CODE § 2.2-3705.6 ¶ 24 that seeks to protect this policy interest.

Second, we have been unable to locate within the materials anything that would maintain protection for the category of private entity records corresponding to “other information submitted by the private entity.” VA CODE § 2.2-3705.6 ¶ 24.b(iii). The attached alternative amendment to VA CODE § 2.2-3705.6 ¶ 24 preserves this category for “the financial interest or bargaining position” of VCSFA. However, VCSFA reasonably expects that the elimination of this category from exemption will narrow the scope of records and information private entities will be willing to disclose to VCSFA. It is common for private entities to protect internally developed information prior to or without full assessment of the strength of arguments that such information qualifies (under scrutiny) as a bona fide trade secret under the Uniform Trade Secret Act. For example, a private entity with internally developed new information may be unable to readily ascertain: (a) whether or not that information carries “independent economic value;” or (b) whether or not it is otherwise “readily ascertainable by [third parties using] proper means.” VA CODE § 59.1-336. VCSFA recommends preserving this exemption. If this exemption is determined not to be generally applicable for private entities, then it could be added to the attached alternative for VA CODE § 2.2-3705.6 ¶ 24.

Third, the consideration of a general exemption provides an opportunity to address the situation in which a Virginia public entity receives Federal records and information under an obligation of confidentiality. For example, VCSFA (or, for example, a public university or law enforcement agency) may reasonably receive national security classified information or other Federal information that meets one or more exemption under the U.S. Freedom of Information Act, 5 U.S.C. § 552. A general exemption could clearly include or extend to such Federal records. While this concept might be addressed in a variety of ways, we note that it might be addressed within the draft amendment to VA CODE § 2.2-3705.6 in RDF 1 of 216 as follows:

(ii) the record was submitted to the public body (a) in compliance with, or in relation to, or as a Federal record exempt from Federal disclosure by, a statute, regulation or other law of Commonwealth or the United States or (b) as a component of a submission made in relation to public procurement, public financing, or public contracts...

If you have any questions, or would like to discuss the enclosed, please feel free to contact me.

Sincerely,



Dale Nash
Executive Director
Virginia Commercial Space Flight Authority

Enclosure
30342822_1

Attachment

VCSFA Proposal

24. a. Records of the Commercial Space Flight Authority relating to rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority if public disclosure would adversely affect the financial interest or bargaining position of the Authority or a private entity providing records to the Authority; or

b. Records provided by a private entity to the Commercial Space Flight Authority, to the extent that such records contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity, where, if any of the foregoing records were made public, the financial interest or bargaining position of the Authority ~~or private entity~~ would be adversely affected.

~~In order for the records specified in clauses (i), (ii), and (iii) of subdivision 24 b to be excluded from the provisions of this chapter, the private entity shall make a written request to the Authority:~~

- ~~1. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;~~
- ~~2. Identifying with specificity the data or other materials for which protection is sought; and~~
- ~~3. Stating the reasons why protection is necessary.~~

~~The Authority shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial records of the private entity. To protect other records submitted by the private entity from disclosure, the Authority shall determine whether public disclosure would adversely affect the financial interest or bargaining position of the Authority or private entity. The Authority shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.~~

8. Remarks Submitted by the Virginia Department of Transportation

Virginia Press Association's Proposed FOIA Exclusion for Trade Secrets Submitted to a Public Body

VDOT Analysis and Comments

1. From VDOT's perspective, the intended interplay between the language in VPA's proposal (See Attachment 1) and the exemption afforded to PPTA/PPEA-related documents set forth in § 2.2 -3705.6 (11) is not clear.
2. The VPA proposal (See Attachment 1) appears to be devoid of the concept contained in the following language set out in the exemption provided in § 2.2 -3705.6 (11):

“a. Memoranda, staff evaluations, or other information prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) where (i) if such information was made public prior to or after the execution of an interim or a comprehensive agreement, § 33.2-1820 or 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be adversely affected and (ii) the basis for the determination required in clause (i) is documented in writing by the responsible public entity; and...”

- The language above is broader than that proposed by the VPA as the VPA exemption appears to only exempt language that is entitled to protection under the Trade Secrets Act.
 - The language above would protect information that is not a Trade Secret per se, but may be information that, if released prior to or after the execution of an interim agreement or a comprehensive agreement, could impact the Commonwealth's ability to effectively negotiate a deal or transaction.

- It is not clear whether the intent of the VPA proposal would be to eliminate the above referenced aspect of the current FOIA exemption.
- VDOT is concerned that eliminating the above referenced language (which was placed in Code in the 2006 Special Session of the General Assembly), if that is the intent, would result in the loss of the exemption as it relates to agency generated records, namely:
 - “Memoranda, staff evaluations, or other information prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.)....”
 - Based on historical documents, this language was enacted into law (with a one year sunset) during a special session of the General Assembly after passage of SB76 during the 2006 regular session of the General Assembly, and was the result of an agreement between the Governor and General Assembly.
 - The language was then re-enacted in the 2007 Session of the General Assembly, after VDOT staff worked with the FOIA council, the patron and others to develop the language in the legislation (SB 1002).
 - The purpose of the language was and continues to be protection of information/records created by responsible public entities that if released could jeopardize the responsible public entity’s ability to protect information that would impact the entity’s financial interest and/or ability to effectively negotiate transactions and obtain the most advantageous deals for the Commonwealth.
- Examples of the type of information contained in records that would lose the current exemption and be made public could include information such as VDOT’s evaluation methodologies

or negotiation strategies for proposals filed under the PPTA or modeling documents/methodologies, etc that may be relevant to more than one PPTA transaction.

- VDOT would have concerns regarding the lack of protection afforded to these types of records and the resulting impact on the agency's ability to maximize its negotiations for the current P3 transaction or future transactions if this portion of the language is removed from the Code/exemption.

3. The VPA proposal conflicts with the following language excluding certain records from the posting requirements in §§33.2-1820 and 56-575.1:

- Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the responsible public entity and the private entity.
- If the intent of the VPA language is to only provide an exemption for/protect trade secrets (and to eliminate protection of financial records and other records" currently protected from disclosure), then the PPTA and PPEA language noted above would be inconsistent with the "corresponding" FOIA exemption.

4. Technical Issue—the VPA draft language, if included in FOIA, would arguably create a "conflict" or result in inconsistent treatment of financial information submitted by a private entity under the PPTA or PPEA (would not provide an exemption) vs financial records submitted under the VPPA(would provide an exemption) for the same type of information or records:

- See Section 2.2-4342 (F) which provides, in subsection F:

F. Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of § 2.2-4317 shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon

submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.

5. With regard to the substance of the language proposed by the VPA relating to Trade Secrets in Attachment A, VDOT is inclined to defer to industry stakeholders as the records that are the subject of current-day protections and the proposed VPA protection are records belonging to the private sector.
 - The private sector is better equipped to address issues that might be presented by the language proposed by VPA.
 - However, to the extent that the language proposed by VPA would discourage private sector involvement in transactions and/or discourage competition under the PPTA/PPEA and impact the Commonwealth's ability to negotiate optimal deals for the Commonwealth, VDOT would have concerns with the language.

9. Remarks Submitted by the Virginia Office of the Inspector General



COMMONWEALTH OF VIRGINIA *Office of the State Inspector General*

June W. Jennings
State Inspector General

Post Office Box 1151
Richmond, Virginia 23218

Telephone (804) 625-3255
Fax (804) 786-2341
www.osig.virginia.gov

February 12, 2016

Maria J.K. Everett, Esq. Executive Director/Senior Attorney
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, VA 23219

SUBJECT: Review of your agency's FOIA exemptions RE: Proprietary Records and Trade Secrets

Dear Ms. Everett,

I have reviewed the proposed changes to FOIA exemption concerning proprietary records and trade secrets that relate to the Office of the State Inspector General (OSIG), and do have some concerns.

Specifically, I am referring to the following language found in § 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets:

22. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq), including but not limited to, financial records, including balance sheets and financial statements that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the State Inspector General for the purpose of an audit, special investigation, or any study requested by the Office of the State Inspector General in accordance with law.

In order for the records specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the State Inspector General:

1. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

2. Identifying with specificity the data or other materials for which protection is sought; and
3. Stating the reasons why protection is necessary.

The State Inspector General shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial records of the private entity. The State Inspector General shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

The draft created by the Virginia Press Association for November 10, 2015, work group meeting, indicates that the section referenced above “might be eliminated if a general exemption is enacted.”

As paragraph 22 of § 2.2-3705.6 is currently written, the burden of responsibility for requesting an exemption rests with the private or nongovernmental entity and it is up to that entity to make the case and justify reasons the information is proprietary and exempt, and as such, should be withheld. It is only after the entity bears the burden of proof that the State Inspector General has the authority to determine if the withholding of such information is appropriate.

Should this section be amended to remove paragraph 22 of *Code* § 2.2-3705.6, OSIG would be entirely responsible for determining what specific information should be considered for withholding, whether certain information should be exempt from release. By eliminating this section, the State Inspector General and OSIG would bear the total responsibility of invoking such exclusion, identifying with specificity the data or other materials for which protection is sought, and stating the reasons why the protection is warranted.

I believe amending the section to remove paragraph 22, would yield unintended consequences that would pose an undue burden on OSIG. In addition and without seeing the wording of a general exemption, I am unable to determine if I would have other issues or concerns.

I respectfully request that the work group NOT eliminate the OSIG-specific language.


If you have any questions, please feel free to call me at (804) 625-3255 or email me at june.jennings@osig.virginia.gov. I am also available to meet with you or the work group in person to discuss my concerns.

Sincerely,



June W. Jennings, CPA
State Inspector General

10. Remarks Submitted by the Commonwealth Health Research Board

	<p>Commonwealth Health Research Board (CHRB) Freedom of Information Act (FOIA) Records Subcommittee Meeting: Discussion of CHRB FOIA Exemption Thursday, August 18, 2016 at 10:00 am House Room C of the General Assembly Building</p>
---	--

Commonwealth Health Research Board [CHRB or Board] Goals, Purposes and Accomplishments


The CHRB was created by Virginia Code § 23-278 to provide financial support for research efforts having the potential of maximizing human health benefits for the citizens of the Commonwealth. This initiative of the General Assembly and the Governor used the proceeds from the sale of Trigon stock to create the framework and fiscal resources for a research grant program. The funds result from the stock and cash distributed to the Commonwealth of Virginia pursuant to the conversion of Trigon Blue Cross and Blue Shield from a mutual insurance company to a stock corporation. Income from the funds is used to make grant awards. Research efforts eligible for support by the Board may include traditional medical and biomedical research relating to the causes and cures of diseases, as well as research related to health services and the delivery of health care.

In accordance with Virginia Code § 23-279, the Board encourages collaborative research efforts among two or more institutions or organizations, gives priority to those research efforts where Board support can be leveraged to foster contributions from federal agencies or other entities, and supports both new research efforts and the expansion or continuation of existing research efforts. CHRB grant recipients to date have leveraged approximately \$27.5 million in additional private and federal grant funds to further their research studies.

Commonwealth Health Research Fund [CHRF]

Virginia Code § 51.1-124.36 delegates the authority to invest and manage the assets of the Commonwealth Health Research Fund [CHRF] to the Virginia Retirement System [VRS]. Assets of the [CHRF] are pooled with the \$68.1 billion [as of June 30, 2016] VRS investment fund; however, the provision requires the VRS to maintain a separate accounting for the CHRF assets.

Grant funding is calculated by an amount not to exceed six percent of the moving average of the market value of the CHRF calculated over the previous five years on a one-year delayed basis, net of any administrative fee assessed pursuant to subsection E of § 51.1-124.36.



Commonwealth Health Research Board (CHRB)
Freedom of Information Act (FOIA) Records Subcommittee
Meeting: Discussion of CHRB FOIA Exemption
Thursday, August 18, 2016 at 10:00 am
House Room C of the General Assembly Building

Entities Eligible for CHRB Grant Funding

State-supported Virginia institutions of higher education

Agencies of the Commonwealth of Virginia

Nonprofit Organizations exempt from income taxation pursuant to § 501 c (3) of the Internal Revenue Code located in the Commonwealth of Virginia.

Current statute: § 2.2-3705.6 (17) Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

17. Records submitted as a grant or loan application, or accompanying a grant or loan application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, if the disclosure of such information would be harmful to the competitive position of the applicant

11. Remarks Submitted by the Virginia Department of Health

Maria:

This is in response to your memo dated July 8, 2016, concerning the provisions of HB817 of 2016. Thank you for giving the Virginia Department of Health (VDH) the opportunity to provide input concerning the impact of this legislation on certain FOIA exemptions applicable to VDH records.

It is my understanding that the primary objective of HB817 was to specify in the FOIA statute that a public body is not authorized to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by a FOIA exemption or by some other provision of law. Based on my review of your memo, it is my further understanding that, in seeking to apply that general provision to the various sections of the FOIA statute, unintended consequences have resulted. Specifically, where FOIA used to “not prohibit” disclosure of a record even though there is an applicable exemption, the statute now – in numerous sections – states that a public body is “not authorized to withhold” a public record even though there is an applicable exemption.

I appreciate the statement in your memo that “[t]here was no intent to change what was exempt, but upon reflection, it appears that a substantive change may have occurred that would require the release of certain reports and/or documents effective July 1, 2016.” VDH concurs with your assessment.

VDH has reviewed HB817 in its entirety. In addition to the amendments in the specific sections that you identified [i.e., §§2.2-3705.2(2), 2.2-3705.2(15), and 2.2-3705.5(17)], VDH believes the following additional amendments made by the legislation may also negatively impact how VDH applies the pertinent FOIA exemption:

- § 2.2-3705.1(1) – Personnel records;
- § 2.2-3705.1(9) – Investigation of a claim or potential claim against a public body’s insurance policy or self-insurance plan;
- § 2.2-3705.2(2) – Information contained in inspection drawings and plans that reveal critical structural components, security equipment and systems;
- § 2.2-3705.2(4) – Information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event;
- § 2.2-3705.3(3) – Investigator notes furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to DHRM;
- § 2.2-3705.3(5) – Investigative notes furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory process under the Virginia Human Rights Act; and
- § 2.2-3705.3(8) – Information furnished in confidence to DHRM with respect to an investigation, consultation or mediation.

Please note that, in conjunction with the Office of the Attorney General, VDH conducts annual FOIA training for its staff. It has never been the policy or practice of VDH to withhold an entire document solely on the grounds that some portion of the document is exempt from FOIA.

I understand from your memo that the FOIA Advisory Council is interested in fixing any unintended consequences that may have resulted from the enactment of HB817. Please let me know if VDH can be of any further assistance to the Council in its efforts to make the necessary corrections.

Sincerely,

Joe Hilbert
Director of Governmental and Regulatory Affairs
Virginia Department of Health
804-864-7006

12. Remarks Submitted by the Virginia Department of Conservation and Recreation

Molly Joseph Ward
Secretary of Natural Resources

Clyde E. Cristman
Director



Rochelle Altholz
Deputy Director of
Administration and Finance

David C. Dowling
Deputy Director of
Soil and Water Conservation
and Dam Safety

Thomas L. Smith
Deputy Director of Operations

COMMONWEALTH of VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION

July 29, 2016

Maria J. K. Everett, Executive Director
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street
Richmond, Virginia 23219

Dear Ms. Everett: *Maria*

We are in receipt of your memorandum dated July 8, 2016 regarding HB 817 (2016) and the potential impact to the Department of Conservation and Recreation (DCR) as it relates to the Freedom of Information Act exemptions. The exemption utilized by DCR is under § 2.2-3705.7. Exclusions to application of chapter; records of specific public bodies and certain other limited exclusions.

~~22. Records of Information held by state or local park and recreation departments and local and regional park authorities to the extent such records contain information identifying a person concerning identifiable individuals under the age of 18 years. However, nothing in this subdivision shall operate to prohibit the disclosure~~ **authorize the withholding of information defined as directory information under regulations implementing the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, unless the public body has undertaken the parental notification and opt-out requirements provided by such regulations.** 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 such information of such persons who are emancipated, the right of access may be asserted by the subject thereof. Any parent or emancipated person who is the subject of the record information may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records information for inspection and copying.~~

Based on our review, changing the language from "prohibit the disclosure" to "authorize the withholding" within the content of the entire sentence does not result in any change in the exemption. Ultimately, DCR was required to disclose information defined as directory information pursuant to the requirements of the Family Educational Rights and Privacy Act prior to the passage of HB817 and as of July 1, 2016, still must abide by those regulations.

We appreciate the opportunity to provide our review and comment for this specific request and the opportunity for continued inclusion regarding HJR No. 96 (2014).

Sincerely,

Lisa D. McGee
Lisa D. McGee
Director of Policy and Planning

600 East Main Street, 24th Floor | Richmond, Virginia 23219 | 804-786-6124

State Parks • Soil and Water Conservation • Outdoor Recreation Planning
Natural Heritage • Dam Safety and Floodplain Management • Land Conservation

13. Remarks Submitted by the Attorney for the City of Hampton School Board.

Maria and Alan,

Two immediate concerns are raised as unintended consequences to school boards under 2.2-3705.2(7) and 2.2-3705.3(3).

With respect to security plans/safety audits under 2.2-3705.2(7), we are concerned about section (ii).

If the new language is that nothing shall be construed to authorize the withholding of recordings relating to the effectiveness of security plans after any person on school property has suffered or been threatened with any personal injury, we believe that this will open a huge number of files regarding personal injuries sustained by minors and staff both on or in school buildings and on school buses. This would compromise our ability to defend school bus liability cases, as all of our security plans encompass all school property. With respect to employment discrimination investigations, 2.2-3705.3(3), there will now be an argument that open HR employment discrimination investigation files can be obtained by FOIA, even though we believe that all personnel files are confidential. It would pit those two provisions of FOIA against one another. While we cannot promise complete confidentiality in such investigations to those involved/interviewed, we do maintain the investigatory file in strict confidence. The new language appears to compromise that possibility.

Nanci Reaves

--

Nanci W. Reaves

School Board Attorney

School Board of the City of Hampton

One Franklin Street

Hampton, VA 23669

(757) 727-4913

(757) 727-2351 Facsimile

Good morning,

I am wondering if you would accept agency feedback via email. If you require it to be on letterhead with the Commissioner signature, I would greatly appreciate an opportunity to have it to you no later than August 3, 2016. Essentially, we do not have a great deal to offer in the way of impact so soon after the law becoming effective. It would still allow the Department to **not** disclose ongoing investigations (mainly licensing investigations) but under this new change, the Department would have to disclose completed investigations if they receive a request under FOIA, but would continue to be required to strip out the identities of the individuals involved. We believe it may take a little longer to comprehend and document any real negative impact.

Thank you, and please let me know if you need this submitted more formally.

Karin S. Clark

Legislative and Regulatory Affairs

Virginia Department of Social Services

801 East Main Street

Richmond VA 23219-2901

(804) 726-7017

karin.clark@dss.virginia.gov

APPENDIX I

2015

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT (DHRM) RECORDS WORKGROUP MATERIALS

DHRM Records Work Group
1:00 PM Wednesday, October 28, 2015
Speaker's Conference Room, Sixth Floor
General Assembly Building, Richmond, VA
Meeting Summary

The DHRM Records Work Group of the Records Subcommittee held its first meeting on Wednesday, October 28, 2015. The purpose of the meeting was to consider the exemption for certain records held by the Department of Human Resources Management (DHRM) related to employment dispute resolution investigations, consultations, and mediations.¹ At its meeting on October 7, 2015, it was suggested to the Records Subcommittee that the subject matter of this exemption may be exempt under the general exemption for personnel records² and that this DHRM-specific exemption may not be needed. The Subcommittee asked staff and interested parties to discuss this issue and report back at the next Subcommittee meeting.

Christopher M. Grab, Director of the Office of Employment Dispute Resolution at DHRM, stated that the DHRM-specific exemption is used in handling employment disputes to keep investigations confidential, but the results are published in an anonymous form as required by other law.³ Mr. Grab pointed out that the scope of the exemption would include not only records of formal proceedings and records included in employees' permanent personnel files, but informal records as well. As examples, he stated that covered matters could include grievances, remediation, counseling employees, and other situations where DHRM provides advice. Mr. Grab informed the work group that DHRM has a new proactive program using a workplace conflict confrontation model that uses input from various parties to help provide ways to deal with workplace issues and improve skills. He stated that the records could involve records concerning employees involved in a dispute, co-workers, supervisors, and human resources personnel. In response to questions Mr. Grab confirmed that results in the form of decisions and rulings are required to be published.

¹ Subdivision 8 of § 2.2-3705.3 exempts "[i]nformation furnished in confidence to the Department of Human Resource Management with respect to an investigation, consultation, or mediation under § 2.2-1202.1, and memoranda, correspondence and other records resulting from any such investigation, consultation or mediation. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information."

² Subdivision 1 of § 2.2-3705.1 exempts "[p]ersonnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any personnel record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying."

³ Subdivision 7 of § 2.2-1202.1 requires that the Director of DHRM shall "[p]ublish hearing officer decisions and Department rulings."

Roger Wiley, an attorney representing local government and a former FOIA Council member, expressed that everything Mr. Grab described would be covered under the general personnel records exemption. He stated that local governments use the general exemption for records concerning all of the same types of issues. Dave Ress of the Daily Press, Ginger Stanley of the Virginia Press Association, and staff all agreed that such records are exempted by the general personnel records exemption, as all of the records described are "[p]ersonnel records containing information concerning identifiable individuals."

The consensus of the work group was therefore to recommend striking the DHRM-specific exemption because the subject matter is already exempted under the personnel records exemption and because there is already a requirement to publish results. The consensus was also to include a statement to that effect in the final report for House Joint Resolution No. 96 (2014).

There being no further business, the meeting was adjourned.

#

APPENDIX J

2015 PROPRIETARY RECORDS WORKGROUP MATERIALS

CONTENTS:

1. Background research concerning the terms "trade secrets" and "proprietary," *Source: FOIA Council;*
2. Proprietary Records Workgroup Meeting Summary, June 18, 2015;
3. Proposed Draft concerning Trade Secrets (originally submitted by the VPA);
4. Remarks Submitted by the Virginia Retirement System;
5. Proposed Draft concerning a general exemption for trade secrets created by a public body;
6. Proposed Draft concerning a general exemption for trade secrets submitted to a public body;
7. Revised Proposed Draft concerning a general exemption for trade secrets created by a public body
8. Revised Proposed Draft concerning a general exemption for trade secrets submitted to a public body;
9. Proposed Draft concerning a general record exemption for certain financial records submitted to a public body;
10. Proposed Draft concerning apportionment of attorney's fees and costs in FOIA enforcement action relating to submission of trade secrets;
11. Proprietary Records Workgroup Meeting Summary, July 21, 2015;
12. Proprietary Records Workgroup Meeting Summary, August 18, 2015;
13. VPA Proposed Draft concerning confidential business information submitted by private entity to a public body, September 2015;
14. Dave Ress, Daily Press Proposed Draft concerning proprietary records; and
15. Proprietary Records Workgroup Meeting Summary, November 10, 2015.

1. Background research concerning the terms "trade secrets" and "proprietary," *Source: FOIA Council*

I. Current definition of "trade secret" in the Uniform Trade Secrets Act (§ 59.1-336)

Trade secret" means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

II. Current definition of "PROPRIETARY"

- No statutory definition in FOIA
- Virginia Supreme Court: "proprietary" should be given its ordinary meaning: "**a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls.**"
- Virginia Supreme Court rejected the argument that "information of a proprietary nature" is limited to that which gives a commercial competitive advantage or which, if disclosed, would financially injure the public body

III. Definition of "PUBLIC RECORDS" under current law, § 2.2-3701:

Public records *"means all writings and recordings that consist of letters, words or numbers, or their equivalent...however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. Records that are not prepared for or used in the transaction of public business are not public records. [Emphasis added.]*

IV. Three- step "earmarking" process used in many, but not all, current exemptions for "proprietary" records:

Sample language from current subdivision 11 b of § 2.2-3706:

In order for the records specified in clauses (i), (ii), and (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the responsible public entity:

- 1. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;*
- 2. Identifying with specificity the data or other materials for which protection is sought; and*
- 3. Stating the reasons why protection is necessary.*

The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial records of the private entity.

V. Question: Should there be a general exemption for trade secrets?

- Sample language:
"Those portions of records containing trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.)."
- Alternative language with "earmark" provision:
"Those portions of records containing trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.). In order for trade secrets to be excluded from the provisions of this chapter, the private entity shall make a written request to the responsible public entity:"

Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
Identifying with specificity the data or other materials for which protection is sought;
and
Stating the reasons why protection is necessary.
The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets of the private entity."

VI. Categories re: "proprietary" records - should there be one or more general exemptions for "proprietary" records?

A. Records "of a proprietary nature" and "proprietary information" (may be limited by other terms within any given exemption, but otherwise not defined)

B. Commercial, financial, and similar records

- undefined proprietary "business," "commercial," and "business-related" records
- other records that would adversely affect the financial interest or bargaining position of the public or private entity if disclosed publicly
- financial records of private entities that are otherwise not publicly disclosed
- financial statements, balance sheets, revenue and cost projections

C. Records related to scientific, academic or other research or study

VII. Copyright - not currently addressed in FOIA.

A. OAG opinions

- 1982 opinion re: county providing copies of maps subject to the county's own copyright:
FOIA "requires that the maps you refer to be made available for public inspection and allow the county to make reasonable charges for copying and search time expended in the supplying of such records. The U.S. copyright laws give the county, as owner of the copyright, the exclusive right to reproduce such maps, thereby prohibiting reproduction of the maps by anyone other than the county without its consent."
- 1998 opinion re: state song submissions from third parties:
Concludes that "the copyrighted nature of a work does not preclude reproduction and release in response to a [FOIA] request or other activity within the exclusive rights granted under the Copyright Act if the copyright owner has given his express or implied consent or if the activity constitutes a fair use of the work." Recommends including with the response "a cover letter or other form of notification to the requester that the work may be protected by copyright, and that permission should be obtained from the copyright owner before making any further copies, public distribution or other copyright-protected use of the work."

B. Current general copyright law for state agencies and employees, § 2.2-2822, states that "Nothing in this section shall be construed to limit access to public records as provided in the Virginia Freedom of Information Act (§ 2.2-3700 et seq.)."

C. QUESTION: Should there be a general exemption for records protected by copyrights held by third parties?

- Sample language reflecting the 1998 opinion of the Attorney General:
"Records protected by copyright, except to the extent disclosure would be allowed as a fair use under copyright law or by permission of the copyright holder."
- Alternative approach: Could add a subsection in § 2.2-3703 stating that copyright law controls over FOIA, similar to the current provision concerning election laws.
Suggested language: "Public access to records protected by copyright shall be governed by copyright law and this chapter. Copyright law shall be controlling in the event of any conflict."

Examples of how "proprietary" and "trade secrets" are used in current exemptions

§ 2.2-3705.1

6. Vendor proprietary information software that may be in the official records of a public body. For the purpose of this subdivision, "vendor proprietary software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

§ 2.2-3705.4

4. "Data, records or information of a proprietary nature produced or collected by or for"
5. " All records ... that contain proprietary, business-related information"

§ 2.2-3705.5

4. "proprietary information not published, copyrighted or patented"
12. "proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues, when such information has not been publicly released, published, copyrighted or patented, if the disclosure of such information would be harmful to the competitive position of the applicant"

§ 2.2-3705.6

1. "Proprietary information gathered by or for"
3. "Confidential proprietary records, voluntarily provided by"
6. "Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to"
7. "Confidential proprietary records related to inventory and sales, voluntarily provided by"
8. "Confidential proprietary information furnished to"

9. "Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by"
10. " Confidential information designated ... as trade secrets or proprietary information"
11. "(i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity, where, if the records were made public prior to the execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining position of the public or private entity would be adversely affected"
12. "Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected, and, after June 30, 1997, where such information was provided pursuant to a promise of confidentiality"
13. "Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or confidential proprietary records that are not generally available to the public through regulatory disclosure or otherwise"
14. "Documents and other information of a proprietary nature furnished by"
16. "Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1, submitted by"
17. "to the extent such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research"
18. "Confidential proprietary records and trade secrets developed and held by"
19. "Confidential proprietary records and trade secrets developed by or for"
20. "Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial records of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise"
21. "Documents and other information of a proprietary or confidential nature disclosed by"
22. "Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), including, but not limited to, financial records, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by"
23. "(i) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (ii) financial records of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (iii) research-related information produced or collected by"
24. b. "(i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity, where, if the records were made public, the financial interest or bargaining position of the Authority or private entity would be adversely affected"
25. "Documents and other information of a proprietary nature furnished by"

26. "Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59:1-336 et seq.), provided to"

27. "Documents and other information of a proprietary nature furnished by"

§ 2.2-3705.7

11. "Records, memoranda, working papers, graphics, video or audio tapes, production models, data and information of a proprietary nature produced by or for or collected by or for"

15. "proprietary information gathered by or in the possession of the Authority from third parties pursuant to a promise of confidentiality" AND "data, records or information of a proprietary nature produced or collected by or for" AND " data, records or information of a proprietary nature produced or collected by or for employees of the Authority, other than the Authority's financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the Authority alone or in conjunction with a governmental body or a private concern, when such data, records or information have not been publicly released, published, copyrighted or patented"

#

2. Proprietary Records Workgroup Meeting Summary, June 18, 2015

The Proprietary Records Work Group of the Records Subcommittee held its third meeting on Tuesday, August 18, 2015 to continue its examination of the proprietary records/trade secrets exemptions found in § 2.2-3705.6. The work group began by reviewing separate draft proposals that would provide general exemptions for trade secrets generated by a public body, trade secrets of a private entity submitted to a public body, and certain financial records, and a draft proposal regarding shifting liability for attorney's fees and costs concerning records submitted to a public body that were improperly designated as trade secrets by a private entity. All of the drafts are posted on the FOIA Council web site.

Regarding the draft for trade secrets generated by a public body, concerns were expressed regarding the scope of the draft and whether it was sufficient to cover things such as enterprise or accounting software and economic development records, or whether it was limited to academic and scientific research only. Staff pointed out that software is already covered by other exemptions, although the exemption for "vendor proprietary information software" had been submitted to the work group for further study.⁴ The work group discussed the economic development exemption⁵ in detail after Kara Hart of the Virginia Economic Development Partnership (VEDP) raised concerns that the draft did not cover records already exempt under existing law. Craig Merritt, representing the Virginia Press Association (VPA), noted that the two clauses of the existing exemption covered certain records submitted to public bodies by private entities and certain records generated by public bodies, respectively, and might be treated differently. The work group discussed various

⁴ Subdivisions 6 and 7 of § 2.2-3705.1. The Records Subcommittee had recommended no changes to subdivision 7, which exempts "Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth."

⁵ Subdivision 3 of § 2.2-3705.6.

amendments to the draft to address the issue. More generally, the work group discussed various types of trade secrets - other than academic and scientific research - generated by public bodies, such as proposals, incentives, and other records when public bodies compete with each other and with other states to attract businesses, tourism, and commerce.

The work group then moved on to consider the draft exemption for trade secrets submitted to a public body, and the issue of shifting liability. In discussing the scope and language of the draft, Mr. Merritt suggested that investment entities (such as the Virginia Retirement System, the Virginia College Savings Plan, etc.) would need their own rules as they deal with unique situations. Julie Whitlock of the Department of General Services (DGS) expressed concern about the time period during which trade secrets are protected, i.e., during the course of negotiations, after a contract is entered into, and while the contract is being carried out. The work group discussed the scope of the draft and specific language used regarding "transactions," "contracting," and "public contracts." The work group also discussed nondisclosure agreements as a "promise of confidentiality" as contemplated by the current economic development exemption. Phil Abraham of the Vectre Corporation, and Roger Wiley, an attorney representing local government, suggested that the economic development exemption should remain free standing. In response to a question from Mr. Merritt, Ms. Hart informed the work group that Virginia regularly competes with Georgia, Maryland, North Carolina, and other southeastern states, as well as some mid-Atlantic states.

The work group next considered the complexities involved with the liability shifting proposal and current "earmarking" provisions where private entities designate what records need to be protected as proprietary/trade secrets. Some of the current earmarking provisions require agreement by the public body regarding such designations, but others do not. Mr. Wiley noted that public bodies are under pressure to agree with private entities' designations as to what is proprietary and a trade secret in order to get deals done. Mr. Merritt noted that local government attorneys are often not in a fair position to evaluate whether particular records are trade secrets, which places the burden on the public body to guess correctly. Mr. Abraham suggested that instead of a statutory provision, public bodies could use indemnification clauses in contracts. Ms. Whitlock asked why a public body's attorney should have to defend a private entity's designation of a trade secret. After further discussion, Mr. Merritt suggested the solution is to make the private entity that submits trade secrets a party to any FOIA suit on the issue, and to impose the cost on any party that improperly designates as trade secrets records that should be open. The work group discussed in further detail who should pay fees and generally agreed that the courts would make that determination on a case-by-case basis. Noting that the draft has the liability provision in the same subdivision as the exemption, the work group agreed with staff that the liability shifting provision should instead be moved into the remedies section of FOIA, § 2.2-3713.

The work group then discussed briefly the draft for certain financial records and how it relates to procurement law provisions. The work group then agreed to have staff re-draft the drafts considered today to reflect the various suggested changes and post them on the FOIA Council website for further consideration. Those present agreed to let staff know whether

they felt it would be helpful to meet again as a work group, or whether staff should instead report to the Records Subcommittee that the work group had considered the issues and drafts discussed above, but had not agreed on a recommendation. There being no further business, the meeting was adjourned.

#

3. Proposed Draft concerning Trade Secrets (originally submitted by the VPA)

A BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia, relating to the Virginia Freedom of Information Act; trade secrets and related records.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3705.6 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

Trade Secrets created by a Public Body:

1. Any record created by a public body to the extent that the record (i) was created by the public body or by an employee or agent of the public body in connection with or for the purpose of conducting academic, medical or scientific research or commercially exploiting such research for the financial benefit of the public body; (ii) contain (a) a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or material that would qualify as a trade secret were the public body a private business entity or (b) are the personal working papers of a professor, instructor, researcher or student; and (iii) has not been the subject of any prior publication, been patented, or otherwise been disclosed in any manner that is inconsistent with the continued need to shield the information from public disclosure.

Nothing in this subdivision shall be construed to require the production of computer software in the possession of a public body that is (1) otherwise available to the public as a product offered on a commercial basis, (2) designated for the specific use of the public body

in carrying out its operations, or (3) an operating system that is being used to conduct the regular business of the public body.

Trade Secrets submitted to a Public Body:

2. A record submitted to a public body by an entity that is not a public body under this chapter to the extent that (i) the record contains information in which the submitting entity has an ownership interest; (ii) the submitted information contains a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (iii) the record was submitted to the public body (a) in compliance with a statute, regulation or other law of Commonwealth or the United States or (b) as a required component of a submission made in connection with a public procurement, public financing or economic development transaction; and (iv) the information that the submitting entity seeks to protect was clearly and specifically identified by the submitting entity as a trade secret at the time of its submission to the public body, such identification being a representation by the submitting entity that it has made a good faith effort only to designate as trade secrets those portions of the submission that are entitled to protection under the law.

In the event a public body, in response to a request under this chapter denied access to a record or portion thereof exempted under this subdivision on the ground that the requested record has been identified by the submitting entity as a trade secret and the requester challenges the characterization of the withheld record as a trade secret, the public body shall notify the submitting entity within two working days of the challenge made by the requester. If the submitting entity and the requester are unable after conferring to reach agreement on the proper designation of the record in dispute or the submitting entity refuses to confer with the requester, the requester may bring an action under this chapter to require the public body to produce the requested record, and shall name as defendant in the action the submitting entity. If as a result of the action the court requires the public body to produce a record or portion thereof that has been improperly designated as a trade secret by the submitting entity, any award of attorneys' fees in favor of the requester shall be paid by

the submitting entity and not by the public body. [NOTE by Maria Everett: Consider alternate placement of this paragraph as a subsection in § 2.2-3713, set out at the end of this draft.]

Existing 2014 § 2.2-3705.6 Provisions Not Set Out

§ 2.2-3713. Proceedings for enforcement of chapter.

A. Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause. Such petition may be brought in the name of the person notwithstanding that a request for public records was made by the person's attorney in his representative capacity. Venue for the petition shall be addressed as follows:

1. In a case involving a local public body, to the general district court or circuit court of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied;

2. In a case involving a regional public body, to the general district or circuit court of the county or city where the principal business office of such body is located; and

3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

B. In any action brought before a general district court, a corporate petitioner may appear through its officer, director or managing agent without the assistance of counsel, notwithstanding any provision of law or Rule of the Supreme Court of Virginia to the contrary.

C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three

working days prior to filing. The hearing on any petition made outside of the regular terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

D. The petition shall allege with reasonable specificity the circumstances of the denial of the rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position.

E. In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

F. In the event a public body, in response to a request under this chapter denied access to a record or portion thereof exempted under subdivision X of § 2.2-3705.6, on the ground that the requested information has been identified by the submitting entity as a trade secret and the requester challenges the characterization of the withheld record as a trade secret, the public body shall notify the submitting entity within two working days of the challenge made by the requester. If the submitting entity and the requester are unable after conferring to reach agreement on the proper designation of the record in dispute or the submitting entity refuses to confer with the requester, the requester may bring an action under this chapter to require the public body to produce the requested record, and shall

name as defendant in the action the submitting entity. If as a result of the action the court requires that the public body produce a record or portion thereof that has been improperly designated as a trade secret by the submitting entity, any award of attorneys' fees in favor of the requester shall be paid by the submitting entity and not by the public body.

G. Failure by any person to request and receive notice of the time and place of meetings as provided in § 2.2-3707 shall not preclude any person from enforcing his rights and privileges conferred by this chapter.

#

4. Remarks Submitted by the Virginia Retirement System, July 2015

VRS COMMENTS ON DRAFT VPA TRADE SECRETS STATUTE

July 21, 2015

The following information is presented to the FOIA Council in relation to the recently proposed trade secrets statute (generic proposal). In concept, VRS is not opposed to a generic statute, but has a fiduciary duty to its members and beneficiaries to pursue changes that will protect the investment of retirement trust funds. Art. X, § 11 of the Constitution of Virginia provides that “[t]he funds of the retirement system . . . shall be invested and administered solely in the interests of the members and beneficiaries thereof.” When the Subcommittee on Records reviewed the existing VRS exemptions in 2014, they were determined to be appropriate and no action was deemed necessary to remove or narrow them. As VRS noted during the 2014 review of its existing exemptions, to meet our fiduciary duty set forth in the Constitution, statutes and regulations, it is critical that we retain our current exemptions. As the generic proposal addresses § 2.2-3705.6, we anticipate the concurrence by the working group in retaining the protections for our trust in § 2.2-3705.7.

In order for the generic statute to apply to the VRS trust fund, in addition to its existing specific exemptions, there are a few primary issues that VRS would like to highlight in the proposed draft:

1. VRS’ internal investment research and internally developed algorithms and software are not covered under the “Trade Secrets Created by a Public Body” section because that section is limited to academic, medical or scientific research and thus could not be withheld to protect its proprietary value.
2. Trade secrets submitted by VRS’ external managers are not covered under the “Trade Secrets Submitted to a Public Body” section as currently drafted because they do not meet requirement (iii), which requires that a trade secret must be submitted in compliance with a statute, law or regulation of the Commonwealth or the U.S., or as a requirement of a public procurement, public financing or economic development transaction, none of which apply to the trade secrets submitted to VRS by its external investment managers.
3. Proprietary and confidential analysis is key to investment managers’ success. If this information cannot be protected from competitors, managers will lose the economic value of their internal analysis and expertise. The protection of proprietary and confidential internal information is of paramount importance to these managers.
4. Managers will simply not allow VRS to place investments with them if they must be named as a defendant in FOIA enforcement actions and are statutorily liable for unlimited attorneys’ fees in the event of a judicial finding that the records submitted were not property trade secrets. This is particularly true of the top quartile managers, with which VRS partners and seeks to partner.
5. There is strong and active competition among investors for access to top investment managers. If a potential investor (i.e., VRS) is required to impose onerous, costly and burdensome conditions on the manager, the manager is easily able to refuse to allow the entity to invest with the manager.

Background

- VRS manages approximately \$68 billion on behalf of more than 650,000 members, retirees and beneficiaries
- As of March 31, 2015, VRS had approximately \$5 billion invested in its private equity portfolio, equal to about 7.4% of total assets
- Private equity has historically been VRS' most profitable asset class
 - As of March 31, 2015, the 10-year private equity returns were 13.2% (net of fees)
- Protecting confidential proprietary information and trade secrets is required in order to be allowed to invest with premier private managers (i.e. top-quartile managers)
 - Funds avoid or disallow investors that are unable to guarantee protection of confidential information
 - VRS is now able to invest with such funds due to existing exemptions
- Public managers will also provide more in depth information to entities that are able to protect confidential and proprietary background and analysis
- Prior to the passage of VRS' existing FOIA exemptions, VRS' inability to protect confidential proprietary information led VRS' top-performing private equity manager to drop VRS as an investor
 - The manager, whose internal rate of return exceeded 90% as of March 3, 2014, cited potential risks due to Virginia's FOIA laws and the lack of protection for its proprietary and economically valuable trade secrets
 - This prompted VRS to pursue and obtain its existing exemptions
- Historically, most requests for private equity information have come from data aggregators, who collect information, bundle it, and sell it to subscribers, including other managers
 - This harms VRS as it allows other investors to "front run" VRS' investment strategies, as well as the internal strategies of VRS' external managers
- The VRS Board of Trustees recognizes the value of private investments and has increased the trust fund's allowable exposure to private equity and other private investments, including real assets
 - However, VRS has not been able to increase its allocation to private investments as quickly as hoped due to competition for the best investment opportunities
- Without protection from forced disclosure, VRS will likely face further difficulties in investing and the trust fund will lose the opportunity to benefit from potentially higher returns

Trade Secrets Created by a Public Body

VRS' internal investment research is not protected by the generic proposal. In order to protect a trade secret created by a public body, the proposal requires that a record be "in connection with or for the purpose of conducting *academic, medical or scientific research* or commercially exploiting such research for the financial benefit of the public body." VRS cannot satisfy these elements because, in a strict sense, internal investment research is not academic, medical, or scientific in nature. Instead, VRS' internal research is mathematical and financial in nature. Under the proposal, therefore, VRS would lose protection of its internal investment research. To address this nuance, we suggest the following:

Recommendation – On line 11, after “medical” insert “, investment”

Trade Secrets Submitted to a Public Body

Trade secrets submitted to VRS by its external managers will not be protected by the generic proposal. The generic proposal requires that, in order to be protected, a record must be submitted “(a) in compliance with a statute, regulation, or other law of [the] Commonwealth or the United States or (b) as a required component of a submission made in connection with a public procurement, public financing or economic development transaction.”

VRS and its external managers cannot satisfy these elements. First, most of the trade secrets submitted to VRS are received as part of a contractual relationship rather than a law or regulation. Some information is even obtained absent a contractual obligation, but nonetheless requires protection from disclosure or else external managers would cease sharing it with VRS. Second, the trade secrets submitted to VRS are not related to a public procurement, public financing, or an economic development transaction. VRS does not deal in public financing or economic development transactions, and VRS’ private equity managers, in a strict sense, are not retained through a public procurement. Therefore, the trade secrets submitted to VRS by its managers would not be protected under the proposal. To address VRS’ unique circumstances, we recommend the following change:

- Recommendation** – At the end of line 25, insert “contract,”
- On line 25 after “with” insert “or in relation to”
 - On line 27 after “public financing” insert “, investment”

New Process for Resolving Disputes Concerning Trade Secret Designations

Top-quartile funds are not likely to be willing to submit to the proposal’s requirements for the resolution of disputes concerning the classification of material as trade secrets. In the private equity industry, there is more capital available to top-quartile managers than they can invest. Therefore, top-quartile managers can afford to be selective in choosing investors. Although VRS is a public body of the Commonwealth, it is measured against private pools of capital that are not subject to public disclosure laws. In this respect, VRS is already at a disadvantage. However, the existing FOIA exemptions typically alleviate most managers’ concerns.

The proposed resolution process, however, would increase VRS’ disadvantage in this space. Having investment partners be named as defendants in FOIA litigation is yet another reason for top-quartile managers to exclude VRS from future investments. In addition, the proposal would subject VRS’ external managers to unlimited litigation costs as a matter of law to the extent the requesting party is awarded attorneys’ fees.

Recommendation – Exempt VRS from the provisions related to naming the submitting party as a defendant in litigation related to withholding trade secrets and the provisions related to paying legal fees for a prevailing requesting party.

5. Proposed Draft concerning a general exemption for trade secrets created by a public body

A BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia, relating to the Virginia Freedom of Information Act; general records exemption for trade secrets created by a public body.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3705.6 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

Trade Secrets created by a Public Body:

1. Any record created by a public body or an employee or agent of the public body to the extent that the records (i) were created in connection with or for the purpose of conducting academic, medical, investment, or scientific research or commercially exploiting such research for the financial benefit of the public body, (ii) contain (a) a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or material that would qualify as a trade secret were the public body a private business entity or (b) are the personal working papers of a professor, instructor, researcher or student[NOTE: M Query: is this clause (b) too broad?]; and (iii) have not been the subject of any prior publication, been patented, or otherwise been disclosed in any manner that is inconsistent with the continued need to shield the information from public disclosure.

Nothing in this subdivision shall be construed to require the production of computer software in the possession of a public body that is (1) otherwise available to the public as a product offered on a commercial basis, (2) designated for the specific use of the public body

in carrying out its operations, or (3) an operating system that is being used to conduct the regular business of the public body.

Existing 2014 § 2.2-3705.6 Provisions Not Set Out

#

6. Proposed Draft concerning a general exemption for trade secrets submitted to a public body

A BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia, relating to the Virginia Freedom of Information Act; general record exemption for trade secrets submitted to a public body.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3705.6 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

Trade Secrets submitted to a Public Body:

1. Records submitted to a public body by an entity that is not a public body under this chapter to the extent that (i) the submitted record contains a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) the record was submitted to the public body (a) in compliance with, or in relation to, a contract or statute, regulation or other law of Commonwealth or the United States or (b) as a required component of a submission made in connection with a public procurement, public financing, investment, or economic development transaction; and (iii) the information that the submitting entity seeks to protect was clearly and specifically identified by the submitting entity as a trade secret at

the time of its submission to the public body, such identification being a representation by the submitting entity that it has made a good faith effort only to designate as trade secrets those portions of the submission that are entitled to protection under the law.

In order for records specified in clause (ii) (b) to be excluded from the provisions of this chapter, the public body shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets of the submitting entity, which determination shall be set forth in writing, reflecting the agreement between it and the submitting entity of the nature and scope of the protection to be afforded by it under this subdivision.

In the event a public body, in response to a request under this chapter denied access to a record or portion thereof exempted under this subdivision on the ground that the requested record has been identified by the submitting entity as a trade secret and the requester challenges the characterization of the withheld record as a trade secret, the public body shall notify the submitting entity within two working days of the challenge made by the requester. If the submitting entity and the requester are unable after conferring to reach agreement on the proper designation of the record in dispute or the submitting entity refuses to confer with the requester, the requester may bring an action under this chapter to require the public body to produce the requested record, and shall name as defendant in the action the submitting entity. If as a result of the action the court requires the public body to produce a record or portion thereof that has been improperly designated as a trade secret by the submitting entity, any award of attorneys' fees in favor of the requester shall be paid by the submitting entity and not by the public body. [NOTE by Maria Everett: Consider alternate placement of this paragraph as a subsection in § 2.2-3713, set out at the end of this draft.]

Existing 2014 § 2.2-3705.6 Provisions Not Set Out

§ 2.2-3713. Proceedings for enforcement of chapter.

A. Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause. Such petition may be brought in the name of the person notwithstanding that a request for public records was made by the person's attorney in his representative capacity. Venue for the petition shall be addressed as follows:

1. In a case involving a local public body, to the general district court or circuit court of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied;

2. In a case involving a regional public body, to the general district or circuit court of the county or city where the principal business office of such body is located; and

3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

B. In any action brought before a general district court, a corporate petitioner may appear through its officer, director or managing agent without the assistance of counsel, notwithstanding any provision of law or Rule of the Supreme Court of Virginia to the contrary.

C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing. The hearing on any petition made outside of the regular terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

D. The petition shall allege with reasonable specificity the circumstances of the denial of the rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position.

E. In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

F. In the event a public body, in response to a request under this chapter denied access to a record or portion thereof exempted under subdivision X of § 2.2-3705.6, on the ground that the requested information has been identified by the submitting entity as a trade secret and the requester challenges the characterization of the withheld record as a trade secret, the public body shall notify the submitting entity within two working days of the challenge made by the requester. If the submitting entity and the requester are unable after conferring to reach agreement on the proper designation of the record in dispute or the submitting entity refuses to confer with the requester, the requester may bring an action under this chapter to require the public body to produce the requested record, and shall name as defendant in the action the submitting entity. If as a result of the action the court requires that the public body produce a record or portion thereof that has been improperly designated as a trade secret by the submitting entity, any award of attorneys' fees in favor of the requester shall be paid by the submitting entity and not by the public body.

G. Failure by any person to request and receive notice of the time and place of meetings as provided in § 2.2-3707 shall not preclude any person from enforcing his rights and privileges conferred by this chapter.

#

7. Revised Proposed Draft concerning a general exemption for trade secrets created by a public body

A BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia, relating to the Virginia Freedom of Information Act; general records exemption for trade secrets created by a public body.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3705.6 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

Trade Secrets created by a Public Body:

1. Any record created by or for a public body or an employee or agent of the public body to the extent that the record (i) contains a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) and (ii) has not been the subject of any prior publication, been patented, or otherwise been disclosed in any manner that is inconsistent with the continued need to shield the information from public disclosure.

Existing 2015 § 2.2-3705.6 Provisions Not Set Out

#

8. Revised Proposed Draft concerning a general exemption for trade secrets submitted to a public body

A BILL to amend and reenact §§ 2.2-3705.6 and 2.2-3713 of the Code of Virginia, relating to the Virginia Freedom of Information Act; general record exemption for trade secrets submitted to a public body; enforcement.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3705.6 and 2.2-3713 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

Trade Secrets submitted to a Public Body:

1. Records submitted to a public body by an entity that is not a public body under this chapter to the extent that (i) the submitted record contains a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) the record was submitted to the public body (a) in compliance with, or in relation to, a statute, regulation or other law of Commonwealth or the United States or (b) as a component of a submission made in relation to public procurement, public financing, or public contracts; and (iii) the information that the submitting entity seeks to protect was specifically identified by the submitting entity as a trade secret at the time of its submission to the public body, such identification being a representation by the submitting entity that it has made a good faith effort only to designate as trade secrets those portions of the submission that are entitled to protection under the law, [and the submitting entity states the reasons why protection is necessary]. This []
portion inserted by Maria--query is it needed?

Existing 2015 § 2.2-3705.6 Provisions Not Set Out

§ 2.2-3713. Proceedings for enforcement of chapter.

A. Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause. Such petition may be brought in the name of the person notwithstanding that a request for public records was made by the person's attorney in his representative capacity. Venue for the petition shall be addressed as follows:

1. In a case involving a local public body, to the general district court or circuit court of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied;

2. In a case involving a regional public body, to the general district or circuit court of the county or city where the principal business office of such body is located; and

3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

B. In any action brought before a general district court, a corporate petitioner may appear through its officer, director or managing agent without the assistance of counsel, notwithstanding any provision of law or Rule of the Supreme Court of Virginia to the contrary.

C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing. The hearing on any petition made outside of the regular terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

D. The petition shall allege with reasonable specificity the circumstances of the denial of the rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position.

E. In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

F. In the event a public body, in response to a request under this chapter denied access to a record or portion thereof exempted under subdivision X of § 2.2-3705.6, on the ground that the requested information has been identified by the submitting entity as a trade secret and the requester challenges the characterization of the withheld record as a trade secret, the public body shall notify the submitting entity within two working days of the challenge made by the requester. If the submitting entity and the requester are unable after conferring to reach agreement on the proper designation of the record in dispute or the submitting entity refuses to confer with the requester, the requester may bring an action under this chapter to require the public body to produce the requested record, and shall name as defendant in the action the submitting entity. If as a result of the action the court requires that the public body produce a record or portion thereof that has been improperly designated as a trade secret by the submitting entity, any award of attorneys' fees in favor of the requester shall be paid by the submitting entity and not by the public body.

G. Failure by any person to request and receive notice of the time and place of meetings as provided in § 2.2-3707 shall not preclude any person from enforcing his rights and privileges conferred by this chapter.

#

9. Proposed Draft concerning a general record exemption for certain financial records submitted to a public body

A BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia, relating to the Virginia Freedom of Information Act; general record exemption for certain financial records submitted to a public body.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3705.6 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

General record exemption for financial records submitted to a public body:

1. Financial records, other than trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), submitted by a private entity to a public body, including balance sheets and financial statements that are not generally available to the public through regulatory disclosure or otherwise, where, if such information were made public, the competitive advantage or financial interest of the private entity would be adversely affected. In order for the records specified in this subdivision to be excluded from the provisions of this chapter, the submitting entity shall make a written request to the public body:

1. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

2. Identifying with specificity the data or other materials for which protection is sought; and

3. Stating the reasons why protection is necessary.

Existing 2014 § 2.2-3705.6 Provisions Not Set Out

#

10. Proposed Draft concerning apportionment of attorney's fees and costs in FOIA enforcement action relating to submission of trade secrets

A BILL to amend and reenact § 2.2-3713 of the Code of Virginia, relating to the Virginia Freedom of Information Act; enforcement; payment of attorney's fees and costs in certain cases.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3713 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3713. Proceedings for enforcement of chapter.

A. Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause. Such petition may be brought in the name of the person notwithstanding that a request for public records was made by the person's attorney in his representative capacity. Venue for the petition shall be addressed as follows:

1. In a case involving a local public body, to the general district court or circuit court of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied;

2. In a case involving a regional public body, to the general district or circuit court of the county or city where the principal business office of such body is located; and

3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a

standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

B. In any action brought before a general district court, a corporate petitioner may appear through its officer, director or managing agent without the assistance of counsel, notwithstanding any provision of law or Rule of the Supreme Court of Virginia to the contrary.

C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing. The hearing on any petition made outside of the regular terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

D. The petition shall allege with reasonable specificity the circumstances of the denial of the rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. ~~If~~ Except as provided in subsection F, if the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position.

E. In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any

failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

F. Where a public body has denied access to a record or portion thereof on the grounds that such record has been identified by the submitting entity as a trade secret and the requester disputes such designation, the public body shall notify the submitting entity within two working days that the requester disputes such designation. If the submitting entity and the requester are unable after conferring to reach agreement on the proper designation of the record in dispute or the submitting entity refuses to confer with the requester, the requester may bring an action under this chapter to require the public body to produce the requested record, which action shall also name as defendant the submitting entity. If as a result of the action, the court requires the public body to produce such record, the petitioner shall be entitled to recover reasonable costs, including costs, reasonable fees for expert witnesses, and attorneys' fees if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. If awarded, the court shall order such fees and costs to be paid by the submitting entity or the public body, or both, in the proportion deemed appropriate by the court.

G. Failure by any person to request and receive notice of the time and place of meetings as provided in § 2.2-3707 shall not preclude any person from enforcing his rights and privileges conferred by this chapter.

#

11. Proprietary Records Workgroup Meeting Summary, July 21, 2015

The Proprietary Records Work Group of the Records Subcommittee held its second meeting on Tuesday, July 21, 2015 to continue its examination of the proprietary records/trade secrets exemptions found in § 2.2-3705.6. At its last meeting, the work group reviewed draft legislation that would (i) provide that any conflicts between copyright law and FOIA would be governed by copyright law and (ii) create a general exemption for trade secrets in the possession of public bodies, whether submitted by a private individual or entity or whether such records were generated by a public body. After brief discussion, the work group agreed to recommend the copyright draft to the Records Subcommittee for its consideration, noting that it merely reflected the fact that federal law is controlling in this area. With regard to the trade secrets draft, there

was extensive discussion and several objections made. The Virginia Retirement System (VRS) provided written comments to the work group, which indicated that VRS preferred that their exemption found at subdivisions 12 and 25 in § 2.2-3705.7 remain as written and not be swept into a general exemption due to the unique duties of VRS.

Roger Wiley indicated that he felt that trade secrets draft necessarily included proprietary records. Phil Abraham, Vector Corporation, stated that the draft may not cover the proprietary record exemption for PPEA or PPTA procurements found in subdivision 11 of § 2.2-3705.6. He objected to the portion of the draft suggested by the Virginia Press Association that would shift liability to the submitting private entity should a FOIA enforcement action be commenced and the court found that the submitting entity has improperly earmarked records for protection that were not trade secrets. Sandy McNinch, Virginia Economic Development Partnership Authority, advised that she agreed with Mr. Abraham, but noted that with economic development prospects, they keep even their names secret until the deal is done. Dave Ress, Daily Press, averred that the trade secret definition found in the UTSA is too broad. Roger Wiley suggested that if the press believes the definition is too broad and government folks think it too narrow, we are in the right place.

The work group considered at length whether the definition of trade secrets encompassed financial records. Roger Wiley, Chris McGee, and Craig Merritt advised that they believed it does. Julie Whitlock, Department of General Services, expressed concern that in the context of routine public procurement, financial records would not be covered by the definition of trade secrets. Mr. Merritt suggested that FOIA contain the definition of trade secrets found in the UTSA and include the provision that financial records that are not publicly available through regulatory disclosure or otherwise be added to the definition. He noted that any draft should distinguish between situations where the public body is generating the material versus trade secrets submitted to a public body. He and Mr. Ress both suggested that any records submitted as evidence of financial responsibility or other mandatory compliance purposes should be open to the public. Mr. Merritt then went through the various provisions of the VPA draft proposal. There was a great deal of discussion about the burden-shifting provision in the draft for situations where a public body might be challenged in court to release a record that a private entity has marked as a trade secret. There was additional discussion over current language used in many exemptions of § 2.2-3705.6 regarding the three-step "earmarking" process and whether the public body should have to make a call as to whether the private entity has properly marked such records. Mr. Wiley noted that in routine procurements many public bodies simply allow the private entity to mark whatever they want, and the public body agrees to it because it does not want to lose the contract. Mr. Merritt pointed out there were risks of losing control over how an entity defines its own trade secrets. Mr. Ress expressed that the Uniform Trade Secrets Act and FOIA have different purposes, and other states use more specific definitions. The workgroup then discussed how to re-draft the proposal to reflect the three different categories of records identified in the discussion. Staff volunteered to redraft the trade secrets draft to reflect the discussions held by the work group, including the creation of three distinct drafts to reflect each situation discussed above. There being no further business, the meeting was adjourned.

#

12. Proprietary Records Workgroup Meeting Summary, August 18, 2015

The Proprietary Records Work Group of the Records Subcommittee held its third meeting on Tuesday, August 18, 2015 to continue its examination of the proprietary records/trade secrets exemptions found in § 2.2-3705.6. The work group began by reviewing separate draft proposals that would provide general exemptions for trade secrets generated by a public body, trade secrets of a private entity submitted to a public body, and certain financial records, and a draft proposal regarding shifting liability for attorney's fees and costs concerning records submitted to a public body that were improperly designated as trade secrets by a private entity. All of the drafts are posted on the FOIA Council web site.

Regarding the draft for trade secrets generated by a public body, concerns were expressed regarding the scope of the draft and whether it was sufficient to cover things such as enterprise or accounting software and economic development records, or whether it was limited to academic and scientific research only. Staff pointed out that software is already covered by other exemptions, although the exemption for "vendor proprietary information software" had been submitted to the work group for further study.⁶ The work group discussed the economic development exemption⁷ in detail after Kara Hart of the Virginia Economic Development Partnership (VEDP) raised concerns that the draft did not cover records already exempt under existing law. Craig Merritt, representing the Virginia Press Association (VPA), noted that the two clauses of the existing exemption covered certain records submitted to public bodies by private entities and certain records generated by public bodies, respectively, and might be treated differently. The work group discussed various amendments to the draft to address the issue. More generally, the work group discussed various types of trade secrets - other than academic and scientific research - generated by public bodies, such as proposals, incentives, and other records when public bodies compete with each other and with other states to attract businesses, tourism, and commerce.

The work group then moved on to consider the draft exemption for trade secrets submitted to a public body, and the issue of shifting liability. In discussing the scope and language of the draft, Mr. Merritt suggested that investment entities (such as the Virginia Retirement System, the Virginia College Savings Plan, etc.) would need their own rules as they deal with unique situations. Julie Whitlock of the Department of General Services (DGS) expressed concern about the time period during which trade secrets are protected, i.e., during the course of negotiations, after a contract is entered into, and while the contract is being carried out. The work group discussed the scope of the draft and specific language used regarding "transactions," "contracting," and "public contracts." The work group also discussed nondisclosure agreements as a "promise of confidentiality" as contemplated by the current economic development exemption. Phil Abraham of the Vectre Corporation, and Roger Wiley, an attorney representing local government, suggested that the economic development exemption should remain free standing. In response to a question from Mr. Merritt, Ms. Hart informed the work group that Virginia regularly competes with Georgia, Maryland, North Carolina, and other southeastern states, as well as some mid-Atlantic states.

⁶ Subdivisions 6 and 7 of § 2.2-3705.1. The Records Subcommittee had recommended no changes to subdivision 7, which exempts "Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth."

⁷ Subdivision 3 of § 2.2-3705.6.

The work group next considered the complexities involved with the liability shifting proposal and current "earmarking" provisions where private entities designate what records need to be protected as proprietary/trade secrets. Some of the current earmarking provisions require agreement by the public body regarding such designations, but others do not. Mr. Wiley noted that public bodies are under pressure to agree with private entities' designations as to what is proprietary and a trade secret in order to get deals done. Mr. Merritt noted that local government attorneys are often not in a fair position to evaluate whether particular records are trade secrets, which places the burden on the public body to guess correctly. Mr. Abraham suggested that instead of a statutory provision, public bodies could use indemnification clauses in contracts. Ms. Whitlock asked why a public body's attorney should have to defend a private entity's designation of a trade secret. After further discussion, Mr. Merritt suggested the solution is to make the private entity that submits trade secrets a party to any FOIA suit on the issue, and to impose the cost on any party that improperly designates as trade secrets records that should be open. The work group discussed in further detail who should pay fees and generally agreed that the courts would make that determination on a case-by-case basis. Noting that the draft has the liability provision in the same subdivision as the exemption, the work group agreed with staff that the liability shifting provision should instead be moved into the remedies section of FOIA, § 2.2-3713.

The work group then discussed briefly the draft for certain financial records and how it relates to procurement law provisions. The work group then agreed to have staff re-draft the drafts considered today to reflect the various suggested changes and post them on the FOIA Council website for further consideration. Those present agreed to let staff know whether they felt it would be helpful to meet again as a work group, or whether staff should instead report to the Records Subcommittee that the work group had considered the issues and drafts discussed above, but had not agreed on a recommendation.

There being no further business, the meeting was adjourned.

#

13. VPA Proposed Draft concerning confidential business information submitted by private entity to a public body, September 2015

1 **§2.2-37xx. Confidential business information submitted by a private entity to a public**
2 **body.**

3 When a private entity submits a record to a public body subject to the provisions of this chapter,
4 the submitting entity shall designate at the time of submission all information contained in the
5 record that it considers confidential and seeks to have the public body withhold from inspection
6 or copying as provided in this chapter, but only if such information falls within one of the
7 following categories:

8 (a) the information qualifies as a trade secret under the Uniform Trade Secrets Act, § 59.1-
9 336, et seq., and continues to be maintained as a trade secret by the private entity; or

10 (b) the information is confidential financial information of the submitting entity, including
11 balance sheets, income statements, other accounting records, audit materials, or
12 projections of revenue or expenses, and the financial information (1) has not become
13 publicly available through regulatory disclosure or otherwise; (2) continues to be treated
14 by the private entity as confidential in the regular course of business and is the subject of
15 reasonable steps to maintain its confidentiality; and (3) has not been identified by the
16 public body prior to its submission as information material to the decision making of the
17 public body and a proper subject of disclosure notwithstanding the presence of elements
18 (b)(1) and (2) above, or

19 (c) the information is in the nature of a trade secret or confidential financial information and
20 is subject to a federal or state law that prohibits its dissemination to the public.

21 A private entity seeking protection of information under this section shall submit a statement of
22 reasons at the time it submits the subject information to the public body. The statement of
23 reasons shall designate with specificity all information within the record for which protection is

1 sought, describe the general subject matter of the information with clarity, and identify the
2 provisions of this section upon which the submitting private entity is relying to seek protection of
3 the identified information. A request for protection of information under subsection (c) above
4 shall specify the federal or state statute requiring that the material be maintained in confidence
5 and not be subject to public disclosure. The statement of reasons shall be a public record
6 available for inspection and copying under the provisions of this chapter.
7 In the event a public body denies a request for information submitted pursuant to this chapter on
8 the ground that it is being withheld pursuant to this section, it shall, simultaneously with
9 communicating the denial, send an open copy of the communication denying the request to the
10 submitting private entity, along with a copy of the request that was denied.

11
12
13
14
15
16
17
18
19
20
21

22 Submitted by Virginia Press Association to VFOIAC work group
23 September 1, 2015

Dave Ress

14. Dave Ress, Daily Press Proposed Draft concerning proprietary records

Daily Press

Proprietary records exemption, generalized to replace the several separate ones.

Business and financial records shall be open to public inspection and copying when used as the basis for a public body's decision-making or if they involve the receipt or expenditure of public funds. Business or financial records of a quasi-public corporation or authority receiving public funds are public records from the time the public funds are received. However, that portion of a record provided to a public body by an individual or group or business that constitutes trade secret; that is, a plan, formula, pattern, compilation, program, device, method, technique, or process that has an economic value because it is known only to its owner(s) and those employees to whom the information must be confided in order to apply it to the uses intended. For such information to be withheld from release, the private entity that provides it must request in advance that specific information be held in confidence and explain (1) that it only known to it and its employees and (2) why it has economic value. Before accepting such information as part of any submission by a private entity, the public must acknowledge in writing that it agrees that the information is a trade secret, and detail why it so agrees. Both the request for confidential treatment of information and the public body's agreement shall be public information, subject to the provisions of this act.

This language incorporates the Trade Secrets definition in Virginia law, expanded to include "plans" as other states' legislation provides. It makes clear, as other states do, that when businesses' financial position is an element of a public body's decision-making or financial support, that records of that business's financial position is public.

In addition to protecting the public's fundamental right to know, this language should insure more careful review by public bodies of any commitment of taxpayer money to support private entities' activities – hopefully avoiding such debacles as US 460, the Elizabeth River Tunnels tolls or PeopleExpress.

15. Proprietary Records Workgroup Meeting Summary, November 10, 2015

The Proprietary Records Work Group of the Records Subcommittee held its fourth meeting on Tuesday, November 10, 2015 to continue its examination of the proprietary records and trade secrets exemptions found in § 2.2-3705.6 and elsewhere in FOIA. Staff presented a brief recap of the work done to date and a reminder that the Records Subcommittee had asked the Work Group to continue meeting to address whether one or more generic exemptions for trade secrets and similar records might be crafted. Specifically, at its last meeting the Records Subcommittee had asked whether the Work Group had gone through the exemptions one by one to determine which might be amended or eliminated if one or more generic trade secrets exemptions were enacted. The Work Group had not done so. For reference, staff presented a chart that listed various exemptions with blank spaces to be filled in as to whether each exemption would be affected and for any relevant notes. Staff also distributed a draft prepared by the Virginia Press Association (VPA) that went through § 2.2-3705.6 and struck language likely to be affected by any generic exemption(s)(the "VPA markup"). Craig Merritt, speaking on behalf of VPA, explained that the VPA markup was not a recommendation of what VPA felt should be done, but instead only identified those exemptions or portions thereof likely to be affected by any generic exemption(s) for trade secrets or financial records. Mr. Merritt referred to a draft proposal VPA had submitted to the Records Subcommittee at its October 7, 2015 meeting (the "VPA draft") that identified three categories of records submitted by a private entity to a public body that would be protected: (1) trade secrets as defined in the Uniform Trade Secrets Act, (2) certain financial records not otherwise made public or required for decision making by the public body, and (3) other records in the nature of a trade secret or confidential financial information that is prohibited from release under state or federal law.

Phil Abraham of the Vectre Corporation pointed out that the work group had not yet agreed on what a generic exemption would look like, that some current exemptions would be easier to put within a generic version than others, and that assuming there is agreement on a generic agreement, it still must be decided what current exemptions should and should not remain. He noted his prior understanding that the exemption for certain procurement records under the Public-Private Transportation Act of 1995 and the Public Private Education Facilities and Infrastructure Act of 2002 (PPEA), subdivision 11 of § 2.2-3705.6 (the PPEA/PPTA exemption), would remain unaffected but that understanding was not reflected in the VPA draft. Christopher Lloyd of McGuire Woods Consulting agreed and pointed out that some exemptions may actually cover more than what is at first apparent. He gave the example of the Virginia Port Authority exemption, subdivision 1 of § 2.2-3705.6, which might at first appear to cover only confidential financial records but could in fact also apply to cargo manifests, bills of lading, and many other types of documents. Dave Ress, a reporter with the Daily Press, noted that as a practical matter, he had had a request denied on the basis of the PPEA, without any citation to a FOIA exemption.

Mr. Merritt asked whether there was any alternative counterproposal or modification of the VPA draft. No alternatives were presented and the general consensus was to use the VPA draft as a vehicle for further discussion (although there was no agreement to recommend it in its current form). In further discussion it was agreed that it would be helpful to leave certain exemptions unchanged at this time in order to facilitate further discussion of the

draft, including the PPTA/PPEA exemption and certain exemptions for money managers such as the Virginia College Savings Plan and the Virginia Retirement System. Sandi McNinch and Kara Hart of the Virginia Economic Development Partnership (VEDP) expressed concerns with the method of designating exempt information in the VPA draft as written.

The participants then began to discuss what process the work group should use to move forward. It was generally agreed first to identify and bifurcate the various exemptions into those that are agency-specific and those that apply more generally. Second, notice would be sent to affected agencies summarizing the work so far, including draft proposals. It was agreed that certain exemptions including the PPEA/PPTA exemption and various exemptions for money managers such as VEDP, Virginia College Savings Plan, and the Virginia Retirement System would not be under consideration at this time, in order to allow the discussion of one or more generic exemptions to move forward. The third step would be to present a definite date by which all comments and any alternative draft proposals would be received. These steps are to be carried out before the 2016 Session of the General Assembly begins, and with a reminder that the next meeting of the work group will be held in March or April of 2016, after the 2016 Session adjourns.

There being no further business, the meeting was adjourned.

#

APPENDIX K

2016 PROPRIETARY RECORDS WORKGROUP MATERIAL

CONTENTS:

1. Remarks Submitted by the Virginia Department of Mines, Minerals and Energy, February 2016;
2. Remarks Submitted by the Virginia Department of Aviation, February 25, 2016;
3. Remarks Submitted by the Virginia Port Authority, February 16, 2016;
4. Remarks Submitted by the Office of the Inspector General, February 12, 2016;
5. Remarks Submitted by the Virginia Department of Medical Assistance;
6. Remarks Submitted by the Virginia Resources Authority, January 14, 2016;
7. Remarks Submitted by the Virginia Department of Agriculture and Consumer Services, March 9, 2016;
8. Remarks Submitted by the University of Virginia, March 21, 2016; and
9. Remarks Submitted by the Virginia Department of Rail and Public Transportation, March 22, 2016.

**1. Remarks Submitted by the Virginia Department of Mines, Minerals and Energy,
February 2016**

From: Skiffington, Mike (DMME) <Mike.Skiffington@dmme.virginia.gov>
Date: Mon, Feb 29, 2016 at 9:43 AM
Subject: DMME FOIA Exemption
To: "foiacouncil@dls.virginia.gov" <foiacouncil@dls.virginia.gov>
Cc: "Kazerooni, Borna (DMME)" <BXK@dmme.virginia.gov>

Good morning. Please accept this e-mail in response to your letter of December 22, 2015.

DMME's Division of Energy is responsible under 45.1-390 of the Code for coordinating the energy-related activities of state agencies and advise the Governor on energy issues that arise at the local, state and national levels. Energy contingency planning is an important function of the Division and as such, we would ask that the FOIA exemption remain in place.

Thank you for the opportunity to comment and let me know if you have any questions or if we can provide any further information.

Michael A. Skiffington
Policy and Planning Manager
Dept. of Mines, Minerals and Energy
Division of Administration
804.692.3212
804.370.1833 mobile
www.dmme.virginia.gov



COMMONWEALTH of VIRGINIA

Randall P. Burdette
Executive Director

Department of Aviation
5702 Gulfstream Road
Richmond, Virginia 23250-2422

V/TDD • (804) 236-3624
FAX • (804) 236-3635

ISO 9001:2008 Certified
IS-BAO Registered

February 25, 2016

Maria J. K. Everett, Esq.,
Executive Director/Senior Attorney
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, Virginia 23219

Dear Maria,

I was forwarded a copy of the Review of your agency's FOIA exemptions RE: Proprietary Records and Trade Secrets that was sent to Keith McCrea, our Air Service & Policy Manager, and was asked to comment. The Department of Aviation's exemption for information of a proprietary nature furnished by licensed public use airports to the Virginia Department of Aviation was approved in 2013 because it was established that no other current exemption, general or agency specific, allowed this information to be withheld.

Therefore, we feel that it is important to maintain this exemption and I've attached some brief comments.

Please let us know if you need any additional information from us.

Sincerely,

A handwritten signature in cursive script that reads "Betty Wilson".

Betty Wilson
Public Relations Manager



Review of Department of Aviation FOIA Exemptions: Proprietary Records and Trade Secrets

Validity of DOAV Exemption

In response to the letter that came in with this request to review our agency's FOIA exemptions, we have reviewed the code and find that the Virginia Department of Aviation's exemption (§ 2.2-3705.6 (27)) is still valid and necessary to protect proprietary information submitted by airports (most publicly owned and a few privately owned) in support of funding from programs administered by the Department of Aviation or the Virginia Aviation Board, where if the records were made public, the financial interest of the airport would be adversely affected.

Comments on Work Groups Ideas

The letter shared that a work group, formed by the Records Subcommittee, believes that the Proprietary Records and Trade Secrets section might be consolidated into one or two general exemptions and the group had categorized these exemptions as follows:

"In general terms, the work group categorized the exemptions as those addressing proprietary records and trade secrets generated by a public body (such as academic and scientific research), proprietary records and trade secrets submitted to a public body by a private entity (the majority of the exemptions) and financial records of a private entity submitted to a public body that are not otherwise made public."

While these cover certain situations, we are not confident that they would allow the Department of Aviation to withhold documents covered in our current exemption. We (a public entity) receive documents from airports (mostly public entities) in support of our grant programs that may result in a negative financial impact on the airport if released prematurely. These public body records are not academic or scientific research but may be receipts or quotes for services, appraisals, or other documents provided by airports to our office in order to fulfill the requirements of our matching grant programs. Here are a couple of examples:

Example 1:

Airport X (a public owned, public use airport) is seeking additional airline service. They have applied and received an Air Service Development and Enhancement grant from the Virginia Department of Aviation. Funds are used to hire a consultant to assist them in putting together a presentation and making appointments to meet privately with a selected airline. Once the airline visit is completed, and often before the airport knows whether it succeeded in obtaining new or upgraded air service, the airport submits a request for reimbursement to the Department of Aviation's grant program. This request requires the submission of copies of contracts/invoices and travel receipts (including airline tickets, hotel invoices, etc.) associated with the visit that includes the name of the airline visited and their headquarters city. These documents need to be submitted so the agency can justify the grant reimbursement; however, if they are released to the public prior to the airline formally approving or declining new or expanded service, it may impact the airline's decision.

Example 2:

Airport Y, a general aviation airport in Virginia, is looking to lengthen/widen their runway and must purchase additional parcels of land to do so. The public entity operating the airport has obtained an appraisal for one parcel of land involved. A copy of this appraisal is submitted by the airport operator (public entity) to the Virginia Department of Aviation for review in support of a grant request. If an adjacent property owner, whose property is also in negotiations with the airport operator, submits a Virginia Freedom of Information Act request for all documents related to the runway extension project, providing the appraisal for the first parcel, would put the airport operator at a financial disadvantage in negotiating for the second parcel.

VPA Markup

In reviewing the VPA markup provided, the Department of Aviation's exclusion is marked out entirely. The only general language left is "memoranda, working papers or other records related to businesses that are considering relocating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where, if such records are made public, the financial interest of the public body would be adversely affected." This language is not a substitute for the Department of Aviation's current exemption and would not appear to allow the exemptions for both of the examples that I provided earlier.

In closing, we strongly encourage the working group to maintain the Virginia Department of Aviation's current exemption as written.

However, if the working group decides to draft one or two new Proprietary Records and Trade Secrets general exemptions in lieu of all current general and individual agency exemptions, we encourage them to draft those exemptions to include language that protects the financial interests of Virginia's public use airports when they submit required documents to our agency.

3. Remarks Submitted by the Virginia Port Authority, February 16, 2016



VIRGINIA PORT AUTHORITY
600 WORLD TRADE CENTER, NORFOLK, VA 23510
(757) 683-8000

February 16, 2016

The Honorable James M. LeMunyon, Chair
Virginia Freedom of Information Advisory Council
201 North 9th Street, Second Floor
Richmond, VA 23219

Re: Review of Virginia Port Authority's FOIA exemptions RE: Proprietary Records and Trade Secrets

Dear Delegate LeMunyon:

Thank you for the opportunity to provide comments as part of the Virginia Freedom of Information Advisory Council's (FOIA Council) review of exemptions to Virginia's Freedom of Information Act (FOIA) pursuant to 2014 House Joint Resolution 96. The Port of Virginia staff has reviewed the information provided and offers the following comments.

The FOIA exemption granted to the Virginia Port Authority (VPA) in § 2.2-3705.6 subsection 1 is narrowly applied to specific proprietary information as identified in § 62.1-132.4 and § 62.1-134.1.

§ 62.1-132.4 addresses port operations and contracts with ship lines and other third parties. The port's rates with these parties are not uniform and can be negotiated individually based on volumes and other considerations. Port operations drive the need for the different rates. Furthermore, § 62.1-132.4 includes specific prohibition against disclosing proprietary information provided by customers and terminal operators.

Similarly § 62.1-134.1 includes proprietary information from railroads, mining companies, ship lines, and others and even prohibits disclosure of information to the Board of Commissioners; information covered under § 62.1-134.1 is for use exclusively by the port's Executive Director and staff. § 62.1-134.1 does require disclosure of information within 45 days of request for information kept in the regular course of business.

The Port of Virginia operates in many aspects as a business with a public mission with a unique construction of a public agency (VPA) owning marine terminals which are operated by a Limited Liability Corporation (Virginia International Terminals, LLC or VIT). Efficient operations of the port are predicated on the use of a shared services agreement between VPA and VIT, which was vetted and approved by both the Governor and Attorney General. The use and availability of proprietary records are essential to the effective implementation of the shared services agreement. Private sector partners (importers, exporters, manufacturers, ship lines, etc.)

expect protection of proprietary records, and their confidence in the port's protection of their information is imperative to the port's ability to compete against other ports and not negotiate against itself.

Given the port's unique construction and operation, it is important and appropriate that VPA's proprietary information FOIA exemption remain and as a specific exemption rather than being included under a general exemption.

Should you have any questions, please do not hesitate to contact me at 757-683-2129 or asinclair@portofvirginia.com. Thank you again for the opportunity to comment on the FOIA Council's review of the Virginia Port Authority's FOIA exemptions.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew M. Sinclair". The signature is fluid and cursive, with a period at the end.

Andrew M. Sinclair
Director, Government Affairs

4. Remarks Submitted by the Office of the Inspector General, February 12, 2016



COMMONWEALTH OF VIRGINIA
Office of the State Inspector General

June W. Jennings
State Inspector General

Post Office Box 1151
Richmond, Virginia 23218

Telephone (804) 625-3255
Fax (804) 786-2341
www.osig.virginia.gov

February 12, 2016

Maria J.K. Everett, Esq. Executive Director/Senior Attorney
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, VA 23219

SUBJECT: Review of your agency's FOIA exemptions RE: Proprietary Records and Trade Secrets

Dear Ms. Everett,

I have reviewed the proposed changes to FOIA exemption concerning proprietary records and trade secrets that relate to the Office of the State Inspector General (OSIG), and do have some concerns.

Specifically, I am referring to the following language found in § 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets:

22. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq), including but not limited to, financial records, including balance sheets and financial statements that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the State Inspector General for the purpose of an audit, special investigation, or any study requested by the Office of the State Inspector General in accordance with law.

In order for the records specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the State Inspector General:

1. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

2. Identifying with specificity the data or other materials for which protection is sought; and
3. Stating the reasons why protection is necessary.

The State Inspector General shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial records of the private entity. The State Inspector General shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

The draft created by the Virginia Press Association for November 10, 2015, work group meeting, indicates that the section referenced above “might be eliminated if a general exemption is enacted.”

As paragraph 22 of § 2.2-3705.6 is currently written, the burden of responsibility for requesting an exemption rests with the private or nongovernmental entity and it is up to that entity to make the case and justify reasons the information is proprietary and exempt, and as such, should be withheld. It is only after the entity bears the burden of proof that the State Inspector General has the authority to determine if the withholding of such information is appropriate.

Should this section be amended to remove paragraph 22 of *Code* § 2.2-3705.6, OSIG would be entirely responsible for determining what specific information should be considered for withholding, whether certain information should be exempt from release. By eliminating this section, the State Inspector General and OSIG would bear the total responsibility of invoking such exclusion, identifying with specificity the data or other materials for which protection is sought, and stating the reasons why the protection is warranted.

I believe amending the section to remove paragraph 22, would yield unintended consequences that would pose an undue burden on OSIG. In addition and without seeing the wording of a general exemption, I am unable to determine if I would have other issues or concerns.

I respectfully request that the work group NOT eliminate the OSIG-specific language.

If you have any questions, please feel free to call me at (804) 625-3255 or email me at june.jennings@osig.virginia.gov. I am also available to meet with you or the work group in person to discuss my concerns.

Sincerely,



June W. Jennings, CPA
State Inspector General



COMMONWEALTH of VIRGINIA
Department of Medical Assistance Services

CYNTHIA B. JONES
DIRECTOR

February 16, 2016

SUITE 1300
600 EAST BROAD STREET
RICHMOND, VA 23219
804/786-7933
800/343-0634 (TDD)
www.dmas.virginia.gov

Maria J.K. Everett, Esq.
Executive Director
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, VA 23219

Dear Ms. Everett:

Thank you for allowing us the opportunity to comment on your letter of December 22, 2015, regarding the review of the Agency's Freedom of Information Act (FOIA) exemption(s) re: Proprietary Records and Trade Secrets.

I would also like to thank Alan Gemhardt for contacting Nancy Malczewski, the Department of Medical Assistance Services' (DMAS') FOIA Coordinator, and advising her to have someone represent DMAS on this much debated matter. At that meeting (I believe in August 2015), Ms. Malczewski and a representative from the Office of the Attorney General (OAG) represented DMAS. Ms. Malczewski explained the need to retain the exemption § 2.2-3705.3.4

"Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1."

As she stated in that meeting, she has cited and used this exemption as follows:

1. When audits are being done and have not yet been completed, and the provider/client has not yet been notified of the findings, or has not had the opportunity to respond regarding any dollar amount that may be retracted or required repayment.
2. When there is an active appeal and documents relating to that appeal are being requested under FOIA.

Upon completion, the information would be available, except those that have been referred to the OAG for investigation.

Maria J.K. Everett, Esq.
February 16, 2016
Page 2

It was DMAS' understanding at that August meeting that the above exemption would be retained for DMAS. From the attachment you provided with your letter "Proprietary Records & Trade Secrets Exemptions (Current as of July 1, 2015), the above exemption has been eliminated. Could this be an error or simply an oversight? In any instance, DMAS strongly urges the FOIA Council to reinstate DMAS' exclusion under § 2.2-3705.3.

Under Federal regulations, DMAS is required to have an investigative and audit process that verifies the provision of services to Medicaid recipients. *See* 42 CFR §455.1. The exclusion at issue allows DMAS investigators to audit Medicaid providers' documentation without any hindrance. The loss of this exclusion would unduly interfere in DMAS' ability to properly investigate providers who fail to properly provide care to Medicaid recipients or maintain documentation by allowing providers to obtain investigator notes and communications prior to the issuance of an adverse action. By obtaining the investigator notes and communications, Medicaid providers will have the opportunity to circumvent the DMAS' investigation and audit process and interfere with DMAS' ability to verify the provision of services to Medicaid services.

If it was meant to be eliminated, we would like to make suggestions regarding the replacement of that wording in one of two code citations. You could modify and add the **and underlined wording to:**

II. Exemptions limited to A Specific Public Body

§2.2-3705.5. Exclusions to application of chapter; health and social services records.

4. Investigative notes; proprietary information not published, copyrighted or patented; information obtained from employee personnel records; personally identifiable information regarding residents, clients or other recipients of services; other correspondence and information furnished in confidence to the Department of Social Services in connection with an active investigation of an applicant or licensee pursuant to Chapters 17 (§ 63.2-1700 et seq.) and 18 (§ 63.2-1800 et seq.) of Title 63.2; **records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1;** and records and information furnished to the Office of the Attorney General in connection with an investigation or litigation pursuant to Article 19.1 (§ 8:01-216.1 et seq.) of Chapter 3 of Title 8.01 and Chapter 9 (§ 32.1-310 et seq.) of Title 32.1. However, nothing in this section shall prohibit disclosure of information from the records of completed investigations in a form that does not reveal the identity of complainants, persons supply information, or other individuals involved in the investigation."

After the Department of Social Services determines Medicaid eligibility, the client's information is placed in the Virginia Medicaid Management Information System. Placing DMAS' exemption in the above citation would further protect DMAS when also providing

Maria J.K. Everett, Esq.
February 16, 2016
Page 3

records to the Office of the Attorney General in connection with their investigations after DMAS has notified them of the possibility of fraud by a provider or a client.

Further, DMAS has also received complaints and allocations of fraud by providers and clients and would like to keep their identity from being disclosed.

Another suggestion would be to modify the following:

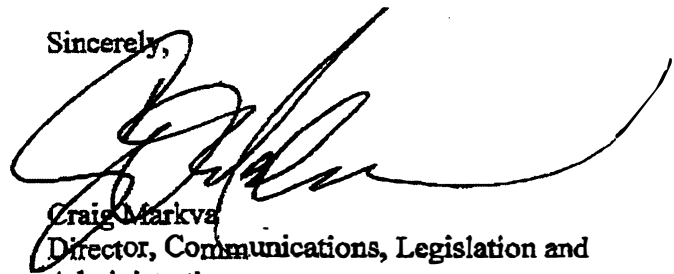
"II. Exemptions limited to A Specific Public Body

§2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1; records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1; and records and information furnished to the Office of the Attorney General in connection with an investigation or litigation pursuant to Article 19.1 (§ 18:01-216.1 et seq.) of Chapter 3 of Title 8.01 and Chapter 9 (§ 32.1-310 et seq.) of Title 32.1. However nothing in this section shall prohibit disclosure of information from the records of completed investigations in a form that does not reveal the identity of complainants, persons supplying information, or other individuals involved in the investigation.

Thank you for the opportunity to provide specific exemption language regarding DMAS. If you have any questions, you may contact me directly at 804-225-2765 or my email address: craig.markva@dmas.virginia.gov . You can also contact Nancy Malczewski at 804-371-6391 or nancy.malczewski@dmas.virginia.gov .

Sincerely,



Craig Markva
Director, Communications, Legislation and
Administration

CM/njm

J:/FOIA/FOI Advisory Council

K12



Stephanie L. Hamlett
Executive Director

January 14, 2016

Maria J.K. Everett, Esq.
Executive Director/Senior Attorney
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, Virginia 23219

Re: Review of FOIA Exemptions

Dear Ms. Everett:

Thank you for your correspondence dated December 22, 2015 regarding proprietary exemptions and trade secrets. We appreciate the opportunity to comment.

The Virginia Resources Authority (VRA) is very concerned regarding the elimination of its exemption for proprietary records and trade secrets especially since there is no draft of a general exemption available to be considered.

As you may know, VRA is an independent political subdivision of the Commonwealth. Section 62.1-198 of the Virginia Code outlines VRA's purpose as follows:

"... to encourage the investment of both public and private funds and to make loans, grants, and credit enhancements available to local governments to finance water and sewer projects, land conservation or land preservation programs or projects, oyster restoration projects, drainage projects, solid waste treatment, disposal and management projects, recycling projects, energy conservation and energy efficiency projects, professional sports facilities, resource recovery projects, public safety facilities, airport facilities, the remediation of brownfields and contaminated properties including properties contaminated by drywall, the design and construction of roads, public parking garages and other facilities for public transportation by commuter rail, site acquisition and site development work for the benefit of economic development projects, technology, construction of local government buildings, including administrative and operations systems and other local government equipment and infrastructure, infrastructure for broadband services, recovered gas energy facilities, federal facilities or former federal facilities, and renewable energy projects ..."

Maria J.K. Everett, Esq.

January 14, 2016

Page 2

While VRA is not a state agency and receives no direct state appropriations, for organizational purposes, it is aligned with the Secretary of Commerce and Trade due to its economic development function. Not unlike the Virginia Economic Development Partnership, VRA does work with and receive information from private entities that include proprietary and trade secret information not otherwise available to the public. For example, VRA has an outstanding loan in its land conservation portfolio. The loan documents provide that we receive copies of financial statements of entities related to the borrower (but that have no outstanding loan with VRA). These financial statements can be very helpful in monitoring the loan. If, however, this information were required to be made public, it is unlikely the borrower would have ever agreed to the requirement in loan documents to provide it.

VRA would respectfully request that its exemption remain in place. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jean Bass", written in a cursive style.

Jean Bass
Director of Policy

cc: The Honorable Maurice Jones
Office of the Governor

Stephanie Hamlett
VRA Executive Director



COMMONWEALTH of VIRGINIA

Department of Agriculture and Consumer Services

PO Box 1163, Richmond, Virginia 23218

Phone: 804/786-3501 • fax: 804/371-2945 • Hearing Impaired: 800/828-1120

www.vdacs.virginia.gov

Sandra J. Adams
Commissioner

March 9, 2016

Ms. Maria J.K. Everett, Esq.
Executive Director/Senior Attorney
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, VA 23219

Dear Ms. Everett:

I am writing in response to your letter to Kevin Schmidt from this agency dated December 22, 2015, requesting that the Virginia Department of Agriculture and Consumer Services (VDACS) assist in reviewing Virginia Freedom of Information Act (FOIA) exemptions concerning proprietary records and trade secrets.

VDACS wishes to provide the following written comments so that you may post them for all participants to review prior to the first meeting of the proprietary records and trade secrets work group this year:

Va. Code § 2.2-3705.6

14. Documents and other information of a proprietary nature furnished by a supplier of charitable gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection E of § 18.2-340.34.

VDACS requests that this exemption be retained as is

Charitable gaming suppliers are privately held companies, and their financial activities are not routinely available to the public. Documents and other information of a proprietary nature furnished by a supplier typically consist of all financial activities with a particular charitable gaming organization, software, hardware, testing reports on said software and hardware, and business contracts. Charitable gaming suppliers are adamant about keeping their proprietary information out of the hands of their competitors, and with the current exemption in place, are willing to provide such information to VDACS because they know the information will be protected from disclosure. The agency's access to proprietary information enables it to approve electronic gaming equipment intended for the charitable gaming market, conduct analysis on financial activities, identify missing receipts, and identify criminal activity.

15. *Records and reports related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to § 3.2-1215.*

VDACS requests that this exemption be removed

VDACS believes that this exemption is no longer necessary, as the Virginia State Apple Board does not currently collect sales information. Further, the agency believes that the requirement in subdivision 6 of § 3.2-103 that the Commissioner of Agriculture and Consumer Services hold in confidence tax returns required by any agricultural commodity board established pursuant to Title 3.2 of the Code of Virginia protects those excise tax records or reports required of apple producers.

25. *Documents and other information of a proprietary nature furnished by an agricultural landowner or operator to the Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Agriculture and Consumer Services or any political subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9, other than when required as part of a state or federal regulatory enforcement action.*

VDACS requests that this exemption be retained as is.

VDACS believes that this specific exemption is important to retain as is. As an example of records protected under this exemption, the agency could possess records regarding the nutrients applied to a particular farm, the release of which could result in the release of specific fertilizer formulas or blends as well as proprietary rates of micronutrients applied to the farm, all proprietary information related to the operation of that farm.

Generic Exemption

VDACS may be supportive of the concept of one or more generic exemptions replacing the specific exemptions in Va. Code § 2.2-3705.6, including subdivisions 14 and 25. However, the agency's support of such revisions could only occur if the agency is certain that the generic exemption is crafted in such a manner as to at least cover the specific exemptions included in subdivisions 14 and 25 of § 2.2-3705.6.

Again, I appreciate the opportunity that you provided to present written comments on the exemptions concerning proprietary records and trade secrets affecting VDACS. Please direct any questions as well as information regarding upcoming meetings of the Virginia Freedom of Information Advisory Council to Kevin Schmidt, Director, Office of Policy, Planning, and Research. Kevin may be reached at (804) 786-1346 or kevin.schmidt@vdacs.virginia.gov.

Sincerely



Sandra J. Adams
Commissioner

cc: Kevin Schmidt, Director, Office of Policy, Planning, and Research



March 21, 2016

Maria J.K. Everett
Executive Director, Virginia Freedom of Information Advisory Council
General Assembly Building, 2nd Floor
201 North 9th Street
Richmond, VA 23219

Dear Maria:

I am in response to your request for feedback on the University's exemption included in § 2.2-3705.4 (5) of the Virginia Freedom of Information Act relating to certain records of the University of Virginia Medical Center. In the 1990s, the General Assembly enacted §§ 23-77.3 and 23-77.4 of the Code of Virginia recognizing the unique role of the Medical Center in support of the missions of medical and health sciences education and research at UVA; and the need for the Medical Center to remain economically viable, with the ability to participate in joint ventures, partnerships, contracts and other cooperative arrangements that are reflective of changes in health care delivery. In addition, these sections provide that "the ability of the Medical Center to continue to be a reliable source of such revenues is heavily dependent upon its ability to compete with other providers of health care that are not subject to the requirements of law applicable to agencies of the Commonwealth." It is important to note that the Medical Center receives no general fund appropriations and is totally dependent on operating revenues, like other health care systems with whom the Medical Center competes. Recognizing that the Medical Center would not be able to operate successfully in the health care marketplace if its proprietary information were made publically available (whereas similar information of its competitors is not publically available), § 2.2-3705.4 (5) exempts proprietary and business-related information pertaining to the operations of the Medical Center from public disclosure under the FOIA.

In a constantly evolving health care industry, this exemption continues to remain critical for the Medical Center to compete with the privately-owned hospitals and health care entities in the Commonwealth. As such, we respectfully request that the exemption remain as written in the Code of Virginia. Thank you for the opportunity to provide feedback on this exemption. We plan to attend the subcommittee meeting on Thursday and will be able to provide further explanation to the subcommittee members, if needed.

Sincerely,

Laura W. Fornash
Executive Assistant to the President for State
Governmental Relations

Cc: Colette Sheehy

Richmond Office
11 S. 12th Street, Suite 225 • Richmond, Virginia 23219-4085
Phone: 804-371-0202 • Fax: 804-371-0284



COMMONWEALTH of VIRGINIA

Jennifer L. Mitchell
Director

DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION
600 EAST MAIN STREET, SUITE 2102
RICHMOND, VA 23219-2416

(804) 786-4440
FAX (804) 225-3752
Virginia Relay Center
800-828-1120 (TDD)

March 22, 2016

Virginia FOIA Council
Attn: Alan Gernhardt
201 N. 9th Street
Richmond, Virginia 23219

Dear Mr. Gernhardt:

Please find enclosed a proposal from the Department of Rail and Public Transportation (DRPT) as it relates to the agency's specific proprietary records exemptions – sections 6 and 9 under Va. Code § 2.2-3705.6.

The suggested edit to remove section 6 entirely comes from a bit of redundancy as it relates to the exclusions provided in section 9. Section 9 was somewhat outdated in its reference to federal transportation policy, so by removing that limitation and adding language specific to the practical application of what DRPT does (i.e., administer grants for transportation projects), we are creating a policy for our agency that satisfies both the necessity for open government as well as the importance of legitimate exempting in order to efficiently conduct business with a private entity.

Lastly, we have added to our specific exemption the requirements that are currently applicable to section 11 regarding the process for requesting, evaluating and approving exemptions. While it is only added to section 9, it is important to note that we believe that any public agency agreeing to withhold records on the basis of any given FOIA exclusion should statutorily have the responsibility to review and approve such information. This is not intended to create the need for additional expertise within each agency, but rather, create an expectation of due diligence. That being said, we believe full liability should rightfully be placed on the private entity, but establishing the public entity's role in the process is a necessary element.

We will be happy to discuss our proposed amendments at the upcoming Proprietary Records meeting.

Sincerely,

Bethany Wolfe
Manager of Policy and Communications

Enclosure

The Smartest Distance Between Two Points
www.drpt.virginia.gov

1 **§ 2.2-3705.6. Exclusions to application of chapter;**
2 **proprietary records and trade secrets.**

3 The following records are excluded from the provisions of this chapter but may be disclosed by
4 the custodian in his discretion, except where such disclosure is prohibited by law:

5 1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-
6 132.4 or 62.1-134.1.

7 2. Financial statements not publicly available filed with applications for industrial development
8 financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.

9 3. Confidential proprietary records, voluntarily provided by private business pursuant to a
10 promise of confidentiality from a public body, used by the public body for business, trade and
11 tourism development or retention; and memoranda, working papers or other records related to
12 businesses that are considering locating or expanding in Virginia, prepared by a public body,
13 where competition or bargaining is involved and where, if such records are made public, the
14 financial interest of the public body would be adversely affected.

15 4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-
16 239 et seq.), as such Act existed prior to July 1, 1992.

17 5. Fisheries data that would permit identification of any person or vessel, except when required
18 by court order as specified in § 28.2-204.

19 ~~6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost~~
20 ~~projections provided to the Department of Rail and Public Transportation, provided such~~
21 ~~information is exempt under the federal Freedom of Information Act or the federal Interstate~~
22 ~~Commerce Act or other laws administered by the Surface Transportation Board or the Federal~~
23 ~~Railroad Administration with respect to data provided in confidence to the Surface~~
24 ~~Transportation Board and the Federal Railroad Administration.~~

25 7. Confidential proprietary records related to inventory and sales, voluntarily provided by private
26 energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for
27 energy contingency planning purposes or for developing consolidated statistical information on
28 energy supplies.

29 8. Confidential proprietary information furnished to the Board of Medical Assistance Services or
30 the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et
31 seq.) of Chapter 10 of Title 32.1.

32 | 9. a. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue
33 and cost projections provided by a private transportation business to the Virginia Department of
34 Transportation ~~and or~~ the Department of Rail and Public Transportation for the purpose of
35 conducting transportation studies of for evaluation by the public body needed to obtain grants or

36 ~~other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-~~
37 ~~178)~~ for transportation projects, provided such information is exempt under the federal Freedom
38 of Information Act or the federal Interstate Commerce Act or other laws administered by the
39 Surface Transportation Board or the Federal Railroad Administration with respect to data
40 provided in confidence to the Surface Transportation Board and the Federal Railroad
41 Administration. However, the exemption provided by this subdivision shall not apply to any
42 wholly owned subsidiary of a public body. Such information required throughout the lifecycle
43 of the grant or other awarded financial assistance submitted to the public body for reporting
44 purposes or performance measures shall also be exempt.

45 b. In order for records to be excluded from the provisions of this chapter, the private entity shall
46 make a written request to the responsible public entity:

47 1. Invoking such exclusion upon submission of the data or other materials for which protection
48 from disclosure is sought;

49 2. Identifying with specificity the data or other materials for which protection is sought; and

50 3. Stating the reasons why protection is necessary.

51 The responsible public entity shall determine whether the requested exclusion from disclosure is
52 necessary to protect the trade secrets or financial records of the private entity. To protect other
53 records submitted by the private entity from disclosure, the responsible public entity shall
54 determine whether public disclosure prior to the execution of an interim agreement or a
55 comprehensive agreement would adversely affect the financial interest or bargaining position of
56 the public or private entity. The responsible public entity shall make a written determination of
57 the nature and scope of the protection to be afforded by the responsible public entity under this
58 subdivision. Once a written determination is made by the responsible public entity, the records
59 afforded protection under this subdivision shall continue to be protected from disclosure when in
60 the possession of any affected jurisdiction or affected local jurisdiction.

61 10. Confidential information designated as provided in subsection F of § 2.2-4342 as trade
62 secrets or proprietary information by any person who has submitted to a public body an
63 application for prequalification to bid on public construction projects in accordance with
64 subsection B of § 2.2-4317.

65 11. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity,
66 its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of
67 proposals filed under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the
68 Public Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i)
69 if such records were made public prior to or after the execution of an interim or a comprehensive
70 agreement, § 33.2-1820 or 56-575.17 notwithstanding, the financial interest or bargaining
71 position of the public entity would be adversely affected, and (ii) the basis for the determination
72 required in clause (i) is documented in writing by the responsible public entity; and

73 b. Records provided by a private entity to a responsible public entity, affected jurisdiction, or
74 affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of
75 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, to the extent that
76 such records contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets
77 Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and
78 financial statements, that are not generally available to the public through regulatory disclosure
79 or otherwise; or (iii) other information submitted by the private entity, where, if the records were
80 made public prior to the execution of an interim agreement or a comprehensive agreement, the
81 financial interest or bargaining position of the public or private entity would be adversely
82 affected. In order for the records specified in clauses (i), (ii), and (iii) to be excluded from the
83 provisions of this chapter, the private entity shall make a written request to the responsible public
84 entity:

- 85 1. Invoking such exclusion upon submission of the data or other materials for which protection
86 from disclosure is sought;
- 87 2. Identifying with specificity the data or other materials for which protection is sought; and
- 88 3. Stating the reasons why protection is necessary.

89 The responsible public entity shall determine whether the requested exclusion from disclosure is
90 necessary to protect the trade secrets or financial records of the private entity. To protect other
91 records submitted by the private entity from disclosure, the responsible public entity shall
92 determine whether public disclosure prior to the execution of an interim agreement or a
93 comprehensive agreement would adversely affect the financial interest or bargaining position of
94 the public or private entity. The responsible public entity shall make a written determination of
95 the nature and scope of the protection to be afforded by the responsible public entity under this
96 subdivision. Once a written determination is made by the responsible public entity, the records
97 afforded protection under this subdivision shall continue to be protected from disclosure when in
98 the possession of any affected jurisdiction or affected local jurisdiction.

99 Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed
100 to authorize the withholding of (a) procurement records as required by § 33.2-1820 or 56-575.17;
101 (b) information concerning the terms and conditions of any interim or comprehensive agreement,
102 service contract, lease, partnership, or any agreement of any kind entered into by the responsible
103 public entity and the private entity; (c) information concerning the terms and conditions of any
104 financing arrangement that involves the use of any public funds; or (d) information concerning
105 the performance of any private entity developing or operating a qualifying transportation facility
106 or a qualifying project.

107 For the purposes of this subdivision, the terms "affected jurisdiction," "affected local
108 jurisdiction," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying
109 transportation facility," "responsible public entity," and "private entity" shall mean the same as
110 those terms are defined in the Public-Private Transportation Act of 1995 or in the Public-Private
111 Education Facilities and Infrastructure Act of 2002.

112 12. Confidential proprietary information or trade secrets, not publicly available, provided by a
113 private person or entity to the Virginia Resources Authority or to a fund administered in
114 connection with financial assistance rendered or to be rendered by the Virginia Resources
115 Authority where, if such information were made public, the financial interest of the private
116 person or entity would be adversely affected, and, after June 30, 1997, where such information
117 was provided pursuant to a promise of confidentiality.

118 13. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or
119 confidential proprietary records that are not generally available to the public through regulatory
120 disclosure or otherwise, provided by a (a) bidder or applicant for a franchise or (b) franchisee
121 under Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority
122 pursuant to a promise of confidentiality from the franchising authority, to the extent the records
123 relate to the bidder's, applicant's, or franchisee's financial capacity or provision of new services,
124 adoption of new technologies or implementation of improvements, where such new services,
125 technologies or improvements have not been implemented by the franchisee on a
126 nonexperimental scale in the franchise area, and where, if such records were made public, the
127 competitive advantage or financial interests of the franchisee would be adversely affected.

128 In order for trade secrets or confidential proprietary information to be excluded from the
129 provisions of this chapter, the bidder, applicant, or franchisee shall (i) invoke such exclusion
130 upon submission of the data or other materials for which protection from disclosure is sought, (ii)
131 identify the data or other materials for which protection is sought, and (iii) state the reason why
132 protection is necessary.

133 No bidder, applicant, or franchisee may invoke the exclusion provided by this subdivision if the
134 bidder, applicant, or franchisee is owned or controlled by a public body or if any representative
135 of the applicable franchising authority serves on the management board or as an officer of the
136 bidder, applicant, or franchisee.

137 14. Documents and other information of a proprietary nature furnished by a supplier of charitable
138 gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection
139 E of § 18.2-340.34.

140 15. Records and reports related to Virginia apple producer sales provided to the Virginia State
141 Apple Board pursuant to § 3.2-1215.

142 16. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1,
143 submitted by CMRS providers as defined in § 56-484.12 to the Wireless Carrier E-911 Cost
144 Recovery Subcommittee created pursuant to § 56-484.15, relating to the provision of wireless E-
145 911 service.

146 17. Records submitted as a grant or loan application, or accompanying a grant or loan
147 application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3
148 (§ 2.2-2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board
149 pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain
150 proprietary business or research-related information produced or collected by the applicant in the

151 conduct of or as a result of study or research on medical, rehabilitative, scientific, technical,
152 technological, or scholarly issues, when such information has not been publicly released,
153 published, copyrighted, or patented, if the disclosure of such information would be harmful to
154 the competitive position of the applicant.

155 18. Confidential proprietary records and trade secrets developed and held by a local public body
156 (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable
157 television services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2, to
158 the extent that disclosure of such records would be harmful to the competitive position of the
159 locality. In order for confidential proprietary information or trade secrets to be excluded from the
160 provisions of this chapter, the locality in writing shall (a) invoke the protections of this
161 subdivision, (b) identify with specificity the records or portions thereof for which protection is
162 sought, and (c) state the reasons why protection is necessary.

163 19. Confidential proprietary records and trade secrets developed by or for a local authority
164 created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.)
165 to provide qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.)
166 of Chapter 15 of Title 56, where disclosure of such information would be harmful to the
167 competitive position of the authority, except that records required to be maintained in accordance
168 with § 15.2-2160 shall be released.

169 20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial
170 records of a business, including balance sheets and financial statements, that are not generally
171 available to the public through regulatory disclosure or otherwise, provided to the Department of
172 Small Business and Supplier Diversity as part of an application for certification as a small,
173 women-owned, or minority-owned business in accordance with Chapter 16.1 (§ 2.2-1603 et
174 seq.). In order for such trade secrets or financial records to be excluded from the provisions of
175 this chapter, the business shall (i) invoke such exclusion upon submission of the data or other
176 materials for which protection from disclosure is sought, (ii) identify the data or other materials
177 for which protection is sought, and (iii) state the reasons why protection is necessary.

178 21. Documents and other information of a proprietary or confidential nature disclosed by a
179 carrier to the State Health Commissioner pursuant to §§ 32.1-276.5:1 and 32.1-276.7:1.

180 22. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), including,
181 but not limited to, financial records, including balance sheets and financial statements, that are
182 not generally available to the public through regulatory disclosure or otherwise, and revenue and
183 cost projections supplied by a private or nongovernmental entity to the State Inspector General
184 for the purpose of an audit, special investigation, or any study requested by the Office of the
185 State Inspector General in accordance with law.

186 In order for the records specified in this subdivision to be excluded from the provisions of this
187 chapter, the private or nongovernmental entity shall make a written request to the State Inspector
188 General:

189 1. Invoking such exclusion upon submission of the data or other materials for which protection
190 from disclosure is sought;

191 2. Identifying with specificity the data or other materials for which protection is sought; and

192 3. Stating the reasons why protection is necessary.

193 The State Inspector General shall determine whether the requested exclusion from disclosure is
194 necessary to protect the trade secrets or financial records of the private entity. The State
195 Inspector General shall make a written determination of the nature and scope of the protection to
196 be afforded by it under this subdivision.

197 23. Records submitted as a grant application, or accompanying a grant application, to the
198 Tobacco Region Revitalization Commission to the extent such records contain (i) trade secrets as
199 defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (ii) financial records of a grant
200 applicant that is not a public body, including balance sheets and financial statements, that are not
201 generally available to the public through regulatory disclosure or otherwise, or (iii) research-
202 related information produced or collected by the applicant in the conduct of or as a result of
203 study or research on medical, rehabilitative, scientific, technical, technological, or scholarly
204 issues, when such information has not been publicly released, published, copyrighted, or
205 patented, if the disclosure of such information would be harmful to the competitive position of
206 the applicant; and memoranda, staff evaluations, or other records prepared by the Commission or
207 its staff exclusively for the evaluation of grant applications. The exclusion provided by this
208 subdivision shall apply to grants that are consistent with the powers of and in furtherance of the
209 performance of the duties of the Commission pursuant to § 3.2-3103.

210 In order for the records specified in this subdivision to be excluded from the provisions of this
211 chapter, the applicant shall make a written request to the Commission:

212 1. Invoking such exclusion upon submission of the data or other materials for which protection
213 from disclosure is sought;

214 2. Identifying with specificity the data, records or other materials for which protection is sought;
215 and

216 3. Stating the reasons why protection is necessary.

217 The Commission shall determine whether the requested exclusion from disclosure is necessary to
218 protect the trade secrets, financial records or research-related information of the applicant. The
219 Commission shall make a written determination of the nature and scope of the protection to be
220 afforded by it under this subdivision.

221 24. a. Records of the Commercial Space Flight Authority relating to rate structures or charges for
222 the use of projects of, the sale of products of, or services rendered by the Authority if public
223 disclosure would adversely affect the financial interest or bargaining position of the Authority or
224 a private entity providing records to the Authority; or

225 b. Records provided by a private entity to the Commercial Space Flight Authority, to the extent
226 that such records contain (i) trade secrets of the private entity as defined in the Uniform Trade
227 Secrets Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance
228 sheets and financial statements, that are not generally available to the public through regulatory
229 disclosure or otherwise; or (iii) other information submitted by the private entity, where, if the
230 records were made public, the financial interest or bargaining position of the Authority or private
231 entity would be adversely affected.

232 In order for the records specified in clauses (i), (ii), and (iii) of subdivision 24 b to be excluded
233 from the provisions of this chapter, the private entity shall make a written request to the
234 Authority:

235 1. Invoking such exclusion upon submission of the data or other materials for which protection
236 from disclosure is sought;

237 2. Identifying with specificity the data or other materials for which protection is sought; and

238 3. Stating the reasons why protection is necessary.

239 The Authority shall determine whether the requested exclusion from disclosure is necessary to
240 protect the trade secrets or financial records of the private entity. To protect other records
241 submitted by the private entity from disclosure, the Authority shall determine whether public
242 disclosure would adversely affect the financial interest or bargaining position of the Authority or
243 private entity. The Authority shall make a written determination of the nature and scope of the
244 protection to be afforded by it under this subdivision.

245 25. Documents and other information of a proprietary nature furnished by an agricultural
246 landowner or operator to the Department of Conservation and Recreation, the Department of
247 Environmental Quality, the Department of Agriculture and Consumer Services or any political
248 subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and
249 10.1-104.9, other than when required as part of a state or federal regulatory enforcement action.

250 26. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided to
251 the Department of Environmental Quality pursuant to the provisions of § 10.1-1458. In order for
252 such trade secrets to be excluded from the provisions of this chapter, the submitting party shall
253 (i) invoke this exclusion upon submission of the data or materials for which protection from
254 disclosure is sought, (ii) identify the data or materials for which protection is sought, and (iii)
255 state the reasons why protection is necessary.

256 27. Documents and other information of a proprietary nature furnished by a licensed public-use
257 airport to the Department of Aviation for funding from programs administered by the
258 Department of Aviation or the Virginia Aviation Board, where if the records were made public,
259 the financial interest of the public-use airport would be adversely affected.

260 In order for the records specified in this subdivision to be excluded from the provisions of this
261 chapter, the public-use airport shall make a written request to the Department of Aviation:

- 262 1. Invoking such exclusion upon submission of the data or other materials for which protection
263 from disclosure is sought;
- 264 2. Identifying with specificity the data or other materials for which protection is sought; and
- 265 3. Stating the reasons why protection is necessary
- 266

APPENDIX L

2016 PERSONNEL RECORDS WORKGROUP MATERIAL

CONTENTS:

1. July 14, 2016 Meeting Agenda;
2. Proposed Draft of Personnel Records Exemption;
3. August 4, 2016 Meeting Agenda;
4. September 7, 2016 Meeting Agenda;
5. DHRM Draft Suggestions; and
6. VPA Draft Suggestions.

1. July 14, 2016 Meeting Agenda

July 14, 2016

**Personnel Records Workgroup
of the
Records Subcommittee of the
Virginia Freedom of Information Advisory Council**

1. Call to order; introduction of attendees; sign-in sheet.
2. Charge to the workgroup as per the Records Subcommittee and the FOIA Council.
Explore possibility of a workable definition of "personnel record"
3. Attendant issues--application to:
 - Current public employees;
 - Applicants for public employment;
 - Former public employees and retirees;
 - Elected public officials;
 - Appointed public officials; and
 - Volunteers.
4. Review of suggested language by various interested parties.
5. Public Comment.
6. Discussion.
7. Recommendations.
8. Adjournment.

Council Staff
Maria J.K. Everett
Alan Gernhardt

#

2. Proposed Draft of Personnel Records Exemption

A BILL to amend and reenact §§ 2.2-3705.1 and 2.2-3705.3 of the Code of Virginia, relating to the Virginia Freedom of Information Act; definition of personnel record; administrative investigations related to personnel matters.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3705.1 and 2.2-3705.3 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Personnel information concerning identifiable individuals, ~~except that access shall not be denied to the person who is the subject thereof~~ other than individuals involved in administrative investigations excluded in accordance with § 2.2-3705.3, that (i) is used or has been used to determine that individual's qualification for employment, promotion, assignment, or additional compensation, except as otherwise provided in this subdivision; (ii) otherwise documents the employment relationship, including records related to attendance; payroll; medical, tax, or employee benefits; evaluations; retirement; grievance, termination, or other disciplinary action; or (iii) is personal information as defined in § 2.2-3801.

Access to such personnel information shall not be denied to the person who is the subject thereof. Any person who is the subject of such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such information shall be disclosed.

Nothing in this subdivision shall be construed to authorize the withholding of ~~any~~:

a. Any contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes excluded under subdivision 1;

b. Records of the name, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body. The provisions of this subdivision b, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less;

c. Certificates of training or other evidence of training required as a condition of employment or continued employment;

d. Any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107; or

e. Records of the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees.

2. Written advice of legal counsel to state, regional, or local public bodies or the officers or employees of such public bodies, and any other information protected by the attorney-client privilege.....

[NOTE: Remainder of section is not set out because there were no further amendments.]

§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active administrative investigation. Information contained in reports of completed investigations shall be disclosed in a form that does not reveal the identity of the

complainants or persons supplying information. The information disclosed shall include the agency involved, the nature of the complaint, the actions taken to resolve the complaint, and the identity of the person who is the subject of the complaint. If, however, an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person.

2. (Effective until July 1, 2018) Information relating to investigations of applicants for licenses and permits, and of all licensees and permittees, made by or submitted to the Alcoholic Beverage Control Board, the Virginia Lottery, the Virginia Racing Commission, the Department of Agriculture and Consumer Services relating to investigations and applications pursuant to Article 1.1:1 (§ 18.2-340.15 et seq.) of Chapter 8 of Title 18.2, or the Private Security Services Unit of the Department of Criminal Justice Services.

~~4-2.~~ (Effective July 1, 2018) Information relating to investigations of applicants for licenses and permits, and of all licensees and permittees, made by or submitted to the Virginia Alcoholic Beverage Control Authority, the Virginia Lottery, the Virginia Racing Commission, the Department of Agriculture and Consumer Services relating to investigations and applications pursuant to Article 1.1:1 (§ 18.2-340.15 et seq.) of Chapter 8 of Title 18.2, or the Private Security Services Unit of the Department of Criminal Justice Services.

~~2-3.~~ Records of active investigations being conducted by the Department of Health Professions or by any health regulatory board in the Commonwealth pursuant to § 54.1-108.

~~3. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management, to such personnel of any local public body, including local school boards, as are responsible for conducting such investigations in confidence, or to any public institution of higher education. Information contained in inactive reports shall be disclosed in a form that does not reveal the identity of charging parties, persons supplying the information, or other individuals involved in the investigation.~~

4. Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1.

5. Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3900 et seq.) or under any local ordinance adopted in accordance with the authority specified in § 2.2-524, or adopted pursuant to § 15.2-965, or adopted prior to July 1, 1987, in accordance with applicable law, relating to local human rights or human relations commissions. Information contained in inactive reports shall be disclosed in a form that does not reveal the identity of the parties involved or other persons supplying information.

6. Information relating to studies and investigations by the Virginia Lottery of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ 58.1-4014 through 58.1-4018, (iv) defects in the law or regulations that cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) the use of the lottery as a subterfuge for organized crime and illegal gambling where such information has not been publicly released, published or copyrighted. All studies and investigations referred to under clauses (iii), (iv), and (v) shall be open to inspection and copying upon completion of the study or investigation.

7. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for (i) the Auditor of Public Accounts; (ii) the Joint Legislative Audit and Review Commission; (iii) an appropriate authority as defined in § 2.2-3010 with respect to an allegation of wrongdoing or abuse under the Fraud and Abuse Whistle Blower Protection Act (§ 2.2-3009 et seq.); (iv) the Office of the State Inspector General with respect to an investigation initiated through the Fraud, Waste and Abuse Hotline or an investigation initiated pursuant to Chapter 3.2 (§ 2.2-307 et seq.); (v) internal auditors appointed by the head of a state agency or by any public institution of higher education; (vi) the committee or the auditor with respect to an investigation or audit conducted pursuant to § 15.2-825; or (vii) the auditors, appointed by the local governing

body of any county, city, or town or a school board, who by charter, ordinance, or statute have responsibility for conducting an investigation of any officer, department, or program of such body. Information contained in completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is excluded by this subdivision, the information disclosed shall include the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person. Local governing bodies shall adopt guidelines to govern the disclosure required by this subdivision.

8. Information furnished in confidence to the Department of Human Resource Management with respect to an investigation, consultation, or mediation under § 2.2-1202.1, and memoranda, correspondence and other records resulting from any such investigation, consultation or mediation. Information contained in inactive reports shall be disclosed in a form that does not reveal the identity of the parties involved or other persons supplying information.

9. The names, addresses and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints or complaints relating to the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.) made to a local governing body.

10. Records of active investigations being conducted by the Department of Criminal Justice Services pursuant to Article 4 (§ 9.1-138 et seq.), Article 4.1 (§ 9.1-150.1 et seq.), Article 11 (§ 9.1-185 et seq.), and Article 12 (§ 9.1-186 et seq.) of Chapter 1 of Title 9.1.

11. Information furnished to or prepared by the Board of Education pursuant to subsection D of § 22.1-253.13:3 in connection with the review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees responsible for the distribution or administration of the tests. However, this section shall not prohibit the disclosure of such information to (i) a local school board or division

superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee or (ii) any requester, after the conclusion of a review or investigation, in a form that (a) does not reveal the identity of any person making a complaint or supplying information to the Board on a confidential basis and (b) does not compromise the security of any test mandated by the Board.

12. Information contained in ~~(i) an application for licensure or renewal of a license for teachers and other school personnel, including transcripts or other documents submitted in support of an application, and (ii) an active investigation conducted by or for the Board of Education related to the denial, suspension, cancellation, revocation, or reinstatement of teacher and other school personnel licenses including investigator notes and other correspondence and information, furnished in confidence with respect to such investigation.~~ However, this subdivision shall not prohibit the disclosure of such ~~(a) application information to the applicant at his own expense or (b) investigation information to a local school board or division superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee.~~ Information contained in completed investigations shall be disclosed in a form that does not reveal the identity of any complainant or person supplying information to investigators. The completed investigation information disclosed shall include information regarding the school or facility involved, the identity of the person who was the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation fails to support a complaint or does not lead to corrective action, the identity of the person who was the subject of the complaint may be released only with the consent of the subject person. No personally identifiable information regarding a current or former student shall be released except as permitted by state or federal law.

13. Information provided in confidence and related to an investigation by the Attorney General under Article 1 (§ 3.2-4200 et seq.) or Article 3 (§ 3.2-4204 et seq.) of Chapter 42 of Title 3.2, Article 10 (§ 18.2-246.6 et seq.) of Chapter 6 or Chapter 13 (§ 18.2-512 et seq.) of Title 18.2, or Article 1 (§ 58.1-1000) of Chapter 10 of Title 58.1. However, information related to an

investigation that has been inactive for more than six months shall, upon request, be disclosed provided such disclosure is not otherwise prohibited by law and does not reveal the identity of charging parties, complainants, persons supplying information, witnesses, or other individuals involved in the investigation.

2. That the provisions of this act are declaratory of existing law.

#

3. August 4, 2016 Meeting Agenda

**Personnel Records Workgroup
of the
Records Subcommittee of the
Virginia Freedom of Information Advisory Council**

1. Call to order; introduction of attendees; sign-in sheet.
2. Charge to the workgroup as per the Records Subcommittee and the FOIA Council.
Explore possibility of a workable definition of "personnel record"
3. Attendant issues--application to:
 - Current public employees;
 - Applicants for public employment;
 - Former public employees and retirees;
 - Elected public officials;
 - Appointed public officials; and
 - Volunteers.
4. Review of proposed draft.
5. Public Comment.
6. Discussion.
7. Recommendations.
8. Adjournment.

Council Staff
Maria J.K. Everett
Alan Gernhardt

#

4. September 7, 2016 Meeting Agenda

**Personnel Records Workgroup
of the
Records Subcommittee of the
Virginia Freedom of Information Advisory Council**

1. Call to order; introduction of attendees; sign-in sheet.
2. Charge to the workgroup as per the Records Subcommittee and the FOIA Council.
Explore possibility of a workable definition of "personnel record"
3. Attendant issues--application to:
 - Current public employees;
 - Applicants for public employment;
 - Former public employees and retirees;
 - Elected public officials;
 - Appointed public officials; and
 - Volunteers.
4. Review of work to date. *As a reminder, at the last meeting of the workgroup some of the interested parties indicated they would get together and try to work out some language based on the discussions to date.*
5. Public Comment.
6. Discussion.
7. Recommendations.
8. Adjournment.

Council Staff
Maria J.K. Everett
Alan Gernhardt
#

5. DHRM Draft Suggestions

§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Personnel information concerning identifiable individuals, ~~except that access shall not be denied to the person who is the subject thereof.~~ that (i) is used or has been used to determine that individual's qualification for employment, promotion, assignment, or additional compensation except as otherwise provided in this subdivision; (ii) otherwise documents the employment relationship, including records related to attendance, payroll, medical, tax, employee benefits, evaluations, retirement, grievance, termination, or other disciplinary action; or (iii) is personal information as defined in 2.2-3801.

Access to such personnel information shall not be denied to the person who is the subject thereof. Any person who is the subject of such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such information shall be disclosed.

Nothing in this subdivision shall be construed to authorize the withholding of:

- a. Any contracts between a public body and its officers or employees, other than contracts settling public employee employment dispute excluded under subdivision 1.
- b. Records of the name, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body. The provisions of this subdivision b, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less;
- c. Certificates of training or other evidence of training required as a condition of employment or continued employment;
- d. Any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107;
- e. Records of the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees
- f. The final report of an administrative investigation where disclosure is required in accordance with § 2.2-3705.3.

§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Investigator notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for an administrative investigation concerning conduct by an employee in the course of employment related to a member of the public. Information contained in the final reports of completed investigations shall be disclosed unless the disclosure would constitute an unwarranted invasion of personal privacy balanced against the public interest in disclosure. The disclosure of a final report must be in a form that does not reveal the identity of the complainants or persons supplying information. The information disclosed shall include the agency involved, the nature of the complaint, the actions taken to resolve the complaint, and the identity of the person who is the subject of the complaint. If, however, any investigation does not lead to corrective action or if the corrective action is rescinded, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person.

#

6. VPA Draft Suggestions

§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies.--

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Personnel information concerning identifiable individuals that the public body receives or generates for the purpose of (i) determining whether to employ a particular individual; (ii) determining or effectuating a change in the individual's employment status, position, salary, rate of pay or benefits; or (iii) enabling the individual employee to apply for or register with the payroll system, insurance plan, retirement plan or other benefits plan.

Access to such personnel information shall not be denied to the person who is the subject thereof. Any person who is the subject of such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such information shall be disclosed.

Nothing in this subdivision shall be construed to authorize the withholding of:

a. Any contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes, except that the amount of any monetary payment or the value of any benefit required to be conferred under any such contract shall not be withheld;

b. The name, position, job classification, salary or rate of pay, or the allowances or reimbursements for expenses paid or payable to any officer, official, or employee of a public body in connection with his or her service to the public body. The provisions of this

subdivision b, however, shall not require public access to salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less;

c. Certificates of training or other evidence of training required as a condition of employment or continued employment;

d. Any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107; ~~or~~

e. Records of the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees; or

f. Records relating to administrative investigations that are required to be released pursuant to the provisions of § 2.2-3705.3. or by other statute.

#

APPENDIX M

**Council-recommended Legislation as introduced in the 2017
Session of the General Assembly, annotated with LD tracking and
DRAFTING NOTES**
*(for HB 1539 and HB 1540 as enacted, please see 2017 Acts of Assembly,
chapters 778 and 616, respectively, which are not included in this
appendix.)*

HB 1539

SUMMARY TEXT:

Virginia Freedom of Information Act (FOIA); public access to records of public bodies. Clarifies the definition of public record. The bill also (i) defines "personal contact information" that is excluded from FOIA's mandatory disclosure provisions in certain cases; (ii) clarifies that a requester has the right to inspect records or receive copies at his option; (iii) clarifies language in certain record exclusions under FOIA that certain records may be disclosed at the discretion of the custodian; (iv) consolidates the personnel record exclusion with the limitation on the application of that exclusion, and specifically clarifies that the name, in addition to position, job classification, and salary, of a public employee is public information as per opinions of the Attorney General and the FOIA Council; (v) eliminates, effective July 1, 2018, the exclusion for the Alcoholic Beverage Control Authority relating to operating and marketing strategies; (vi) eliminates the exclusion for correspondence of local officials as unnecessary; (vii) consolidates various public safety exclusions relating to building plans and drawings and critical infrastructure into a single exclusion; (viii) eliminates the exclusion for administrative investigations of the Department of Human Resource Management, as the exclusion is already covered under the personnel records exclusion; (ix) expands the exclusion for personal information provided to the Virginia College Savings Plan to cover qualified beneficiaries, designated survivors, and authorized individuals, which terms are defined in the bill; (x) consolidates the various record exclusions for the Department of Health Professions and the Department of Health into single exclusions for each Department; (xi) clarifies certain Department of Social Services exclusions; (xii) provides an exclusion for local finance boards that provide postemployment benefits other than pensions; and (xiii) eliminates the record exclusion for Virginia Wildlife Magazine. The bill also eliminates the correspondence exclusion for certain state and local officials. The bill contains numerous technical amendments. This bill is a recommendation of the Freedom of Information Advisory Council pursuant to the HJR 96 FOIA study (2014-2016).

HB 1539
DRAFT TEXT:

A BILL to amend and reenact §§ 2.2-3701, 2.2-3704, 2.2-3704.1, 2.2-3704.2, 2.2-3705.1 through 2.2-3705.8, 2.2-3711, 2.2-3714, 2.2-3806, 22.1-253.13:3, 22.1-279.8, 23.1-2425, 32.1-48.08, 32.1-48.011, 32.1-48.015, 32.1-283.1, 32.1-283.2, 32.1-283.3, 32.1-283.5, 32.1-283.6, 44-146.18, 44-146.22, 54.1-2517, and 54.1-2523 of the Code of Virginia, relating to the Virginia Freedom of Information Act; public access to records of public bodies.

Annotated--This document is the consolidation of the FOIA Council's legislative recommendations made during the course of the HJR 96 Study (2014--2016) and introduced in the 2017 Session of the General Assembly as HB 1539.

How to use this document: Each recommended change in this document is annotated to provide the following information: (i) a "DRAFTING NOTE" that explains the amendment(s) to each amended section of FOIA, including whether the amendment was technical or substantive, (ii) the legislative draft (LD) identification number of the recommended change before incorporation into HB 1539, the omnibus bill recommended by the FOIA Council and enacted by the 2017 Session of the General Assembly (2017 Acts of Assembly, Chapter 778), (iii) the date recommendation was adopted by the Records Subcommittee, and (iv) the date the recommendation was approved by the FOIA Council. Please note that any amendments to Code of Virginia sections outside of FOIA do not include any DRAFTING NOTE as these amendments are all technical, cross reference fixes.

Be it enacted by the General Assembly of Virginia:

- 1. That §§ 2.2-3701 ,2.2-3704, 2.2-3704.1, 2.2-3704.2, 2.2-3705.1 through 2.2-3705.8, 2.2-3711, 2.2-3714, 2.2-3806, 22.1-253.13:3, 22.1-279.8, 23.1-2425, 32.1-48.08, 32.1-**

48.011, 32.1-48.015, 32.1-283.1, 32.1-283.2, 32.1-283.3, 32.1-283.5, 32.1-283.6, 44-146.18, 44-146.22, 54.1-2517, and 54.1-2523 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3701. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Closed meeting" means a meeting from which the public is excluded.

"Electronic communication" means any audio or combined audio and visual communication method.

"Emergency" means an unforeseen circumstance rendering the notice required by this chapter impossible or impracticable and which circumstance requires immediate action.

"Information" as used in the exclusions established by §§ 2.2-3705.1 through 2.2-3705.7, means the content within a public record that references a specifically identified subject matter, and shall not be interpreted to require the production of information that is not embodied in a public record.

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or 2.2-3708.1, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business

may be a topic of discussion or debate at such public meeting, shall be deemed a "meeting" subject to the provisions of this chapter.

"Open meeting" or "public meeting" means a meeting at which the public may be present.

"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers and private police departments as defined in § 9.1-101 shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. ~~Records that are not~~

prepared for or used in the transaction of public business are not public records. [LD 17100698; recommended by Records Subcommittee on 9/8/16; Approved by FOIA Council 10/17/16.]

"Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, whose members are appointed by the participating local governing bodies, and such unit includes two or more counties or cities.

"Scholastic records" means those records containing information directly related to a student or an applicant for admission and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution.

DRAFTING NOTE: Clarifying amendment. The words that appear stricken in the definition of "public record" were deleted because it was a source of confusion and the Council felt that it did not add to the substantive understanding of the definition of "public record."

§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc. [LD 17100765; recommended by Records Subcommittee on 9/29/16; Approved by FOIA Council 11/21/16.]

A. Except as otherwise specifically provided by law, all public records shall be open to ~~inspection and copying by any citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth~~ during the regular office hours of the custodian of such records. Access to such records shall ~~not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth~~ be provided by the custodian in accordance with this chapter by inspection or by providing copies of the requested records, at the option of the requester. The custodian may require the requester to provide his name and legal

address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

B. A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of this chapter or to impose the time limits for response by a public body. Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

1. The requested records are being entirely withheld. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

2. The requested records are being provided in part and are being withheld in part. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.

C. Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the

time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

D. Subject to the provisions of subsection G, no public body shall be required to create a new record if the record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.

E. Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter.

F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

G. Public records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases are combined or contain exempt and

nonexempt records, the public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation, or compilation of a new public record.

H. In any case where a public body determines in advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to agree to payment of a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

J. In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian

of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester. Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia shall be the custodian of such permanently archived records and shall be responsible for responding to requests for such records made pursuant to this chapter.

DRAFTING NOTE: Technical amendments.

§ 2.2-3704.1. Posting of notice of rights and responsibilities by state and local public bodies; assistance by the Freedom of Information Advisory Council. [Staff recommendation considered and approved by FOIA Council 11/21/16.]

A. All state public bodies subject to the provisions of this chapter ~~and~~, any county or city, and any town with a population of more than 250, and any school board, shall make available the following information to the public upon request and shall post a link to such information on the homepage of their respective official public government websites:

1. A plain English explanation of the rights of a requester under this chapter, the procedures to obtain public records from the public body, and the responsibilities of the public body in complying with this chapter. For purposes of this section, "plain English" means written in nontechnical, readily understandable language using words of common everyday usage and avoiding legal terms and phrases or other terms and words of art whose usage or special meaning primarily is limited to a particular field or profession;

2. Contact information for the FOIA officer designated by the public body pursuant to § 2.2-3704.2 to (i) assist a requester in making a request for records or (ii) respond to requests for public records;

3. A general description, summary, list, or index of the types of public records maintained by such ~~state~~ public body;

4. A general description, summary, list, or index of any exemptions in law that permit or require such public records to be withheld from release;

5. Any policy the public body has concerning the type of public records it routinely withholds from release as permitted by this chapter or other law; and

6. The following statement: "A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen as set forth in subsection F of § 2.2-3704 of the Code of Virginia."

B. The Freedom of Information Advisory Council, created pursuant to § 30-178, shall assist in the development and implementation of the provisions of subsection A, upon request.

***DRAFTING NOTE:** The addition of the requirement for school boards to post a FOIA Rights and Responsibilities statement is a substantive change. As a separate political subdivision, school boards were inadvertently omitted from this requirement. The remainder of amendments to this section are technical.*

§ 2.2-3704.2. Public bodies to designate FOIA officer.

A. All state public bodies, including state authorities, that are subject to the provisions of this chapter and all local public bodies that are subject to the provisions of this

chapter, shall designate and publicly identify one or more Freedom of Information Act officers (FOIA officer) whose responsibility is to serve as a point of contact for members of the public in requesting public records and to coordinate the public body's compliance with the provisions of this chapter.

B. For such state public bodies, the name and contact information of the public body's FOIA officer to whom members of the public may direct requests for public records and who will oversee the public body's compliance with the provisions of this chapter shall be made available to the public upon request and be posted on the respective public body's official public government website at the time of designation and maintained thereafter on such website for the duration of the designation.

C. For such local public bodies, the name and contact information of the public body's FOIA officer to whom members of the public may direct requests for public records and who will oversee the public body's compliance with the provisions of this chapter shall be made available in a way reasonably calculated to provide notice to the public, including posting at the public body's place of business, posting on its official public government website, or including such information in its publications.

D. For the purposes of this section, local public bodies shall include constitutional officers.

E. Any such FOIA officer shall possess specific knowledge of the provisions of this chapter and be trained at least annually by legal counsel for the public body or the Virginia Freedom of Information Advisory Council.

DRAFTING NOTE: Technical amendments.

§ 2.2-3705.1. Exclusions to application of chapter; exclusions of general application to public bodies. [LD 17100766--re: global language change ("Nothing to prevent disclosure..."), recommended by Records Subcommittee on 9/29/16; Approved by FOIA Council 11/21/16.]

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Personnel information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of such information and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such information shall be disclosed. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107.

No provision of this chapter or any provision of Chapter 38 (§ 2.2-3800 et seq.) shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1; (ii) records of the name, position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subdivision, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less. [LD 15100326; recommended by Records Subcommittee on 8/25/15; Approved by FOIA Council 11/21/16.]

2. Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other information protected by the attorney-client privilege.

3. Legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting under § 2.2-3711.

4. Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by a public body.

As used in this subdivision, "test or examination" shall include (a) any scoring key for any such test or examination and (b) any other document that would jeopardize the security of the test or examination. Nothing contained in this subdivision shall prohibit the release of test scores or results as provided by law, or limit access to individual records as provided by law. However, the subject of such employment tests shall be entitled to review and inspect all records relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

5. Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711. However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting.

6. Vendor proprietary information software that may be in the public records of a public body. For the purpose of this subdivision, "vendor proprietary information software"

means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

7. Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth.

8. Appraisals and cost estimates of real property subject to a proposed purchase, sale, or lease, prior to the completion of such purchase, sale, or lease.

9. Information concerning reserves established in specific claims administered by the Department of the Treasury through its Division of Risk Management as provided in Article 5 (§ 2.2-1832 et seq.) of Chapter 18, or by any county, city, or town; and investigative notes, correspondence and information furnished in confidence with respect to an investigation of a claim or a potential claim against a public body's insurance policy or self-insurance plan. However, nothing in this subdivision shall ~~authorize the withholding~~ prevent the disclosure of information taken from inactive reports upon expiration of the period of limitations for the filing of a civil suit.

10. Personal contact information, ~~as defined in § 2.2-3801~~, including electronic mail addresses, furnished to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information. However, access shall not be denied to the person who is the subject of the record. As used in this subdivision, "personal contact information" means the information provided to the public body for the purpose of receiving electronic mail from the public body and includes home or business (i) address, (ii) email address, or (iii) telephone number or comparable number assigned to any other electronic communication device. [LD 15100327; recommended by Records Subcommittee on 11/5/14; Approved by FOIA Council 6/23/16.]

11. Communications and materials required to be kept confidential pursuant to § 2.2-4119 of the Virginia Administrative Dispute Resolution Act (§ 2.2-4115 et seq.).

12. Information relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such information would adversely affect the bargaining position or negotiating strategy of the public body. Such information shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of information relating to such transactions shall be governed by the Virginia Public Procurement Act.

13. Account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. However, access shall not be denied to the person who is the subject of the information. For the purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, savings and loan companies or associations, and credit unions.

***DRAFTING NOTE:** The amendment to subdivision 1 is technical and is derived from § 2.2-3705.8 A, with an additional clarifying amendment that the name of any public officer, official, or employee is subject to mandatory disclosure as previously opined by the Attorney General and the FOIA Council. The amendments to subdivision 9 are substantive and revert the language of this exclusion to the language as it existed prior to 2016 in an effort to eliminate potential unforeseen consequences; such reversion was referred to as the "global language change." The amendments to subdivision 10 are substantive in that they create a more precise definition of "personal contact information" and eliminate the overly-broad existing definition in subdivision 10 of "personal information as defined in § 2.2-3801."*

§ 2.2-3705.2. Exclusions to application of chapter; records relating to public safety. [LD 17100766--re: global language change ("Nothing to prevent disclosure..."), recommended by Records Subcommittee on 9/29/16; Approved by FOIA Council

11/21/16 and LD 16100995 (Public safety consolidation); recommended by Records Subcommittee on 10/7/15; Approved by FOIA Council 6/23/16.]

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Confidential information, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses.

~~2. Information contained in engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit if disclosure of such information would identify specific trade secrets or other information that would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.~~

~~Information contained in engineering and construction drawings and plans that reveal critical structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems submitted for the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.) if disclosure of such information would jeopardize the safety or security of any public or private commercial office, multifamily residential, or retail building or its occupants in the event of terrorism or other threat to public safety. In order for the information to be excluded from mandatory disclosure, the owner or lessee of such property, equipment, or system in writing~~

~~shall (i) invoke the protections of this paragraph; (ii) identify the drawings, plans, or other materials to be protected; and (iii) state the reasons why protection is necessary.~~

~~Nothing in this subdivision shall authorize the withholding of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster, or other catastrophic event.~~

~~3. Information that describes the design, function, operation, or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.~~

~~4. Information concerning the prevention or response to terrorist activity or cyber attacks, including (i) critical infrastructure information; (ii) vulnerability assessments, operational, procedural, transportation, and tactical planning or training manuals, and staff meeting minutes; (iii) engineering or architectural plans or drawings, or information derived from such plans or drawings; and (iv) information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities or security plans and measures of an entity, facility, building, structure, information technology system, or software program if disclosure of such information would (a) reveal the location or operation of security equipment and systems, elevators, ventilation, fire protection, emergency, electrical, telecommunications or utility equipment and systems of any public building, structure or information storage facility, or telecommunications or utility equipment or systems or (b) jeopardize the safety of any person.~~

~~The same categories of information concerning any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection may be withheld from disclosure if such person or entity in writing (1) invokes the protections of this subdivision, (2) identifies with specificity the information for which protection is sought, and (3) states with reasonable particularity why the protection of such information from public disclosure is necessary to meet the objective of antiterrorism,~~

~~cybersecurity planning or protection, or critical infrastructure information security and resilience. Such statement shall be a public record and shall be disclosed upon request.~~

~~Any public body receiving a request for records excluded under this subdivision shall notify the Secretary of Public Safety and Homeland Security or his designee of such request and the response made by the public body in accordance with § 2.2-3704.~~

~~Nothing in this subdivision shall be construed to authorize the withholding of information relating to the structural or environmental soundness of any building, nor shall it authorize the withholding of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster, or other catastrophic event.~~

~~As used in this subdivision, "critical infrastructure information" means the same as that term is defined in 6 U.S.C. § 131.~~

~~5-3. Information that would disclose the security aspects of a system safety program plan adopted pursuant to 49 C.F.R. Part 659 by the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency; and information in the possession of such agency, the release of which would jeopardize the success of an ongoing investigation of a rail accident or other incident threatening railway safety.~~

~~6. Information contained in engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes if disclosure of such information would (i) reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols or (ii) jeopardize the security of any governmental facility, building, or structure or the safety of persons using such facility, building, or structure.~~

~~7-4. Information concerning security plans and specific assessment components of school safety audits, as provided in § 22.1-279.8.~~

~~Nothing in this subdivision shall be construed to authorize the withholding prevent the disclosure of information relating to the effectiveness of security plans after (i) any~~

school building or property has been subjected to fire, explosion, natural disaster, or other catastrophic event or (ii) any person on school property has suffered or been threatened with any personal injury.

~~8-5.~~ Information concerning the mental health assessment of an individual subject to commitment as a sexually violent predator under Chapter 9 (§ 37.2-900 et seq.) of Title 37.2 held by the Commitment Review Committee; except that in no case shall information identifying the victims of a sexually violent predator be disclosed.

~~9-6.~~ Subscriber data provided directly or indirectly by a ~~telecommunications carrier~~ communications services provider to a public body that operates a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system if the data is in a form not made available by the ~~telecommunications carrier~~ communications services provider to the public generally. Nothing in this subdivision shall ~~authorize the withholding~~ prevent the disclosure of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

For the purposes of this subdivision, "~~subscriber~~:"

"Communications services provider" means the same as that term is defined in § 58.1-647.

"Subscriber data" means the name, address, telephone number, and any other information identifying a subscriber of a ~~telecommunications carrier~~ communications services provider.

~~10-7.~~ Subscriber data collected by a local governing body in accordance with the Enhanced Public Safety Telephone Services Act (§ 56-484.12 et seq.) and other identifying information of a personal, medical, or financial nature provided to a local governing body in connection with a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system if such records are not otherwise publicly available.

Nothing in this subdivision shall ~~authorize the withholding~~ prevent the disclosure of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

For the purposes of this subdivision, ~~"subscriber:~~

"Communications services provider" means the same as that term is defined in § 58.1-647.

"Subscriber data" means the name, address, telephone number, and any other information identifying a subscriber of a ~~telecommunications carrier~~ communications services provider.

~~11.~~ 8. Information held by the Virginia Military Advisory Council or any commission created by executive order for the purpose of studying and making recommendations regarding preventing closure or realignment of federal military and national security installations and facilities located in Virginia and relocation of such facilities to Virginia, or a local or regional military affairs organization appointed by a local governing body, that would (i) reveal strategies under consideration or development by the Council or such commission or organizations to prevent the closure or realignment of federal military installations located in Virginia or the relocation of national security facilities located in Virginia, to limit the adverse economic effect of such realignment, closure, or relocation, or to seek additional tenant activity growth from the Department of Defense or federal government or (ii) disclose trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided to the Council or such commission or organizations in connection with their work.

In order to invoke the trade secret protection provided by clause (ii), the submitting entity shall, in writing and at the time of submission (a) invoke this exclusion, (b) identify with specificity the information for which such protection is sought, and (c) state the reason

why such protection is necessary. Nothing in this subdivision shall be construed to ~~authorize the withholding~~ prevent the disclosure of all or part of any record, other than a trade secret that has been specifically identified as required by this subdivision, after the Department of Defense or federal agency has issued a final, unappealable decision, or in the event of litigation, a court of competent jurisdiction has entered a final, unappealable order concerning the closure, realignment, or expansion of the military installation or tenant activities, or the relocation of the national security facility, for which records are sought.

~~12-9.~~ 12-9. Information, as determined by the State Comptroller, that describes the design, function, operation, or implementation of internal controls over the Commonwealth's financial processes and systems, and the assessment of risks and vulnerabilities of those controls, including the annual assessment of internal controls mandated by the State Comptroller, if disclosure of such information would jeopardize the security of the Commonwealth's financial assets. However, records relating to the investigation of and findings concerning the soundness of any fiscal process shall be disclosed in a form that does not compromise internal controls. Nothing in this subdivision shall be construed to prohibit the Auditor of Public Accounts or the Joint Legislative Audit and Review Commission from reporting internal control deficiencies discovered during the course of an audit.

~~13-10.~~ 13-10. Information relating to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system that (i) describes the design, function, programming, operation, or access control features of the overall system, components, structures, individual networks, and subsystems of the STARS or any other similar local or regional communications system or (ii) relates to radio frequencies assigned to or utilized by STARS or any other similar local or regional communications system, code plugs, circuit routing, addressing schemes, talk groups, fleet maps, encryption, or programming maintained by or utilized by STARS or any other similar local or regional public safety communications system; ~~those engineering and construction drawings and plans that reveal critical structural components, interconnectivity, security equipment and~~

~~systems, network monitoring, network operation center, master sites, ventilation systems, fire protection equipment, mandatory building emergency equipment, electrical systems, and other utility equipment and systems related to STARS or any other similar local or regional public safety communications system; and special event plans, operational plans, storm plans, or other pre-arranged programming, if disclosure of such information would (a) reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols or (b) jeopardize the security of any governmental facility, building, or structure or the safety of any person.~~

~~14-11.~~ Information concerning a salaried or volunteer Fire/EMS company or Fire/EMS department if disclosure of such information would reveal the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties.

~~15-12.~~ Information concerning the disaster recovery plans or the evacuation plans in the event of fire, explosion, natural disaster, or other catastrophic event for hospitals and nursing homes regulated by the Board of Health pursuant to Chapter 5 (§ 32.1-123 et seq.) of Title 32.1 provided to the Department of Health. Nothing in this subdivision shall be construed to authorize the withholding prevent the disclosure of information relating to the effectiveness of executed evacuation plans after the occurrence of fire, explosion, natural disaster, or other catastrophic event.

~~16-13.~~ Records received by the Department of Criminal Justice Services pursuant to §§ 9.1-184, 22.1-79.4, and 22.1-279.8 or for purposes of evaluating threat assessment teams established by a public institution of higher education pursuant to § 23.1-805 or by a private nonprofit institution of higher education, to the extent such records reveal security plans, walk-through checklists, or vulnerability and threat assessment components.

14. Information contained in (i) engineering, architectural, or construction drawings; (ii) operational, procedural, tactical planning, or training manuals; (iii) staff meeting minutes; or (iv) other records that reveal any of the following, the disclosure of which would

jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure; or public or private commercial office, multifamily residential, or retail building or its occupants:

a. Critical structural information or the location or operation of security equipment and systems of any public building, structure, or information storage facility, including ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, or utility equipment and systems;

b. Vulnerability assessments, information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities, or security plans and measures of an entity, facility, building structure, information technology system, or software program;

c. Surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational or transportation plans or protocols; or

d. Interconnectivity, network monitoring, network operation centers, master sites, or systems related to the Statewide Agencies Radio System (STARS) or any other similar local or regional public safety communications system.

The same categories of records of any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism, cybersecurity planning or protection, or critical infrastructure information security and resilience. Such statement shall be a public record and shall be disclosed upon request.

Any public body receiving a request for records excluded under clauses (a) and (b) of this subdivision 14 shall notify the Secretary of Public Safety and Homeland Security or his

designee of such request and the response made by the public body in accordance with § 2.2-3704.

Nothing in this subdivision 14 shall prevent the disclosure of records relating to (1) the structural or environmental soundness of any such facility, building, or structure or (2) an inquiry into the performance of such facility, building, or structure after it has been subjected to fire, explosion, natural disaster, or other catastrophic event.

As used in this subdivision, "critical infrastructure information" means the same as that term is defined in 6 U.S.C. § 131.

DRAFTING NOTE: Technical amendments regarding the consolidation of existing public safety exclusions, formerly designated subdivisions 4, 6, and 13) into a single exclusion (new subdivision 14). Formerly designated subdivision 2 was moved to § 2.2-3705.6 as new subdivision 29, as it protects certain proprietary information in construction drawing and building plans. In newly designated subdivisions 4, 7, 8, and 12, the amendments are substantive and revert the language of these exclusions to the language as it existed prior to 2016 in an effort to eliminate potential unforeseen consequences; such reversion was referred to as the "global language change." In newly designated subdivisions 6 and 7, the remainder of the amendments are technical and update terminology for "telecommunications provider" to "communications services provider."

§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations. [LD 17100766--re: global language change ("Nothing to prevent disclosure..."), recommended by Records Subcommittee on 9/29/16; Approved by FOIA Council 11/21/16 and LD 1710048 (DHRM #8 stricken); recommended by Records Subcommittee on 11/18/15; Approved by FOIA Council 6/23/16.]

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. (Effective until July 1, 2018) Information relating to investigations of applicants for licenses and permits, and of all licensees and permittees, made by or submitted to the Alcoholic Beverage Control Board, the Virginia Lottery, the Virginia Racing Commission, the Department of Agriculture and Consumer Services relating to investigations and applications pursuant to Article 1.1:1 (§ 18.2-340.15 et seq.) of Chapter 8 of Title 18.2, or the Private Security Services Unit of the Department of Criminal Justice Services.

1. (Effective July 1, 2018) Information relating to investigations of applicants for licenses and permits, and of all licensees and permittees, made by or submitted to the Virginia Alcoholic Beverage Control Authority, the Virginia Lottery, the Virginia Racing Commission, the Department of Agriculture and Consumer Services relating to investigations and applications pursuant to Article 1.1:1 (§ 18.2-340.15 et seq.) of Chapter 8 of Title 18.2, or the Private Security Services Unit of the Department of Criminal Justice Services.

2. Records of active investigations being conducted by the Department of Health Professions or by any health regulatory board in the Commonwealth pursuant to § 54.1-108.

3. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management, to such personnel of any local public body, including local school boards, as are responsible for conducting such investigations in confidence, or to any public institution of higher education. ~~Information contained in~~ However, nothing in this subdivision shall prevent the disclosure of information taken from inactive reports ~~shall be disclosed~~ in a form that does not reveal the identity of charging parties, persons supplying the information, or other individuals involved in the investigation.

4. Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1.

5. Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3900 et seq.) or under any local ordinance adopted in accordance with the authority specified in § 2.2-524, or adopted pursuant to § 15.2-965, or adopted prior to July 1, 1987, in accordance with applicable law, relating to local human rights or human relations commissions. ~~Information contained in~~ However, nothing in this subdivision shall prevent the distribution of information taken from inactive reports shall be disclosed in a form that does not reveal the identity of the parties involved or other persons supplying information.

6. Information relating to studies and investigations by the Virginia Lottery of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ 58.1-4014 through 58.1-4018, (iv) defects in the law or regulations that cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) the use of the lottery as a subterfuge for organized crime and illegal gambling where such information has not been publicly released, published or copyrighted. All studies and investigations referred to under clauses (iii), (iv), and (v) shall be open to inspection and copying upon completion of the study or investigation.

7. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for (i) the Auditor of Public Accounts; (ii) the Joint Legislative Audit and Review Commission; (iii) an appropriate authority as defined in § 2.2-3010 with respect to an allegation of wrongdoing or abuse under the Fraud and Abuse Whistle Blower Protection Act (§ 2.2-3009 et seq.); (iv) the Office of the State Inspector General with respect to an investigation initiated through the Fraud, Waste and Abuse Hotline or an investigation initiated pursuant to Chapter 3.2 (§ 2.2-307 et seq.); (v) internal auditors appointed by the head of a state agency or by any public institution of higher education; (vi) the committee or the auditor with respect to an investigation or audit conducted pursuant to § 15.2-825; or

(vii) the auditors, appointed by the local governing body of any county, city, or town or a school board, who by charter, ordinance, or statute have responsibility for conducting an investigation of any officer, department, or program of such body. Information contained in completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is excluded by this subdivision, the information disclosed shall include the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person. Local governing bodies shall adopt guidelines to govern the disclosure required by this subdivision.

~~8. Information furnished in confidence to the Department of Human Resource Management with respect to an investigation, consultation, or mediation under § 2.2-1202.1, and memoranda, correspondence and other records resulting from any such investigation, consultation or mediation. Information contained in inactive reports shall be disclosed in a form that does not reveal the identity of the parties involved or other persons supplying information.~~

9. The names, addresses and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints or complaints relating to the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.) made to a local governing body.

~~10.~~ 9. Records of active investigations being conducted by the Department of Criminal Justice Services pursuant to Article 4 (§ 9.1-138 et seq.), Article 4.1 (§ 9.1-150.1 et seq.), Article 11 (§ 9.1-185 et seq.), and Article 12 (§ 9.1-186 et seq.) of Chapter 1 of Title 9.1.

~~11.~~ 10. Information furnished to or prepared by the Board of Education pursuant to subsection D of § 22.1-253.13:3 in connection with the review or investigation of any

alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees responsible for the distribution or administration of the tests. However, this section shall not prohibit the disclosure of such information to (i) a local school board or division superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee or (ii) any requester, after the conclusion of a review or investigation, in a form that (a) does not reveal the identity of any person making a complaint or supplying information to the Board on a confidential basis and (b) does not compromise the security of any test mandated by the Board.

~~12.~~ 11. Information contained in (i) an application for licensure or renewal of a license for teachers and other school personnel, including transcripts or other documents submitted in support of an application, and (ii) an active investigation conducted by or for the Board of Education related to the denial, suspension, cancellation, revocation, or reinstatement of teacher and other school personnel licenses including investigator notes and other correspondence and information, furnished in confidence with respect to such investigation. However, this subdivision shall not prohibit the disclosure of such (a) application information to the applicant at his own expense or (b) investigation information to a local school board or division superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee. Information contained in completed investigations shall be disclosed in a form that does not reveal the identity of any complainant or person supplying information to investigators. The completed investigation information disclosed shall include information regarding the school or facility involved, the identity of the person who was the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation fails to support a complaint or does not lead to corrective action, the identity of the person who was the subject of the complaint may be released only with the consent of

the subject person. No personally identifiable information regarding a current or former student shall be released except as permitted by state or federal law.

~~13.~~12. Information provided in confidence and related to an investigation by the Attorney General under Article 1 (§ 3.2-4200 et seq.) or Article 3 (§ 3.2-4204 et seq.) of Chapter 42 of Title 3.2, Article 10 (§ 18.2-246.6 et seq.) of Chapter 6 or Chapter 13 (§ 18.2-512 et seq.) of Title 18.2, or Article 1 (§ 58.1-1000) of Chapter 10 of Title 58.1. However, information related to an investigation that has been inactive for more than six months shall, upon request, be disclosed provided such disclosure is not otherwise prohibited by law and does not reveal the identity of charging parties, complainants, persons supplying information, witnesses, or other individuals involved in the investigation.

DRAFTING NOTE: The amendments to subdivisions 3 and 5 are substantive and revert the language of these exclusions to the language as it existed prior to 2016 in an effort to eliminate potential unforeseen consequences; such reversion was referred to as the "global language change." Language shown as stricken in former subdivision 8 was deleted as redundant because it would be considered a personnel record excluded from mandatory disclosure under subdivision 1 of § 2.2-3705.1.

§ 2.2-3705.4. Exclusions to application of chapter; educational records and certain records of educational institutions. [LD 17100766--re: global language change ("Nothing to prevent disclosure..."), recommended by Records Subcommittee on 9/29/16; Approved by FOIA Council 11/21/16 and LD 1710033 (VCSP #6); recommended by Records Subcommittee on 9/14/15; Approved by FOIA Council 6/23/16.]

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the

parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, that are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a state-supported institution of higher education, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such records shall be disclosed.

2. Confidential letters and statements of recommendation placed in the records of educational agencies or institutions respecting (i) admission to any educational agency or institution, (ii) an application for employment or promotion, or (iii) receipt of an honor or honorary recognition.

3. Information held by the Brown v. Board of Education Scholarship Awards Committee that would reveal personally identifiable information, including scholarship applications, personal financial information, and confidential correspondence and letters of recommendation.

4. Information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical,

scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such information has not been publicly released, published, copyrighted or patented.

5. Information held by the University of Virginia or the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, that contain proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would be harmful to the competitive position of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be.

6. Personal information, as defined in § 2.2-3801, provided to the Board of the Virginia College Savings Plan or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 7 (§ 23.1-700 et seq.) of Title 23.1, including personal information related to (i) qualified beneficiaries as that term is defined in § 23.1-700, (ii) designated survivors, or (iii) authorized individuals. However, Nothing in this subdivision shall be construed to prevent disclosure or publication of information in a statistical or other form that does not identify individuals or provide personal information shall be disclosed and may be published by the Board. Individuals shall be provided access to their own personal information.

For purposes of this subdivision:

"Authorized individual" means an individual who may be named by the account owner to receive information regarding the account but who does not have any control or authority over the account.

"Designated survivor" means the person who will assume account ownership in the event of the account owner's death.

7. Information maintained in connection with fundraising activities by or for a public institution of higher education that would reveal (i) personal fundraising strategies relating to identifiable donors or prospective donors or (ii) wealth assessments; estate, financial, or tax planning information; health-related information; employment, familial, or marital status information; electronic mail addresses, facsimile or telephone numbers; birth dates or social security numbers of identifiable donors or prospective donors. Nothing in this subdivision, however, shall be construed to ~~authorize the withholding~~ prevent the disclosure of information relating to the amount, date, purpose, and terms of the pledge or donation, or the identity of the donor unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation. The exclusion provided by this subdivision shall not apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the institution for the performance of research services or other work or (ii) the terms and conditions of such grants or contracts.

8. Information held by a threat assessment team established by a local school board pursuant to § 22.1-79.4 or by a public institution of higher education pursuant to § 23.1-805 relating to the assessment or intervention with a specific individual. However, in the event an individual who has been under assessment commits an act, or is prosecuted for the commission of an act that has caused the death of, or caused serious bodily injury, including any felony sexual assault, to another person, such information of the threat assessment team concerning the individual under assessment shall be made available as provided by this chapter, with the exception of any criminal history records obtained pursuant to § 19.2-389 or 19.2-389.1, health records obtained pursuant to § 32.1-127.1:03, or scholastic records as defined in § 22.1-289. The public body providing such information shall remove personally identifying information of any person who provided information to the threat assessment team under a promise of confidentiality.

***DRAFTING NOTE:** Amendments to subdivision 6 are substantive in that they (i) add protection from mandatory disclosure for personal information of "designated survivors" and "authorized individuals," both terms defined therein and (ii) revert the language of this exclusion to the language as it existed prior to 2016 in an effort to eliminate potential unforeseen consequences; such reversion was referred to as the "global language change."*

§ 2.2-3705.5. Exclusions to application of chapter; health and social services records. [LD 17100766--re: global language change ("Nothing to prevent disclosure..."), recommended by Records Subcommittee on 9/29/16; Approved by FOIA Council 11/21/16; and LD 1710067 (DHP consolidation and DSS citation fix; recommended by Records Subcommittee on 9/14/16; Approved by FOIA Council 9/19/16.)]

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § 32.1-127.1:03.

Where the person who is the subject of health records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the health records if the administrator or chief medical officer has reasonable cause to believe that such confined person has an infectious disease or other medical condition from which other persons so confined need to be protected. Health records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the health records of a person so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

Where the person who is the subject of health records is under the age of 18, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated, a court of competent jurisdiction has restricted or denied such access, or a parent has been denied access to the health record in accordance with § 20-124.6. In instances where the person who is the subject thereof is an emancipated minor, a student in a public institution of higher education, or is a minor who has consented to his own treatment as authorized by § 16.1-338 or 54.1-2969, the right of access may be asserted by the subject person.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning abuse of individuals receiving services compiled by the Commissioner of Behavioral Health and Developmental Services shall be disclosed. No such summaries or data shall include any information that identifies specific individuals receiving services.

2. Applications for admission to examinations or for licensure and scoring records maintained by the Department of Health Professions or any board in that department on individual licensees or applicants. ~~However, such material may be made available during normal working hours for copying, at the requester's expense, by the individual who is the subject thereof, in the offices of the Department of Health Professions or in the offices of any health regulatory board, whichever may possess the material; information required to be provided to the Department of Health Professions by certain licensees pursuant to § 54.1-2506.1; information held by the Health Practitioners' Monitoring Program Committee within the Department of Health Professions that identifies any practitioner who may be, or who is actually, impaired to the extent that disclosure is prohibited by § 54.1-2517; and information relating to the prescribing and dispensing of covered substances to recipients and any abstracts from such information that are in the possession of the Prescription Monitoring Program (Program) pursuant to Chapter 25.2 (§ 54.1-2519 et seq.) of Title 54.1 and any material relating to the operation or security of the Program.~~

3. Reports, documentary evidence, and other information as specified in §§ 51.5-122, and 51.5-141, and ~~63.2-104~~ Chapter 1 (§ 63.2-100 et seq.) of Title 63.2 and information and statistical registries required to be kept confidential pursuant to Chapter 1 (§ 63.2-100 et seq.) of Title 63.2.

4. Investigative notes; proprietary information not published, copyrighted or patented; information obtained from employee personnel records; personally identifiable information regarding residents, clients or other recipients of services; other correspondence and information furnished in confidence to the Department of Social Services in connection with an active investigation of an applicant or licensee pursuant to Chapters 17 (§ 63.2-1700 et seq.) and 18 (§ 63.2-1800 et seq.) of Title 63.2; and information furnished to the Office of the Attorney General in connection with an investigation or litigation pursuant to Article 19.1 (§ 8.01-216.1 et seq.) of Chapter 3 of Title 8.01 and Chapter 9 (§ 32.1-310 et seq.) of Title 32.1. ~~Information-~~ However, nothing in this subdivision shall prevent the disclosure of information from the records of completed investigations-shall be disclosed in a form that does not reveal the identity of complainants, persons supplying information, or other individuals involved in the investigation.

5. Information collected for the designation and verification of trauma centers and other specialty care centers within the Statewide Emergency Medical Services System and Services pursuant to Article 2.1 (§ 32.1-111.1 et seq.) of Chapter 4 of Title 32.1.

6. Reports and court documents relating to involuntary admission required to be kept confidential pursuant to § 37.2-818.

~~7. Data formerly required to be submitted to the Commissioner of Health relating to the establishment of new or the expansion of existing clinical health services, acquisition of major medical equipment, or certain projects requiring capital expenditures pursuant to former § 32.1-102.3:4.~~

~~8. Information required to be provided to the Department of Health Professions by certain licensees pursuant to § 54.1-2506.1.~~

~~9.~~ Information acquired (i) during a review of any child death conducted by the State Child Fatality Review team established pursuant to § 32.1-283.1 or by a local or regional child fatality review team to the extent that such information is made confidential by § 32.1-283.2; (ii) during a review of any death conducted by a family violence fatality review team to the extent that such information is made confidential by § 32.1-283.3; or (iii) during a review of any adult death conducted by the Adult Fatality Review Team to the extent made confidential by § 32.1-283.5 or by a local or regional adult fatality review team to the extent that such information is made confidential by § 32.1-283.6.

~~10.~~8. Patient level data collected by the Board of Health and not yet processed, verified, and released, pursuant to § 32.1-276.9, to the Board by the nonprofit organization with which the Commissioner of Health has contracted pursuant to § 32.1-276.4.

~~11.~~ Information held by the Health Practitioners' Monitoring Program Committee within the Department of Health Professions that may identify any practitioner who may be, or who is actually, impaired and disclosure of such information is prohibited by § 54.1-2517.

~~12.~~9. Information relating to a grant application, or accompanying a grant application, submitted to the Commonwealth Neurotrauma Initiative Advisory Board pursuant to Article 12 (§ 51.5-178 et seq.) of Chapter 14 of Title 51.5 that would (i) reveal (a) medical or mental health records or other data identifying individual patients or (b) proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant.

~~13.~~10. Any information copied, recorded, or received by the Commissioner of Health in the course of an examination, investigation, or review of a managed care health

insurance plan licensee pursuant to §§ 32.1-137.4 and 32.1-137.5, including books, records, files, accounts, papers, documents, and any or all computer or other recordings.

~~14. Information and statistical registries required to be kept confidential pursuant to §§ 63.2-102 and 63.2-104.~~

~~15. Information relating to the prescribing and dispensing of covered substances to recipients and any abstracts from such information that are in the possession of the Prescription Monitoring Program pursuant to Chapter 25.2 (§ 54.1-2519 et seq.) of Title 54.1 and any material relating to the operation or security of the Program.~~

~~16.~~ 11. Records of the Virginia Birth-Related Neurological Injury Compensation Program required to be kept confidential pursuant to § 38.2-5002.2.

~~17.~~ 12. Information held by the State Health Commissioner relating to the health of any person subject to an order of quarantine or an order of isolation pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1. However, nothing in this subdivision shall be construed to ~~authorize the withholding~~ prevent the disclosure of statistical summaries, abstracts, or other information in aggregate form.

~~18.~~ 13. The names and addresses or other contact information of persons receiving transportation services from a state or local public body or its designee under Title II of the Americans with Disabilities Act, (42 U.S.C. § 12131 et seq.) or funded by Temporary Assistance for Needy Families (TANF) created under § 63.2-600.

~~19.~~ 14. Information held by certain health care committees and entities that may be withheld from discovery as privileged communications pursuant to § 8.01-581.17.

***DRAFTING NOTE:** Amendments to subdivision 2 are technical and represent a consolidation of the record exclusions for the Department of Health Professions, specifically, formerly designated subdivisions 8, 11, and 15, shown herein as stricken. The amendments to subdivision 4 and newly designated subdivision 12 are substantive and revert the language of these exclusions to the language as it existed prior to 2016 in an effort to eliminate potential unforeseen consequences; such reversion was referred to as the "global language change." Formerly designated subdivision 7, shown*

herein as stricken, was deleted as obsolete. Amendments to subdivision 3 are technical and are derived from formerly designated subdivision 14, shown herein as stricken.

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets. [LD 1710035 (Part of Public safety consolidation, new #29); Records Subcommittee referred to full FOIA Council without recommendation 8/18/16; Approved by FOIA Council 10/17/16.]

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-132.4 or 62.1-134.1.
2. Financial statements not publicly available filed with applications for industrial development financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.
3. Proprietary information, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.
4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.); as such Act existed prior to July 1, 1992.
5. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § 28.2-204.

6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.

7. Proprietary information related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy contingency planning purposes or for developing consolidated statistical information on energy supplies.

8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.

9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects if disclosure of such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exclusion provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

10. Confidential information designated as provided in subsection F of § 2.2-4342 as trade secrets or proprietary information by any person in connection with a procurement transaction or by any person who has submitted to a public body an application for

prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

11. a. Memoranda, staff evaluations, or other information prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) where (i) if such information was made public prior to or after the execution of an interim or a comprehensive agreement, § 33.2-1820 or 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be adversely affected and (ii) the basis for the determination required in clause (i) is documented in writing by the responsible public entity; and

b. Information provided by a private entity to a responsible public entity, affected jurisdiction, or affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) if disclosure of such information would reveal (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity where if such information was made public prior to the execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining position of the public or private entity would be adversely affected. In order for the information specified in clauses (i), (ii), and (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the responsible public entity:

(1) Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

(2) Identifying with specificity the data or other materials for which protection is sought; and

(3) Stating the reasons why protection is necessary.

The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by the private entity from disclosure, the responsible public entity shall determine whether public disclosure prior to the execution of an interim agreement or a comprehensive agreement would adversely affect the financial interest or bargaining position of the public or private entity. The responsible public entity shall make a written determination of the nature and scope of the protection to be afforded by the responsible public entity under this subdivision. Once a written determination is made by the responsible public entity, the information afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of any affected jurisdiction or affected local jurisdiction.

Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed to authorize the withholding of (a) procurement records as required by § 33.2-1820 or 56-575.17; (b) information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity and the private entity; (c) information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or (d) information concerning the performance of any private entity developing or operating a qualifying transportation facility or a qualifying project.

For the purposes of this subdivision, the terms "affected jurisdiction, " "affected local jurisdiction, " "comprehensive agreement, " "interim agreement, " "qualifying project, " "qualifying transportation facility, " "responsible public entity, " and "private entity" shall mean the same as those terms are defined in the Public-Private Transportation Act of 1995

(§ 33.2-1800 et seq.) or in the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.).

12. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity pursuant to a promise of confidentiality to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected.

13. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or confidential proprietary information that is not generally available to the public through regulatory disclosure or otherwise, provided by a (i) bidder or applicant for a franchise or (ii) franchisee under Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority pursuant to a promise of confidentiality from the franchising authority, to the extent the information relates to the bidder's, applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies, or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such information were made public, the competitive advantage or financial interests of the franchisee would be adversely affected.

In order for trade secrets or confidential proprietary information to be excluded from the provisions of this chapter, the bidder, applicant, or franchisee shall (a) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (b) identify the data or other materials for which protection is sought, and (c) state the reason why protection is necessary.

No bidder, applicant, or franchisee may invoke the exclusion provided by this subdivision if the bidder, applicant, or franchisee is owned or controlled by a public body or

if any representative of the applicable franchising authority serves on the management board or as an officer of the bidder, applicant, or franchisee.

14. Information of a proprietary nature furnished by a supplier of charitable gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection E of § 18.2-340.34.

15. Information related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to § 3.2-1215.

16. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1, submitted by CMRS providers as defined in § 56-484.12 to the Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § 56-484.15, relating to the provision of wireless E-911 service.

17. Information relating to a grant or loan application, or accompanying a grant or loan application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to Chapter 5.3 (§ 32.1-162.23 et seq.) of Title 32.1 if disclosure of such information would (i) reveal proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant.

18. Confidential proprietary information and trade secrets developed and held by a local public body (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2 if disclosure of such information would be harmful to the competitive position of the locality.

In order for confidential proprietary information or trade secrets to be excluded from the provisions of this chapter, the locality in writing shall (a) invoke the protections of this

subdivision, (b) identify with specificity the information for which protection is sought, and (c) state the reasons why protection is necessary. However, the exemption provided by this subdivision shall not apply to any authority created pursuant to the BVU Authority Act (§ 15.2-7200 et seq.).

19. Confidential proprietary information and trade secrets developed by or for a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) to provide qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.) of Chapter 15 of Title 56, where disclosure of such information would be harmful to the competitive position of the authority, except that information required to be maintained in accordance with § 15.2-2160 shall be released.

20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial information of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, provided to the Department of Small Business and Supplier Diversity as part of an application for certification as a small, women-owned, or minority-owned business in accordance with Chapter 16.1 (§ 2.2-1603 et seq.). In order for such trade secrets or financial information to be excluded from the provisions of this chapter, the business shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary.

21. Information of a proprietary or confidential nature disclosed by a carrier to the State Health Commissioner pursuant to §§ 32.1-276.5:1 and 32.1-276.7:1.

22. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), including, but not limited to, financial information, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, and revenue and cost projections supplied by a private or nongovernmental entity

to the State Inspector General for the purpose of an audit, special investigation, or any study requested by the Office of the State Inspector General in accordance with law.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the private or nongovernmental entity shall make a written request to the State Inspector General:

a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

b. Identifying with specificity the data or other materials for which protection is sought; and

c. Stating the reasons why protection is necessary.

The State Inspector General shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. The State Inspector General shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

23. Information relating to a grant application, or accompanying a grant application, submitted to the Tobacco Region Revitalization Commission that would (i) reveal (a) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (b) financial information of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant; and memoranda, staff evaluations, or other information prepared by the Commission or its staff exclusively for the evaluation of grant applications. The exclusion provided by this subdivision shall apply to grants that are consistent with the

powers of and in furtherance of the performance of the duties of the Commission pursuant to § 3.2-3103.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Commission:

a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

b. Identifying with specificity the data, information or other materials for which protection is sought; and

c. Stating the reasons why protection is necessary.

The Commission shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets, financial information, or research-related information of the applicant. The Commission shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

24. a. Information held by the Commercial Space Flight Authority relating to rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority if disclosure of such information would adversely affect the financial interest or bargaining position of the Authority or a private entity providing the information to the Authority; or

b. Information provided by a private entity to the Commercial Space Flight Authority if disclosure of such information would (i) reveal (a) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (b) financial information of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private entity and (ii) adversely affect the financial interest or bargaining position of the Authority or private entity.

In order for the information specified in clauses (a), (b), and (c) of subdivision 24 b to be excluded from the provisions of this chapter, the private entity shall make a written request to the Authority:

(1) Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

(2) Identifying with specificity the data or other materials for which protection is sought; and

(3) Stating the reasons why protection is necessary.

The Authority shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by the private entity from disclosure, the Authority shall determine whether public disclosure would adversely affect the financial interest or bargaining position of the Authority or private entity. The Authority shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

25. Information of a proprietary nature furnished by an agricultural landowner or operator to the Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Agriculture and Consumer Services, or any political subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9, other than when required as part of a state or federal regulatory enforcement action.

26. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided to the Department of Environmental Quality pursuant to the provisions of § 10.1-1458. In order for such trade secrets to be excluded from the provisions of this chapter, the submitting party shall (i) invoke this exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii) identify the data or materials for which protection is sought, and (iii) state the reasons why protection is necessary.

27. Information of a proprietary nature furnished by a licensed public-use airport to the Department of Aviation for funding from programs administered by the Department of Aviation or the Virginia Aviation Board, where if such information was made public, the financial interest of the public-use airport would be adversely affected.

In order for the information specified in this subdivision to be excluded from the provisions of this chapter, the public-use airport shall make a written request to the Department of Aviation:

- a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;
- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

28. Records submitted as a grant or loan application, or accompanying a grant or loan application, for an award from the Virginia Research Investment Fund pursuant to Article 8 (§ 23.1-3130 et seq.) of Chapter 31 of Title 23.1, to the extent that such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, if the disclosure of such information would be harmful to the competitive position of the applicant.

29. Information contained in engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit if disclosure of such information would identify specific trade secrets or other information that would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure.

DRAFTING NOTE: Technical amendments. Newly designated subdivision 29 is derived from former subdivision 2 of § 2.2-3705.2.

§ 2.2-3705.7. Exclusions to application of chapter; records of specific public bodies and certain other limited exclusions. [LD 17100766--re: global language change ("Nothing to prevent disclosure..."), recommended by Records Subcommittee on 9/29/16; Approved by FOIA Council 11/21/16.]

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1. State income, business, and estate tax returns, personal property tax returns, and confidential records held pursuant to § 58.1-3.

2. Working papers~~—and—correspondence~~ of the Office of the Governor; the Lieutenant Governor; or the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates~~—and—~~or the Senate of Virginia; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia. However, no information that is otherwise open to inspection under this chapter shall be deemed excluded by virtue of the fact that it has been attached to or incorporated within any working paper~~—or—correspondence~~. Further, information publicly available or not otherwise subject to an exclusion under this chapter or other provision of law that has been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed working papers. Nothing in this subdivision shall be construed to authorize the withholding of any resumes or applications submitted by persons who are appointed by the Governor pursuant to § 2.2-106 or 2.2-107.

As used in this subdivision:

"Members of the General Assembly" means each member of the Senate of Virginia and the House of Delegates and their legislative aides when working on behalf of such member.

"Office of the Governor" means the Governor; ~~his~~ the Governor's chief of staff, counsel, director of policy, and Cabinet Secretaries, and the Assistant to the Governor for Intergovernmental Affairs; and those individuals to whom the Governor has delegated his authority pursuant to § 2.2-104.

"Working papers" means those records, including correspondence, prepared by or for ~~an above-named~~ a public official identified in this subdivision for his personal or deliberative use. **[LD 17100603; recommended by Records Subcommittee on 8/18/15 (without new language on lines 1073-1076); Approved by FOIA Council 10/1716 as shown in this draft.]**

3. Information contained in library records that can be used to identify both (i) any library patron who has borrowed material from a library and (ii) the material such patron borrowed.

4. Contract cost estimates prepared for the confidential use of the Department of Transportation in awarding contracts for construction or the purchase of goods or services, and records and automated systems prepared for the Department's Bid Analysis and Monitoring Program.

5. Lists of registered owners of bonds issued by a political subdivision of the Commonwealth, whether the lists are maintained by the political subdivision itself or by a single fiduciary designated by the political subdivision.

6. Information furnished by a member of the General Assembly to a meeting of a standing committee, special committee, or subcommittee of his house established solely for the purpose of reviewing members' annual disclosure statements and supporting materials filed under § 30-110 or of formulating advisory opinions to members on standards of conduct, or both.

7. Customer account information of a public utility affiliated with a political subdivision of the Commonwealth, including the customer's name and service address, but excluding the amount of utility service provided and the amount of money charged or paid for such utility service. **[LD 15101103; recommended by Records Subcommittee on 8/25/14; Approved by FOIA Council 6/23/16.]**

8. Personal information, as defined in § 2.2-3801, (i) filed with the Virginia Housing Development Authority concerning individuals who have applied for or received loans or other housing assistance or who have applied for occupancy of or have occupied housing financed, owned or otherwise assisted by the Virginia Housing Development Authority; (ii) concerning persons participating in or persons on the waiting list for federally funded rent-assistance programs; (iii) filed with any local redevelopment and housing authority created pursuant to § 36-4 concerning persons participating in or persons on the waiting list for housing assistance programs funded by local governments or by any such authority; or (iv) filed with any local redevelopment and housing authority created pursuant to § 36-4 or any other local government agency concerning persons who have applied for occupancy or who have occupied affordable dwelling units established pursuant to § 15.2-2304 or 15.2-2305. However, access to one's own information shall not be denied.

9. Information regarding the siting of hazardous waste facilities, except as provided in § 10.1-1441, if disclosure of such information would have a detrimental effect upon the negotiating position of a governing body or on the establishment of the terms, conditions, and provisions of the siting agreement.

10. Information on the site-specific location of rare, threatened, endangered, or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. This exclusion shall not apply to requests from the owner of the land upon which the resource is located.

11. Memoranda, graphics, video or audio tapes, production models, data, and information of a proprietary nature produced by or for or collected by or for the Virginia Lottery relating to matters of a specific lottery game design, development, production, operation, ticket price, prize structure, manner of selecting the winning ticket, manner of payment of prizes to holders of winning tickets, frequency of drawings or selections of winning tickets, odds of winning, advertising, or marketing, where such information not been publicly released, published, copyrighted, or patented. Whether released, published, or copyrighted, all game-related information shall be subject to public disclosure under this chapter upon the first day of sales for the specific lottery game to which it pertains.

12. Information held by the Virginia Retirement System, acting pursuant to § 51.1-124.30, or a local retirement system, acting pursuant to § 51.1-803, or 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 to Article 8 (§ 15.2-1544 et seq.) of Chapter 15 of Title 15.2, or by the Rector and Visitors of the University of Virginia, acting pursuant to § 23.1-2210, or by the Virginia College Savings Plan, acting pursuant to § 23.1-704, relating to the acquisition, holding, or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, if disclosure of such information would (i) reveal confidential analyses prepared for the Rector and Visitors of the University of Virginia, prepared by the retirement system, a local finance board or board of trustees, or the Virginia College Savings Plan, or provided to the retirement system, a local finance board or board of trustees, or the Virginia College Savings Plan under a promise of confidentiality of the future value of such ownership interest or the future financial performance of the entity and (ii) have an adverse effect on the value of the investment to be acquired, held, or disposed of by the retirement system, a local finance board or board of trustees, the Rector and Visitors of the University of Virginia, or the Virginia College Savings Plan. Nothing in this subdivision shall be construed to ~~authorize the withholding~~ prevent the disclosure of

information relating to the identity of any investment held, the amount invested, or the present value of such investment. **[LD 16101008; recommended by Records Subcommittee on 7/21/15; Approved by FOIA Council 6/23/16.]**

~~13. Names and addresses of subscribers to Virginia Wildlife magazine, published by the Department of Game and Inland Fisheries, provided the individual subscriber has requested in writing that the Department not release such information. **[LD 15101104; recommended by Records Subcommittee on 11/5/14; Approved by FOIA Council 6/23/16.]**~~

14. Financial, medical, rehabilitative, and other personal information concerning applicants for or recipients of loan funds submitted to or maintained by the Assistive Technology Loan Fund Authority under Chapter 11 (§ 51.5-53 et seq.) of Title 51.5.

~~15.~~ 14. Information held by the Virginia Commonwealth University Health System Authority pertaining to any of the following: an individual's qualifications for or continued membership on its medical or teaching staffs; proprietary information gathered by or in the possession of the Authority from third parties pursuant to a promise of confidentiality; contract cost estimates prepared for confidential use in awarding contracts for construction or the purchase of goods or services; information of a proprietary nature produced or collected by or for the Authority or members of its medical or teaching staffs; financial statements not publicly available that may be filed with the Authority from third parties; the identity, accounts, or account status of any customer of the Authority; consulting or other reports paid for by the Authority to assist the Authority in connection with its strategic planning and goals; the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority; and information of a proprietary nature produced or collected by or for employees of the Authority, other than the Authority's financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical, or scholarly issues, whether sponsored by the Authority alone or in conjunction with a governmental body or a

private concern, when such information has not been publicly released, published, copyrighted, or patented. This exclusion shall also apply when such information is in the possession of Virginia Commonwealth University.

~~16.~~15. Information held by the Department of Environmental Quality, the State Water Control Board, the State Air Pollution Control Board, or the Virginia Waste Management Board relating to (i) active federal environmental enforcement actions that are considered confidential under federal law and (ii) enforcement strategies, including proposed sanctions for enforcement actions. Upon request, such information shall be disclosed after a proposed sanction resulting from the investigation has been proposed to the director of the agency. This subdivision shall not be construed to ~~authorize the withholding~~ prevent the disclosure of information related to inspection reports, notices of violation, and documents detailing the nature of any environmental contamination that may have occurred or similar documents.

~~17.~~16. Information related to the operation of toll facilities that identifies an individual, vehicle, or travel itinerary, including vehicle identification data or vehicle enforcement system information; video or photographic images; Social Security or other identification numbers appearing on driver's licenses; credit card or bank account data; home addresses; phone numbers; or records of the date or time of toll facility use.

~~18.~~17. Information held by the Virginia Lottery pertaining to (i) the social security number, tax identification number, state sales tax number, home address and telephone number, personal and lottery banking account and transit numbers of a retailer, and financial information regarding the nonlottery operations of specific retail locations and (ii) individual lottery winners, except that a winner's name, hometown, and amount won shall be disclosed.

~~19.~~18. Information held by the Board for Branch Pilots relating to the chemical or drug testing of a person regulated by the Board, where such person has tested negative or has not been the subject of a disciplinary action by the Board for a positive test result.

~~20.~~ 19. Information pertaining to the planning, scheduling, and performance of examinations of holder records pursuant to the Uniform Disposition of Unclaimed Property Act (§ 55-210.1 et seq.) prepared by or for the State Treasurer or his agents or employees or persons employed to perform an audit or examination of holder records.

~~21.~~ 20. Information held by the Virginia Department of Emergency Management or a local governing body relating to citizen emergency response teams established pursuant to an ordinance of a local governing body that reveal the name, address, including e-mail address, telephone or pager numbers, or operating schedule of an individual participant in the program.

~~22.~~ 21. Information held by state or local park and recreation departments and local and regional park authorities concerning identifiable individuals under the age of 18 years. However, nothing in this subdivision shall operate to ~~authorize the withholding~~ prevent the disclosure of information defined as directory information under regulations implementing the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, unless the public body has undertaken the parental notification and opt-out requirements provided by such regulations. 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 such information of persons who are emancipated, the right of access may be asserted by the subject thereof. Any parent or emancipated person who is the subject of the information may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such information for inspection and copying.

~~23.~~ 22. Information submitted for inclusion in the Statewide Alert Network administered by the Department of Emergency Management that reveal names, physical addresses, email addresses, computer or internet protocol information, telephone numbers, pager numbers, other wireless or portable communications device information, or operating schedules of individuals or agencies, where the release of such information would

compromise the security of the Statewide Alert Network or individuals participating in the Statewide Alert Network.

~~24.~~ 23. Information held by the Judicial Inquiry and Review Commission made confidential by § 17.1-913.

~~25.~~ 24. Information held by the Virginia Retirement System acting pursuant to § 51.1-124.30, a local retirement system acting pursuant to § 51.1-803 (hereinafter collectively referred to as the retirement system), or the Virginia College Savings Plan, acting pursuant to § 23.1-704 relating to:

a. Internal deliberations of or decisions by the retirement system or the Virginia College Savings Plan on the pursuit of particular investment strategies, or the selection or termination of investment managers, prior to the execution of such investment strategies or the selection or termination of such managers, if disclosure of such information would have an adverse impact on the financial interest of the retirement system or the Virginia College Savings Plan; and

b. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided by a private entity to the retirement system or the Virginia College Savings Plan if disclosure of such records would have an adverse impact on the financial interest of the retirement system or the Virginia College Savings Plan.

For the records specified in subdivision b to be excluded from the provisions of this chapter, the entity shall make a written request to the retirement system or the Virginia College Savings Plan:

(1) Invoking such exclusion prior to or upon submission of the data or other materials for which protection from disclosure is sought;

(2) Identifying with specificity the data or other materials for which protection is sought; and

(3) Stating the reasons why protection is necessary.

The retirement system or the Virginia College Savings Plan shall determine whether the requested exclusion from disclosure meets the requirements set forth in subdivision b.

Nothing in this subdivision shall be construed to ~~authorize the withholding~~prevent the disclosure of the identity or amount of any investment held or the present value and performance of all asset classes and subclasses.

~~26-25.~~ Information held by the Department of Corrections made confidential by § 53.1-233.

~~27-26.~~ Information maintained by the Department of the Treasury or participants in the Local Government Investment Pool (§ 2.2-4600 et seq.) and required to be provided by such participants to the Department to establish accounts in accordance with § 2.2-4602.

~~28-27.~~ Personal information, as defined in § 2.2-3801, contained in the Veterans Care Center Resident Trust Funds concerning residents or patients of the Department of Veterans Services Care Centers, except that access shall not be denied to the person who is the subject of the information:

~~29-28.~~ Information maintained in connection with fundraising activities by the Veterans Services Foundation pursuant to § 2.2-2716 that reveal the address, electronic mail address, facsimile or telephone number, social security number or other identification number appearing on a driver's license, or credit card or bank account data of identifiable donors, except that access shall not be denied to the person who is the subject of the information. Nothing in this subdivision, however, shall be construed to ~~authorize the withholding~~prevent the disclosure of information relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor, unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation. The exclusion provided by this subdivision shall not apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the foundation for the performance of services or other work or (ii) the terms and conditions of such grants or contracts.

~~30. 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. However, no information that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any such correspondence. [LD 15101105; recommended by Records Subcommittee on 8/25/14; Approved by FOIA Council 11/21/16.]~~

~~31-29.~~ Information prepared for and utilized by the Commonwealth's Attorneys' Services Council in the training of state prosecutors or law-enforcement personnel, where such information is not otherwise available to the public and the disclosure of such information would reveal confidential strategies, methods, or procedures to be employed in law-enforcement activities or materials created for the investigation and prosecution of a criminal case.

~~32-30.~~ Information provided to the Department of Aviation by other entities of the Commonwealth in connection with the operation of aircraft where the information would not be subject to disclosure by the entity providing the information. The entity providing the information to the Department of Aviation shall identify the specific information to be protected and the applicable provision of this chapter that excludes the information from mandatory disclosure.

~~33-31.~~ Information created or maintained by or on the behalf of the judicial performance evaluation program related to an evaluation of any individual justice or judge made confidential by § 17.1-100.

~~34. (Effective July 1, 2018) Information held by the Virginia Alcoholic Beverage Control Authority that contains (i) information of a proprietary nature gathered by or in the possession of the Authority from a private entity pursuant to a promise of confidentiality; (ii) trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), of any~~

~~private entity; (iii) financial information of a private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; (iv) contract cost estimates prepared for the (a) confidential use in awarding contracts for construction or (b) purchase of goods or services; or (v) the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority.~~

~~In order for the information identified in clauses (i), (ii), or (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the Authority:~~

~~a. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;~~

~~b. Identifying with specificity the data or other materials for which protection is sought; and~~

~~c. Stating the reasons why protection is necessary.~~

~~The Authority shall determine whether the requested exclusion from disclosure is necessary to protect such information of the private entity. The Authority shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision. [LD 17101306; recommended by Records Subcommittee on 11/18/15; Approved by FOIA Council 11/21/16.]~~

~~35-32. Information reflecting the substance of meetings in which individual sexual assault cases are discussed by any sexual assault team established pursuant to § 15.2-1627.4. The findings of the team may be disclosed or published in statistical or other aggregated form that does not disclose the identity of specific individuals.~~

***DRAFTING NOTE:** Amendments to the first paragraph of subdivision 2 are substantive and (i) eliminate the correspondence exclusion for the Office of the Governor; the Lieutenant Governor; the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates and the Senate of Virginia; the mayor or chief executive officer of any*

political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia and (ii) provide that information publicly available or not otherwise subject to an exclusion under FOIA or other provision of law that have been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed "working papers"[NOTE: the correspondence exclusion was added back into the exclusion by the 2017 General Assembly]. The remainder of the amendments in subdivision 2 are technical. The amendments to newly designated subdivisions 15, 21, 24, and 28 are substantive and revert the language of this exclusion as it existed prior to 2016 to eliminate potential unforeseen consequences; such reversion known as the "global language change." The amendment to subdivision 7 is substantive and adds the amount of money "charged" (in addition to "paid") for such utility service. The amendment in subdivision 12 is substantive and an exclusion for records of local finance boards of trustee for postemployment benefits other than pensions was added as the sensitivity of these records is equivalent to those currently excluded for the Virginia Retirement System and local retirement systems. The amendment to formerly designated subdivision 13 was deleted as obsolete. The amendment to formerly designated subdivision 30 is technical and this exclusion was deleted as redundant of the definition of "public record" found in § 2.2-3701. Finally, the amendment to formerly designated subdivision 34 is substantive and was deleted as premature for the yet-to-be created Alcoholic Beverage Control Authority.

§ 2.2-3705.8. Limitation on record exclusions.

~~A. Neither any provision of this chapter nor any provision of Chapter 38 (§ 2.2-3800 et seq.) of this title shall be construed as denying public access to (i) contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes held confidential as personnel records under § 2.2-3705.1; (ii) records of the position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees.~~

~~The provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less. [LD 15100326; recommended by Records Subcommittee on 8/25/14; Approved by FOIA Council 11/21/16.]~~

B. Nothing in this chapter shall be construed as denying public access to the nonexempt portions of a report of a consultant hired by or at the request of a local public body or the mayor or chief executive or administrative officer of such public body if (i) the contents of such report have been distributed or disclosed to members of the local public body or (ii) the local public body has scheduled any action on a matter that is the subject of the consultant's report.

DRAFTING NOTE: Technical amendments. Formerly designated subsection A was moved to the personnel records exclusion found in subdivision 1 of § 2.2-3705.1.

§ 2.2-3711. Closed meetings authorized for certain limited purposes.

A. Public bodies may hold closed meetings only for the following purposes:

1. Discussion, consideration, or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining, or resignation of specific public officers, appointees, or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board. Nothing in this subdivision, however, shall be construed to authorize a closed meeting by a local governing body or an elected school board to discuss compensation matters that affect the membership of such body or board collectively.

2. Discussion or consideration of admission or disciplinary matters or any other matters that would involve the disclosure of information contained in a scholastic record concerning any student of any Virginia public institution of higher education or any state school system. However, any such student, legal counsel and, if the student is a minor, the student's parents or legal guardians shall be permitted to be present during the taking of testimony or presentation of evidence at a closed meeting, if such student, parents, or guardians so request in writing and such request is submitted to the presiding officer of the appropriate board.

3. Discussion or consideration of the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.

4. The protection of the privacy of individuals in personal matters not related to public business.

5. Discussion 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.

6. Discussion or consideration of the investment of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the governmental unit would be adversely affected.

7. Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body; and consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. For the purposes of this subdivision, "probable litigation" means litigation that has been specifically threatened or on which the public body or its legal counsel has a reasonable basis to believe will be

commenced by or against a known party. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

8. In the case of boards of visitors of public institutions of higher education, discussion or consideration of matters relating to gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants, and contracts made by a foreign government, a foreign legal entity, or a foreign person and accepted by a public institution of higher education in Virginia shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a political subdivision thereof; (ii) "foreign legal entity" means any legal entity created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such entity is composed of foreign persons or foreign legal entities, or any legal entity created under the laws of a foreign government; and (iii) "foreign person" means any individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.

9. 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.

10. Discussion or consideration of honorary degrees or special awards.

11. Discussion or consideration of tests, examinations, or other information excluded from this chapter pursuant to subdivision 4 of § 2.2-3705.1.

12. Discussion, consideration, or review by the appropriate House or Senate committees of possible disciplinary action against a member arising out of the possible

inadequacy of the disclosure statement filed by the member, provided the member may request in writing that the committee meeting not be conducted in a closed meeting.

13. Discussion of strategy with respect to the negotiation of a hazardous waste siting agreement or to consider the terms, conditions, and provisions of a hazardous waste siting agreement if the governing body in open meeting finds that an open meeting will have an adverse effect upon the negotiating position of the governing body or the establishment of the terms, conditions and provisions of the siting agreement, or both. All discussions with the applicant or its representatives may be conducted in a closed meeting.

14. Discussion by the Governor and any economic advisory board reviewing forecasts of economic activity and estimating general and nongeneral fund revenues.

15. Discussion or consideration of medical and mental health records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.5.

16. Deliberations of the Virginia Lottery Board in a licensing appeal action conducted pursuant to subsection D of § 58.1-4007 regarding the denial or revocation of a license of a lottery sales agent; and discussion, consideration or review of Virginia Lottery matters related to proprietary lottery game information and studies or investigations exempted from disclosure under subdivision 6 of § 2.2-3705.3 and subdivision 11 of § 2.2-3705.7.

17. Those portions of meetings by local government crime commissions where the identity of, or information tending to identify, individuals providing information about crimes or criminal activities under a promise of anonymity is discussed or disclosed.

18. Those portions of meetings in which the Board of Corrections discusses or discloses the identity of, or information tending to identify, any prisoner who (i) provides information about crimes or criminal activities, (ii) renders assistance in preventing the escape of another prisoner or in the apprehension of an escaped prisoner, or (iii) voluntarily or at the instance of a prison official renders other extraordinary services, the disclosure of which is likely to jeopardize the prisoner's life or safety.

19. Discussion of plans to protect public safety as it relates to terrorist activity or specific cybersecurity threats or vulnerabilities and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such matters or a related threat to public safety; discussion of information excluded from this chapter pursuant to subdivision ~~3 or 4~~ 2 or 14 of § 2.2-3705.2, where discussion in an open meeting would jeopardize the safety of any person or the security of any facility, building, structure, information technology system, or software program; or discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure.

20. Discussion by the Board of the Virginia Retirement System, acting pursuant to § 51.1-124.30, or of any local retirement system, acting pursuant to § 51.1-803, or by a local finance board or board of trustees of a trust established by one or more local public bodies to invest funds for postemployment benefits other than pensions, acting pursuant to Article 8 (§ 15.2-1544 et seq.) of Chapter 15 of Title 15.2, ~~or~~ by the Rector and Visitors of the University of Virginia, acting pursuant to § 23.1-2210, or by the Board of the Virginia College Savings Plan, acting pursuant to § 23.1-706, regarding the acquisition, holding or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, to the extent that such discussion (i) concerns confidential analyses prepared for the Rector and Visitors of the University of Virginia, prepared by the retirement system, or a local finance board or board of trustees, ~~or by~~ the Virginia College Savings Plan or provided to the retirement system, a local finance board or board of trustees, or the Virginia College Savings Plan under a promise of confidentiality, of the future value of such ownership interest or the future financial performance of the entity, and (ii) would have an adverse effect on the value of the investment to be acquired, held or disposed of by the retirement system, a local finance board or board of trustees, the Rector and Visitors of the University of Virginia, or the Virginia College Savings Plan. Nothing in this subdivision shall be construed to prevent

the disclosure of information relating to the identity of any investment held, the amount invested or the present value of such investment. **[LD 16101008; recommended by Records Subcommittee on 7/21/15; Approved by FOIA Council 6/23/16.]**

21. Those portions of meetings in which individual child death cases are discussed by the State Child Fatality Review team established pursuant to § 32.1-283.1, those portions of meetings in which individual child death cases are discussed by a regional or local child fatality review team established pursuant to § 32.1-283.2, those portions of meetings in which individual death cases are discussed by family violence fatality review teams established pursuant to § 32.1-283.3, those portions of meetings in which individual adult death cases are discussed by the state Adult Fatality Review Team established pursuant to § 32.1-283.5, and those portions of meetings in which individual adult death cases are discussed by a local or regional adult fatality review team established pursuant to § 32.1-283.6.

22. Those portions of meetings of the University of Virginia Board of Visitors or the Eastern Virginia Medical School Board of Visitors, as the case may be, and those portions of meetings of any persons to whom management responsibilities for the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, have been delegated, in which there is discussed proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would adversely affect the competitive position of the Medical Center or Eastern Virginia Medical School, as the case may be.

23. In the case of the Virginia Commonwealth University Health System Authority, discussion or consideration of any of the following: the acquisition or disposition of real or

personal property where disclosure would adversely affect the bargaining position or negotiating strategy of the Authority; operational plans that could affect the value of such property, real or personal, owned or desirable for ownership by the Authority; matters relating to gifts, bequests and fund-raising activities; grants and contracts for services or work to be performed by the Authority; marketing or operational strategies where disclosure of such strategies would adversely affect the competitive position of the Authority; members of its medical and teaching staffs and qualifications for appointments thereto; and qualifications or evaluations of other employees. This exclusion shall also apply when the foregoing discussions occur at a meeting of the Virginia Commonwealth University Board of Visitors.

24. Those portions of the meetings of the Health Practitioners' Monitoring Program Committee within the Department of Health Professions to the extent such discussions identify any practitioner who may be, or who actually is, impaired pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1.

25. Meetings or portions of meetings of the Board of the Virginia College Savings Plan wherein personal information, as defined in § 2.2-3801, which has been provided to the Board or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 7 (§ 23.1-700 et seq.) of Title 23.1 is discussed.

26. Discussion or consideration, by the Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § 56-484.15, of trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), submitted by CMRS providers as defined in § 56-484.12, related to the provision of wireless E-911 service.

27. Those portions of disciplinary proceedings by any regulatory board within the Department of Professional and Occupational Regulation, Department of Health Professions, or the Board of Accountancy conducted pursuant to § 2.2-4019 or 2.2-4020 during which the board deliberates to reach a decision or meetings of health regulatory

boards or conference committees of such boards to consider settlement proposals in pending disciplinary actions or modifications to previously issued board orders as requested by either of the parties.

28. Discussion or consideration of information excluded from this chapter pursuant to subdivision 11 of § 2.2-3705.6 by a responsible public entity or an affected locality or public entity, as those terms are defined in § 33.2-1800, or any independent review panel appointed to review information and advise the responsible public entity concerning such records.

29. Discussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body.

30. Discussion or consideration of grant or loan application information excluded from this chapter pursuant to subdivision 17 of § 2.2-3705.6 by (i) the Commonwealth Health Research Board or (ii) the Innovation and Entrepreneurship Investment Authority or the Research and Technology Investment Advisory Committee appointed to advise the Innovation and Entrepreneurship Investment Authority.

31. Discussion or consideration by the Commitment Review Committee of information excluded from this chapter pursuant to subdivision ~~8~~ 5 of § 2.2-3705.2 relating to individuals subject to commitment as sexually violent predators under Chapter 9 (§ 37.2-900 et seq.) of Title 37.2.

32. [Expired.]

33. Discussion or consideration of confidential proprietary information and trade secrets excluded from this chapter pursuant to subdivision 18 of § 2.2-3705.6. However, the exemption provided by this subdivision shall not apply to any authority created pursuant to the BVU Authority Act (§ 15.2-7200 et seq.).

34. Discussion or consideration by a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) of confidential proprietary information and trade secrets excluded from this chapter pursuant to subdivision 19 of § 2.2-3705.6.

35. Discussion or consideration by the State Board of Elections or local electoral boards of voting security matters made confidential pursuant to § 24.2-625.1.

36. Discussion or consideration by the Forensic Science Board or the Scientific Advisory Committee created pursuant to Article 2 (§ 9.1-1109 et seq.) of Chapter 11 of Title 9.1 of records excluded from this chapter pursuant to subdivision A 2 a of § 2.2-3706.

37. Discussion or consideration by the Brown v. Board of Education Scholarship Program Awards Committee of information or confidential matters excluded from this chapter pursuant to subdivision 3 of § 2.2-3705.4, and meetings of the Committee to deliberate concerning the annual maximum scholarship award, review and consider scholarship applications and requests for scholarship award renewal, and cancel, rescind, or recover scholarship awards.

38. Discussion or consideration by the Virginia Port Authority of information excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.6.

39. Discussion or consideration by the Board of Trustees of the Virginia Retirement System acting pursuant to § 51.1-124.30, by the Investment Advisory Committee appointed pursuant to § 51.1-124.26, by any local retirement system, acting pursuant to § 51.1-803, by the Board of the Virginia College Savings Plan acting pursuant to § 23.1-706, or by the Virginia College Savings Plan's Investment Advisory Committee appointed pursuant to § 23.1-702 of information excluded from this chapter pursuant to subdivision ~~25~~ 24 of § 2.2-3705.7.

40. Discussion or consideration of information excluded from this chapter pursuant to subdivision 3 of § 2.2-3705.6.

41. Discussion or consideration by the Board of Education of information relating to the denial, suspension, or revocation of teacher licenses excluded from this chapter pursuant to subdivision ~~12~~ 11 of § 2.2-3705.3.

42. Those portions of meetings of the Virginia Military Advisory Council or any commission created by executive order for the purpose of studying and making recommendations regarding preventing closure or realignment of federal military and national security installations and facilities located in Virginia and relocation of such facilities to Virginia, or a local or regional military affairs organization appointed by a local governing body, during which there is discussion of information excluded from this chapter pursuant to subdivision ~~11~~ 8 of § 2.2-3705.2.

43. Discussion or consideration by the Board of Trustees of the Veterans Services Foundation of information excluded from this chapter pursuant to subdivision ~~29~~ 28 of § 2.2-3705.7.

44. Discussion or consideration by the Virginia Tobacco Region Revitalization Commission of information excluded from this chapter pursuant to subdivision 23 of § 2.2-3705.6.

45. Discussion or consideration by the board of directors of the Commercial Space Flight Authority of information excluded from this chapter pursuant to subdivision 24 of § 2.2-3705.6.

46. Discussion or consideration of personal and proprietary information that are excluded from the provisions of this chapter pursuant to (i) subdivision 25 of § 2.2-3705.6 or (ii) subsection E of § 10.1-104.7. This exclusion shall not apply to the discussion or consideration of records that contain information that has been certified for release by the person who is the subject of the information or transformed into a statistical or aggregate form that does not allow identification of the person who supplied, or is the subject of, the information.

47. (Effective July 1, 2018) Discussion or consideration by the Board of Directors of the Virginia Alcoholic Beverage Control Authority of information excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.3 or subdivision 34 of § 2.2-3705.7.

48. Discussion or consideration of grant or loan application records excluded from this chapter pursuant to subdivision 28 of § 2.2-3705.6 related to the submission of an application for an award from the Virginia Research Investment Fund pursuant to Article 8 (§ 23.1-3130 et seq.) of Chapter 31 of Title 23.1.

49. Discussion or development of grant proposals by a regional council established pursuant to Article 26 (§ 2.2-2484 et seq.) of Chapter 24 to be submitted for consideration to the Virginia Growth and Opportunity Board.

B. No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation, or motion that shall have its substance reasonably identified in the open meeting.

C. Public officers improperly selected due to the failure of the public body to comply with the other provisions of this section shall be de facto officers and, as such, their official actions are valid until they obtain notice of the legal defect in their election.

D. Nothing in this section shall be construed to prevent the holding of conferences between two or more public bodies, or their representatives, but these conferences shall be subject to the same procedures for holding closed meetings as are applicable to any other public body.

E. This section shall not be construed to (i) require the disclosure of any contract between the Department of Health Professions and an impaired practitioner entered into pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1 or (ii) require the board of directors of any authority created pursuant to the Industrial Development and Revenue Bond Act (§ 15.2-4900 et seq.), or any public body empowered to issue industrial revenue

bonds by general or special law, to identify a business or industry to which subdivision A 5 applies. However, such business or industry shall be identified as a matter of public record at least 30 days prior to the actual date of the board's authorization of the sale or issuance of such bonds.

***DRAFTING NOTE:** Technical amendments to correspond to amendments made to record exclusions previously identified in this document.*

§ 2.2-3714. Violations and penalties.

In a proceeding commenced against any officer, employee, or member of a public body under § 2.2-3713 for a violation of § 2.2-3704, 2.2-3705.1 through ~~2.2-3705.8~~ 2.2-3705.7, 2.2-3706, 2.2-3707, 2.2-3708, 2.2-3708.1, 2.2-3710, 2.2-3711 or 2.2-3712, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such officer, employee, or member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than \$500 nor more than \$2,000, which amount shall be paid into the State Literary Fund. For a second or subsequent violation, such civil penalty shall be not less than \$2,000 nor more than \$5,000.

***DRAFTING NOTE:** Technical amendments.*

§ 2.2-3806. Rights of data subjects.

A. Any agency maintaining personal information shall:

1. Inform an individual who is asked to supply personal information about himself whether he is legally required, or may refuse, to supply the information requested, and also of any specific consequences that are known to the agency of providing or not providing the information.

2. Give notice to a data subject of the possible dissemination of part or all of this information to another agency, nongovernmental organization or system not having regular access authority, and indicate the use for which it is intended, and the specific consequences for the individual, which are known to the agency, of providing or not providing the information. However documented permission for dissemination in the hands of the other

agency or organization shall satisfy the requirement of this subdivision. The notice may be given on applications or other data collection forms prepared by data subjects.

3. Upon request and proper identification of any data subject, or of his authorized agent, grant the data subject or agent the right to inspect, in a form comprehensible to him:

a. All personal information about that data subject except as provided in subdivision 1 of § 2.2-3705.1, subdivision 1 of § 2.2-3705.4, and subdivision 1 of § 2.2-3705.5.

b. The nature of the sources of the information.

c. The names of recipients, other than those with regular access authority, of personal information about the data subject including the identity of all persons and organizations involved and their relationship to the system when not having regular access authority, except that if the recipient has obtained the information as part of an ongoing criminal investigation such that disclosure of the investigation would jeopardize law-enforcement action, then no disclosure of such access shall be made to the data subject.

4. Comply with the following minimum conditions of disclosure to data subjects:

a. An agency shall make disclosures to data subjects required under this chapter, during normal business hours, in accordance with the procedures set forth in subsections B and C of § 2.2-3704 for responding to requests under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) or within a time period as may be mutually agreed upon by the agency and the data subject.

b. The disclosures to data subjects required under this chapter shall be made (i) in person, if he appears in person and furnishes proper identification, or (ii) by mail, if he has made a written request, with proper identification. Copies of the documents containing the personal information sought by a data subject shall be furnished to him or his representative at reasonable charges for document search and duplication in accordance with subsection F of § 2.2-3704.

c. The data subject shall be permitted to be accompanied by a person of his choosing, who shall furnish reasonable identification. An agency may require the data subject to

furnish a written statement granting the agency permission to discuss the individual's file in such person's presence.

5. If the data subject gives notice that he wishes to challenge, correct, or explain information about him in the information system, the following minimum procedures shall be followed:

a. The agency maintaining the information system shall investigate, and record the current status of that personal information.

b. If, after such investigation, the information is found to be incomplete, inaccurate, not pertinent, not timely, or not necessary to be retained, it shall be promptly corrected or purged.

c. If the investigation does not resolve the dispute, the data subject may file a statement of not more than 200 words setting forth his position.

d. Whenever a statement of dispute is filed, the agency maintaining the information system shall supply any previous recipient with a copy of the statement and, in any subsequent dissemination or use of the information in question, clearly note that it is disputed and supply the statement of the data subject along with the information.

e. The agency maintaining the information system shall clearly and conspicuously disclose to the data subject his rights to make such a request.

f. Following any correction or purging of personal information the agency shall furnish to past recipients notification that the item has been purged or corrected whose receipt shall be acknowledged.

B. Nothing in this chapter shall be construed to require an agency to disseminate any recommendation or letter of reference from or to a third party that is a part of the personnel file of any data subject nor to disseminate any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by any public body.

As used in this subsection, "test or examination" includes (i) any scoring key for any such test or examination and (ii) any other document that would jeopardize the security of the test or examination. Nothing contained in this subsection shall prohibit the release of test scores or results as provided by law, or to limit access to individual records as provided by law; however, the subject of the employment tests shall be entitled to review and inspect all documents relative to his performance on those employment tests.

When, in the reasonable opinion of the public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. Minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

C. Neither any provision of this chapter nor any provision of the Freedom of Information Act (§ 2.2-3700 et seq.) shall be construed to deny public access to records of the position, job classification, official salary or rate of pay of, and to records of the allowances or reimbursements for expenses paid to any public officer, official or employee at any level of state, local or regional government in the Commonwealth. The provisions of this subsection shall not apply to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.

D. Nothing in this section or in this chapter shall be construed to require an agency to disseminate information derived from tax returns ~~in violation of §§ 2.2-3705.7 and prohibited from release pursuant to § 58.1-3.~~

§ 22.1-253.13:3. Standard 3. Accreditation, other standards, assessments, and releases from state regulations.

A. The Board of Education shall promulgate regulations establishing standards for accreditation pursuant to the Administrative Process Act (§ 2.2-4000 et seq.), which shall

include, but not be limited to, student outcome measures, requirements and guidelines for instructional programs and for the integration of educational technology into such instructional programs, administrative and instructional staffing levels and positions, including staff positions for supporting educational technology, student services, auxiliary education programs such as library and media services, requirements for graduation from high school, community relations, and the philosophy, goals, and objectives of public education in Virginia.

The Board of Education shall promulgate regulations establishing standards for accreditation of public virtual schools under the authority of the local school board that enroll students full time.

The Board shall review annually the accreditation status of all schools in the Commonwealth. The Board shall review the accreditation status of a school once every three years if the school has been fully accredited for three consecutive years. Upon such triennial review, the Board shall review the accreditation status of the school for each individual year within that triennial review period. If the Board finds that the school would have been accredited every year of that triennial review period the Board shall accredit the school for another three years. The Board may review the accreditation status of any other school once every two years or once every three years, provided that any school that receives a multiyear accreditation status other than full accreditation shall be covered by a Board-approved multiyear corrective action plan for the duration of the period of accreditation. Such multiyear corrective action plan shall include annual written progress updates to the Board. A multiyear accreditation status shall not relieve any school or division of annual reporting requirements.

Each local school board shall maintain schools that are fully accredited pursuant to the standards for accreditation as prescribed by the Board of Education. Each local school board shall report the accreditation status of all schools in the local school division annually in public session. Within the time specified by the Board of Education, each school board

shall submit corrective action plans for any schools within its school division that have been designated as not meeting the standards as approved by the Board.

When the Board of Education determines through the school academic review process that the failure of schools within a division to achieve full accreditation status is related to division-level failure to implement the Standards of Quality or other division-level action or inaction, the Board may require a division-level academic review. After the conduct of such review and within the time specified by the Board of Education, each school board shall submit to the Board for approval a corrective action plan, consistent with criteria established by the Board setting forth specific actions and a schedule designed to ensure that schools within its school division achieve full accreditation status. If the Board determines that the proposed corrective action plan is not sufficient to enable all schools within the division to achieve full accreditation, the Board may return the plan to the local school board with directions to submit an amended plan pursuant to Board guidance. Such corrective action plans shall be part of the relevant school division's comprehensive plan pursuant to § 22.1-253.13:6.

With such funds as are appropriated or otherwise received for this purpose, the Board shall adopt and implement an academic review process, to be conducted by the Department of Education, to assist schools that are accredited with warning. The Department shall forward a report of each academic review to the relevant local school board, and such school board shall report the results of such academic review and the required annual progress reports in public session. The local school board shall implement any actions identified through the academic review and utilize them for improvement planning.

B. The Superintendent of Public Instruction shall develop and the Board of Education shall approve criteria for determining and recognizing educational performance in the Commonwealth's public school divisions and schools. Such criteria, when approved, shall become an integral part of the accreditation process and shall include student outcome

measurements. The Superintendent of Public Instruction shall annually report to the Board on the accreditation status of all school divisions and schools. Such report shall include an analysis of the strengths and weaknesses of public education programs in the various school divisions in Virginia and recommendations to the General Assembly for further enhancing student learning uniformly across the Commonwealth. In recognizing educational performance in the school divisions, the Board shall include consideration of special school division accomplishments, such as numbers of dual enrollments and students in Advanced Placement and International Baccalaureate courses, and participation in academic year Governor's Schools.

The Superintendent of Public Instruction shall assist local school boards in the implementation of action plans for increasing educational performance in those school divisions and schools that are identified as not meeting the approved criteria. The Superintendent of Public Instruction shall monitor the implementation of and report to the Board of Education on the effectiveness of the corrective actions taken to improve the educational performance in such school divisions and schools.

C. With such funds as are available for this purpose, the Board of Education shall prescribe assessment methods to determine the level of achievement of the Standards of Learning objectives by all students. Such assessments shall evaluate knowledge, application of knowledge, critical thinking, and skills related to the Standards of Learning being assessed. The Board shall, with the assistance of independent testing experts, conduct a regular analysis and validation process for these assessments. The Department of Education shall make available to school divisions Standards of Learning assessments typically administered by the middle and high schools by December 1 of the school year in which such assessments are to be administered or when newly developed assessments are available, whichever is later.

The Board shall also provide the option of industry certification and state licensure examinations as a student-selected credit.

The Board of Education shall make publicly available such assessments in a timely manner and as soon as practicable following the administration of such tests, so long as the release of such assessments does not compromise test security or deplete the bank of assessment questions necessary to construct subsequent tests, or limit the ability to test students on demand and provide immediate results in the web-based assessment system.

The Board shall include in the student outcome measures that are required by the Standards for Accreditation end-of-course or end-of-grade assessments for various grade levels and classes, including the completion of the alternative assessments implemented by each local school board, in accordance with the Standards of Learning. These assessments shall include end-of-course or end-of-grade tests for English, mathematics, science, and history and social science and may be integrated to include multiple subject areas.

The Board shall prescribe alternative methods of Standards of Learning assessment administration for children with disabilities, as that term is defined in § 22.1-213, who meet criteria established by the Board to demonstrate achievement of the Standards of Learning. An eligible student's Individual Education Program team shall make the final determination as to whether an alternative method of administration is appropriate for the student.

The Standards of Learning assessments administered to students in grades three through eight shall not exceed (a) reading and mathematics in grades three and four; (b) reading, mathematics, and science in grade five; (c) reading and mathematics in grades six and seven; (d) reading, writing, and mathematics in grade eight; (e) science after the student receives instruction in the grade six science, life science, and physical science Standards of Learning and before the student completes grade eight; and (f) Virginia Studies and Civics and Economics once each at the grade levels deemed appropriate by each local school board.

Each school board shall annually certify that it has provided instruction and administered an alternative assessment, consistent with Board guidelines, to students in grades three through eight in each Standards of Learning subject area in which a Standards

of Learning assessment was not administered during the school year. Such guidelines shall (1) incorporate options for age-appropriate, authentic performance assessments and portfolios with rubrics and other methodologies designed to ensure that students are making adequate academic progress in the subject area and that the Standards of Learning content is being taught; (2) permit and encourage integrated assessments that include multiple subject areas; and (3) emphasize collaboration between teachers to administer and substantiate the assessments and the professional development of teachers to enable them to make the best use of alternative assessments.

Local school divisions shall provide targeted mathematics remediation and intervention to students in grades six through eight who show computational deficiencies as demonstrated by their individual performance on any diagnostic test or grade-level Standards of Learning mathematics test that measures non-calculator computational skills.

The Department of Education shall award recovery credit to any student in grades three through eight who fails a Standards of Learning assessment in English reading or mathematics, receives remediation, and subsequently retakes and passes such an assessment, including any such student who subsequently retakes such an assessment on an expedited basis.

In addition, to assess the educational progress of students, the Board of Education shall (A) develop appropriate assessments, which may include criterion-referenced tests and other assessment instruments that may be used by classroom teachers; (B) select appropriate industry certification and state licensure examinations; and (C) prescribe and provide measures, which may include nationally normed tests to be used to identify students who score in the bottom quartile at selected grade levels. An annual justification that includes evidence that the student meets the participation criteria defined by the Virginia Department of Education shall be provided for each student considered for the Virginia Grade Level Alternative. Each Individual Education Program team shall review such justification and make the final determination as to whether or not the Virginia Grade Level Alternative is

appropriate for the student. The superintendent and the school board chairman shall certify to the Board of Education, as a part of certifying compliance with the Standards of Quality, that there is a justification in the Individual Education Program for every student who takes the Virginia Grade Level Alternative. Compliance with this requirement shall be monitored as a part of the special education monitoring process conducted by the Department of Education. The Board shall report to the Governor and General Assembly in its annual reports pursuant to § 22.1-18 any school division that is not in compliance with this requirement.

The Standards of Learning requirements, including all related assessments, shall be waived for any student awarded a scholarship under the Brown v. Board of Education Scholarship Program, pursuant to § 30-231.2, who is enrolled in a preparation program for a high school equivalency examination approved by the Board of Education or in an adult basic education program or an adult secondary education program to obtain the high school diploma or a high school equivalency certificate.

The Department of Education shall develop processes for informing school divisions of changes in the Standards of Learning.

The Board of Education may adopt special provisions related to the administration and use of any Standards of Learning test or tests in a content area as applied to accreditation ratings for any period during which the Standards of Learning content or assessments in that area are being revised and phased in. Prior to statewide administration of such tests, the Board of Education shall provide notice to local school boards regarding such special provisions.

The Board of Education shall not include in its calculation of the passage rate of a Standards of Learning assessment for the purposes of state accountability any student whose parent has decided to not have his child take such Standards of Learning assessment, unless such exclusions would result in the school's not meeting any required state or federal participation rate.

D. The Board of Education may pursue all available civil remedies pursuant to § 22.1-19.1 or administrative action pursuant to § 22.1-292.1 for breaches in test security and unauthorized alteration of test materials or test results.

The Board may initiate or cause to be initiated a review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests, including the exclusion of students from testing who are required to be assessed, by local school board employees responsible for the distribution or administration of the tests.

Records and other information furnished to or prepared by the Board during the conduct of a review or investigation may be withheld pursuant to subdivision ~~11~~ 10 of § 2.2-3705.3. However, this section shall not prohibit the disclosure of records to (i) a local school board or division superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee or (ii) any requester, after the conclusion of a review or investigation, in a form that (a) does not reveal the identity of any person making a complaint or supplying information to the Board on a confidential basis and (b) does not compromise the security of any test mandated by the Board. Any local school board or division superintendent receiving such records or other information shall, upon taking personnel action against a relevant employee, place copies of such records or information relating to the specific employee in such person's personnel file.

Notwithstanding any other provision of state law, no test or examination authorized by this section, including the Standards of Learning assessments, shall be released or required to be released as minimum competency tests, if, in the judgment of the Board, such release would breach the security of such test or examination or deplete the bank of questions necessary to construct future secure tests.

E. With such funds as may be appropriated, the Board of Education may provide, through an agreement with vendors having the technical capacity and expertise to provide computerized tests and assessments, and test construction, analysis, and security, for (i) web-based computerized tests and assessments, including computer-adaptive Standards of

Learning assessments, for the evaluation of student progress during and after remediation and (ii) the development of a remediation item bank directly related to the Standards of Learning.

F. To assess the educational progress of students as individuals and as groups, each local school board shall require the use of Standards of Learning assessments, alternative assessments, and other relevant data, such as industry certification and state licensure examinations, to evaluate student progress and to determine educational performance. Each local school shall require the administration of appropriate assessments to students, which may include criterion-referenced tests and teacher-made tests and shall include the Standards of Learning assessments, the local school board's alternative assessments, and the National Assessment of Educational Progress state-by-state assessment. Each school board shall analyze and report annually, in compliance with any criteria that may be established by the Board of Education, the results from the Stanford Achievement Test Series, Ninth Edition (Stanford Nine) assessment, if administered, industry certification examinations, and the Standards of Learning Assessments to the public.

The Board of Education shall not require administration of the Stanford Achievement Test Series, Ninth Edition (Stanford Nine) assessment, except as may be selected to facilitate compliance with the requirements for home instruction pursuant to § 22.1-254.1.

The Board shall include requirements for the reporting of the Standards of Learning assessment scores and averages for each year, regardless of accreditation frequency, as part of the Board's requirements relating to the School Performance Report Card. Such scores shall be disaggregated for each school by student subgroups on the Virginia assessment program as appropriate and shall be reported to the public within three months of their receipt. These reports (i) shall be posted on the portion of the Department of Education's website relating to the School Performance Report Card, in a format and in a manner that

allows year-to-year comparisons, and (ii) may include the National Assessment of Educational Progress state-by-state assessment.

G. Each local school division superintendent shall regularly review the division's submission of data and reports required by state and federal law and regulations to ensure that all information is accurate and submitted in a timely fashion. The Superintendent of Public Instruction shall provide a list of the required reports and data to division superintendents annually. The status of compliance with this requirement shall be included in the Board of Education's annual report to the Governor and the General Assembly as required by § 22.1-18.

H. Any school board may request the Board of Education for release from state regulations or, on behalf of one or more of its schools, for approval of an Individual School Accreditation Plan for the evaluation of the performance of one or more of its schools as authorized for certain other schools by the Standards of Accreditation pursuant to 8VAC20-131-280 C of the Virginia Administrative Code. Waivers of regulatory requirements may be granted by the Board of Education based on submission of a request from the division superintendent and chairman of the local school board. The Board of Education may grant, for a period up to five years, a waiver of regulatory requirements that are not (i) mandated by state or federal law or (ii) designed to promote health or safety. The school board shall provide in its waiver request a description of how the releases from state regulations are designed to increase the quality of instruction and improve the achievement of students in the affected school or schools. The Department of Education shall provide (a) guidance to any local school division that requests releases from state regulations and (b) information about opportunities to form partnerships with other agencies or entities to any local school division in which the school or schools granted releases from state regulations have demonstrated improvement in the quality of instruction and the achievement of students.

The Board of Education may also grant local school boards waivers of specific requirements in § 22.1-253.13:2, based on submission of a request from the division

superintendent and chairman of the local school board, permitting the local school board to assign instructional personnel to the schools with the greatest needs, so long as the school division employs a sufficient number of personnel divisionwide to meet the total number required by § 22.1-253.13:2 and all pupil/teacher ratios and class size maximums set forth in subsection C of § 22.1-253.13:2 are met. The school board shall provide in its request a description of how the waivers from specific Standards of Quality staffing standards are designed to increase the quality of instruction and improve the achievement of students in the affected school or schools. The waivers may be renewed in up to five-year increments, or revoked, based on student achievement results in the affected school or schools.

§ 22.1-279.8. School safety audits and school crisis, emergency management, and medical emergency response plans required.

A. For the purposes of this section, unless the context requires otherwise:

"School crisis, emergency management, and medical emergency response plan" means the essential procedures, operations, and assignments required to prevent, manage, and respond to a critical event or emergency, including natural disasters involving fire, flood, tornadoes, or other severe weather; loss or disruption of power, water, communications or shelter; bus or other accidents; medical emergencies, including cardiac arrest and other life-threatening medical emergencies; student or staff member deaths; explosions; bomb threats; gun, knife or other weapons threats; spills or exposures to hazardous substances; the presence of unauthorized persons or trespassers; the loss, disappearance or kidnapping of a student; hostage situations; violence on school property or at school activities; incidents involving acts of terrorism; and other incidents posing a serious threat of harm to students, personnel, or facilities. The plan shall include a provision that the Department of Criminal Justice Services and the Virginia Criminal Injuries Compensation Fund shall be contacted immediately to deploy assistance in the event of an emergency as defined in the emergency response plan when there are victims as defined in § 19.2-11.01. The Department of Criminal Justice Services and the Virginia Criminal Injuries

Compensation Fund shall be the lead coordinating agencies for those individuals determined to be victims, and the plan shall also contain current contact information for both agencies.

"School safety audit" means a written assessment of the safety conditions in each public school to (i) identify and, if necessary, develop solutions for physical safety concerns, including building security issues and (ii) identify and evaluate any patterns of student safety concerns occurring on school property or at school-sponsored events. Solutions and responses shall include recommendations for structural adjustments, changes in school safety procedures, and revisions to the school board's standards for student conduct.

B. The Virginia Center for School and Campus Safety, in consultation with the Department of Education, shall develop a list of items to be reviewed and evaluated in the school safety audits required by this section. Such items shall include those incidents reported to school authorities pursuant to § 22.1-279.3:1 and shall include a school inspection walk-through using a standardized checklist provided by the Virginia Center for School and Campus Safety, which shall incorporate crime prevention through environmental design principles.

The Virginia Center for School and Campus Safety shall prescribe a standardized report format for school safety audits, additional reporting criteria, and procedures for report submission, which may include instructions for electronic submission.

Each local school board shall require all schools under its supervisory control to annually conduct school safety audits as defined in this section and consistent with such list.

The results of such school safety audits shall be made public within 90 days of completion. The local school board shall retain authority to withhold or limit the release of any security plans, walk-through checklists, and specific vulnerability assessment components as provided in subdivision ~~7~~ 4 of § 2.2-3705.2. The completed walk-through checklist shall be made available upon request to the chief law-enforcement officer of the locality or his designee. Each school shall maintain a copy of the school safety audit, which

may exclude such security plans, walk-through checklists, and vulnerability assessment components, within the office of the school principal and shall make a copy of such report available for review upon written request.

Each school shall submit a copy of its school safety audit to the relevant school division superintendent. The division superintendent shall collate and submit all such school safety audits, in the prescribed format and manner of submission, to the Virginia Center for School and Campus Safety and shall make available upon request to the chief law-enforcement officer of the locality the results of such audits.

C. The division superintendent shall establish a school safety audit committee to include, if available, representatives of parents, teachers, local law-enforcement, emergency services agencies, local community services boards, and judicial and public safety personnel. The school safety audit committee shall review the completed school safety audits and submit any plans, as needed, for improving school safety to the division superintendent for submission to the local school board.

D. Each school board shall ensure that every school that it supervises shall develop a written school crisis, emergency management, and medical emergency response plan, consistent with the definition provided in this section, and shall provide copies of such plans to the chief law-enforcement officer, the fire chief, the chief of the emergency medical services agency, and the emergency management official of the locality. Each school division shall designate an emergency manager. The Department of Education and the Virginia Center for School and Campus Safety shall provide technical assistance to the school divisions of the Commonwealth in the development of the school crisis, emergency management, and medical emergency response plans that describe the components of a medical emergency response plan developed in coordination with local emergency medical services providers, the training of school personnel and students to respond to a life-threatening emergency, and the equipment required for this emergency response. The local school board shall annually review the written school crisis, emergency management, and

medical emergency response plans. The local school board shall have the authority to withhold or limit the review of any security plans and specific vulnerability assessment components as provided in subdivision ~~7~~4 of § 2.2-3705.2. The local school division superintendent shall certify this review in writing to the Virginia Center for School and Campus Safety no later than August 31 of each year.

Upon consultation with local school boards, division superintendents, the Virginia Center for School and Campus Safety, and the Coordinator of Emergency Management, the Board of Education shall develop, and may revise as it deems necessary, a model school crisis, emergency management, and medical emergency response plan for the purpose of assisting the public schools in Virginia in developing viable, effective crisis, emergency management, and medical emergency response plans. Such model shall set forth recommended effective procedures and means by which parents can contact the relevant school or school division regarding the location and safety of their school children and by which school officials may contact parents, with parental approval, during a critical event or emergency.

§ 23.1-2425. Confidential and public information.

A. The Authority is subject to the provisions of the Freedom of Information Act (§ 2.2-3700 et seq.), including the exclusions set forth in subdivision ~~15~~14 of § 2.2-3705.7 and subdivision A 23 of § 2.2-3711.

B. For purposes of the Freedom of Information Act (§ 2.2-3700 et seq.), meetings of the board are not considered meetings of the board of visitors of the University. Meetings of the board may be conducted through telephonic or video means as provided in § 2.2-3708.

§ 32.1-48.08. Declaration of quarantine.

A. The State Health Commissioner may declare a quarantine of any person or persons or any affected area after he finds that the quarantine is the necessary means to contain a communicable disease of public health threat as defined in § 32.1-48.06 to which

such person or persons or the people of an affected area have been or may have been exposed and thus may become infected.

B. The State Health Commissioner shall record his findings and any information on which he has relied in making the finding required for quarantine pursuant to subsection A. The State Health Commissioner's record of findings concerning any communicable disease of public health threat shall be confidential and shall not be disclosed in accordance with subdivision ~~17~~ 12 of § 2.2-3705.5.

C. The State Health Commissioner may order the quarantined person or persons to remain in their residences, to remain in another place where they are present, or to report to a place or places designated by the State Health Commissioner for the duration of their quarantine. An electronic device may be used to enforce any such quarantine. The Commissioner's order of quarantine shall be for a duration consistent with the known incubation period for such disease or, if the incubation period is unknown, for a period anticipated as being consistent with the incubation period for other similar infectious agents.

§ 32.1-48.011. Isolation may be ordered under certain exceptional circumstances; Commissioner authorized to require hospitalization or other health care.

A. Whenever the State Health Commissioner makes a determination of exceptional circumstances pursuant to § 32.1-48.05 and that the isolation procedures set forth in Article 3.01 (§ 32.1-48.01 et seq.) of this chapter are insufficient control measures to contain a communicable disease of public health threat, the isolation procedures herein may be invoked.

B. The State Health Commissioner may order the isolation of a person or persons upon a finding that (i) such person or persons are infected with or may reasonably be suspected to be infected with a communicable disease of public health threat and (ii) isolation is necessary to protect the public health, to ensure such isolated person or persons receive appropriate medical treatment, and to protect health care providers and others who may come into contact with such infected person or persons.

C. The State Health Commissioner shall record his findings and any information on which he has relied in making the finding required for isolation pursuant to this section. The State Health Commissioner's record of findings concerning any communicable disease of public health threat that is involved in an order of isolation shall be confidential and shall not be disclosed in accordance with subdivision ~~17~~ 12 of § 2.2-3705.5.

D. The Commissioner may order the isolated person or persons to remain in their places of residence, to remain in another place where they are present, or to report to a place or facility designated by the Commissioner for the duration of their isolation. An electronic device may be used to enforce any such isolation. The Commissioner's order of isolation shall be for a duration consistent with the known course of such communicable disease of public health threat or, if the course of the disease is unknown or uncertain, for a period consistent with the probable course of the communicable disease of public health threat.

E. To the extent that persons subject to an order of isolation pursuant to this article require hospitalization or other health care services, the State Health Commissioner shall be authorized to require that such services be provided.

F. The State Health Commissioner shall also have the authority to monitor the medical condition of any person or persons subject to an order of isolation pursuant to this article through regular visits by public health nurses or such other means as the Commissioner shall determine to be necessary.

§ 32.1-48.015. Authorization to disclose health records.

A. The provisions of this article are hereby declared to be necessary to prevent serious harm and serious threats to the health and safety of individuals and the public in Virginia for purposes of authorizing the State Health Commissioner or his designee to examine and review any health records of any person or persons subject to any order of quarantine or order of isolation pursuant to this article and the regulations of the Department of Health and Human Services promulgated in compliance with the Health Insurance Portability and Accountability Act of 1996, as amended. The State Health

Commissioner shall authorize any designee in writing to so examine and review any health records of any person or persons subject to any order of quarantine or order of isolation pursuant to this article.

B. Pursuant to the regulations concerning patient privacy promulgated by the federal Department of Health and Human Services, covered entities may disclose protected health information to the State Health Commissioner or his designee without obtaining consent or authorization for such disclosure from the person who is the subject of the records. Such protected health information shall be used to facilitate the health care of any person or persons who are subject to an order of quarantine or an order of isolation. The State Health Commissioner or his designee shall only redisclose such protected health information in compliance with the aforementioned federal regulations. Further, the protected health information disclosed to the State Health Commissioner or his designee shall be held confidential and shall not be disclosed pursuant to the provisions of subdivision ~~17~~ 12 of § 2.2-3705.5.

C. Pursuant to subsection G of § 32.1-116.3, any person requesting or requiring any employee of a public safety agency as defined in subsection J of § 32.1-45.2 to arrest, transfer, or otherwise exercise custodial supervision over an individual known to the requesting person (i) to be infected with any communicable disease or (ii) to be subject to an order of quarantine or an order of isolation pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 shall inform such employee of a public safety agency of the potential risk of exposure to a communicable disease.

§ 32.1-283.1. State Child Fatality Review Team; membership; access to and maintenance of records; confidentiality; etc.

A. There is hereby created the State Child Fatality Review Team, referred to in this section as "the Team," which shall develop and implement procedures to ensure that child deaths occurring in Virginia are analyzed in a systematic way. The Team shall review (i) violent and unnatural child deaths, (ii) sudden child deaths occurring within the first 18

months of life, and (iii) those fatalities for which the cause or manner of death was not determined with reasonable medical certainty. No child death review shall be initiated by the Team until conclusion of any law-enforcement investigation or criminal prosecution. The Team shall (i) develop and revise as necessary operating procedures for the review of child deaths, including identification of cases to be reviewed and procedures for coordination among the agencies and professionals involved, (ii) improve the identification, data collection, and record keeping of the causes of child death, (iii) recommend components for prevention and education programs, (iv) recommend training to improve the investigation of child deaths, and (v) provide technical assistance, upon request, to any local child fatality teams that may be established. The operating procedures for the review of child deaths shall be exempt from the Administrative Process Act (§ 2.2-4000 et seq.) pursuant to subdivision B 17 of § 2.2-4002.

B. The 16-member Team shall be chaired by the Chief Medical Examiner and shall be composed of the following persons or their designees: the Commissioner of Behavioral Health and Developmental Services; the Director of Child Protective Services within the Department of Social Services; the Superintendent of Public Instruction; the State Registrar of Vital Records; and the Director of the Department of Criminal Justice Services. In addition, one representative from each of the following entities shall be appointed by the Governor to serve for a term of three years: local law-enforcement agencies, local fire departments, local departments of social services, the Medical Society of Virginia, the Virginia College of Emergency Physicians, the Virginia Pediatric Society, local emergency medical services personnel, attorneys for the Commonwealth, and community services boards.

C. Upon the request of the Chief Medical Examiner in his capacity as chair of the Team, made after the conclusion of any law-enforcement investigation or prosecution, information and records regarding a child whose death is being reviewed by the Team may be inspected and copied by the Chief Medical Examiner or his designee, including, but not

limited to, any report of the circumstances of the event maintained by any state or local law-enforcement agency or medical examiner, and information or records maintained on such child by any school, social services agency or court. Information, records, or reports maintained by any attorney for the Commonwealth shall be made available for inspection and copying by the Chief Medical Examiner pursuant to procedures which shall be developed by the Chief Medical Examiner and the Commonwealth's Attorneys' Services Council established by § 2.2-2617. Any presentence report prepared pursuant to § 19.2-299 for any person convicted of a crime that led to the death of the child shall be made available for inspection and copying by the Office of the Chief Medical Examiner pursuant to procedures which shall be developed by the Chief Medical Examiner. In addition, the Office of the Chief Medical Examiner may inspect and copy from any Virginia health care provider, on behalf of the Team, (i) without obtaining consent, the health and mental health records of the child and those perinatal medical records of the child's mother that related to such child and (ii) upon obtaining consent from each adult regarding his personal records, or from a parent regarding the records of a minor child, the health and mental health records of the child's family. All such information and records shall be confidential and shall be excluded from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) pursuant to subdivision ~~9~~ 7 of § 2.2-3705.5. Upon the conclusion of the child death review, all information and records concerning the child and the child's family shall be shredded or otherwise destroyed by the Office of the Chief Medical Examiner in order to ensure confidentiality. Such information or records shall not be subject to subpoena or discovery or be admissible in any criminal or civil proceeding. If available from other sources, however, such information and records shall not be immune from subpoena, discovery, or introduction into evidence when obtained through such other sources solely because the information and records were presented to the Team during a child death review. Further, the findings of the Team may be disclosed or published in statistical or other form which shall not identify individuals. The portions of meetings in which individual child death cases

are discussed by the Team shall be closed pursuant to subdivision A 21 of § 2.2-3711. In addition to the requirements of § 2.2-3712, all team members, persons attending closed team meetings, and persons presenting information and records on specific child deaths to the Team during closed meetings shall execute a sworn statement to honor the confidentiality of the information, records, discussions, and opinions disclosed during any closed meeting to review a specific child death. Violations of this subsection are punishable as a Class 3 misdemeanor.

D. Upon notification of a child death, any state or local government agency maintaining records on such child or such child's family which are periodically purged shall retain such records for the longer of 12 months or until such time as the State Child Fatality Review Team has completed its child death review of the specific case.

E. The Team shall compile annual data which shall be made available to the Governor and the General Assembly as requested. These statistical data compilations shall not contain any personally identifying information and shall be public records.

§ 32.1-283.2. Local and regional child fatality review teams established; membership; authority; confidentiality; immunity.

A. Upon the initiative of any local or regional law-enforcement agency, fire department, department of social services, emergency medical services agency, attorney for the Commonwealth's office, or community services board, local or regional child fatality teams may be established for the purpose of conducting contemporaneous reviews of local child deaths in order to develop interventions and strategies for prevention specific to the locality or region. Each team shall establish rules and procedures to govern the review process. Agencies may share information but shall be bound by confidentiality and execute a sworn statement to honor the confidentiality of the information they share. Violations are punishable as a Class 3 misdemeanor. The State Child Fatality Review Team shall provide technical assistance and direction as provided for in subsection A of § 32.1-283.1.

B. Local and regional teams may be composed of the following persons from the localities represented on a particular board or their designees: a medical examiner appointed pursuant to § 32.1-282, a local social services official in charge of child protective services, a director of the relevant local or district health department, a chief law-enforcement officer, a local fire marshal, a local emergency medical services agency chief, the attorney for the Commonwealth, an executive director of the local community services board or other local mental health agency, and such additional persons, not to exceed four, as may be appointed to serve by the chairperson of the local or regional team. The chairperson shall be elected from among the designated membership. The additional members appointed by the chairperson may include, but are not restricted to, representatives of local human services agencies; local public education agencies; local pediatricians, psychiatrists and psychologists; and local child advocacy organizations.

C. Each team shall establish local rules and procedures to govern the review process prior to conducting the first child fatality review. The review of a death shall be delayed until any criminal investigations connected with the death are completed or the Commonwealth consents to the commencement of such review prior to the completion of the criminal investigation.

D. All information and records obtained or created regarding the review of a fatality shall be confidential and shall be excluded from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) pursuant to subdivision ~~9~~7 of § 2.2-3705.5. All such information and records shall be used by the team only in the exercise of its proper purpose and function and shall not be disclosed. Such information or records shall not be subject to subpoena, subpoena duces tecum, or discovery or be admissible in any criminal or civil proceeding. If available from other sources, however, such information and records shall not be immune from subpoena, subpoena duces tecum, discovery or introduction into evidence when obtained through such other sources solely because the information and records were presented to the team during a fatality review. No person who participated in the reviews

nor any member of the team shall be required to make any statement as to what transpired during the review or what information was collected during the review. Upon the conclusion of the fatality review, all information and records concerning the victim and the family shall be returned to the originating agency or destroyed. However, the findings of the team may be disclosed or published in statistical or other form which shall not identify individuals. The portions of meetings in which individual cases are discussed by the team shall be closed pursuant to subdivision A 21 of § 2.2-3711. All team members, persons attending closed team meetings, and persons presenting information and records on specific fatalities to the team during closed meetings shall execute a sworn statement to honor the confidentiality of the information, records, discussions, and opinions disclosed during any closed meeting to review a specific death. Violations of this subsection are punishable as a Class 3 misdemeanor.

E. Members of teams, as well as their agents and employees, shall be immune from civil liability for any act or omission made in connection with participation in a child fatality review team review, unless such act or omission was the result of gross negligence or willful misconduct. Any organization, institution, or person furnishing information, data, testimony, reports or records to review teams as part of such review, shall be immune from civil liability for any act or omission in furnishing such information, unless such act or omission was the result of gross negligence or willful misconduct.

§ 32.1-283.3. Family violence fatality review teams established; model protocol and data management; membership; authority; confidentiality, etc.

A. The Office of the Chief Medical Examiner shall develop a model protocol for the development and implementation of local family violence fatality review teams (teams) and such model protocol shall include relevant procedures for conducting reviews of fatal family violence incidents. A "fatal family violence incident" means any fatality that occurred or that is suspected of having occurred in the context of abuse between family members or

intimate partners. The Office of the Chief Medical Examiner shall provide technical assistance to the local teams and serve as a clearinghouse for information.

B. Subject to available funding, the Office of the Chief Medical Examiner shall provide ongoing surveillance of fatal family violence occurrences and promulgate an annual report based on accumulated data.

C. Any county or city, or combination of counties, cities, or counties and cities, may establish a family violence fatality review team to examine fatal family violence incidents and to create a body of information to help prevent future family violence fatalities. The team shall have the authority to review the facts and circumstances of all fatal family violence incidents that occur within its designated geographic area.

D. Membership in the team may include, but shall not be limited to, health care professionals, representatives from the local bar, attorneys for the Commonwealth, judges, law-enforcement officials, criminologists, medical examiners appointed pursuant to § 32.1-282, other experts in forensic medicine and pathology, family violence victim advocates, health department professionals, probation and parole professionals, adult and child protective services professionals, and representatives of family violence local coordinating councils.

E. Each team shall establish local rules and procedures to govern the review process prior to the first fatal family violence incident review conducted. The review of a death shall be delayed until any criminal investigations or prosecutions connected with the death are completed.

F. All information and records obtained or created regarding the review of a fatality shall be confidential and shall be excluded from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) pursuant to subdivision ~~9~~7 of § 2.2-3705.5. All such information and records shall be used by the team only in the exercise of its proper purpose and function and shall not be disclosed. Such information or records shall not be subject to subpoena, subpoena duces tecum or discovery or be admissible in any criminal or civil proceeding. If

available from other sources, however, such information and records shall not be immune from subpoena, subpoena duces tecum, discovery or introduction into evidence when obtained through such other sources solely because the information and records were presented to the team during a fatality review. No person who participated in the review nor any member of the team shall be required to make any statement as to what transpired during the review or what information was collected during the review. Upon the conclusion of the fatality review, all information and records concerning the victim and the family shall be returned to the originating agency or destroyed. However, the findings of the team may be disclosed or published in statistical or other form which shall not identify individuals. The portions of meetings in which individual cases are discussed by the team shall be closed pursuant to subdivision A 21 of § 2.2-3711. All team members, persons attending closed team meetings, and persons presenting information and records on specific fatalities to the team during closed meetings shall execute a sworn statement to honor the confidentiality of the information, records, discussions, and opinions disclosed during any closed meeting to review a specific death. Violations of this subsection are punishable as a Class 3 misdemeanor.

G. Members of teams, as well as their agents and employees, shall be immune from civil liability for any act or omission made in connection with participation in a family violence fatality review, unless such act or omission was the result of gross negligence or willful misconduct. Any organization, institution, or person furnishing information, data, testimony, reports or records to review teams as part of such review, shall be immune from civil liability for any act or omission in furnishing such information, unless such act or omission was the result of gross negligence or willful misconduct.

§ 32.1-283.5. Adult Fatality Review Team; duties; membership; confidentiality; penalties; report; etc.

A. There is hereby created the Adult Fatality Review Team, referred to in this section as "the Team," which shall develop and implement procedures to ensure that adult

deaths occurring in the Commonwealth are analyzed in a systematic way. The Team shall review the death of any person age 60 years or older, or any adult age 18 years or older who is incapacitated, who resides in the Commonwealth, or who does not reside in the Commonwealth but who is temporarily in the Commonwealth and who is in need of temporary or emergency protective services (i) who was the subject of an adult protective services or law-enforcement investigation; (ii) whose death was due to abuse, neglect, or exploitation or acts suggesting abuse, neglect, or exploitation; or (iii) whose death came under the jurisdiction of or was investigated by the Office of the Chief Medical Examiner pursuant to § 32.1-283. The Team shall not initiate an adult death review until the conclusion of any law-enforcement investigation or criminal prosecution. The operating procedures for the review of adult deaths shall be exempt from the Administrative Process Act (§ 2.2-4000 et seq.) pursuant to subdivision B 17 of § 2.2-4002.

B. The 16-member team shall consist of the following persons or their designees: the Chief Medical Examiner, the Commissioner of Behavioral Health and Developmental Services, the Commissioner for Aging and Rehabilitative Services, the Director of the Office of Licensure and Certification of the Department of Health, and the State Long-Term Care Ombudsman. In addition, the Governor shall appoint one representative from each of the following entities: a licensed funeral services provider, the Medical Society of Virginia, and local departments of social services, emergency medical services, attorneys for the Commonwealth, law-enforcement agencies, nurses specializing in geriatric care, psychiatrists specializing in geriatric care, and long-term care providers. The Team further shall include two members appointed by the Governor who are advocates for elderly or disabled populations in Virginia. The Chief Medical Examiner shall serve as chair of the Team.

After the initial staggering of terms, members appointed by the Governor shall be appointed for a term of four years. Appointments to fill vacancies, other than by expiration of a term, shall be for the unexpired terms. Vacancies shall be filled in the same manner as

the original appointments. All members may be reappointed. The Chief Medical Examiner and other ex officio members of the Team shall serve terms coincident with their terms of office.

C. Upon the request of the chair of the Team, made after the conclusion of any law-enforcement investigation or prosecution, information and records regarding an adult whose death is being reviewed by the Team shall be inspected and copied by the chair or his designee, including but not limited to any report of the circumstances of the event maintained by any state or local law-enforcement agency or the Office of the Chief Medical Examiner and information or records on the adult maintained by any facility that provided services to the adult, by any social services agency, or by any court. Information, records, or reports maintained by any attorney for the Commonwealth shall be made available for inspection and copying by the chair or his designee pursuant to procedures that shall be developed by the Chief Medical Examiner and the Commonwealth Attorneys Services Council established by § 2.2-2617. In addition, a health care provider shall provide the Team, upon request, with access to the health and mental health records of (i) the adult whose death is subject to review, without authorization; (ii) any adult relative of the deceased, with authorization; and (iii) any minor child of the deceased, with the authorization of the minor's parent or guardian. The chair of the Team also may copy and inspect the presentence report, prepared pursuant to § 19.2-299, of any person convicted of a crime that led to the death of the adult who is the subject of review by the Team.

D. All information obtained or generated by the Team regarding a review shall be confidential and excluded from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) pursuant to subdivision ~~9~~7 of § 2.2-3705.5. Such information shall not be subject to subpoena or discovery or be admissible in any civil or criminal proceeding. If available from other sources, however, such information and records shall not be immune from subpoena, discovery, or introduction into evidence when obtained through such other sources solely because the information and records were presented to the Team during an adult death

review. The Team shall compile all information collected during a review. The findings of the Team may be disclosed or published in statistical or other form, but shall not identify any individuals. The portions of meetings in which individual adult death cases are discussed by the Team shall be closed pursuant to subdivision A 21 of § 2.2-3711.

E. All Team members and other persons attending closed Team meetings, including any persons presenting information or records on specific fatalities, shall execute a sworn statement to honor the confidentiality of the information, records, discussions, and opinions disclosed during meetings at which the Team reviews a specific death. No Team member or other person who participates in a review shall be required to make any statement regarding the review or any information collected during the review. Upon conclusion of a review, all information and records concerning the victim and the family shall be shredded or otherwise destroyed in order to ensure confidentiality. Violations of this subsection are punishable as a Class 3 misdemeanor.

F. Upon notification of an adult death, any state or local government agency or facility that provided services to the adult or maintained records on the adult or the adult's family shall retain the records for the longer of 12 months or until such time as the Team has completed its review of the case.

G. The Team shall compile an annual report by October 1 of each year that shall be made available to the Governor and the General Assembly. The annual report shall include any policy, regulatory, or budgetary recommendations developed by the Team. Any statistical compilations prepared by the Team shall be public record and shall not contain any personally identifying information.

§ 32.1-283.6. Local and regional adult fatality review teams established; membership; authority; confidentiality; immunity.

A. Upon the initiative of any local or regional law-enforcement agency, department of social services, emergency medical services agency, attorney for the Commonwealth's office, community services board, or official with the Adult Protective Services Unit

established pursuant to § 51.5-148, local or regional adult fatality review teams may be established for the purpose of conducting contemporaneous reviews of local adult deaths in order to develop interventions and strategies for prevention specific to the locality or region. For the purposes of this section, the team may review the death of any person age 60 years or older, or any adult age 18 years or older who is incapacitated, who resides in the Commonwealth and who is in need of temporary or emergency protective services (i) who was the subject of an adult protective services or law-enforcement investigation; (ii) whose death was due to abuse, neglect, or exploitation or acts suggesting abuse, neglect, or exploitation; or (iii) whose death came under the jurisdiction of or was investigated by the Office of the Chief Medical Examiner as occurring in any suspicious, unusual, or unnatural manner, pursuant to § 32.1-283. Each team shall establish rules and procedures to govern the review process. Agencies may share information but shall be bound by confidentiality and execute a sworn statement to honor the confidentiality of the information they share. A violation of this subsection is punishable as a Class 3 misdemeanor. The Office of the Chief Medical Examiner shall develop a model protocol for the development and implementation of local or regional adult fatality review teams and such model protocol shall include relevant procedures for conducting reviews of adult fatalities.

B. Local and regional teams may be composed of the following persons from the localities represented on a particular board or their designees: a medical examiner appointed pursuant to § 32.1-282, a local adult protective services official, a local social services official, a director of the relevant local or district health department, an executive director of the local area agency on aging or other department representing the interests of the elderly or disabled, a chief law-enforcement officer, the attorney for the Commonwealth, an executive director of the local community services board or other local mental health agency, a local judge, and such additional persons as may be appointed to serve by the chair of the local or regional team. The chair shall be elected from among the designated membership. The additional members appointed by the chair may include, but are not

restricted to, representatives of local human services agencies, local health care professionals specializing in geriatric care or care of incapacitated adults, local emergency medical services personnel, local long-term care providers, representatives of local advocacy or service organizations for elderly or disabled populations, experts in forensic medicine and pathology, local funeral services providers, local centers for independent living, local long-term care ombudsmen, and representatives of the local bar.

C. Each local or regional team shall establish operating procedures to govern the review process prior to conducting the first adult fatality review. The review of a death shall be delayed until any criminal investigations connected with the death are completed or the Commonwealth consents to the commencement of such review prior to the completion of the criminal investigation.

D. All information and records obtained or created regarding a review of a fatality shall be confidential and shall be excluded from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) pursuant to subdivision ~~9~~7 of § 2.2-3705.5. All such information and records shall be used by the team only in the exercise of its proper purpose and function and shall not be disclosed. Such information and records shall not be subject to subpoena, subpoena duces tecum, discovery, or introduction into evidence when obtained through such other sources solely because the information and records were presented to the team during the fatality review. No person who participated in the review and no member of the team shall be required to make any statement as to what transpired during the review or what information was collected during the review. Upon the conclusion of the fatality review, all information and records concerning the victim and family shall be returned to the originating agency or destroyed. However, the findings of the team may be disclosed or published in statistical or other form that does not identify any individuals. The portions of meetings in which individual cases are discussed by the team shall be closed pursuant to subdivision A 21 of § 2.2-3711. All team members, persons attending closed team meetings, and persons presenting information and records on specific fatalities to the team during

closed meetings shall execute a sworn statement to honor the confidentiality of the information, records, discussions, and opinions disclosed during any closed meeting to review a specific death. A violation of this subsection is punishable as a Class 3 misdemeanor.

E. Members of teams, as well as their agents and employees, shall be immune from civil liability for any act or omission made in connection with participation in an adult fatality review team review, unless such act or omission was the result of gross negligence or willful misconduct. Any organization, institution, or person furnishing information, data, testimony, reports, or records to review teams as part of such review shall be immune from civil liability for any act or omission in furnishing such information, unless such act or omission was the result of gross negligence or willful misconduct.

§ 44-146.18. Department of Emergency Services continued as Department of Emergency Management; administration and operational control; coordinator and other personnel; powers and duties.

A. The State Office of Emergency Services is continued and shall hereafter be known as the Department of Emergency Management. Wherever the words "State Department of Emergency Services" are used in any law of the Commonwealth, they shall mean the Department of Emergency Management. During a declared emergency this Department shall revert to the operational control of the Governor. The Department shall have a coordinator who shall be appointed by and serve at the pleasure of the Governor and also serve as State Emergency Planning Director. The Department shall employ the professional, technical, secretarial, and clerical employees necessary for the performance of its functions.

B. The Department of Emergency Management shall in the administration of emergency services and disaster preparedness programs:

1. In coordination with political subdivisions and state agencies, ensure that the Commonwealth has up-to-date assessments and preparedness plans to prevent, respond to and recover from all disasters including acts of terrorism;

2. Conduct a statewide emergency management assessment in cooperation with political subdivisions, private industry and other public and private entities deemed vital to preparedness, public safety and security. The assessment shall include a review of emergency response plans, which include the variety of hazards, natural and man-made. The assessment shall be updated annually;

3. Submit to the Governor and to the General Assembly, no later than the first day of each regular session of the General Assembly, an annual executive summary and report on the status of emergency management response plans throughout the Commonwealth and other measures taken or recommended to prevent, respond to and recover from disasters, including acts of terrorism. This report shall be made available to the Division of Legislative Automated Systems for the processing of legislative documents and reports. Information submitted in accordance with the procedures set forth in subdivision ~~4~~ 14 of § 2.2-3705.2 shall not be disclosed unless:

a. It is requested by law-enforcement authorities in furtherance of an official investigation or the prosecution of a criminal act;

b. The agency holding the record is served with a proper judicial order; or

c. The agency holding the record has obtained written consent to release the information from the Department of Emergency Management;

4. Promulgate plans and programs that are conducive to adequate disaster mitigation preparedness, response and recovery programs;

5. Prepare and maintain a State Emergency Operations Plan for disaster response and recovery operations that assigns primary and support responsibilities for basic emergency services functions to state agencies, organizations and personnel as appropriate;

6. Coordinate and administer disaster mitigation, preparedness, response and recovery plans and programs with the proponent federal, state and local government agencies and related groups;

7. Provide guidance and assistance to state agencies and units of local government in developing and maintaining emergency management and continuity of operations (COOP) programs, plans and systems;

8. Make necessary recommendations to agencies of the federal, state, or local governments on preventive and preparedness measures designed to eliminate or reduce disasters and their impact;

9. Determine requirements of the Commonwealth and its political subdivisions for those necessities needed in the event of a declared emergency which are not otherwise readily available;

10. Assist state agencies and political subdivisions in establishing and operating training programs and programs of public information and education regarding emergency services and disaster preparedness activities;

11. Consult with the Board of Education regarding the development and revision of a model school crisis and emergency management plan for the purpose of assisting public schools in establishing, operating, and maintaining emergency services and disaster preparedness activities;

12. Consult with the State Council of Higher Education in the development and revision of a model institutional crisis and emergency management plan for the purpose of assisting public and private two-year and four-year institutions of higher education in establishing, operating, and maintaining emergency services and disaster preparedness activities and, as needed, in developing an institutional crisis and emergency management plan pursuant to § 23.1-804;

13. Develop standards, provide guidance and encourage the maintenance of local and state agency emergency operations plans, which shall include the requirement for a provision that the Department of Criminal Justice Services and the Virginia Criminal Injuries Compensation Fund be contacted immediately to deploy assistance in the event of an emergency as defined in the emergency response plan when there are victims as defined

1. The receipt, evaluation, and dissemination of intelligence pertaining to an impending or actual disaster;

2. Providing facilities from which state agencies and supporting organizations may conduct emergency operations;

3. Providing an adequate communications and warning system capable of notifying all political subdivisions in the Commonwealth of an impending disaster within a reasonable time;

4. Establishing and maintaining liaison with affected political subdivisions;

5. Determining requirements for disaster relief and recovery assistance;

6. Coordinating disaster response actions of federal, state and volunteer relief agencies;

7. Coordinating and providing guidance and assistance to affected political subdivisions to ensure orderly and timely response to and recovery from disaster effects.

D. The Department of Emergency Management shall be provided the necessary facilities and equipment needed to perform its normal day-to-day activities and coordinate disaster-related activities of the various federal, state, and other agencies during a state of emergency declaration by the Governor or following a major disaster declaration by the President.

E. The Department of Emergency Management is authorized to enter into all contracts and agreements necessary or incidental to performance of any of its duties stated in this section or otherwise assigned to it by law, including contracts with the United States, other states, agencies and government subdivisions of the Commonwealth, and other appropriate public and private entities.

F. The Department of Emergency Management shall encourage private industries whose goods and services are deemed vital to the public good to provide annually updated preparedness assessments to the local coordinator of emergency management on or before April 1 of each year, to facilitate overall Commonwealth preparedness. For the purposes of

this section, "private industry" means companies, private hospitals, and other businesses or organizations deemed by the State Coordinator of Emergency Management to be essential to the public safety and well-being of the citizens of the Commonwealth.

G. The Department of Emergency Management shall establish a Coordinator of Search and Rescue. Powers and duties of the Coordinator shall include:

1. Coordinating the search and rescue function of the Department of Emergency Management;
2. Coordinating with local, state, and federal agencies involved in search and rescue;
3. Coordinating the activities of search and rescue organizations involved in search and rescue;
4. Maintaining a register of search and rescue certifications, training, and responses;
5. Establishing a memorandum of understanding with the Virginia Search and Rescue Council and its respective member agencies regarding search and rescue efforts;
6. Providing on-scene search and rescue coordination when requested by an authorized person;
7. Providing specialized search and rescue training to police, fire-rescue, EMS, emergency managers, volunteer search and rescue responders, and others who might have a duty to respond to a search and rescue emergency;
8. Gathering and maintaining statistics on search and rescue in the Commonwealth;
9. Compiling, maintaining, and making available an inventory of search and rescue resources available in the Commonwealth;
10. Periodically reviewing search and rescue cases and developing best professional practices; and
11. Providing an annual report to the Secretary of Public Safety and Homeland Security on the current readiness of Virginia's search and rescue efforts.

in § 19.2-11.01. The Department of Criminal Justice Services and the Virginia Criminal Injuries Compensation Fund shall be the lead coordinating agencies for those individuals determined to be victims, and the plan shall also contain current contact information for both agencies;

14. Prepare, maintain, coordinate or implement emergency resource management plans and programs with federal, state and local government agencies and related groups, and make such surveys of industries, resources, and facilities within the Commonwealth, both public and private, as are necessary to carry out the purposes of this chapter;

15. Coordinate with the federal government and any public or private agency or entity in achieving any purpose of this chapter and in implementing programs for disaster prevention, mitigation, preparation, response, and recovery;

16. Establish guidelines pursuant to § 44-146.28, and administer payments to eligible applicants as authorized by the Governor;

17. Coordinate and be responsible for the receipt, evaluation, and dissemination of emergency services intelligence pertaining to all probable hazards affecting the Commonwealth;

18. Coordinate intelligence activities relating to terrorism with the Department of State Police; and

19. Develop an emergency response plan to address the needs of individuals with household pets and service animals in the event of a disaster and assist and coordinate with local agencies in developing an emergency response plan for household pets and service animals.

The Department of Emergency Management shall ensure that all such plans, assessments, and programs required by this subsection include specific preparedness for, and response to, disasters resulting from electromagnetic pulses and geomagnetic disturbances.

C. The Department of Emergency Management shall during a period of impending emergency or declared emergency be responsible for:

Nothing in this chapter shall be construed as authorizing the Department of Emergency Management to take direct operational responsibilities from local, state, or federal law enforcement in the course of search and rescue or missing person cases.

§ 44-146.22. Development of measures to prevent or reduce harmful consequences of disasters; disclosure of information.

A. In addition to disaster prevention measures included in state, local and interjurisdictional emergency operations plans, the Governor shall consider, on a continuing basis, hazard mitigation or other measures that could be taken to prevent or reduce the harmful consequences of disasters. At his direction, and pursuant to any other authority, state agencies, including, but not limited to, those charged with responsibilities in connection with floodplain management, stream encroachment and flow regulation, weather modification, fire prevention and control, air quality, public works, critical infrastructure protection, land use and land-use planning, and construction standards, shall make studies of disaster prevention. The Governor, from time to time, shall make recommendations to the General Assembly, local governments, and other appropriate public and private entities as may facilitate measures for prevention or reduction of the harmful consequences of disasters.

B. The Governor or agencies acting on his behalf may receive information, voluntarily submitted from both public and nonpublic entities, related to the protection of the nation's critical infrastructure sectors and components that are located in Virginia or affect the health, safety, and welfare of the citizens of Virginia. Information submitted by any public or nonpublic entity in accordance with the procedures set forth in subdivision-4 14 of § 2.2-3705.2 shall not be disclosed unless:

1. It is requested by law-enforcement authorities in furtherance of an official investigation or the prosecution of a criminal act;
2. The agency holding the record is served with a proper judicial order; or

3. The agency holding the record has obtained the written consent to release the information from the entity voluntarily submitting it.

§ 54.1-2517. Health Practitioners' Monitoring Program Committee; certain meetings, decisions to be excepted from the Freedom of Information Act; confidentiality of records; immunity from liability.

A. The Health Practitioners' Monitoring Program Committee shall consist of nine persons appointed by the Director to advise and assist in the operation of the Program, of whom eight shall be licensed, certified, or registered practitioners and one shall be a citizen member. Of the members who are licensed, certified, or registered practitioners, at least one shall be licensed to practice medicine or osteopathy in Virginia and engaged in active clinical practice, at least one shall be a registered nurse engaged in active practice, and all shall be knowledgeable about impairment and rehabilitation, particularly as related to the monitoring of health care practitioners. The Committee shall have the following powers and duties:

1. To determine, in accordance with the regulations, eligibility to enter into the Program;
 2. To determine, in accordance with the regulations, those Program participants who are eligible for stayed disciplinary action;
 3. To enter into written contracts with practitioners which may include, among other terms and conditions, withdrawal from practice or limitations on the scope of the practice for a period of time;
 4. To report to the Director and the health regulatory boards as necessary on the status of applicants for and participants in the Program;
 5. To report to the Director, at least annually, on the performance of the Program;
- and
6. To assist the Director in carrying out the provisions of this chapter.

B. Records of the Program, to the extent such records identify individual practitioners in the Program, shall be privileged and confidential, and shall not be disclosed consistent with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). Such records shall be used only in the exercise of the proper functions as set forth in this chapter and shall not be public records nor shall such records be subject to court order, except as provided in subdivision C 4, or be subject to discovery or introduction as evidence in any civil, criminal, or administrative proceedings except those conducted by a health regulatory board.

C. Notwithstanding the provisions of subsection B and of subdivision ~~4~~ 2 of § 2.2-3705.5, the Committee may disclose such records relative to an impaired practitioner only:

1. When disclosure of the information is essential to the monitoring needs of the impaired practitioner;

2. When release of the information has been authorized in writing by the impaired practitioner;

3. To a health regulatory board within the Department of Health Professions; or

4. When an order by a court of competent jurisdiction has been granted, upon a showing of good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate protections against unauthorized disclosures.

D. Pursuant to subdivision A 24 of § 2.2-3711, the proceedings of the Committee which in any way pertain or refer to a specific practitioner who may be, or who is actually, impaired and who may be or is, by reason of such impairment, subject to disciplinary action by the relevant board shall be excluded from the requirements of the Freedom of Information Act (§ 2.2-3700 et seq.) and may be closed. Such proceedings shall be privileged and confidential.

E. The members of the Committee shall be immune from liability resulting from the exercise of the powers and duties of the Committee as provided in § 8.01-581.13.

§ 54.1-2523. Confidentiality of data; disclosure of information; discretionary authority of Director.

A. All data, records, and reports relating to the prescribing and dispensing of covered substances to recipients and any abstracts from such data, records, and reports that are in the possession of the Prescription Monitoring Program pursuant to this chapter and any material relating to the operation or security of the program shall be confidential and shall be exempt from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) pursuant to subdivision ~~15~~ 2 of § 2.2-3705.5. Records in possession of the Prescription Monitoring Program shall not be available for civil subpoena, nor shall such records be disclosed, discoverable, or compelled to be produced in any civil proceeding, nor shall such records be deemed admissible as evidence in any civil proceeding for any reason. Further, the Director shall only have discretion to disclose any such information as provided in subsections B and C.

B. Upon receiving a request for information in accordance with the Department's regulations and in compliance with applicable federal law and regulations, the Director shall disclose the following:

1. Information relevant to a specific investigation of a specific recipient or of a specific dispenser or prescriber to an agent who has completed the Virginia State Police Drug Diversion School designated by the superintendent of the Department of State Police or designated by the chief law-enforcement officer of any county, city, or town or campus police department to conduct drug diversion investigations pursuant to § 54.1-3405.

2. Information relevant to an investigation or inspection of or allegation of misconduct by a specific person licensed, certified, or registered by or an applicant for licensure, certification, or registration by a health regulatory board; information relevant to a disciplinary proceeding before a health regulatory board or in any subsequent trial or

appeal of an action or board order to designated employees of the Department of Health Professions; or to designated persons operating the Health Practitioners' Monitoring Program pursuant to Chapter 25.1 (§ 54.1-2515 et seq.).

3. Information relevant to the proceedings of any investigatory grand jury or special grand jury that has been properly impaneled in accordance with the provisions of Chapter 13 (§ 19.2-191 et seq.) of Title 19.2.

4. Information relevant to a specific investigation of a specific recipient, dispenser, or prescriber to an agent of a federal law-enforcement agency with authority to conduct drug diversion investigations.

5. Information relevant to a specific investigation, supervision, or monitoring of a specific recipient for purposes of the administration of criminal justice pursuant to Chapter 1 (§ 9.1-100 et seq.) of Title 9.1 to a probation or parole officer as described in Article 2 (§ 53.1-141 et seq.) of Chapter 4 of Title 53.1 or a local community-based probation officer as described in § 9.1-176.1 who has completed the Virginia State Police Drug Diversion School designated by the Director of the Department of Corrections or his designee.

C. In accordance with the Department's regulations and applicable federal law and regulations, the Director may, in his discretion, disclose:

1. Information in the possession of the program concerning a recipient who is over the age of 18 to that recipient. The information shall be mailed to the street or mailing address indicated on the recipient request form.

2. Information on a specific recipient to a prescriber, as defined in this chapter, for the purpose of establishing the treatment history of the specific recipient when such recipient is either under care and treatment by the prescriber or the prescriber is consulting on or initiating treatment of such recipient. In a manner specified by the Director in regulation, notice shall be given to patients that information may be requested by the prescriber from the Prescription Monitoring Program.

3. Information on a specific recipient to a dispenser for the purpose of establishing a prescription history to assist the dispenser in (i) determining the validity of a prescription in accordance with § 54.1-3303 or (ii) providing clinical consultation on the care and treatment of the recipient. In a manner specified by the Director in regulation, notice shall be given to patients that information may be requested by the dispenser from the Prescription Monitoring Program.

4. Information relevant to an investigation or regulatory proceeding of a specific dispenser or prescriber to other regulatory authorities concerned with granting, limiting or denying licenses, certificates or registrations to practice a health profession when such regulatory authority licenses such dispenser or prescriber or such dispenser or prescriber is seeking licensure by such other regulatory authority.

5. Information relevant to an investigation relating to a specific dispenser or prescriber who is a participating provider in the Virginia Medicaid program or information relevant to an investigation relating to a specific recipient who is currently eligible for and receiving or who has been eligible for and has received medical assistance services to the Medicaid Fraud Control Unit of the Office of the Attorney General or to designated employees of the Department of Medical Assistance Services, as appropriate.

6. Information relevant to determination of the cause of death of a specific recipient to the designated employees of the Office of the Chief Medical Examiner.

7. Information for the purpose of bona fide research or education to qualified personnel; however, data elements that would reasonably identify a specific recipient, prescriber, or dispenser shall be deleted or redacted from such information prior to disclosure. Further, release of the information shall only be made pursuant to a written agreement between such qualified personnel and the Director in order to ensure compliance with this subdivision.

8. Information relating to prescriptions for covered substances issued by a specific prescriber, which have been dispensed and reported to the Program, to that prescriber.

9. Information about a specific recipient who is a member of a Virginia Medicaid managed care program to a physician or pharmacist licensed in the Commonwealth and employed by the Virginia Medicaid managed care program. Such information shall only be used to determine eligibility for and to manage the care of the specific recipient in a Patient Utilization Management Safety or similar program. Notice shall be given to recipients that information may be requested by a licensed physician or pharmacist employed by the Virginia Medicaid managed care program from the Prescription Monitoring Program.

10. (Expires July 1, 2022) Information to the Board of Medicine about prescribers who meet a certain threshold for prescribing covered substances for the purpose of requiring relevant continuing education. The threshold shall be determined by the Board of Medicine in consultation with the Program.

D. The Director may enter into agreements for mutual exchange of information among prescription monitoring programs in other jurisdictions, which shall only use the information for purposes allowed by this chapter.

E. This section shall not be construed to supersede the provisions of § 54.1-3406 concerning the divulging of confidential records relating to investigative information.

F. Confidential information that has been received, maintained or developed by any board or disclosed by the board pursuant to subsection A shall not, under any circumstances, be available for discovery or court subpoena or introduced into evidence in any medical malpractice suit or other action for damages arising out of the provision of or failure to provide services. However, this subsection shall not be construed to inhibit any investigation or prosecution conducted pursuant to Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2.

2. That the provisions of § 2.2-3704, subdivisions 10 and 14 of §2.2-3705.2, subdivisions 2 and 3 of § 2.2-3705.5, and subdivision 29 of §2.2-3705.6, as amended by this act, are declaratory of existing law.

#

HB 1540

SUMMARY TEXT:

Virginia Freedom of Information Act (FOIA); public access to meetings of public bodies. Revises FOIA's various open meeting exemptions relating to legal matters, litigation, certain museums, and the Virginia Commonwealth University Health System Authority. The bill also (i) clarifies where meeting notices and minutes are to be posted, (ii) requires copies of proposed agendas to be made available, (iii) eliminates reporting to the Joint Commission on Science and Technology when a state public body convenes an electronic communication meeting, and (iv) makes technical corrections to several open meeting exemptions to provide context for those meeting exemptions that currently only cross-reference corollary records exemptions. The bill also clarifies closed meeting procedures. The bill contains numerous technical corrections. This bill is a recommendation of the Freedom of Information Advisory Council pursuant to the HJR 96 FOIA study (2014-2016).

HB 1540

DRAFT TEXT:

A BILL to amend and reenact §§ 2.2-3701, 2.2-3707, 2.2-3707.1, 2.2-3708, 2.2-3708.1, 2.2-3711, 2.2-3712, 10.1-104.7, 15.2-1416, 23.1-1303, and 54.1-2400.2 of the Code of Virginia, relating to the Virginia Freedom of Information Act; public access to meetings of public bodies.

Annotated--This document is the consolidation of the FOIA Council's legislative recommendations made during the course of the HJR 96 Study (2014--2016) and introduced in the 2017 Session of the General Assembly as HB 1540.

How to use this document: Each recommended change in this document is annotated to provide the following information: (i) a "DRAFTING NOTE" that explains the amendment(s) to each amended section of FOIA, including whether the amendment was technical or substantive, (ii) the legislative draft (LD) identification number of the recommended change before incorporation into the omnibus bill recommended by the FOIA Council and enacted by the 2017 Session of the General Assembly (2017 Acts of Assembly, c. 616), (iii) the date

recommendation was adopted by the Meetings Subcommittee, and (iv) the date the recommendation was approved by the FOIA Council. Please note that any amendments to Code of Virginia sections outside of FOIA do not include any DRAFTING NOTE as these amendments are all technical, cross reference fixes.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3701, 2.2-3707, 2.2-3707.1, 2.2-3708, 2.2-3708.1, 2.2-3711, 2.2-3712, 10.1-104.7, 15.2-11416, 23.1-1303, and 54.1-2400.2 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3701. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Closed meeting" means a meeting from which the public is excluded.

"Electronic communication" means any audio or combined audio and visual communication method.

"Emergency" means an unforeseen circumstance rendering the notice required by this chapter impossible or impracticable and which circumstance requires immediate action.

"Information" as used in the exclusions established by §§ 2.2-3705.1 through 2.2-3705.7, means the content within a public record that references a specifically identified subject matter, and shall not be interpreted to require the production of information that is not embodied in a public record.

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or 2.2-3708.1, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such

gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting, shall be deemed a "meeting" subject to the provisions of this chapter.

"Open meeting" or "public meeting" means a meeting at which the public may be present.

"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers and private police departments as defined in § 9.1-101 shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. Records that are not prepared for or used in the transaction of public business are not public records.

"Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, ~~whose members are appointed by the participating local governing bodies, and such~~ which unit includes two or more ~~counties or cities~~ localities. **[LD 17100176; recommended by Meetings Subcommittee on 9/19/16; Approved by FOIA Council 9/19/16.]**

"Scholastic records" means those records containing information directly related to a student or an applicant for admission and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution.

***DRAFTING NOTE:** Deletion of the words "whose members are appointed by the participating local governing bodies" is a substantive change. The unamended definition of "regional public body" was seen as imprecise and confusing. Ultimately for public access purposes, how the membership is appointed is superfluous in the definition of "regional public body."*

§ 2.2-3707. Meetings to be public; notice of meetings; recordings; minutes. LD 17100047; recommended by Meetings Subcommittee on 6/6/16; Approved by FOIA Council 10/17/16.]

A. All meetings of public bodies shall be open, except as provided in §§ 2.2-3707.01 and 2.2-3711.

B. No meeting shall be conducted through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or

transact public business, except as provided in § 2.2-3708, 2.2-3708.1 or as may be specifically provided in Title 54.1 for the summary suspension of professional licenses.

C. Every public body shall give notice of the date, time, and location of its meetings ~~by placing the notice in a prominent public location at which notices are regularly posted and in the office of the clerk of the public body, or in the case of a public body that has no clerk, in the office of the chief administrator:~~

1. Posting such notice on its publicly available website, if any;

2. Placing such notice in a prominent public location at which notices are regularly posted; and

3. Placing such notice at the office of the clerk of the public body, or in the case of a public body that has no clerk, in the office of the chief administrator.

All state public bodies subject to the provisions of this chapter shall also post notice of their meetings ~~on their websites and on the electronic calendar maintained by the Virginia Information Technologies Agency commonly known as the Commonwealth Calendar~~ on a central, publicly available electronic calendar maintained by the Commonwealth. Publication of meeting notices by electronic means by other public bodies shall be encouraged.

The notice shall be posted at least three working days prior to the meeting. ~~Notices for meetings of state public bodies on which there is at least one member appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.~~

D. Notice, reasonable under the circumstance, of special ~~or~~, emergency, or continued meetings shall be given contemporaneously with the notice provided to the members of the public body conducting the meeting.

E. Any person may annually file a written request for notification with a public body. The request shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any. The public body

receiving such request shall provide notice of all meetings directly to each such person. Without objection by the person, the public body may provide electronic notice of all meetings in response to such requests.

F. At least one copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body. The proposed agendas for meetings of state public bodies where at least one member has been appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.

~~G. The notice provisions of this chapter shall not apply to informal meetings or gatherings of the members of the General Assembly.~~

~~H.~~ Any person may photograph, film, record or otherwise reproduce any portion of a meeting required to be open. The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting to prevent interference with the proceedings, but shall not prohibit or otherwise prevent any person from photographing, filming, recording, or otherwise reproducing any portion of a meeting required to be open. No public body shall conduct a meeting required to be open in any building or facility where such recording devices are prohibited.

I.H. Minutes shall be recorded at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly; (ii) legislative interim study commissions and committees, including the Virginia Code Commission; (iii) study committees or commissions appointed by the Governor; or (iv) study commissions or study committees, or any other committees or subcommittees appointed by the governing bodies or school boards of counties, cities and towns, except

where the membership of any such commission, committee or subcommittee includes a majority of the governing body of the county, city or town or school board.

Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter.

Minutes shall be in writing and shall include (i) the date, time, and location of the meeting; (ii) the members of the public body recorded as present and absent; and (iii) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. In addition, for electronic communication meetings conducted in accordance with § 2.2-3708, minutes of state public bodies shall include (a) the identity of the members of the public body at each remote location identified in the notice who participated in the meeting through electronic communications means, (b) the identity of the members of the public body who were physically assembled at the primary or central meeting location, and (c) the identity of the members of the public body who were not present at the locations identified in clauses (a) and (b), but who monitored such meeting through electronic communications means.

***DRAFTING NOTE:** Amendments to subsection C are both technical and substantive. The substantive change is requiring the posting of notice of a meeting on a public body's publicly available website, if any. Amendments to subsection D and F are substantive in that they add a new requirement for (i) the posting of notice for continued meetings and (ii) including a copy of any proposed agenda to the agenda materials that must be made available for inspection, respectively.*

§ 2.2-3707.1. Posting of minutes for state boards and commissions. LD 17100786; recommended by Meetings Subcommittee on 9/19/16; Approved by FOIA Council 10/17/16.

All boards, commissions, councils, and other public bodies created in the executive branch of state government and subject to the provisions of this chapter shall post minutes of their meetings on such body's official public government website, if any, and on the a

~~central electronic calendar maintained by the Virginia Information Technologies Agency commonly known as the Commonwealth Calendar Commonwealth.~~ Draft minutes of meetings shall be posted as soon as possible but no later than ~~ten~~ 10 working days after the conclusion of the meeting. Final approved meeting minutes shall be posted within three working days of final approval of the minutes.

DRAFTING NOTE: Technical amendments.

§ 2.2-3708. Electronic communication meetings; applicability; physical quorum required; exceptions; notice; report. [LD 17100176; recommended by Meetings Subcommittee on 9/19/16; Approved by FOIA Council 9/19/16.]

A. Except as expressly provided in subsection G of this section or § 2.2-3708.1, no local governing body, school board, or any authority, board, bureau, commission, district or agency of local government, any committee thereof, or any entity created by a local governing body, school board, or any local authority, board, or commission shall conduct a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled. Nothing in this section shall be construed to prohibit the use of interactive audio or video means to expand public participation.

B. Except as provided in subsection G or H of this section or subsection D of § 2.2-3707.01, state public bodies may conduct any meeting wherein the public business is discussed or transacted through electronic communication means, provided (i) a quorum of the public body is physically assembled at one primary or central meeting location, (ii) notice of the meeting has been given in accordance with subsection C, and (iii) the remote locations, from which additional members of the public body participate through electronic communication means, are open to the public. All persons attending the meeting at any of the meeting locations shall be afforded the same opportunity to address the public body as persons attending the primary or central location.

If an authorized public body holds an electronic meeting pursuant to this section, it shall also hold at least one meeting annually where members in attendance at the meeting are physically assembled at one location and where no members participate by electronic communication means.

C. Notice of any ~~meetings~~ regular meeting held pursuant to this section shall be provided at least three working days in advance of the date scheduled for the meeting. Notice, reasonable under the circumstance, of special, emergency, or continued meetings held pursuant to this section shall be given contemporaneously with the notice provided to members of the public body conducting the meeting. For the purposes of this subsection, "continued meeting" means a meeting that is continued to address an emergency or to conclude the agenda of a meeting for which proper notice was given.

The notice shall include the date, time, place, and purpose for the meeting; shall identify the locations for the meeting; and shall include a telephone number that may be used at remote locations to notify the primary or central meeting location of any interruption in the telephonic or video broadcast of the meeting to the remote locations. Any interruption in the telephonic or video broadcast of the meeting shall result in the suspension of action at the meeting until repairs are made and public access restored.

D. ~~Agenda~~ A copy of the proposed agenda and agenda packets and, unless exempt, all materials that will be distributed to members of the public body and that have been made available to the staff of the public body in sufficient time for duplication and forwarding to all locations where public access will be provided shall be made available to the public at the time of the meeting. Minutes of all meetings held by electronic communication means shall be recorded as required by § 2.2-3707. Votes taken during any meeting conducted through electronic communication means shall be recorded by name in roll-call fashion and included in the minutes.

E. Three working days' notice shall not be required for meetings authorized under this section held in accordance with subsection G ~~or that are continued to address an~~

~~emergency or to conclude the agenda of the meeting for which proper notice has been given, when the date, time, place, and purpose of the continued meeting are set during the meeting prior to adjournment.~~ Public bodies conducting emergency meetings through electronic communication means shall comply with the provisions of subsection D requiring minutes of the meeting. The nature of the emergency shall be stated in the minutes.

F. Any authorized public body that meets by electronic communication means shall make a written report of the following to the Virginia Freedom of Information Advisory Council ~~and the Joint Commission on Technology and Science~~ by December 15 of each year:

1. The total number of electronic communication meetings held that year;
2. The dates and purposes of the meetings;
3. A copy of the agenda for the meeting;
4. The number of sites for each meeting;
5. The types of electronic communication means by which the meetings were held;
6. The number of participants, including members of the public, at each meeting location;
7. The identity of the members of the public body recorded as absent and those recorded as present at each meeting location;
8. A summary of any public comment received about the electronic communication meetings; and
9. A written summary of the public body's experience using electronic communication meetings, including its logistical and technical experience.

In addition, any authorized public body shall make available to the public at any meeting conducted in accordance with this section a public comment form prepared by the Virginia Freedom of Information Advisory Council in accordance with § 30-179.

G. Any public body may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has

declared a state of emergency in accordance with § 44-146.17, provided that (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii) the purpose of the meeting is to address the emergency. The public body convening a meeting in accordance with this subsection shall (a) give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided members of the public body conducting the meeting; (b) make arrangements for public access to such meeting; and (c) otherwise comply with the provisions of this section. The nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held shall be stated in the minutes.

H. ~~[Expired]~~.

DRAFTING NOTE: Amendments to subsections C, D, and F are substantive. Subsections C and D add a new requirement for (i) the posting of notice for continued meetings and (ii) including a copy of any proposed agenda to the agenda materials that must be made available for inspection, respectively. The substantive change to subsection F eliminates the requirement that reports of electronic communication meetings be filed with the Joint Commission on Technology and Science.

§ 2.2-3708.1. Participation in meetings due to personal matter; certain disabilities; distance from meeting location for certain public bodies. . [LD 17100176; recommended by Meetings Subcommittee on 9/19/16; Approved by FOIA Council 9/19/16.]

A. A member of a public body may participate in a meeting governed by this chapter through electronic communication means from a remote location that is not open to the public only as follows and subject to the requirements of subsection B:

1. If, on or before the day of a meeting, a member of the public body holding the meeting notifies the chair of the public body that such member is unable to attend the meeting due to ~~an emergency or~~ a personal matter and identifies with specificity the nature of the ~~emergency or~~ personal matter, and the public body holding the meeting records in its

minutes the specific nature of the ~~emergency~~ or personal matter and the remote location from which the member participated. If a member's participation from a remote location is disapproved because such participation would violate the policy adopted pursuant to subsection B, such disapproval shall be recorded in the minutes with specificity.

Such participation by the member shall be limited each calendar year to two meetings ~~or 25 percent of the meetings of the public body, whichever is fewer;~~

2. If a member of a public body notifies the chair of the public body that such member is unable to attend a meeting due to a temporary or permanent disability or other medical condition that prevents the member's physical attendance and the public body records this fact and the remote location from which the member participated in its minutes; or

3. If, on the day of a meeting, a member of a regional public body notifies the chair of the public body that such member's principal residence is more than 60 miles from the meeting location identified in the required notice for such meeting and the public body holding the meeting records in its minutes the remote location from which the member participated. If a member's participation from a remote location is disapproved because such participation would violate the policy adopted pursuant to subsection B, such disapproval shall be recorded in the minutes with specificity.

B. Participation by a member of a public body as authorized under subsection A shall be only under the following conditions:

1. The public body has adopted a written policy allowing for and governing participation of its members by electronic communication means, including an approval process for such participation, subject to the express limitations imposed by this section. Once adopted, the policy shall be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting;

2. A quorum of the public body is physically assembled at the primary or central meeting location; and

3. The public body makes arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location.

DRAFTING NOTE: Amendments to subsection A 1 are both technical and substantive. The word "emergency" was eliminated as it is encompassed in the term "personal matter." The substantive change is the elimination of the 25 percent limitation for a member's participation. This limitation was seen as difficult to apply and therefore deleted.

§ 2.2-3711. Closed meetings authorized for certain limited purposes. [(i) LD 15100276; recommended by Meetings Subcommittee on 8/19/14; Approved by FOIA Council 11/21/16; (ii) LD 1610002; recommended by Meetings Subcommittee on May 12, 2015; Approved by FOIA Council 6/23/16; (iii) LD 16100201, recommended by Meetings Subcommittee on 7/21/15; Approved by FOIA Council 6/23/16; and (iv) LD 17100049; recommended by Meetings Subcommittee 9/19/16; Approved by Council 9/19/16.]

A. Public bodies may hold closed meetings only for the following purposes:

1. Discussion, consideration, or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining, or resignation of specific public officers, appointees, or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board. Nothing in this subdivision, however, shall be construed to authorize a

closed meeting by a local governing body or an elected school board to discuss compensation matters that affect the membership of such body or board collectively.

2. Discussion or consideration of admission or disciplinary matters or any other matters that would involve the disclosure of information contained in a scholastic record concerning any student of any Virginia public institution of higher education or any state school system. However, any such student, legal counsel and, if the student is a minor, the student's parents or legal guardians shall be permitted to be present during the taking of testimony or presentation of evidence at a closed meeting, if such student, parents, or guardians so request in writing and such request is submitted to the presiding officer of the appropriate board.

3. Discussion or consideration of the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.

4. The protection of the privacy of individuals in personal matters not related to public business.

5. Discussion 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.

6. Discussion or consideration of the investment of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the governmental unit would be adversely affected.

7. Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body; ~~and consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel.~~ For the purposes of this

subdivision, "probable litigation" means litigation that has been specifically threatened or on which the public body or its legal counsel has a reasonable basis to believe will be commenced by or against a known party. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

8. Consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

~~In the case of boards of visitors of public institutions of higher education, discussion~~
9. Discussion or consideration by boards of visitors of public institutions of higher education of matters relating to gifts, bequests and fund-raising activities, and of grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants, and contracts made by a foreign government, a foreign legal entity, or a foreign person and accepted by a public institution of higher education in Virginia shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a political subdivision thereof; (ii) "foreign legal entity" means any legal entity (a) created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such entity is composed of foreign persons or foreign legal entities, ~~or any legal entity,~~ (b) created under the laws of a foreign government; and (iii) "foreign person" means any individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.

~~9. In the case of~~ 10. Discussion or consideration by 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.

~~10.11.~~ Discussion or consideration of honorary degrees or special awards.

~~11.12.~~ Discussion or consideration of tests, examinations, or other information excluded from this chapter pursuant to used, administered, or prepared by a public body and subject to the exclusion in subdivision 4 of § 2.2-3705.1.

~~12.13.~~ Discussion, consideration, or review by the appropriate House or Senate committees of possible disciplinary action against a member arising out of the possible inadequacy of the disclosure statement filed by the member, provided the member may request in writing that the committee meeting not be conducted in a closed meeting.

~~13.14.~~ Discussion of strategy with respect to the negotiation of a hazardous waste siting agreement or to consider the terms, conditions, and provisions of a hazardous waste siting agreement if the governing body in open meeting finds that an open meeting will have an adverse effect upon the negotiating position of the governing body or the establishment of the terms, conditions and provisions of the siting agreement, or both. All discussions with the applicant or its representatives may be conducted in a closed meeting.

~~14.15.~~ Discussion by the Governor and any economic advisory board reviewing forecasts of economic activity and estimating general and nongeneral fund revenues.

~~15.16.~~ Discussion or consideration of medical and mental health records ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 1 of § 2.2-3705.5.

~~16.17.~~ Deliberations of the Virginia Lottery Board in a licensing appeal action conducted pursuant to subsection D of § 58.1-4007 regarding the denial or revocation of a license of a lottery sales agent; and discussion, consideration or review of Virginia Lottery matters related to proprietary lottery game information and studies or investigations ~~exempted excluded from disclosure under~~ excluded from disclosure under this chapter pursuant to subdivision 6 of § 2.2-3705.3 and subdivision 11 of § 2.2-3705.7.

~~17. Those portions of meetings by local government crime commissions where the identity of, or information tending to identify, individuals providing information about crimes or criminal activities under a promise of anonymity is discussed or disclosed.~~

18. Those portions of meetings in which the Board of Corrections discusses or discloses the identity of, or information tending to identify, any prisoner who (i) provides information about crimes or criminal activities, (ii) renders assistance in preventing the escape of another prisoner or in the apprehension of an escaped prisoner, or (iii) voluntarily or at the instance of a prison official renders other extraordinary services, the disclosure of which is likely to jeopardize the prisoner's life or safety.

19. Discussion of plans to protect public safety as it relates to terrorist activity or specific cybersecurity threats or vulnerabilities and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such matters or a related threat to public safety; ~~discussion of information excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 3 or 4 of § 2.2-3705.2, where discussion in an open meeting would jeopardize the safety of any person or the security of any facility, building, structure, information technology system, or software program; or discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure.

20. Discussion by the Board of the Virginia Retirement System, acting pursuant to § 51.1-124.30, or of any local retirement system, acting pursuant to § 51.1-803, or 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 to Article 8 (§ 15.2-1544 et seq.) of Chapter 15 of Title 15.2, or of the Rector and Visitors of the University of Virginia, acting pursuant to § 23.1-2210, or by the Board of the Virginia College Savings Plan, acting pursuant to § 23.1-706, regarding the acquisition, holding or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, to the extent that such

discussion (i) concerns confidential analyses prepared for the Rector and Visitors of the University of Virginia, prepared by the retirement system, or by the local finance board or board of trustees of such a trust pursuant to Article 8 (§ 15.2-1544 et seq.) of Chapter 15 of Title 15.2, or by the Virginia College Savings Plan or provided to the retirement system or the Virginia College Savings Plan under a promise of confidentiality, of the future value of such ownership interest or the future financial performance of the entity, and (ii) would have an adverse effect on the value of the investment to be acquired, held or disposed of by the retirement system, or by the local finance board or board of trustees of such a trust pursuant to Article 8 (§ 15.2-1544 et seq.) of Chapter 15 of Title 15.2, the Rector and Visitors of the University of Virginia, or the Virginia College Savings Plan. Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the identity of any investment held, the amount invested or the present value of such investment.

21. Those portions of meetings in which individual child death cases are discussed by the State Child Fatality Review team established pursuant to § 32.1-283.1, those portions of meetings in which individual child death cases are discussed by a regional or local child fatality review team established pursuant to § 32.1-283.2, those portions of meetings in which individual death cases are discussed by family violence fatality review teams established pursuant to § 32.1-283.3, those portions of meetings in which individual adult death cases are discussed by the state Adult Fatality Review Team established pursuant to § 32.1-283.5, and those portions of meetings in which individual adult death cases are discussed by a local or regional adult fatality review team established pursuant to § 32.1-283.6.

22. Those portions of meetings of the University of Virginia Board of Visitors or the Eastern Virginia Medical School Board of Visitors, as the case may be, and those portions of meetings of any persons to whom management responsibilities for the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, have been

delegated, in which there is discussed proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would adversely affect the competitive position of the Medical Center or Eastern Virginia Medical School, as the case may be.

~~23. In the case of the Virginia Commonwealth University Health System Authority, discussion~~ Discussion or consideration by the Virginia Commonwealth University Health System Authority or the Virginia Commonwealth University Board of Visitors of any of the following: the acquisition or disposition by the Authority of real ~~or personal~~ property, equipment, or technology software or hardware and related goods or services, where disclosure would adversely affect the bargaining position or negotiating strategy of the Authority; ~~operational plans that could affect the value of such property, real or personal, owned or desirable for ownership by the Authority;~~ matters relating to gifts, or bequests to, and fund-raising activities of, the Authority; grants and contracts for services or work to be performed by the Authority; marketing or operational strategies plans of the Authority where disclosure of such strategies or plans would adversely affect the competitive position of the Authority; and members of its the Authority's medical and teaching staffs and qualifications for appointments thereto; ~~and qualifications or evaluations of other employees. This exclusion shall also apply when the foregoing discussions occur at a meeting of the Virginia Commonwealth University Board of Visitors.~~

24. Those portions of the meetings of the Health Practitioners' Monitoring Program Committee within the Department of Health Professions to the extent such discussions identify any practitioner who may be, or who actually is, impaired pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1:

~~25. (Effective until October 1, 2016) Meetings or portions of meetings of the Board of the Virginia College Savings Plan wherein personal information, as defined in § 2.2-3801, which has been provided to the Board or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 4.9 (§ 23-38.75 et seq.) of Title 23 is discussed.~~

25. (Effective October 1, 2016) Meetings or portions of meetings of the Board of the Virginia College Savings Plan wherein personal information, as defined in § 2.2-3801, which has been provided to the Board or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 7 (§ 23.1-700 et seq.) of Title 23.1 is discussed.

26. Discussion or consideration, by the Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § 56-484.15, of trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), submitted by CMRS providers as defined in § 56-484.12, related to the provision of wireless E-911 service.

27. Those portions of disciplinary proceedings by any regulatory board within the Department of Professional and Occupational Regulation, Department of Health Professions, or the Board of Accountancy conducted pursuant to § 2.2-4019 or 2.2-4020 during which the board deliberates to reach a decision or meetings of health regulatory boards or conference committees of such boards to consider settlement proposals in pending disciplinary actions or modifications to previously issued board orders as requested by either of the parties.

28. Discussion or consideration of information ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 11 of § 2.2-3705.6 by a responsible public entity or an affected locality or public entity, as those terms are defined in § 33.2-1800, or any independent review panel appointed to review information and advise the responsible public entity concerning such records.

29. Discussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body.

30. Discussion or consideration of grant or loan application information ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 17 of § 2.2-3705.6 by (i) the Commonwealth Health Research Board or (ii) the Innovation and Entrepreneurship Investment Authority or the Research and Technology Investment Advisory Committee appointed to advise the Innovation and Entrepreneurship Investment Authority.

31. Discussion or consideration by the Commitment Review Committee of information ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 8 of § 2.2-3705.2 relating to individuals subject to commitment as sexually violent predators under Chapter 9 (§ 37.2-900 et seq.) of Title 37.2.

32. ~~[Expired.]~~

~~33.~~ Discussion or consideration of confidential proprietary information and trade secrets ~~excluded from this chapter pursuant to~~ developed and held by a local public body providing certain telecommunication services or cable television services and subject to the exclusion in subdivision 18 of § 2.2-3705.6. However, the exemption provided by this subdivision shall not apply to any authority created pursuant to the BVU Authority Act (§ 15.2-7200 et seq.).

~~34.~~^{33.} Discussion or consideration by a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) of confidential proprietary information and trade secrets ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 19 of § 2.2-3705.6.

~~35.~~^{34.} Discussion or consideration by the State Board of Elections or local electoral boards of voting security matters made confidential pursuant to § 24.2-625.1.

~~36-35.~~ Discussion or consideration by the Forensic Science Board or the Scientific Advisory Committee created pursuant to Article 2 (§ 9.1-1109 et seq.) of Chapter 11 of Title 9.1 of records excluded from this chapter pursuant to criminal investigative files subject to the exclusion in subdivision A 2 a of § 2.2-3706.

~~37-36.~~ Discussion or consideration by the Brown v. Board of Education Scholarship Program Awards Committee of information or confidential matters excluded from this chapter pursuant to subject to the exclusion in subdivision 3 of § 2.2-3705.4, and meetings of the Committee to deliberate concerning the annual maximum scholarship award, review and consider scholarship applications and requests for scholarship award renewal, and cancel, rescind, or recover scholarship awards.

~~38-37.~~ Discussion or consideration by the Virginia Port Authority of information excluded from this chapter pursuant to subject to the exclusion in subdivision 1 of § 2.2-3705.6 related to certain proprietary information gathered by or for the Virginia Port Authority.

~~39-38.~~ Discussion or consideration by the Board of Trustees of the Virginia Retirement System acting pursuant to § 51.1-124.30, by the Investment Advisory Committee appointed pursuant to § 51.1-124.26, by any local retirement system, acting pursuant to § 51.1-803, by the Board of the Virginia College Savings Plan acting pursuant to § 23.1-706, or by the Virginia College Savings Plan's Investment Advisory Committee appointed pursuant to § 23.1-702 of information excluded from this chapter pursuant to subject to the exclusion in subdivision 25 of § 2.2-3705.7.

~~40-39.~~ Discussion or consideration of information excluded from this chapter pursuant to subject to the exclusion in subdivision 3 of § 2.2-3705.6 related to economic development.

~~41-40.~~ Discussion or consideration by the Board of Education of information relating to the denial, suspension, or revocation of teacher licenses excluded from this chapter pursuant to subject to the exclusion in subdivision 12 of § 2.2-3705.3.

~~42-41.~~ Those portions of meetings of the Virginia Military Advisory Council or any commission created by executive order for the purpose of studying and making recommendations regarding preventing closure or realignment of federal military and national security installations and facilities located in Virginia and relocation of such facilities to Virginia, or a local or regional military affairs organization appointed by a local governing body, during which there is discussion of information ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 11 of § 2.2-3705.2.

~~43-42.~~ Discussion or consideration by the Board of Trustees of the Veterans Services Foundation of information ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 29 of § 2.2-3705.7 related to personally identifiable information of donors.

~~44-43.~~ Discussion or consideration by the Virginia Tobacco Region Revitalization Commission of information ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 23 of § 2.2-3705.6 related to certain information contained in grant applications.

~~45-44.~~ Discussion or consideration by the board of directors of the Commercial Space Flight Authority of information ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 24 of § 2.2-3705.6 related to rate structures or charges for the use of projects of, the sale of products of, or services rendered by the Authority and certain proprietary information of a private entity provided to the Authority.

~~46-45.~~ Discussion or consideration of personal and proprietary information ~~that are excluded from the provisions of this chapter pursuant to~~ related to the resource management plan program and subject to the exclusion in (i) subdivision 25 of § 2.2-3705.6 or (ii) subsection E of § 10.1-104.7. This exclusion shall not apply to the discussion or consideration of records that contain information that has been certified for release by the person who is the subject of the information or transformed into a statistical or aggregate form that does not allow identification of the person who supplied, or is the subject of, the information.

~~47.46.~~ (Effective July 1, 2018) Discussion or consideration by the Board of Directors of the Virginia Alcoholic Beverage Control Authority of information ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 1 of § 2.2-3705.3 or subdivision 34 of § 2.2-3705.7 related to investigations of applicants for licenses and permits and of licensees and permittees.

~~48.47.~~ Discussion or consideration of grant or loan application records ~~excluded from this chapter pursuant to~~ subject to the exclusion in subdivision 28 of § 2.2-3705.6 related to the submission of an application for an award from the Virginia Research Investment Fund pursuant to Article 8 (§23.1-3130 et seq.) of Chapter 31 of Title 23.1.

~~49.48.~~ Discussion or development of grant proposals by a regional council established pursuant to Article 26 (§ 2.2-2484 et seq.) of Chapter 24 to be submitted for consideration to the Virginia Growth and Opportunity Board.

B. No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation, or motion that shall have its substance reasonably identified in the open meeting.

C. Public officers improperly selected due to the failure of the public body to comply with the other provisions of this section shall be de facto officers and, as such, their official actions are valid until they obtain notice of the legal defect in their election.

D. Nothing in this section shall be construed to prevent the holding of conferences between two or more public bodies, or their representatives, but these conferences shall be subject to the same procedures for holding closed meetings as are applicable to any other public body.

E. This section shall not be construed to (i) require the disclosure of any contract between the Department of Health Professions and an impaired practitioner entered into pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1 or (ii) require the board of

directors of any authority created pursuant to the Industrial Development and Revenue Bond Act (§ 15.2-4900 et seq.), or any public body empowered to issue industrial revenue bonds by general or special law, to identify a business or industry to which subdivision A 5 applies. However, such business or industry shall be identified as a matter of public record at least 30 days prior to the actual date of the board's authorization of the sale or issuance of such bonds.

***DRAFTING NOTE:** Technical amendments. Referred to as the "context draft", amendments to multiple subdivisions of this section were recommended by the Council in instances where meeting exclusions merely reference existing FOIA record exclusions. It was decided that such meeting exclusions should contain more information, including the identity of the public body(s) to which the exclusion applies and a general description of the subject matter of the excluded records/topic for discussion in a closed meeting in addition to the citation to the applicable records exclusion. In no way was the addition of the above described information intended to limit the scope of a meeting exclusion but only to provide more context for the end user. Amendments to subdivisions 10, 20, and 23 are substantive. In the newly designated subdivision 10, the words "from private sources" were added to clarify that only these sources of funding are proper for a closed meeting. In subdivision 20, an exclusion for discussions by local finance boards of trustees for postemployment benefits other than pensions was added as the sensitivity of the discussions are equivalent to those currently permitted by the Virginia Retirement System and local retirement systems. In subdivision 23, the amendments narrow the topics for which closed meetings may be held by the Board of Visitors of Virginia Commonwealth University (VCU) and the VCU Health System Authority. Amendments changing existing language "excluded from this chapter pursuant to" was replaced throughout this section with "subject to the exclusion in" as a technical change and is the reason for the inclusion of the second enactment clause found at the end of this document.*

§ 2.2-3712. Closed meetings procedures; certification of proceedings. [LD 16101652; recommended by Meetings Subcommittee on 11/4/15; Approved by FOIA Council 6/23/16.]

A. No closed meeting shall be held unless the public body proposing to convene such meeting has taken an affirmative recorded vote in an open meeting approving a motion that (i) identifies the subject matter, (ii) states the purpose of the meeting as authorized in subsection A of § 2.2-3711 or other provision of law and (iii) ~~makes specific reference to~~ cites the applicable exemption from open meeting requirements provided in ~~§ 2.2-3707 or~~ subsection A of § 2.2-3711 or other provision of law. The matters contained in such motion shall be set forth in detail in the minutes of the open meeting. A general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting.

B. The notice provisions of this chapter shall not apply to closed meetings of any public body held solely for the purpose of interviewing candidates for the position of chief administrative officer. Prior to any such closed meeting for the purpose of interviewing candidates, the public body shall announce in an open meeting that such closed meeting shall be held at a disclosed or undisclosed location within 15 days thereafter.

C. The public body holding a closed meeting shall restrict its discussion during the closed meeting only to those matters specifically exempted from the provisions of this chapter and identified in the motion required by subsection A.

D. At the conclusion of any closed meeting, the public body holding such meeting shall immediately reconvene in an open meeting and shall take a roll call or other recorded vote to be included in the minutes of that body, certifying that to the best of each member's knowledge (i) only public business matters lawfully exempted from open meeting requirements under this chapter and (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the meeting by the public body. Any member of the public body who believes that there was a departure from the requirements of clauses (i) and (ii), shall so state prior to

the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body.

E. Failure of the certification required by subsection D to receive the affirmative vote of a majority of the members of the public body present during a meeting shall not affect the validity or confidentiality of such meeting with respect to matters considered therein in compliance with the provisions of this chapter. The recorded vote and any statement made in connection therewith, shall upon proper authentication, constitute evidence in any proceeding brought to enforce the provisions of this chapter.

F. A public body may permit nonmembers to attend a closed meeting if such persons are deemed necessary or if their presence will reasonably aid the public body in its consideration of a topic that is a subject of the meeting.

G. A member of a public body shall be permitted to attend a closed meeting held by any committee or subcommittee of that public body, or a closed meeting of any entity, however designated, created to perform the delegated functions of or to advise that public body. Such member shall in all cases be permitted to observe the closed meeting of the committee, subcommittee or entity. In addition to the requirements of § 2.2-3707, the minutes of the committee or other entity shall include the identity of the member of the parent public body who attended the closed meeting.

H. Except as specifically authorized by law, in no event may any public body take action on matters discussed in any closed meeting, except at an open meeting for which notice was given as required by § 2.2-3707.

I. Minutes may be taken during closed meetings of a public body, but shall not be required. Such minutes shall not be subject to mandatory public disclosure.

DRAFTING NOTE: Technical amendments.

§ 10.1-104.7. Resource management plans; effect of implementation; exclusions.

A. Notwithstanding any other provision of law, agricultural landowners or operators who fully implement and maintain the applicable components of their resource

management plan, in accordance with the criteria for such plans set out in § 10.1-104.8 and any regulations adopted thereunder, shall be deemed to be in full compliance with (i) any load allocation contained in a total maximum daily load (TMDL) established under § 303(d) of the federal Clean Water Act addressing benthic, bacteria, nutrient, or sediment impairments; (ii) any requirements of the Virginia Chesapeake Bay TMDL Watershed Implementation Plan; and (iii) applicable state water quality requirements for nutrients and sediment.

B. The presumption of full compliance provided in subsection A shall not prevent or preclude enforcement of provisions pursuant to (i) a resource management plan or a nutrient management plan otherwise required by law for such operation, (ii) a Virginia Pollutant Discharge Elimination System permit, (iii) a Virginia Pollution Abatement permit, or (iv) requirements of the Chesapeake Bay Preservation Act (§ 62.1-44.15:67 et seq.).

C. Landowners or operators who implement and maintain a resource management plan in accordance with this article shall be eligible for matching grants for agricultural best management practices provided through the Virginia Agricultural Best Management Practices Cost-Share Program administered by the Department in accordance with program eligibility rules and requirements. Such landowners and operators may also be eligible for state tax credits in accordance with §§ 58.1-339.3 and 58.1-439.5.

D. Nothing in this article shall be construed to limit, modify, impair, or supersede the authority granted to the Commissioner of Agriculture and Consumer Services pursuant to Chapter 4 (§ 3.2-400 et seq.) of Title 3.2.

E. Any personal or proprietary information collected pursuant to this article shall be exempt from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), except that the Director may release information that has been transformed into a statistical or aggregate form that does not allow identification of the persons who supplied, or are the subject of, particular information. This subsection shall not preclude the application of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) in all other instances of federal or state

regulatory actions. Pursuant to subdivision ~~46~~ 45 of § 2.2-3711, public bodies may hold closed meetings for discussion or consideration of certain records excluded from the provisions of this article and the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

§ 15.2-1416.. Regular meetings.

The governing body shall assemble at a public place as the governing body may prescribe, in regular session in January for counties and in July for cities and towns. Future meetings shall be held on such days as may be prescribed by resolution of the governing body but in no event shall less than six meetings be held in each fiscal year.

The days, times and places of regular meetings to be held during the ensuing months shall be established at the first meeting which meeting may be referred to as the annual or organizational meeting; however, if the governing body subsequently prescribes any public place other than the initial public meeting place, or any day or time other than that initially established, as a meeting day, place or time, the governing body shall pass a resolution as to such future meeting day, place or time. The governing body shall cause a copy of such resolution to be posted on the door of the courthouse or the initial public meeting place and inserted in a newspaper having general circulation in the county or municipality at least seven days prior to the first such meeting at such other day, place or time. Should the day established by the governing body as the regular meeting day fall on any legal holiday, the meeting shall be held on the next following regular business day, without action of any kind by the governing body.

At its annual meeting the governing body may fix the day or days to which a regular meeting shall be continued if the chairman or mayor, or vice-chairman or vice-mayor if the chairman or mayor is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the regular meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised shall be conducted at the continued meeting and no further advertisement is required.

Regular meetings, ~~without further public notice,~~ may be adjourned from day to day or from time to time or from place to place, not beyond the time fixed for the next regular meeting, until the business before the governing body is completed. Notice of any regular meeting continued under this section shall be reasonable under the circumstances and be given as provided in subsection D of § 2.2-3707.

Notwithstanding the provisions of this section, any city or town that holds an organizational meeting in compliance with its charter or code shall be deemed to be in compliance with this section.

§ 23.1-1303. Governing boards; duties.

A. For purposes of this section, "intellectual property" means (i) a potentially patentable machine, article of manufacture, composition of matter, process, or improvement in any of those; (ii) an issued patent; (iii) a legal right that inheres in a patent; or (iv) anything that is copyrightable.

B. The governing board of each public institution of higher education shall:

1. Adopt and post conspicuously on its website bylaws for its own governance, including provisions that (i) establish the requirement of transparency, to the extent required by law, in all board actions; (ii) describe the board's obligations under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), as set forth in subdivision B 10 of § 23.1-1301, including the requirements that (a) the board record minutes of each open meeting and post the minutes on the board's website, in accordance with subsection ~~I~~H of § 2.2-3707 and § 2.2-3707.1, (b) discussions and actions on any topic not specifically exempted by § 2.2-3711 be held in an open meeting, (c) the board give public notice of all meetings, in accordance with subsection C of § 2.2-3707, and (d) any action taken in a closed meeting be approved in an open meeting before it can have any force or effect, in accordance with subsection B of § 2.2-3711; and (iii) require that the board invite the Attorney General's appointee or representative to all meetings of the board, executive committee, and board committees;

2. Establish regulations or institution policies for the acceptance and assistance of students that include provisions (i) that specify that individuals who have knowingly and willfully failed to meet the federal requirement to register for the selective service are not eligible to receive any state direct student assistance, (ii) that specify that the accreditation status of a public high school in the Commonwealth shall not be considered in making admissions determinations for students who have earned a diploma pursuant to the requirements established by the Board of Education, and (iii) relating to the admission of certain graduates of comprehensive community colleges as set forth in § 23.1-907;

3. Assist the Council in enforcing the provisions relating to eligibility for financial aid;

4. Notwithstanding any other provision of state law, establish policies and procedures requiring the notification of the parent of a dependent student when such student receives mental health treatment at the institution's student health or counseling center and such treatment becomes part of the student's educational record in accordance with the federal Health Insurance Portability and Accountability Act (42 U.S.C. § 1320d et seq.) and may be disclosed without prior consent as authorized by the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and related regulations (34 C.F.R. Part 99). Such notification shall only be required if it is determined that there exists a substantial likelihood that, as a result of mental illness the student will, in the near future, (i) cause serious physical harm to himself or others as evidenced by recent behavior or any other relevant information or (ii) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs. However, notification may be withheld if any person licensed to diagnose and treat mental, emotional, or behavioral disorders by a health regulatory board within the Department of Health Professions who is treating the student has made a part of the student's record a written statement that, in the exercise of his professional judgment, the notification would be reasonably likely to cause substantial harm to the student or another person. No public institution of higher education or employee of a

public institution of higher education making a disclosure pursuant to this subsection is civilly liable for any harm resulting from such disclosure unless such disclosure constitutes gross negligence or willful misconduct by the institution or its employees;

5. Establish policies and procedures requiring the release of the educational record of a dependent student, as defined by the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g), to a parent at his request;

6. Establish programs to seek to ensure that all graduates have the technology skills necessary to compete in the twenty-first century and that all students matriculating in teacher-training programs receive instruction in the effective use of educational technology;

7. Establish policies for the discipline of students who participate in varsity intercollegiate athletics, including a provision requiring an annual report by the administration of the institution to the governing board regarding enforcement actions taken pursuant to such policies;

8. In addition to all meetings prescribed in Chapters 14 (§ 23.1-1400 et seq.) through 29 (§ 23.1-2900 et seq.), meet with the chief executive officer of the institution at least once annually, in a closed meeting pursuant to subdivision A 1 of § 2.2-3711 and deliver an evaluation of the chief executive officer's performance. Any change to the chief executive officer's employment contract during any such meeting or any other meeting of the board shall be made only by a vote of the majority of the board's members;

9. If human research, as defined in § 32.1-162.16, is conducted at the institution, adopt regulations pursuant to the Administrative Process Act (§ 2.2-4000 et seq.) to effectuate the provisions of Chapter 5.1 (§ 32.1-162.16 et seq.) of Title 32.1 for human research. Such regulations shall require the human research committee to submit to the Governor, the General Assembly, and the chief executive officer of the institution or his designee at least annually a report on the human research projects reviewed and approved by the committee and require the committee to report any significant deviations from approved proposals;

10. Submit the annual financial statements for the fiscal year ending the preceding June 30 and the accounts and status of any ongoing capital projects to the Auditor of Public Accounts for the audit of such statements pursuant to § 30-133;

11. Submit to the General Assembly and the Governor an annual executive summary of its interim activity and work no later than the first day of each regular session of the General Assembly. The executive summary shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website;

12. Make available to any interested party upon request a copy of the portion of the most recent report of the Uniform Crime Reporting Section of the Department of State Police entitled "Crime in Virginia" pertaining to institutions of higher education;

13. Adopt policies or institution regulations regarding the ownership, protection, assignment, and use of intellectual property and provide a copy of such policies to the Governor and the Joint Commission on Technology and Science. All employees, including student employees, of public institutions of higher education are bound by the intellectual property policies of the institution employing them; and

14. Adopt policies that are supportive of the intellectual property rights of matriculated students who are not employed by such institution.

§ 54.1-2400.2. Confidentiality of information obtained during an investigation or disciplinary proceeding; penalty.

A. Any reports, information or records received and maintained by the Department of Health Professions or any health regulatory board in connection with possible disciplinary proceedings, including any material received or developed by a board during an investigation or proceeding, shall be strictly confidential. The Department of Health Professions or a board may only disclose such confidential information:

1. In a disciplinary proceeding before a board or in any subsequent trial or appeal of an action or order, or to the respondent in entering into a confidential consent agreement under § 54.1-2400;

2. To regulatory authorities concerned with granting, limiting or denying licenses, certificates or registrations to practice a health profession, including the coordinated licensure information system, as defined in § 54.1-3030;

3. To hospital committees concerned with granting, limiting or denying hospital privileges if a final determination regarding a violation has been made;

4. Pursuant to an order of a court of competent jurisdiction for good cause arising from extraordinary circumstances being shown;

5. To qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any person is first deleted. Such release shall be made pursuant to a written agreement to ensure compliance with this section; or

6. To the Health Practitioners' Monitoring Program within the Department of Health Professions in connection with health practitioners who apply to or participate in the Program.

B. In no event shall confidential information received, maintained or developed by the Department of Health Professions or any board, or disclosed by the Department of Health Professions or a board to others, pursuant to this section, be available for discovery or court subpoena or introduced into evidence in any civil action. This section shall not, however, be construed to inhibit an investigation or prosecution under Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2.

C. Any claim of a physician-patient or practitioner-patient privilege shall not prevail in any investigation or proceeding by any health regulatory board acting within the scope of its authority. The disclosure, however, of any information pursuant to this provision shall not be deemed a waiver of such privilege in any other proceeding.

D. This section shall not prohibit the Director of the Department of Health Professions, after consultation with the relevant health regulatory board president or his designee, from disclosing to the Attorney General, or the appropriate attorney for the Commonwealth, investigatory information which indicates a possible violation of any provision of criminal law, including the laws relating to the manufacture, distribution, dispensing, prescribing or administration of drugs, other than drugs classified as Schedule VI drugs and devices, by any individual regulated by any health regulatory board.

E. This section shall not prohibit the Director of the Department of Health Professions from disclosing matters listed in subdivision A 1, A 2, or A 3 of § 54.1-2909; from making the reports of aggregate information and summaries required by § 54.1-2400.3; or from disclosing the information required to be made available to the public pursuant to § 54.1-2910.1.

F. This section shall not prohibit the Director of the Department of Health Professions, following consultation with the relevant health regulatory board president or his designee, from disclosing information about a suspected violation of state or federal law or regulation to other agencies within the Health and Human Resources Secretariat or to federal law-enforcement agencies having jurisdiction over the suspected violation or requesting an inspection or investigation of a licensee by such state or federal agency when the Director has reason to believe that a possible violation of federal or state law has occurred. Such disclosure shall not exceed the minimum information necessary to permit the state or federal agency having jurisdiction over the suspected violation of state or federal law to conduct an inspection or investigation. Disclosures by the Director pursuant to this subsection shall not be limited to requests for inspections or investigations of licensees. Nothing in this subsection shall require the Director to make any disclosure. Nothing in this section shall permit any agency to which the Director makes a disclosure pursuant to this section to re-disclose any information, reports, records, or materials received from the Department.

G. Whenever a complaint or report has been filed about a person licensed, certified, or registered by a health regulatory board, the source and the subject of a complaint or report shall be provided information about the investigative and disciplinary procedures at the Department of Health Professions. Prior to interviewing a licensee who is the subject of a complaint or report, or at the time that the licensee is first notified in writing of the complaint or report, whichever shall occur first, the licensee shall be provided with a copy of the complaint or report and any records or supporting documentation, unless such provision would materially obstruct a criminal or regulatory investigation. If the relevant board concludes that a disciplinary proceeding will not be instituted, the board may send an advisory letter to the person who was the subject of the complaint or report. The relevant board may also inform the source of the complaint or report (i) that an investigation has been conducted, (ii) that the matter was concluded without a disciplinary proceeding, (iii) of the process the board followed in making its determination, and (iv), if appropriate, that an advisory letter from the board has been communicated to the person who was the subject of the complaint or report. In providing such information, the board shall inform the source of the complaint or report that he is subject to the requirements of this section relating to confidentiality and discovery.

H. Orders and notices of the health regulatory boards relating to disciplinary actions, other than confidential exhibits described in subsection K, shall be disclosed. Information on the date and location of any disciplinary proceeding, allegations against the respondent, and the list of statutes and regulations the respondent is alleged to have violated shall be provided to the source of the complaint or report by the relevant board prior to the proceeding. The source shall be notified of the disposition of a disciplinary case.

I. This section shall not prohibit investigative staff authorized under § 54.1-2506 from interviewing fact witnesses, disclosing to fact witnesses the identity of the subject of the complaint or report, or reviewing with fact witnesses any portion of records or other supporting documentation necessary to refresh the fact witnesses' recollection.

J. Any person found guilty of the unlawful disclosure of confidential information possessed by a health regulatory board shall be guilty of a Class 1 misdemeanor.

K. In disciplinary actions in which a practitioner is or may be unable to practice with reasonable skill and safety to patients and the public because of a mental or physical disability, a health regulatory board shall consider whether to disclose and may decide not to disclose in its notice or order the practitioner's health records, as defined in § 32.1-127.1:03, or his health services, as defined in § 32.1-127.1:03. Such information may be considered by the relevant board in a closed hearing in accordance with subsection ~~A 15~~ 16 of § 2.2-3711 and included in a confidential exhibit to a notice or order. The public notice or order shall identify, if known, the practitioner's mental or physical disability that is the basis for its determination. In the event that the relevant board, in its discretion, determines that this subsection should apply, information contained in the confidential exhibit shall remain part of the confidential record before the relevant board and is subject to court review under the Administrative Process Act (§ 2.2-4000 et seq.) and to release in accordance with this section.

2. That the provisions of subdivisions A 7, 8, 9, 12, 16, 19, 28, 30, 31, 32, and 35 through 47 of § 2.2-3711 of the Code of Virginia, as amended by this act, are declaratory of existing law.

#

