

# ARTICLES

## ADMINISTRATIVE LAW

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### INTRODUCTION

What follows is, first, a report of certain developments during the last two years in the administrative law of Virginia, in particular the law governing rulemaking by state agencies and judicial review of both rules and cases from state agencies and, second, a report of developments in the law relating to Virginia's Freedom of Information Act.

#### I. DEVELOPMENTS IN VIRGINIA'S LAW OF ADMINISTRATIVE PROCEDURE

##### A. *Rulemaking*

##### 1. Regulating Abortion Clinics as the General Assembly Has Directed

Much drama played out last year in the Virginia Board of Health (the "Board") as a result of legislation directing it to regulate abortion clinics as hospitals rather than as outpatient surgical facilities, as had been its want when left previously to its own discretion. Conflicting opinions about just how far the new law

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derogated Board discretion divided its members and, for a while, put the Board in opposition to both the Health Department's staff and the attorney general. The brouhaha raised substantial and troublesome questions of statutory construction and constitutional government by rule of law. For now, they remain unresolved.

In Virginia's Health Code, the General Assembly has delegated to the Board power generally to make regulations having force of law "as may be necessary" for the administration of the Health Code and any other laws assigned to the Board, the department, or the commissioner for administration.<sup>1</sup> The Board also is explicitly authorized to provide variances and make exceptions from its regulations, provided that they are "reasonable."<sup>2</sup> But the matter of health regulation is not left there by the legislature. Title 32.1 is replete with provisions in which the General Assembly has preempted the Board from the exercise of its discretion as to what may be necessary. In chapter 5, the legislature dictates its own rules for the operation of health care facilities it classifies as hospitals, nursing homes, hospices, and certified nursing facilities.<sup>3</sup> Thus, it has not been left to the Board to find necessary, for example, the inspection of these premises for asbestos; the General Assembly has arrogated for itself that judgment and enacted law accordingly.<sup>4</sup> In the same fashion, the General Assembly has provided its own exception from doctors' prescriptions for certain vaccinations, authorizing their administration pursuant to a standing order instead.<sup>5</sup> The General Assembly might have shared its lawmaking power with the Board, but it has evidently reserved for itself both the first and the last words on regulatory matters otherwise assigned to the Board. Nothing about this scheme of legislative delegation is novel; indeed, it may be regarded as obedient to constitutional imperative.<sup>6</sup>

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1. VA. CODE ANN. § 32.1-12 (Repl. Vol. 2011).

2. *Id.*; see generally Sean D. Croston, *An Important Member of the Family: The Role of Regulatory Exemptions in Administrative Procedure*, 64 ADMIN. L. REV. 295 (2012).

3. See generally VA. CODE ANN. §§ 32.1-123 to -162.15 (Repl. Vol. 2011 & Supp. 2012).

4. See *id.* § 32.1-126.1 (Repl. Vol. 2011).

5. See *id.* § 32.1-126.4 (Repl. Vol. 2011).

6. *Cf.* *Winchester & Strasburg R.R. v. Commonwealth*, 106 Va. 264, 268, 55 S.E. 692, 693 (1906) ("[T]he whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another to a limited extent."), quoted in *Baliles v. Mazur*, 224 Va. 462, 471-72, 297 S.E.2d 695, 700 (1982); see also 1981-82 Op.

In 2011, the General Assembly enacted Senate Bill 924 (“Bill 924”), amending Virginia Code section 32.1-127.<sup>7</sup> In that section of the Health Code, the legislature has set forth a number of matters in which it has cabined the otherwise broad authority of the Board to license medical facilities and set conditions for the issue or retention of such licenses.<sup>8</sup> Bill 924 directed the Board to classify any facility performing five or more first-trimester abortions per month as a category of hospital<sup>9</sup> and dictated application to such facilities of standards for construction, maintenance, operation, staffing, equipping, staff qualifications and training, and conditions under which services may be provided, as well as requirements for policies related to infection prevention, disaster preparedness, and facility security applied to hospitals, nursing homes, and certified nursing facilities.<sup>10</sup> The legislature did not itself set any of these standards, but left the Board to articulate them with reference to models “established and recognized by medical and health care professionals and by specialists in matters of public health and safety.”<sup>11</sup> Thus, the Board is not afforded its own blank slate for standard writing but instead obliged to avail itself of standards created and embraced by appropriate experts.

Hitherto, the Board had defined outpatient hospitals as facilities offering surgical procedures “in a medical environment exceeding the normal capability found in a physician’s office,” but without hospitalization, and treated “outpatient abortion clinics” as members of this class.<sup>12</sup> This approach left open a question of whether facilities not offering surgical abortions were covered.<sup>13</sup>

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Va. Att’y Gen. 93, 93–94.

7. Act of Mar. 26, 2011, ch. 670, 2011 Va. Acts 1092, 1093 (codified as amended at VA. CODE ANN. § 32.1-127 (Repl. Vol. 2011)).

8. *See id.*

9. In Virginia, abortions after the first trimester must be performed in hospitals. *See* VA. CODE ANN. §§ 18.2-73 to -74 (Repl. Vol. 2011).

10. S.B. 924, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as ch. 670, 2011 Va. Acts. at 1093).

11. Ch. 670, 2011 Va. Acts. at 1093.

12. 12 VA. ADMIN. CODE § 5-410-10 (2010).

13. Such abortions are also called “medication abortions.” *See The Abortion Pill (Medication Abortion)*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/abortion/abortion-pill-medication-abortion-4354.asp> (last visited Oct. 15, 2012). The Planned Parenthood protocol for a non-surgical abortion calls for administration of one drug, mifepristone, at a clinic, but for self-administration of the second drug, misoprostol, as much as three days later at a location agreeable to health care provider and patient. *Id.* Mifepristone is said to inhibit production of progesterone, leaving the uterus to break

The General Assembly supplied the answer in Bill 924, mandating that facilities be treated as hospitals if, in a month, they host five or more first-trimester abortions.<sup>14</sup> Because Bill 924 does not distinguish surgical abortions from non-surgical, application of ordinary rules for the construction of statutes should lead to the conclusion that both sorts have been addressed.<sup>15</sup> Thus, one result of Bill 924 was foreclosure for the Board of the option of exempting facilities offering only non-surgical, i.e., pharmaceutical abortions. The words of the statute simply leave no room for such exemption. Such was the advice of the Board's legal expert, a senior assistant attorney general,<sup>16</sup> and such was the Board's conclusion as expressed in an agency statement of September 19, 2011.<sup>17</sup>

But what Bill 924 did not take away remains. According to the statute, abortion clinics of the sort described "shall be classified as a category of 'hospital.'"<sup>18</sup> The natural inference to be drawn from such wording is that, with regard to regulation, "hospital" is a class presumed by the General Assembly to permit more than one category. Thus, even after Bill 924, the Board ought to be found authorized to regulate abortion clinics as a category of hospital distinct from other categories of hospital (as well as from nursing homes and certified nursing facilities). The Board may have lost the discretion to exempt any abortion clinic, but it has

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down. *Id.* Misoprostol causes the uterus to empty. *Id.* The Planned Parenthood protocol appears to be typical. *Compare id.*, with *Medical Abortion*, UCSF MED. CTR., [http://www.ucsfhealth.org/treatments/medical\\_abortion/](http://www.ucsfhealth.org/treatments/medical_abortion/) (last visited Oct. 15, 2012), and *The Abortion Pill: Medical Abortion with Mifepristone and Misoprostol*, FEMINIST WOMEN'S HEALTH CTR., <http://www.fwhc.org/abortion/medical-ab.htm> (last visited Oct. 15, 2012), and *Mifepristone*, REPROD. HEALTH TECHS. PROJECT, <http://www.rhpt.org/abortion/mifepristone/default.asp#q2> (last visited Oct. 15, 2012). Yet to be determined is where, for the purposes of Bill 924, such an abortion is "performed."

14. S.B. 924.

15. See EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 189 (1940) (footnotes omitted) ("It is also a basic rule of construction that general words should be given a general construction; that is, they should be given their full and natural meaning, unless the statute in some manner reveals that the legislative intent was otherwise."); see also REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 200 (1975); ANTONIN SCALIA & BRYAN A. GARDNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101 (2012); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 47:7 (7th ed. 2007).

16. STATE BD. OF HEALTH MINUTES 14 (Sept. 15, 2011), [www.vdh.virginia.gov/Administration/meetings/documents/2011/pdf/Minutes%20September%2015%202011.pdf](http://www.vdh.virginia.gov/Administration/meetings/documents/2011/pdf/Minutes%20September%2015%202011.pdf).

17. See VA. DEP'T OF HEALTH, *Regulations for Licensure of Abortion Facilities* 3, 7, in VIRGINIA REGULATORY TOWN HALL (Sept. 19, 2011), [http://www.townhall.virginia.gov/GetFile.cfm?File=C:%5CTownHall%5Cdocrroot%5C58%5C3563%5C6006%5CagencyStatement\\_VDH\\_6006\\_v6.pdf](http://www.townhall.virginia.gov/GetFile.cfm?File=C:%5CTownHall%5Cdocrroot%5C58%5C3563%5C6006%5CagencyStatement_VDH_6006_v6.pdf).

18. VA. CODE ANN. § 32.1-127(B)(1) (Repl. Vol. 2011) (emphasis added).

not lost the discretion to regulate them differently. Bill 924 leaves the Board with sufficient discretion to regulate differently the abortion-clinic sort of hospital, taking into account for clinics offering only pharmaceutical abortions, the different implications of such a service with respect to the public interest in “health, hygiene, sanitation, construction and safety.”<sup>19</sup> True, the Board cannot avoid imposing on them what the statute does require, that is, minimum standards for specified matters, viz:

- (i) the construction and maintenance of hospitals, nursing homes and certified nursing facilities to assure the environmental protection and the life safety of its patients, employees, and the public; (ii) the operation, staffing and equipping of hospitals, nursing homes and certified nursing facilities; (iii) qualifications and training of staff of hospitals, nursing homes and certified nursing facilities, except those professionals licensed or certified by the Department of Health Professions; (iv) conditions under which a hospital or nursing home may provide medical and nursing services to patients in their places of residence; and (v) policies related to infection prevention, disaster preparedness, and facility security.<sup>20</sup>

On the other hand, the statute goes only so far and no further. It does indeed command the Board to regulate all abortion clinics as hospitals, but it does not insist that the Board regulate all such clinics exactly the same, without regard to the sort of abortions they make available, and thus, the sort of medical and environmental risks they and their patients may run. Put simply, even as amended by Bill 924, the Health Code does not oblige the Board to regulate as if one size fit all. But that is what the Board seems to have done. Emergency regulations<sup>21</sup> adopted on Septem-

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19. S.B. 924, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as Act of Mar. 26, 2011, ch. 670, 2011 Va. Acts 1092, 1093). If the Board’s counsel afforded such advice, the minutes of the climactic meeting do not so reflect. *See generally* STATE BD. OF HEALTH MINUTES, *supra* note 16.

20. *See* VA. CODE ANN. § 32.1-127(B)(1) (Repl. Vol. 2011).

21. Those familiar with Virginia’s Administrative Process Act (“APA”) know to take with a grain of salt the classification of these regulations as “emergency.” In Virginia, a rulemaking emergency can arise from nothing more than the impatience of the legislature. These are emergency regulations because, in an uncodified section of Bill 924, the General Assembly commanded the Board to promulgate implementing regulations within 280 days of the bill’s enactment. *See* S.B. 924. When the General Assembly is so inclined, it dispenses in this way with the ordinary public rights to timely notice and comment established by the APA for agency rule making. *See* VA. CODE ANN. § 2.2-4011(B) (Repl. Vol. 2011). Emergency regulations of this sort have force of law only for twelve months, during which the promulgating agency may develop permanent replacements in accordance with rulemaking procedures otherwise standard in the APA. *See id.* § 2.2-4011(C) (Repl. Vol. 2011).

ber 16, 2011, made no distinction between clinics offering only pharmaceutical abortions and those offering only surgical abortions or both.<sup>22</sup>

Nor was such a distinction part of the rules proposed to follow their emergency forerunners.<sup>23</sup> That did not long forestall other controversy about their legitimacy. In the same issue of the Virginia Register of Regulations in which were published the emergency regulations, there also appeared a Notice of Intended Regulatory Action (“NOIRA”)<sup>24</sup> calling attention to the intent of the Board to promulgate “Regulations for Licensure of Abortion Facilities . . . to establish minimum standards for the licensure of facilities that perform five or more first trimester abortions per month.”<sup>25</sup> The public was invited to comment within thirty days.<sup>26</sup> Comment followed in “large volume.”<sup>27</sup>

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22. 12 VA. ADMIN. CODE §§ 5-410-10 to -412 (2010 & Cum. Supp. 2012). The definition of abortion embraces both pharmaceutical and surgical procedures, and the definition of abortion clinic depends only on the number performed monthly, without regard to type. Regulations for Licensure of Abortion Facilities (Emergency), 28 Va. Reg. Regs. 915 (Jan. 16, 2012) (to be codified at 12 VA. ADMIN. CODE).

23. VA. DEP’T OF HEALTH, PROPOSED REGULATION AGENCY BACKGROUND DOCUMENT 6-7 (May 1, 2012), *attached to* STATE BD. OF HEALTH AGENDA (June 15, 2012), <http://www.vdh.state.va.us/Administration/meetings/documents/2012/pdf/June%2015%202012%20BOH%20agenda.pdf> (amending 12 VA. ADMIN. CODE §§ 5-410-10, -60 and adding 12 VA. ADMIN. CODE §§ 5-412-10 to -370). Indeed, the director of the Health Department’s Office of Licensure and Certification advised the Board that “Virginia law does not distinguish between medical and surgical abortions and thus, the Board of Health does not have authority to do so.” *Id.* at 12. This is hardly a self-evident proposition in light of the Board’s statutory authority to make law by regulation. *See* VA. CODE ANN. § 32.1-12 (Repl. Vol. 2011). Indeed, it runs contrary to generally accepted principles of agency rulemaking. *See, e.g.,* CORNELIUS M. KERWIN & SCOTT A. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 29–30 (4th ed. 2011). However, it is consistent with advice from the Office of the Attorney General of Virginia. According to Board meeting minutes, “There was discussion concerning whether or not there are any facilities that perform only medical abortions. [Senior Assistant Attorney General] Tysinger informed the Board that from a legal perspective there is no distinction between medical and surgical abortions.” STATE BD. OF HEALTH MINUTES, *supra* note 16, at 14. But there could be, were the Board so inclined.

24. The APA generally requires an agency anticipating the promulgation of a rule to solicit public participation in its drafting by publishing in the Virginia Register a Notice of Intended Regulatory Action (“NOIRA”), and allowing at least thirty days for responses thereto before filing proposed regulations with the registrar. *See* VA. CODE ANN. § 2.2-4007.01 (Repl. Vol. 2011).

25. 28 Va. Reg. Regs. 803 (Jan. 16, 2012).

26. *Id.*

27. Memorandum from Erik Bodin, Director, Office for Licensure & Certification, Proposed Regulations for Licensure of Abortion Clinics (12VAC5-412) (June 1, 2012), *attached to* STATE BD. OF HEALTH AGENDA (June 15, 2012), *supra* note 23.

At its quarterly meeting on June 15, 2012, the Board was presented by staff with a summary of the public comment stimulated by the emergency regulations and the NOIRA,<sup>28</sup> as well as a draft of proposed abortion clinic regulations prepared by the Department's Office of Licensure and Certification staff.<sup>29</sup> Unsurprisingly, under the circumstances, that draft substantially repeated the terms of the emergency regulations they were intended to replace.<sup>30</sup>

But the office draft was not adopted without debate and amendment. As presented to the Board, the proposed regulations would have obliged abortion clinics, as of the date the regulations became effective, to comply with Guidelines for Design and Construction of Health Care Facilities published in 2010 by the Facilities Guidelines Institute.<sup>31</sup> During the meeting, an amendment was tabled distinguishing clinics yet to be built from those already standing, postponing for two years from the effective date of these regulations the deadline for compliance by the latter.<sup>32</sup>

Discussion ensued, including advice from the attorney general that such an amendment would be in violation of Virginia Code section 32.1-127.001 and therefore beyond the scope of the

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28. *Id.*

29. *Id.*

30. *Id.*

31. VA. DEP'T OF HEALTH, PROPOSED REGULATION AGENCY BACKGROUND DOCUMENT 17 (Aug. 30, 2012), *attached to* STATE BD. OF HEALTH AGENDA (Sept. 14, 2012) <http://www.vdh.state.va.us/Administration/meetings/documents/2012/pdf/September%2014%202012%20agenda.pdf>. This draft of the minutes was approved without amendment at the Board's following meeting on September 14, 2012. *See* STATE BD. OF HEALTH AGENDA (Sept. 14, 2012), *supra*. At one time, standards for the design and construction of health care facilities were promulgated by the United States Department of Health and Human Services pursuant to the Hospital Survey and Construction Act (Hill-Burton Act), which established a program of federal grants and loan guarantees for hospital construction. Ch. 958, 60 Stat. 1040 (1946). When that program expired, volunteers attuned to the utility of uniform standards endeavored to preserve and maintain them unofficially and, under the aegis of what is now the American Institute of Architects Academy of Architecture for Health, formed the nonprofit Facilities Guidelines Institute for that purpose. *See* FACILITY GUIDELINES INST., GUIDELINES FOR DESIGN AND CONSTRUCTION OF HEALTH CARE FACILITIES xiv–xv (2010).

32. STATE BD. OF HEALTH MINUTES 6 (June 15, 2012), <http://www.vdh.state.va.us/Administration/meetings/documents/2012/pdf/Minutes%20June%2015%202012.pdf>; *see* VA. DEP'T OF HEALTH, PROPOSED REGULATION AGENCY BACKGROUND DOCUMENT 17, *supra* note 23. A similar amendment had been tabled unsuccessfully at the time the emergency regulations were adopted. VA. DEP'T OF HEALTH, EMERGENCY REGULATION AND NOIRA BACKGROUND DOCUMENT 6, *attached to* STATE BD. OF HEALTH AGENDA (Sept. 14, 2011), *supra* note 31.

Board's rule making authority.<sup>33</sup> Enacted in 2005, this section charges the Board with promulgating regulations for hospitals that "include minimum standards for the design and construction of hospitals, nursing homes, and certified nursing facilities consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health."<sup>34</sup>

From the meeting minutes, it appears that no explanation was offered to the Board for the attorney general's view that the tabled amendment was contrary to law. Even a casual reader ought to notice in section 32.1-127.001 the absence of any limitation or direction with reference to time or deadline. What the General Assembly has not taken away in section 32.1-127.001 ought to be presumed to remain. In the absence of explicit language to the contrary, a reasonable interpretation of that section leaves intact the general rulemaking discretion of the Board pursuant to section 32.1-12, including the discretion to make distinctions and set deadlines that are themselves reasonable. As it pertains to construction and design, therefore, the tabled amendment ought to be within the scope of the Board's discretion so long as it is both reasonable and consistent with the guidelines. Assuming that the expense of retrofitting established clinics can be substantial, to the point of threatening the operation of some (as public comment to the board averred),<sup>35</sup> the amendment seems a reasonable accommodation. It is hardly in conflict with the guidelines, which are devoid of deadlines.

Having heard the attorney general's contrary advice, the Board nevertheless voted seven to four to adopt the grace period

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33. STATE BD. OF HEALTH MINUTES (June 15, 2012), *supra* note 32, at 7. The pertinent part of Senate Bill 924 has been codified as:

Notwithstanding any law or regulation to the contrary, the Board of Health shall promulgate regulations pursuant to § 32.1-127 for the licensure of hospitals and nursing homes that shall include minimum standards for the design and construction of hospitals, nursing homes, and certified nursing facilities consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health.

VA. CODE ANN. § 32.1-127.001 (Repl. Vol. 2011).

34. VA. CODE ANN. § 32.1-127.001 (Repl. Vol. 2011).

35. See VA. DEP'T OF HEALTH, PROPOSED REGULATION AGENCY BACKGROUND DOCUMENT 15 (Aug. 30, 2012), *attached to* STATE BD. OF HEALTH AGENDA (Sept. 14, 2012), *supra* note 31.

amendment.<sup>36</sup> That was less an end to the controversy than a trigger for its transmutation. Presented with proposed regulations that included the amendment, the attorney general declined to certify that they were in accordance with law, and the director of the Health Department's Office of Governmental and Regulatory Affairs then opined that, in the absence of such certification, the office was without authority to convey the proposed regulations to the Virginia Department of Planning and Budget for its economic impact analysis in accordance with the Administrative Process Act ("APA").<sup>37</sup>

This was enough to prompt the Board's chair to put reconsideration of the amendment on the agenda for the next meeting. Meanwhile, the attorney general reiterated his view that the amendment was contrary to law, again without elucidating a basis for that view.<sup>38</sup> Instead, the attorney general warned the Board that, if the amendment were not withdrawn in accordance with his advice, the Board would run the risk that he might refuse to defend them and their regulations in court:

As is the case with any state entity represented by the Office of the Attorney General, Board members may refuse to follow the advice of

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36. STATE BD. OF HEALTH MINUTES (June 15, 2012), *supra* note 32, at 6–8.

37. Memorandum from Joseph J. Hilbert, Director, Governmental and Regulatory Affairs, to the State Board of Health, Proposed Regulations for the Licensure of Abortion Facilities (12 VAC5-412) 1–2 (Aug. 30, 2012), *attached to* STATE BD. OF HEALTH AGENDA (Sept. 14, 2012), *supra* note 31; *see also* VA. CODE ANN. § 2.2-4007.04 (Repl. Vol. 2011) ("Before delivering any proposed regulation under consideration to the Registrar as required in § 2.2-4007.05, the agency shall submit . . . a copy of that regulation to the Department of Planning and Budget. In addition to determining the public benefit, the Department of Planning and Budget in coordination with the agency shall, within 45 days, prepare an economic impact analysis of the proposed regulation . . ."). According to Mr. Hilbert, his hands were tied by Executive Order 14 (2010). That executive order responds to Virginia Code section 2.2-4003, in which the General Assembly sets out its license for executive department review of agency regulations. *See generally* Exec. Order No. 14 (2010) (June 29, 2010). Among other things, Executive Order 14 (2010) says what supporting information should accompany proposed regulations when they are conveyed to the Department of Planning and Budget. Among the items required is "a memorandum from the Office of the Attorney General (OAG) certifying that the agency has legal authority to promulgate the regulation being proposed." *Id.* But Executive Order 14 (2010) does not say anything at all about what should happen when an attorney general refuses such certification. To the contrary, it clearly manifests the governor's intention not to interfere with the process for rulemaking specified by statute, *id.*, so the interpretation that it somehow dictates suspension of that process is hardly a natural one. But this internecine conflict was soon eclipsed and remains unresolved.

38. *See* Memorandum from Allyson K. Tysinger, Senior Assistant Att'y Gen., to Karen Remly, Va. Dep't of Health, Regulations for Licensure of Hospitals in Virginia 12 VAC 5-410-10 et seq. Regulations for Licensure of Abortion Facilities 12 VAC 5-412-10 et seq. (July 16, 2012) (on file with author).

the Attorney General. Should a Board member choose to disregard the Attorney General's advice and subsequently be named in a lawsuit related to the particular Board action taken, such as the recent litigation challenging the certificate of public need program which named every Board member as an individual defendant, the Attorney General is not obligated to provide representation and it is within the discretion of the Attorney General to decline both representation of the Board member and the appointment of special counsel. Such decisions are made on a case-by-case basis. In a case where the Office of the Attorney General declines to represent a Board member because of the member's refusal to follow legal advice, it would be the responsibility of the Board member to obtain and pay for his or her own legal representation if representation was desired.<sup>39</sup>

The implications of this epistle are clear. Admitting that he lacks the power to veto the regulations as amended, the attorney general threatens to abandon his clients if they will not subordinate their judgment to his.<sup>40</sup> This threat, however, rests on assumptions about the attorney general's power that are not grounded in either statute or constitution.

In the first place, while the Virginia Constitution itself creates the Office of Attorney General, it leaves to the General Assembly discretion to specify the attorney general's duties.<sup>41</sup> That explicit delegation ought to lead to a presumption against any claim of inherent or implied powers attached to the office. It ought to follow that the attorney general's duties and powers are to be found in statute. It is true that the Virginia Code affords the attorney general a monopoly of the market for legal services to state agencies.<sup>42</sup> But the same law that creates that monopoly ought to be regarded as imposing a duty to furnish those services. Thus, Virginia Code section 2.2-507 ought to be interpreted as imposing on the attorney general a duty to defend state agencies in civil cases—except when statute excuses him. After all, if no such duty were imposed by subsection 2.2-507(A), its two explicit exceptions in subsection 2.2-507(C) would be meaningless. These allow the attorney general to withhold his legal services when he finds it either “uneconomical” or “impracticable” to provide them. By it-

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39. Memorandum from Allyson K. Tysinger, Senior Assistant Att'y Gen., to Va. Bd. of Health, Legal Representation of Board Members 2 (Sept. 12, 2012), *attached to Julian Walker, Cuccinelli Issues Warning Over Abortion Rules*, VIRGINIAN-PILOT (Sept. 13, 2012), <http://hamptonroads.com/2012/09/cuccinelli-issues-warning-over-abortion-rules>.

40. *See id.*

41. VA. CONST., art. V, § 15.

42. *See* VA. CODE ANN. § 2.2-507(A) (Supp. 2012).

self, however, a lawyer's disagreement with a client's legal position makes its defense neither uneconomical nor impracticable. By the same token, in Virginia Code section 2.2-510, the General Assembly has empowered the Governor to respond to situations in which the attorney general is otherwise "unable" to serve his client.<sup>43</sup> But a lawyer's disagreement with a client's position hardly renders him unable to defend it. An unstrained reading of both sections therefore ought to lead to the conclusion that the attorney general himself would be acting contrary to law were he to refuse to defend simply because he disagrees.<sup>44</sup>

This view of the scope of the attorney general's duty to defend in accordance with statute allows a serious constitutional question to be avoided. If his discretion to deny representation is so broad as to encompass instances in which his only excuse is that he disagrees with an agency's interpretation of its rule making power, then separation of executive and law making powers is far less than it appears. Article III of the Virginia Constitution mandates the separation of executive and legislative powers and authorizes the General Assembly to create and empower administrative agencies.<sup>45</sup> The attorney general has conceded that he is without power to veto a regulation by the Board, even when he considers it *ultra vires*.<sup>46</sup> His predecessor long ago recognized that an agency's rule making is part of legislative power.<sup>47</sup> If the attorney general is right that, by authority conferred in an executive order, he can stay agency rule making with which he disagrees, then he enjoys in fact what he has been denied by law. By the same token, if he can intimidate his rulemaking client, then he enjoys in fact power to dictate rules that he is denied by law. It

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43. *Id.* § 2.2-510(4) (Supp. 2012). Or when clients at odds create a conflict of interest that would make representation of both "improper," *see id.*, a situation neither ripe nor to be ruled out in this controversy.

44. *See id.* §§ 2.2-507(C), -510(1) to -510(4) (Supp. 2012). Moreover, both section 2.2-507(C) and section 2.2-510(1) prescribe what ought to follow the attorney general's withdrawal. *See id.* §§ 2.2-507(C), -510(1) (Supp. 2012). Neither leaves the client defenseless; both contemplate the enlistment of alternative counsel at the client's expense. *See id.* When the attorney general does not defend, the law calls for a substitute.

45. VA. CONST. art. III, § 1; *cf.* *Winchester & Strasburg R.R. v. Commonwealth*, 106 Va. 264, 268, 55 S.E. 692, 693 (1906) ("[T]he whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another to a limited extent."), *quoted in* *Baliles v. Mazur*, 224 Va. 462, 471-72, 297 S.E.2d 695, 700 (1982).

46. Memorandum from Allyson K. Tysinger to Va. Bd. of Health, *supra* note 39.

47. 1981-82 Op. Va. Att'y Gen. 93, 93-94, 95.

might be ventured that this imbalance of executive and legislative powers is only as serious as the threat is effective. Effectiveness is hard to measure, but the fact remains that in the face of such gestures as are herein described, the Board withdrew the grace period amendment.<sup>48</sup> The stage is now set for another transformation of the controversy, into a civil action in court.

When the Board, unbidden by the General Assembly, promulgates regulations that subject clinics offering only non-surgical abortions to standards appropriate for clinics offering surgical abortions, or imposes on existing facilities an early deadline for compliance with construction standards intended for new projects, that judgment is apt for judicial review.<sup>49</sup> The Health Code is clear that the Board's issuance of a variance or exception may be ultra vires if it is not reasonable;<sup>50</sup> the code is far less clear that withholding a variance or exception is unlawful when its issue would be reasonable. The federal Administrative Procedure Act,<sup>51</sup> governing most federal agencies delegated rulemaking power of the sort here in question, empowers a federal court to hold unlawful and set aside agency action the court finds "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

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48. Trevor Baratko, *Abortion Providers Must Meet New Hospital Codes, Board of Health Dicatates*, LOUDOUNTIMES (Sept. 14, 2012), <http://www.loudountimes.com/index.php/news/article/41369>; Jim Nolan, *Cuccinelli OKs New Clinic Regulations; Tighter Rules for Abortion Providers Now Go to Governor for His Review*, RICH. TIMES-DISPATCH, Sept. 27, 2012, at B04.

49. Rulemaking by the Board is subject to the APA. VA. CODE ANN. § 32.1-24 (Repl. Vol. 2011). According to the APA:

Any person affected by and claiming the unlawfulness of any regulation . . . shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia. Actions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any regulation or case decision is the subject of an enforcement action in court, it shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases.

*Id.* § 2.2-4026 (Repl. Vol. 2011 & Supp. 2012).

50. See VA. CODE ANN. § 32.1-12 (Repl. Vol. 2011) ("The Board may make, adopt, promulgate and enforce such regulations and provide for *reasonable* variances and exemptions therefrom . . .") (emphasis added).

51. Act of June 11, 1946, Pub. L. No. 79-404, ch. 324, 60 Stat. 237, 551-59, 701-06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (codified as amended in scattered sections of 5 U.S.C. (1946)).

with law.”<sup>52</sup> The correlative section of the Virginia APA, governing the Board in this instance, is less specific. It empowers a Commonwealth court to hold unlawful and set aside agency action not in accordance with law,<sup>53</sup> but it does not explicitly empower the court to set aside agency action simply because the court finds the agency action arbitrary and capricious.<sup>54</sup> A reviewing Commonwealth court would first have to be persuaded to find material differences between pharmaceutical and medical abortions, or between existing and planned facilities.<sup>55</sup> It would then have to be persuaded that those material differences make regulating both types by the same standards arbitrary and capricious. Only then

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52. 5 U.S.C. § 706(2)(A) (2006). According to the Supreme Court of the United States, a federal court reviewing agency action under section 706

is first required to decide whether the Secretary acted within the scope of his authority. This determination naturally begins with a delineation of the scope of the Secretary’s authority and discretion. As has been shown, Congress has specified only a small range of choices that the Secretary can make. Also involved in this initial inquiry is a determination of whether on the facts the Secretary’s decision can reasonably be said to be within that range. The reviewing court must consider whether the Secretary properly construed his authority . . . . And the reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems.

Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706 (2)(A) requires a finding that the actual choice made was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971) (citations omitted).

53. VA. CODE ANN. § 2.2-4027 (Repl. Vol. 2011 & Supp. 2012).

54. There is plenty of evidence to support an observation that Commonwealth courts consider themselves empowered by Virginia’s APA to set aside case decisions by state agencies on the grounds that they are arbitrary and capricious. *See, e.g.*, *Petersburg Hosp. Co. v. Remley*, No. 0052-11-2 2012, Va. App. LEXIS 55, at \*14 (February 28, 2012) (unpublished decision) (quoting *Loudoun Hosp. Ctr. v. Stroube*, 50 Va. App. 478, 491, 650 S.E.2d 879, 886 (2007)) (“[W]here . . . the issue concerns an agency decision based on the proper application of its expert discretion, the reviewing court will not substitute its own independent judgment for that of the agency but rather will reverse the agency decision only if that decision was arbitrary and capricious”). The author has yet to unearth a report that a Commonwealth court has set aside an agency’s legislative rule or regulation by reference to the state APA on the stated grounds that, because the agency action is arbitrary and capricious, it must not be in accordance with law.

55. To be material in this context, differences ought to relate to “health, hygiene, sanitation, construction and safety,” to which the Board’s attention has been explicitly directed by the legislature. *See* VA. CODE ANN. § 32.1-127(A) (Repl. Vol. 2011).

would the court be in a position to answer the Zen question of whether an unreasonable agency regulation can ever be in “accordance with law.”

Virginia’s APA otherwise empowers a Commonwealth court to set aside agency action that violates a “constitutional right, power, privilege, or immunity.”<sup>56</sup> Potentially at risk from these regulations is a pregnant woman’s federal constitutional right to an abortion.<sup>57</sup> As a constitutional right, her right to abortion is a liberty interest of the sort protected by due process,<sup>58</sup> which translates into immunity from arbitrary and capricious government action.<sup>59</sup> Even after setting to one side the obvious due process issue of whether these regulations unduly burden women attempting to exercise this particular constitutional right,<sup>60</sup> there remains appurtenant to the Board’s rulemaking decision another due process issue: whether the Board’s decision not to regulate different procedures or facilities differently is unconstitutional because it is arbitrary and capricious.

But if a court were somehow to conclude, as has the attorney general, that in Bill 924 the General Assembly in fact stripped the Board of discretion to treat pharmaceutical abortion clinics differently in its regulations, or to afford a period of grace for existing clinics, then surely the regulations now in effect and proposed would be in accordance with law, however arbitrary and

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56. *Id.* § 2.2-4027 (Repl. Vol. 2011 & Supp. 2012).

57. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000) (striking down a state law criminalizing partial-birth abortion); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887, 893–95 (1992) (striking down a state law conditioning abortion on spousal consent).

58. *See generally* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 839 (4th ed. 2011).

59. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84–85 (1980) (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)) (“[The] guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.”). In *Nebbia*, the Court, per Justice Roberts, went on to say, “It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.” 291 U.S. at 525. Judgments that state regulations violate the Fourteenth Amendment because they are unconstitutionally arbitrary and capricious are few and far between, presumably because legislatures and agencies tend not to act that way very often, especially under public scrutiny. *See* CHEMERINSKY, *supra* note 58, at 694–95 (describing a handful of cases in which the Supreme Court invalidated laws for want of a rational basis.)

60. *See generally* CHEMERINSKY, *supra* note 58.

capricious it otherwise might be to treat unlike cases alike.<sup>61</sup> As subsequent and more specific legislation, Bill 924 would be presumed preemptive of older, more general sections of the Health Code with which it conflicts, including the part of section 32.1 that limits the Board to making only regulations that are reasonable.

Time will tell.

## 2. Excluding Firearms by Regulation: Banned if You Do; Banned if You Don't

The authority of Virginia's state agencies with general rule making authority to ban firearms within their jurisdictions has been in dispute for more than a decade. It arose years before the Supreme Court of the United States confirmed a constitutional right to possess firearms free of prohibition by either federal or state law.<sup>62</sup> Several of Virginia's attorneys general have opined on the matter, offering guidance of one sort or the other.<sup>63</sup> In 2011, the Supreme Court of Virginia seemed to settle much of the question.

In 2002, in response to a query by Delegate Black, Attorney General Earley issued an official opinion that a regulation<sup>64</sup> by the Department of Conservation and Recreation ("DCR") prohibiting concealed carriage of firearms in state parks could be enforced against a gunman with a concealed weapons permit.<sup>65</sup> In Attorney

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61. While nothing on the face of the amendment makes this clear, surely nothing in the legislative history shows any attention by legislatures to the distinction. If facial interpretation of the amendment is abandoned for extrinsic evidence, that evidence will disfavor judicial implementation of such a distinction.

62. See *District of Columbia v. Heller*, 554 U.S. 570, 599–600 (2007); see also *McDonald v. Chicago*, 561 U.S. \_\_\_, \_\_\_, 130 S. Ct. 3020, 3036 (2010).

63. "While [the attorney general's opinion is] entitled to due consideration, [it is] not binding on this Court." *Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998) (quoting *City of Virginia Beach v. Virginia Rest. Ass'n*, 231 Va. 130, 135, 341 S.E.2d 198, 201 (1986)) (second alteration in original).

64. VA. ADMIN. CODE § 5-30-200 (2005).

65. 2001 Op. Va. Att'y Gen. 102, 103. Concealed carriage of firearms generally is prohibited in the Commonwealth and the first offense qualifies as a Class 1 misdemeanor. VA. CODE ANN. § 18.2-308(A) (Cum. Supp. 2012). This general prohibition, however, is subject to a number of exceptions based on circumstance or status. See *id.* § 18.2-308(B)–(C) (Cum. Supp. 2012). Moreover, the general prohibition does not inhibit adults with concealed carriage permits issued in Virginia. *Id.* § 18.2-308(D) (Cum. Supp. 2012). Such permits generally are available but foreclosed for a few, like fugitives and addicts, disqualified in the statute. *Id.* § 18.2-308(E) (Cum. Supp. 2012). But a carry permit falls short of carte

General Earley's view, because the statute creating the permit explicitly limited its scope to places where firearms were not "otherwise prohibited by law," such a permit was ineffective in places covered by the DCR's regulation.<sup>66</sup> This syllogism rested on a premise of two parts: that an administrative regulation was a law within the meaning of the permit statute and that the DCR was empowered to promulgate a firearms ban in the form of a regulation.<sup>67</sup> The first gave the attorney general no pause,<sup>68</sup> nor should it have. The DCR is empowered to make rules in accordance with the APA,<sup>69</sup> and that statute makes it clear such regulations have force of law.<sup>70</sup> The terse provision in title 18.2 limiting carriage in accordance with the permit to places where firearms were not otherwise prohibited by law affords no reason to doubt that its drafters regarded regulations as laws. As for the second part of his premise, the attorney general apparently saw no reason to infer an implicit exception from otherwise general language endowing the DCR to make whatever rules were necessary or incidental to the management of state parks.<sup>71</sup> Indeed, he found the DCR "clearly and unambiguously" empowered to make such a rule.<sup>72</sup>

Only a year (and a regime change) later, Attorney General Kilgore opined to the contrary, in response to another query by Delegate Black, finding the same regulation *ultra vires*.<sup>73</sup> In Attorney General Kilgore's view, the various limits to the carry permit set forth in statute are to be read as exclusive.<sup>74</sup> In other words, what the General Assembly did not enumerate, no agency could.<sup>75</sup>

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blanche. It does not "authorize the possession of any handgun or other weapon on property or in places where such possession is otherwise prohibited by law or is prohibited by the owner of private property." *Id.* § 18.2-308(O) (Cum. Supp. 2012). Among the places where such possession is otherwise prohibited are the buildings and grounds of schools elementary, middle, and secondary. *Id.* § 18.2-308.1(A) (Cum. Supp. 2012).

66. 2001 Op. Va. Att'y Gen. at 103.

67. *Id.* at 102-03.

68. *Id.* at 102.

69. VA. CODE ANN. § 10.1-104(B) (Repl. Vol. 2012).

70. *Id.* § 2.2-4001 (Repl. Vol. 2011 & Supp. 2012).

71. 2001 Op. Va. Att'y Gen. at 103.

72. *Id.*

73. Compare *id.*, with 2002 Op. Va. Att'y Gen. 34, 37.

74. 2002 Op. Va. Att'y Gen. at 36-37.

75. *Inclusio unius est exclusio alterius* (i.e., the inclusion of one thing indicates the exclusion of the other). *E.g.*, *United States v. Cottingham*, 40 Va. (1 Rob.) 615, 627 (1843). Attorney General Kilgore offered no reason for presuming that the enumerated list in his

Hitherto, the question had been whether the DCR could ban from parks firearms carried in concealment by those with carry permits. More recently, in 2008, in response to a query by Delegate Cuccinelli, Attorney General McDonnell opined that the DCR was without authority to ban from parks firearms carried openly.<sup>76</sup> Embracing the logic employed by Attorney General Kilgore, Attorney General McDonnell pointed to the only statutory provision on the subject, which banned assault rifles from parks in eight cities and five counties, and concluded that it must be taken as the final word on the matter, leaving no opportunity for the DCR to exercise its rule-making authority.<sup>77</sup>

In *DiGiacinto v. George Mason University*, an occasional visitor sued George Mason University (“GMU”) in the Fairfax County Circuit Court, attacking GMU’s regulation prohibiting entry with a firearm into specified university buildings and attendance with a firearm at certain sorts of university events.<sup>78</sup> He argued that the regulation unconstitutionally interfered with firearm rights he enjoyed under both the Second Amendment of the United States Constitution<sup>79</sup> and article I, section 13 of the Virginia Constitution.<sup>80</sup> He also argued that GMU was otherwise without authority to promulgate such a regulation.<sup>81</sup> His complaint was dismissed.<sup>82</sup> When he appealed, the supreme court affirmed, making short shrift of his constitutional claims<sup>83</sup> and agreeing with the

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contemplation should be taken as the outer boundary rather than an irreducible core. Implicit in the prior decision of Attorney General Earley is his presumption that the list in section 18.2-308(O) leaves open to subordinate lawmakers the option of addition, if not subtraction. As for the contrary opinion of his immediate predecessor, Attorney General Kilgore explained that it had dealt only with whether the regulation was law, not whether the DCR had any authority to promulgate it. 2002 Op. Va. Att’y Gen. at 38 n.39.

76. 2008 Op. Va. Att’y Gen. 12, 12.

77. Compare *id.* at 14 (citing VA. CODE ANN. § 18.2-287.4 (Supp. 2008)), with 2002 Op. Va. Att’y Gen. at 36–37.

78. 281 Va. 127, 130–31, 704 S.E.2d 365, 367 (2011); cf. 8 VA. ADMIN. CODE § 35-60-20 (2010) (“Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden.”).

79. As incorporated in Section 1 of the Fourteenth Amendment. *McDonald v. Chicago*, 561 U.S. \_\_\_, \_\_\_, 130 S. Ct. 3020, 3026 (2010).

80. *DiGiacinto*, 281 Va. at 132, 704 S.E.2d at 368.

81. *Id.* at 131, 704 S.E.2d at 367.

82. *Id.* at 132, 704 S.E.2d at 368.

83. As the Supreme Court of Virginia noted, the Supreme Court of the United States’ recent decisions explicitly recognizing a constitutional right to possess and carry firearms have gone only so far and have left intact laws forbidding the carrying of weapons into

court below that GMU had authority to promulgate a prohibition of firearms as broad in scope as GMU's actual regulation.<sup>84</sup> As far as the court was concerned, when the General Assembly conferred on GMU's Board of Directors the power to make "all needful rules and regulations concerning the University," that general delegation of rulemaking authority encompassed "regulations . . . that promote safety on GMU's campus."<sup>85</sup> Taking note that the prohibition was not general, that is, it left open the carriage to campus of firearms in other circumstances, the court sustained the regulation.<sup>86</sup>

Six months later, in response to a query from Senator Hanger, Attorney General Cuccinelli offered his opinion that the University of Virginia ("UVA") could prohibit the open carriage of firearms on campus by publishing a policy, but could not, simply by publishing a policy, prohibit the concealed carriage of firearms by those generally licensed for such carriage.<sup>87</sup> In his view, even if a policy can serve to effectuate a prohibition, that does not make it law, and the general license for concealed carriage is subject to limitation only by law.<sup>88</sup> Perhaps chastened, UVA soon promulgated the same norm as a regulation.<sup>89</sup>

What the supreme court had to say about the scope of a university's authority to ban firearms by regulations with force of law ought to hold true in equal measure for state agencies with general authority to make within their respective jurisdictions law in the form of regulations. *DiGiacinto* offered the court an opportunity to insist that only specific delegation of authority to make rules about firearms can suffice. The court went in a different di-

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schools and other sensitive places. *Id.* at 134–35, 704 S.E.2d at 369 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008); *McDonald*, 561 U.S. at \_\_\_, 130 S. Ct. at 3047). The Supreme Court of Virginia was not disposed to find in article I section 13 of the Virginia Constitution anything different in this regard, declaring that firearms rights in section 13 are coextensive with those found in the United States Constitution's Second Amendment. *Id.* at 133, 704 S.E.2d at 368.

84. *Id.* at 139, 704 S.E.2d at 372.

85. *Id.* at 136, 704 S.E.2d at 370 (quoting VA. CODE ANN. § 23-91.29(a) (Repl. Vol. 2006)) (internal quotation marks omitted).

86. *Id.* at 136–37, 139, 704 S.E.2d at 370, 372.

87. Op. to Hon. Emmett W. Hanger, Jr. (July 1, 2011). Senator Hanger inquired about Policy SEC-30. *Id.* Apparently, SEC-30 had been on the books since 2009. See *Policy: Regulation of Weapons, Fireworks and Explosives*, UNIV. OF VA. (Dec. 12, 2011), <https://policy.itc.virginia.edu/policy/policydisplay?id=SEC-030>. The version in question was superseded on December 13, 2011. *Id.*

88. Op. to Hon. Emmett W. Hanger, Jr. (July 1, 2011); cf. VA. CODE ANN. § 18.2-308(O) (Cum. Supp. 2012).

89. 8 VA. ADMIN. CODE § 85-20-10 (Cum. Supp. 2012).

rection, and the incumbent attorney general has since opined in harmony.<sup>90</sup>

When it comes to banning firearms, interesting questions about the meaning of statutes with regard to rulemaking power may now be more or less settled for the state agencies of Virginia, in particular her colleges and universities, but troublesome constitutional questions remain open. More precise measurements of what the two constitutions permit any lawmaker so inclined must await another day. It ought not to go unnoticed that in *DiGiacinto* the Supreme Court of Virginia upheld GMU's ban by reference to dicta in *District of Columbia v. Heller* that the Second Amendment does not per se rule out bans in sensitive places such as schools and government buildings.<sup>91</sup> The Supreme Court of Virginia put GMU within that class both because it is an educational institution according to Virginia law and because its property belongs to the Commonwealth.<sup>92</sup> Another court might have taken notice, as did Attorney General McDonnell,<sup>93</sup> of the General Assembly's distinction when it comes to firearms between schools primary, middle, and high on the one hand, and other places of learning, such as colleges and universities.<sup>94</sup> When the Supreme Court of the United States gave notice in *Heller* that firearms could still be banned in schools and government buildings, it did not define its terms.

Another constitutional question left open relates to the scope of the ban. After *DiGiacinto*, a ban of the breadth of GMU's has the sanction of that precedent, but any broader ban is still in jeopardy. In his opinion for Senator Hanger, Attorney General Cuccinelli distinguished on this basis the ban by UVA from the ban by GMU upheld in *DiGiacinto*.<sup>95</sup> Just how short of absolute a campus ban can be and still pass constitutional muster as a "tailored" ban remains to be seen. Stay tuned.

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90. Compare *DiGiacinto*, 281 Va. at 134–35, 139, 704 S.E.2d at 369, 372 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2007)), with Op. to Hon. Emmett W. Hanger, Jr. (July 1, 2011).

91. 281 Va. at 134–35, 704 S.E.2d at 369 (quoting *McDonald v. Chicago*, 561 U.S. \_\_\_, \_\_\_, 130 S. Ct. 3020, 3047 (2010)).

92. See *id.* at 135, 704 S.E.2d at 369.

93. 2008 Op. Va. Att'y Gen. 12, 14.

94. See VA. CODE ANN. § 18.2-308.1 (Cum. Supp. 2012).

95. Op. to Hon. Emmett W. Hanger, Jr. (July 1, 2011).

### 3. Judicial Review of Agency Action

#### a. What Is Arbitrary and Capricious?

By law, Virginia offers education in its public colleges and universities in exchange for tuition and guarantees Virginians a lower rate.<sup>96</sup> By the terms of the statute, the educational institutions involved assess student applications for the lower, in-state rate, and decide contested cases, subject to judicial review.<sup>97</sup> In *Virginia Commonwealth University v. Su*, the Supreme Court of Virginia put an end to whatever confusion there might have been as to the standard for its review of circuit court decisions in such cases, and gave a lesson to the circuit courts regarding the standard of review for such cases when before them.<sup>98</sup>

Su, a native of China, applied from Minnesota for admission to several universities around the country, including Virginia Commonwealth University (“VCU”), which afforded him admission.<sup>99</sup> After a year, he applied for recognition of a domicile change and in-state tuition.<sup>100</sup> He had been living with his uncle in Midlothian, had worked part-time in two local restaurants, and had changed his driver’s license, vehicle title, and registration.<sup>101</sup> During recess, he had returned to China for a month.<sup>102</sup> A university hearing officer rejected his application on the grounds that his F-1 visa prohibited change in his domicile.<sup>103</sup> He appealed to VCU’s Residency Appeals Committee, which took evidence that he had established permanent residency before matriculating.<sup>104</sup> At that hearing, Su said he would “probably” remain in the Commonwealth after graduation.<sup>105</sup> VCU refused him in-state status.<sup>106</sup> The committee denied his application, finding that he had failed to offer clear and convincing evidence that rebutted the statutory presumption that he is in Virginia “primarily for educational

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96. See VA. CODE ANN. §§ 23-7.4, -7.4:2 (Repl. Vol. 2011).

97. *Id.* § 23-7.4:3(A) (Repl. Vol. 2011).

98. See 283 Va. 446, 451–52, 722 S.E.2d 561, 563 (2012).

99. *Id.* at 449–50, 722 S.E.2d at 562.

100. *Id.*

101. *Id.*

102. *Id.* at 450–51, 722 S.E.2d at 563.

103. *Id.* at 450, 722 S.E.2d at 562.

104. *Id.*

105. *Id.* at 451, 722 S.E.2d at 563.

106. See *id.*

purposes.”<sup>107</sup> Su appealed to the Richmond City Circuit Court, which reversed after finding VCU’s decision arbitrary and capricious.<sup>108</sup> VCU appealed, and the supreme court reversed, finding that the court below had erred in demanding more than the organic law required of VCU, in concentrating on the wrong administrative decision, and in accepting and relying on evidence extrinsic to VCU’s record.<sup>109</sup> Along the way, the court stipulated that its standard of review in such a case is *de novo*, notwithstanding language in two prior decisions that seemed to call for a “plainly wrong” standard.<sup>110</sup> Turning from its review to that by the court below, the supreme court noted that the tuition statute directed the circuit court in such cases to determine whether VCU’s decision had been arbitrary and capricious or otherwise contrary to law.<sup>111</sup> According to the court, a decision is arbitrary and capricious when it is “willful and unreasonable, and taken without consideration or in disregard of facts or law or without determining principle.”<sup>112</sup> In this case, the circuit court erred in reweighing the evidence for itself.<sup>113</sup> As interpreted by the supreme court, the

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107. *Id.* (internal quotation marks omitted).

108. *Id.*

109. *See id.* at 454–55, 722 S.E.2d at 565.

110. *Compare id.* at 451–52, 722 S.E.2d at 563, *with* *George Mason Univ. v. Floyd*, 275 Va. 32, 39, 654 S.E.2d 556, 559 (2008), *and* *Ravindranathan v. Va. Commonwealth Univ.*, 258 Va. 269, 275, 519 S.E.2d 618, 620 (1999).

111. *Su*, 283 Va. at 455, 722 S.E.2d at 565 (citing VA. CODE ANN. § 23-7.4:3(A) (Repl. Vol. 2011)).

112. *Sch. Bd. of Norfolk v. Westcott*, 254 Va. 218, 224, 492 S.E.2d 146, 150 (1997) (quoting BLACK’S LAW DICTIONARY 105 (6th ed. 1990)) (internal quotation marks omitted) (reversing circuit court’s judgment that board’s decision to fire a security guard was arbitrary and capricious). In the view of the supreme court, apparently, what arbitrary and capricious means as a standard of review is common to both state university decisions refusing in-state tuition and local school board decisions to terminate a school security guard for excessive absenteeism. *See Su*, 283 Va. at 453, 722 S.E.2d at 564 (citing *Westcott*, 254 Va. at 224, 492 S.E.2d at 150). Thus, the meaning is sufficiently elastic to span judicial review for conformity of judgments by both state agencies and school boards with either statutory or constitutional norms. At least in cases in which the definition of the phrase is undisputed, the supreme court tacitly presumes that its law dictionary meaning was intended by the drafters of both a 1996 statute, Act of April 17, 1996, ch. 931, 1996 Acts 2240, 2246 (codified as amended at VA. CODE ANN. § 23-7.4:3(A) (Cum. Supp. 1996)); Act of Apr. 17, 1996, ch. 981, 1996 Va. Acts 2404, 2410 (codified as amended at VA. CODE ANN. § 23-7.4:3(A) (Cum. Supp. 1996)), where it is explicitly set forth, and the 1971 Virginia Constitution, article XIII, section 7, where it has been found implicitly present. *See Westcott*, 254 Va. at 222, 492 S.E.2d at 148 (quoting *Bristol Va. Sch. Bd. v. Quarles*, 235 Va. 108, 119, 366 S.E.2d 82, 89 (1988)). Yet the phrase is not to be found at all in the revised fourth edition. *See* BLACK’S LAW DICTIONARY 134 (4th ed. 1968). It first appears in the fifth. *See* BLACK’S LAW DICTIONARY 96 (5th ed. 1979); *cf.* LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND 58 (Richard Kelly ed. 2000) (“Curiouser and curiouser!”).

113. *Su*, 283 Va. at 455, 722 S.E.2d at 565.

tuition statute does not allow a circuit court to substitute its judgment for that of the university.<sup>114</sup>

### B. *Timing of Review*

In *Russell v. Board of Agriculture and Consumer Services*, the Virginia Court of Appeals gave meaning to the word “adoption” as it appears in Rule of the Supreme Court of Virginia 2A:2, making clear the starting point for measuring the ensuing window in which those opposed may file notice of appeal.<sup>115</sup> According to the rule:

Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party’s counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party’s last address known to the agency.<sup>116</sup>

This case arose when the Board of Agriculture and Consumer Services on March 20, 2008, adopted, as amended after notice and comment, proposed regulations bringing Virginia into line with standards of the United States Department of Agriculture designed to combat scrapie in sheep and goats.<sup>117</sup> The state regulations, with an effective date of October 30, 2008, appeared in the August 18, 2008, issue of Register of Regulations.<sup>118</sup> On October 30, 2008, Kathryn Russell served the Board of Agriculture and Consumer Services with notice of appeal; she then filed a petition for appeal in the Albemarle County Circuit Court.<sup>119</sup> The Board of Agriculture and Consumer Services moved successfully for dismissal on the grounds that service of the notice of appeal had not been timely per Rule 2A:2.<sup>120</sup> Before the circuit court could rule, the plaintiff died, and her husband was substituted.<sup>121</sup> He eventu-

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114. *Id.*

115. 59 Va. App. 86, 87–88, 717 S.E.2d 413, 413–14 (2011).

116. VA. SUP. CT. R. pt. 2, R. 2A:2(a) (Repl. Vol. 2012).

117. *Russell*, 59 Va. App. at 89–90, 717 S.E.2d at 414.

118. *Id.*, 717 S.E.2d at 414–15.

119. *Id.* at 90, 717 S.E.2d at 415.

120. *Id.*

121. *Id.*

ally appealed on various grounds, one of which was that the notice of appeal had been timely.<sup>122</sup> The court of appeals disagreed on this point, and then declined to rule on his other assignments of error for want of jurisdiction.<sup>123</sup> According to the court of appeals, procedural due process considerations and an interest in limiting judicial review to agency action that is final persuades interpreting “adoption” in Rule 2A:2 as the point in time not when the Board of Agriculture and Consumer Services adopts its final version and forwards it to the registrar, but when the “[thirty-]day ‘final adoption period’” of Virginia Code section 2.2-4013(D) comes to an end, that is, when time runs out on the governor’s discretion to suspend the newly published regulation.<sup>124</sup> For the regulations in question, that occurred on September 17, 2008, the late Mrs. Russell’s notice was untimely, and the circuit court properly dismissed her appeal on that ground.<sup>125</sup> Without jurisdiction, the lower court could not decide other assignments of error (including a claim that the regulation was void ab initio for want of jurisdiction on the part of the Board of Agriculture and Consumer Services).<sup>126</sup> Without error in the court below, the court of appeals could not either.<sup>127</sup>

It would not be unreasonable to project the deadline for giving notice of appeal from the date on which the regulations were to become effective, as Mrs. Russell may have assumed, but that measure would be contrary to the plain language of Rule 2A:2, however that rule’s trigger of “adoption” might be interpreted.

## II. DEVELOPMENTS IN VIRGINIA’S FREEDOM OF INFORMATION ACT

The Virginia Freedom of Information Act (“FOIA”) was enacted by the General Assembly in 1968,<sup>128</sup> two years after Congress enacted the federal Freedom of Information Act.<sup>129</sup> Much like the federal FOIA, the Virginia FOIA was created to grant citizens

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122. *See id.*

123. *See id.* at 90, 95, 717 S.E.2d at 415, 417.

124. *See id.* at 93, 717 S.E.2d at 416.

125. *See id.*

126. *See id.* at 95, 717 S.E.2d at 417.

127. *Id.*

128. Act of Apr. 4, 1968, ch. 479, 1968 Acts 690, 691–93; *see also* VA. CODE ANN. §§ 2.2-3700 to -3714 (Repl. Vol. 2011 & Supp. 2012).

129. *Compare id.*, with Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2006 & Supp. IV. 2010)).

greater access to public records.<sup>130</sup> The guiding principle of FOIA is the presumption of openness.<sup>131</sup> It rejects an “atmosphere of secrecy” and affords citizens “every opportunity . . . to witness the operations of government.”<sup>132</sup> Under FOIA, citizens may: (i) inspect and/or receive copies of public records; (ii) obtain in advance an estimate of any charges that may apply; and, if necessary, (iii) file a petition in district or circuit court to compel compliance when their rights under the act have been violated.<sup>133</sup>

Since its enactment, FOIA has been revised every year to address changing circumstances and public concerns.<sup>134</sup> In 2010 and 2011, the General Assembly made several such revisions. A total of twelve bills were passed in 2010, six of which created four new records exemptions.<sup>135</sup> Twenty bills were passed in 2011, two of which created two more new records exemptions.<sup>136</sup> Each session also added one new closed meeting exemption.<sup>137</sup> The bills also amended several existing provisions of FOIA.<sup>138</sup> Some of these changes merit discussion; notice of all of them must be taken by public bodies and officials.<sup>139</sup>

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130. VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2011 & Supp. 2012).

131. *Id.* (“All public records and meetings shall be presumed open, unless an exemption is properly invoked.”); see VA. MUN. LEAGUE, VIRGINIA FREEDOM OF INFORMATION ACT, VIRGINIA CONFLICT OF INTEREST ACT AND THE VIRGINIA PUBLIC RECORDS ACT 3 (Aug. 2012), available at <http://www.vml.org/CLAY/SeriesPDF/11-12FOIACOIA.pdf> [hereinafter VML 2011 GUIDE] (“The guiding principle of FOIA is openness.”).

132. VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2011 & Supp. 2012).

133. *The Rights of Requesters and the Responsibilities of the Department of Accounts under the Virginia Freedom of Information Act*, VA. DEP’T OF ACCTS., [http://www.doa.virginia.gov/General\\_DOA/FOIA.cfm](http://www.doa.virginia.gov/General_DOA/FOIA.cfm) (last visited Oct. 15, 2012).

134. VML 2011 GUIDE, *supra* note 131, at 3.

135. VA. FREEDOM OF INFO. ADVISORY COUNCIL, 2010 FOIA LEGISLATIVE UPDATE 1 (2010), available at <http://foiacouncil.dls.virginia.gov/2010updt.pdf> [hereinafter 2010 UPDATE]. Established by the General Assembly, the Virginia Freedom of Information Advisory Council is an advisory organ in the legislative branch with a mandate to encourage compliance with the act. VA. FREEDOM OF INFO. ADVISORY COUNCIL, REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL 1 (2010), available at <http://foiacouncil.dls.virginia.gov/2010ar.pdf> [hereinafter 2010 REPORT]. “As directed by statute, the Council is tasked with furnishing advisory opinions concerning FOIA upon the request of any person or agency of state or local government,” as well as “conducting training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of FOIA.” *Id.* (footnote omitted).

136. VA. FREEDOM OF INFO. ADVISORY COUNCIL, 2011 FOIA LEGISLATIVE UPDATE 1 (June 2, 2011), available at <http://foiacouncil.dls.virginia.gov/2011updt.pdf> [hereinafter 2011 UPDATE].

137. 2010 UPDATE, *supra* note 135, at 1; 2011 UPDATE, *supra* note 136, at 1.

138. 2010 UPDATE, *supra* note 135, at 2; 2011 UPDATE, *supra* note 136, at 2.

139. Compare 2011 UPDATE, *supra* note 136, at 1–3, with VA. CODE ANN. § 2.2-3700(B)

### A. *Requests for Public Records*

The majority of state open records laws are modeled after the federal FOIA.<sup>140</sup> Although interpretations of the federal FOIA may inform interpretation of Virginia's FOIA, there are important differences between the two. Moreover, certain records that would be subject to a FOIA request in some states may not be in others. Some states may consider certain entities to be public bodies, while others may determine that the analogous entities in their states are not. Hence, one cannot rely exclusively upon interpretations of the federal FOIA, or of another state's FOIA, when interpreting Virginia's FOIA.

Because FOIA grants access to public records,<sup>141</sup> the first order of business is to define what constitutes a "public record." As enacted, FOIA provided access to *official* records until 1999, when the Act was amended by substitution of the term "public" for "official."<sup>142</sup> As the Virginia Press Association explained at the time, the purpose of this change was to remind public bodies that government records belong to the citizens, hence the public.<sup>143</sup> The word "public" also was regarded as broader by definition than "official" and, therefore, seen as better serving the purpose of the Act by helping "public officials understand . . . that *any* form of information storage constitutes a public record."<sup>144</sup>

From 2001 to 2011, the definition of "public records" remained the same. They were defined as:

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-

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(Repl. Vol. 2011 & Supp. 2012) ("All public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested.")

140. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1161 (2002) ("Today, all fifty states have open records statutes, a majority of which are modeled after the [federal] FOIA.")

141. VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2011 & Supp. 2012) ("[T]he General Assembly ensures the people of the Commonwealth ready access to *public records* . . .") (emphasis added).

142. Act of Mar. 28, 1999, ch. 703, 1999 Va. Acts 1149, 1151–52; Act of Mar. 28, 1999, ch. 726, 1999 Va. Acts 1218, 1220.

143. Letter from Ginger Stanley, Exec. Dir., Va. Press Ass'n, to Joint Subcomm. Studying Va.'s Freedom of Info. Act (Aug. 17, 1998) *in* RPT. OF THE JOINT SUBCOMM. STUDYING VA.'S FREEDOM OF INFO. ACT, H. Doc. No. 106, at B-50, B-52 (2000).

144. *Id.* at B-52, B-53 (emphasis added).

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.<sup>145</sup>

In 2011, the General Assembly added the following sentence: “Records that are not prepared for or used in the transaction of public business are not public records.”<sup>146</sup> In this way, the General Assembly slightly narrowed the definition of public records.

Afterwards, the town of Saltville encountered a FOIA request obliging it to grapple with the question of what may be considered “transaction of public business.”<sup>147</sup> The town applied to the Smyth County Circuit Court for a declaratory judgment as to which, if any, of the records requested were subject to the Act.<sup>148</sup> As “transaction of public business” is not expressly defined in FOIA, it is widely accepted that whether a record qualifies must be determined on a case-by-case basis.<sup>149</sup> A number of documents were submitted by the town under seal; at least two were not.<sup>150</sup> The court reviewed each and found that “[s]ome deal with the transaction of town business and some are totally personal and are not subject to disclosure under [FOIA].”<sup>151</sup> Although the opinion does not describe the contents of the documents, the court stated that nine of the communications contained matters related to the transaction of public business and, thus, were subject to disclosure under FOIA.<sup>152</sup> However, the court ordered redaction of portions of the documents that it found purely personal.<sup>153</sup>

As illustrated by *Saltville*, when a public body is uncertain whether records are public or private, it may apply for judicial guidance.<sup>154</sup> Alternatively, it may consult the Virginia Freedom of

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145. Compare VA. CODE ANN. § 2.2-3701 (Repl. Vol. 2001), with *id.* (Cum. Supp. 2010).

146. Act of Mar. 18, 2011, ch. 242, 2011 Acts 371 (codified as amended at VA. CODE ANN. § 2.2-3701 (Repl. Vol. 2011)).

147. Town of Saltville v. Surber, No. CL11-100, 2011 Va. Cir. LEXIS 219, at \*1 (Cir. Ct. Aug. 24, 2011) (Smyth County) (unpublished decision).

148. *Id.* at \*1–2.

149. See Advisory Op. Freedom Info. Advisory Council A0-04-10 (Nov. 19, 2010), available at [http://foiacouncil.dls.virginia.gov/ops/10/AO\\_04\\_10.htm](http://foiacouncil.dls.virginia.gov/ops/10/AO_04_10.htm).

150. *Saltville*, 2011 Va. Cir. LEXIS 219, at \*2, \*5.

151. Town of Saltville v. Surrber, 83 Va. Cir. 161, 162 (2011) (Smyth County).

152. *Saltville*, 2011 Va. Cir. LEXIS 219, at \*4.

153. See *id.*

154. See *id.* at \*1–2.

Information Advisory Council (“FOI Advisory Council”).<sup>155</sup> The General Assembly established the council to encourage and facilitate compliance with FOIA.<sup>156</sup> Moreover, when members of the public have questions regarding FOIA, they too can direct them to the council, which issues advisory opinions in written form as well as over the phone or by email.<sup>157</sup> Past advisory opinions can be found on the council’s website.<sup>158</sup> The Virginia Office of the Attorney General also issues opinions interpreting FOIA.<sup>159</sup> Although opinions of the FOI Advisory Council and the attorney general are non-binding, in the view of the Virginia Coalition for Open Government, they provide well-reasoned guidance and are potentially persuasive to Virginia’s courts.<sup>160</sup>

In *Burton v. Mann*, the Loudoun County Circuit Court confronted the question of what constitutes a proper response when the custodian believes the records requested do not arise in the transaction of public business and therefore are not public records.<sup>161</sup> A landowner had made FOIA requests to both a member and the chairman of the Loudoun County Board of Supervisors.<sup>162</sup> In a timely fashion, the member furnished some of the e-mails requested but withheld others after concluding that they were not related to the transaction of public business and, therefore, not

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155. VA. CODE ANN. § 2.2-3704.1 (Repl. Vol. 2011); *id.* § 30-179 (Repl. Vol. 2011).

156. *Id.* § 30-178 (Repl. Vol. 2011); see VIRGINIA FREEDOM OF INFO. ADVISORY COUNCIL (August 15, 2000), available at <http://foiacouncil.dls.virginia.gov/sm081500.htm>.

157. VA. FREEDOM OF INFO. ADVISORY COUNCIL, ADVISORY OPINIONS, <http://foiacouncil.dls.virginia.gov/Services/opinions.htm> (last visited Oct. 15, 2012).

158. VA. FREEDOM OF INFO. ADVISORY COUNCIL, SERVICES OF THE COUNCIL, <http://foiacouncil.dls.virginia.gov/> (last visited Oct. 15, 2012).

159. VA. COAL. FOR OPEN GOV’T, ATTORNEY GENERAL, <http://www.opengovva.org/foi-opinions/attorney-general-opinions-mainmenu-63> (last visited Oct. 15, 2012); see John F. O’Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to E-mail Correspondence*, 12 GEO. MASON L. REV. 719, 743 (2004) (citing *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161, 300 S.E.2d 603, 605 (1983)) (“[I]t is a settled doctrine of Virginia law that the construction of a Virginia statute by the Attorney General is entitled to deference by Virginia courts.”).

160. VA. COAL. FOR OPEN GOV’T, LOOK UP OPINIONS, <http://www.opengovva.org/foi-opinions> (last visited Oct. 15, 2012). Formed in 1996, the coalition is a nonprofit alliance promoting expanded access to government records, meetings and other proceedings at the state and local level. VA. COAL. FOR OPEN GOV’T, ABOUT THE COALITION, <http://www.opengovva.org/about-us/about-us> (last visited Oct. 15, 2012). It admits doing some lobbying, but avers that its primary work is educational. *Id.* Its board of directors includes librarians, genealogists, broadcasters, journalists, as well as access and transparency activists. *Id.*

161. 74 Va. Cir. 471, 471 (2008) (Loudoun County).

162. *Id.* at 472.

subject to disclosure.<sup>163</sup> The court ruled that the member's response was legally insufficient.<sup>164</sup>

According to the statute, when a FOIA request is received, the custodian has five days to respond in one of five ways:<sup>165</sup> (i) provide the records,<sup>166</sup> (ii) withhold all of the records requested and identify with reasonable particularity their subject matter,<sup>167</sup> (iii) withhold some of them and identify with reasonable particularity the subject matter of those withheld,<sup>168</sup> (iv) inform the requesting party that the records do not exist or cannot be found,<sup>169</sup> or (v) give notice that responding finally will take longer than five days and explain why (which extends the custodian's deadline another seven days).<sup>170</sup> According to the statute, the custodian's failure to respond is to be treated as a denial of the request.<sup>171</sup> In *Burton*, the question for the court was whether the board member responded sufficiently.<sup>172</sup> Noting that the statute is silent as to what suffices as a proper response in such circumstances,<sup>173</sup> the court articulated three rules. First, the recipient of the request has to determine if it calls for communications "arising out of the course of the public business of the recipient" as opposed to communications that are private.<sup>174</sup> Once that determination is made, the re-

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163. *Id.* at 475; *see also* VML 2011 GUIDE, *supra* note 131, at 9 ("E-mails have generated much controversy since they began being used in government business operation. E-mails that deal with public business are public records."); Advisory Op. Va. Freedom of Info. Advisory Council A0-1-00 (Sept. 29, 2000) *available at* [http://foiacouncil.dls.virginia.gov/ops/00/AO\\_1.htm](http://foiacouncil.dls.virginia.gov/ops/00/AO_1.htm) ("It is . . . the *subject* of those e-mails that determines their status as public records.")

164. *Burton*, 74 Va. Cir. at 478.

165. VA. CODE ANN. § 2.2-3704(B) (Repl. Vol. 2011 & Supp. 2012); *see also* Fenter v. Norfolk Airport Auth., 274 Va. 524, 532, 649 S.E.2d 704, 709 (2007) (holding that the Norfolk Airport Authority had violated FOIA by failing to properly respond to Fenter's requests); Advisory Op. Va. Freedom of Info. Advisory Council A0-07-11 (Nov. 9, 2011), *available at* [http://foiacouncil.dls.virginia.gov/ops/11/AO\\_07\\_11.Htm](http://foiacouncil.dls.virginia.gov/ops/11/AO_07_11.Htm).

166. VA. CODE ANN. § 2.2-3704(B) (Repl. Vol. 2011 & Supp. 2012).

167. *Id.* § 2.2-3704(B)(1).

168. *Id.* § 2.2-3704(B)(2).

169. *Id.* § 2.2-3704(B)(3).

170. *Id.* § 2.2-3704(B)(4).

171. *Id.* § 2.2-3704(E) (Repl. Vol. 2011 & Supp. 2012).

172. 74 Va. Cir. 471, 471 (2008) (Loudoun County).

173. *Id.* at 478.

174. *Id.* at 479. The *Burton* court seems to have thought that information in the custody of a public official could fall only into one of two categories: (i) matters arising in the course of public business or (ii) private matters. Thus, one may presume that a record that does not arise in the course of public business must be a private matter. However, the 2011 amendments added the following category: "Records that are not prepared for or used in the transaction of public business." Act of Mar. 18, 2011, ch. 242, 2011 Acts 371,

recipient then can deny production of records that are indeed private.<sup>175</sup> But the recipient's response must inform the requestor that requested communications are being withheld because they are private and "describe the nature of the record not produced or disclosed in a manner that . . . will enable the party making the request and the Court to assess whether or not the record was prepared in the transaction of public business."<sup>176</sup> As the member of the board of supervisors had simply withheld the records without explaining why, the court found his response inadequate.<sup>177</sup>

The court's rules seem reasonable. Because the General Assembly has afforded a frustrated requestor the option of judicial review of a custodian's denial, it should be presumed that the legislature intended that any denial be accompanied by explanation sufficient to allow the requestor to accept it gracefully, or else seek a second opinion, and in that event, to allow a court to pronounce the custodian's judgment in accordance with law or otherwise. Moreover, there is both a public interest in how custodians respond and a legislative interest in how executives enforce. Those interests also are served by obliging custodians to articulate to requestors their reasons for denial. An interpretation of the statute to the contrary—that is, one sustaining FOIA denials without explanation—would surely be less efficient in the long run. But the rule herein imposed is not without drawback. A request for data that is seen as private by its custodian now puts that custodian between a rock and a hard place. There is a reason why the most popular response among those in the public eye is "no comment." At least in Loudoun County, refusal of a FOIA re-

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371 (codified as amended at VA. CODE ANN. § 2.2-3701 (Repl. Vol. 2011)). Hence, when a record does not arise in the course of public business, that does not automatically make it private.

175. *Burton*, 74 Va. Cir. at 479. "In Virginia, records about public business are subject to FOIA, whether they are kept on personal or government computers, or using personal or government email accounts." VA. COAL. FOR OPEN GOV'T, LIGHT TOUCH FOR FOIA IN 2011, <http://www.opengovva.org/newsletter/april-2011/1521-light-touch-for-foia-in-2011> (last visited Oct. 15, 2012).

176. *Burton*, 79 Va. Cir. at 479. In determining whether a record is related to the transaction of public business, the Loudoun County Circuit Court stated that "[w]hether a record is found in a public databank, or one privately contracted for by the officer, agent, or employee of a public body is not determinative." *Id.* at 474; *see also* *Kansas City Star Co. v. Fulson*, 859 S.W.2d 934, 940 (Mo. App. W.D. 1993) ("Public business encompasses those matters over which the public governmental body has supervision, control, jurisdiction or advisory power.").

177. *Burton*, 74 Va. Cir. at 479.

quest must be accompanied by notice that the custodian considers the data private—and why.<sup>178</sup> From now on, there will be a penalty for failure.<sup>179</sup> The custodian of data that contains the private information of others must find some means of describing the data that will satisfy a reviewing court that refusal was for a good enough reason, without revealing the secrets of others and violating any duty of confidentiality owed them.

Responding to FOIA requests is a responsibility that lies with the custodian of the records.<sup>180</sup> If one public official does not have the records but knows that another does, the non-custodian must respond by providing contact information for the custodian rather than denying a request altogether.<sup>181</sup> The 2010 and 2011 revisions mandate that if a public body archives records, it is its responsibility to retrieve requested records from storage.<sup>182</sup> This, however, does not apply when records have been permanently archived at the Library of Virginia, which becomes the custodian of such records.<sup>183</sup> It is important to note that the responsibility of responding to a FOIA request lies with the individual custodian and not the institutional custodian.<sup>184</sup> However, the institution may be named as a defendant if a violation occurs and the requestor files suit.<sup>185</sup>

### B. *The Citizenship Debate*

According to Virginia's FOIA, only citizens of the Commonwealth are entitled to access its public records.<sup>186</sup> Only a few other

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178. *Id.*

179. "No civil penalty shall be assessed, as the actions of [the custodian in this case] were not willful, they being upon advise [sic] of counsel or subject to the rule adopted this date." *Id.*

180. VML 2011 GUIDE, *supra* note 131, at 9.

181. VA. CODE ANN. § 2.2-3704(B)(3) (Repl. Vol. 2011 & Supp. 2012).

182. Act of Mar. 25, 2011, ch. 604, 2011 Acts 986, 987 (codified as amended at VA. CODE ANN. § 2.2-3704(J) (Repl. Vol. 2011)).

183. VA. CODE ANN. § 2.2-3704(J) (Repl. Vol. 2011).

184. VML 2011 GUIDE, *supra* note 131, at 9.

185. *Id.*

186. *See* VA. CODE ANN. § 2.2-3704(A) (Repl. Vol. 2011).

states have imposed such a restriction.<sup>187</sup> Virginia's FOIA provides that:

Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by *any citizens of 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.*<sup>188</sup>

Recently, this restriction was called into question. In 2006, the United States Court of Appeals for the Third Circuit affirmed a judgment that such a restriction in Delaware's FOIA violated the United States Constitution. In *Lee v. Minner*, the plaintiff, a citizen of New York, had requested from various state officials records regarding Delaware's decision to join a nationwide settlement with a lending company, Household International, Inc., which was to resolve an investigation into the company's deceptive lending practices.<sup>189</sup> His requests were referred to the state solicitor, who denied them on the grounds that only Delaware citizens could make such requests.<sup>190</sup> When Lee sued for declaratory judgment and injunctive relief on the grounds that this restriction violated the Privileges and Immunities Clause in Article IV, Section 4, the United States District Court for the District of Delaware agreed and granted him summary judgment.<sup>191</sup> With resort to a three-prong test set forth by the Supreme Court of the United States in *Toomer v. Witsell*,<sup>192</sup> the court found that the restriction impermissibly interfered with Lee's right as a journalist to be on equal footing with the journalists of Delaware, as well as

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187. The states (other than Virginia) that allow only their citizens requests for public records are Alabama, Arkansas, Georgia, New Hampshire, New Jersey, and Tennessee. See ALA. CODE § 36-12-40 (Cum. Supp. 2011) (stating that all "citizens" have a right to access Alabama's public records but not indicating whether it means citizens of Alabama or citizens of the United States); ARK. CODE ANN. § 25-19-105(a)(1)(A) (Supp. 2011); GA. CODE ANN. § 50-18-70(b) (2009); N.H. REV. STAT. ANN. § 91-A:4 (Cum. Supp. 2011) (indicating that all "citizens" have a right to access New Hampshire's public records but not clarifying whether this includes only citizens of New Hampshire or citizens of the United States); TENN. CODE ANN. § 10-7-503(a)(2)(A) (Supp. 2011). In light of the Third Circuit's ruling in *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006), New Jersey's citizen-only restriction will become invalid. Cf. N.J. STAT. ANN. § 47:1A-1 (2003).

188. VA. CODE ANN. § 2.2-3704(A) (Repl. Vol. 2011 & Supp. 2012) (emphasis added).

189. 485 F.3d 194, 195 (3d Cir. 2006), *aff'ing* 369 F. Supp. 2d 527 (D. Del. 2005).

190. *Lee*, 485 F.3d at 195-96.

191. *Lee*, 369 F. Supp. 2d at 529.

192. 334 U.S. 385, 396 (1948).

with his right under the clause to “engage in the political process with regard to matters of both national political and economic importance.”<sup>193</sup> The district court went on to hold that, while Delaware’s interest in shaping its own political community was sufficiently important to warrant interference with rights of the sort claimed by Lee, the citizen-only limit did not substantially serve that interest.<sup>194</sup>

On appeal, the Third Circuit affirmed, adopting the district court’s reasoning with respect to Lee’s right to engage as an outsider in the political process.<sup>195</sup> In support of the proposition that such an interest enjoyed the protection of the Privileges and Immunities Clause, the court of appeals invoked its decision in *Tolchin v. Supreme Court of the State of New Jersey*.<sup>196</sup> In that case, the court sustained certain professional requirements imposed on noncitizen members of the New Jersey bar.<sup>197</sup> Having held the citizen-only limit unconstitutional on this basis, the court of appeals in *Lee v. Minner* declined to rule on the alternative holding by the district court that the limit impermissibly inhibited Lee’s right to engage in the common calling of journalism on equal footing with Delaware journalists.<sup>198</sup>

*Lee v. Minner* was the principal precedent invoked recently by plaintiffs challenging the citizen-only limit in Virginia’s FOIA.<sup>199</sup> McBurney, a citizen of Rhode Island pursuing child support payments from a Virginian, applied for assistance from the Virginia Department of Child Support Services.<sup>200</sup> Eventually, by reference to FOIA, he requested records pertaining to his case.<sup>201</sup> The department denied his request on two grounds: first, that the documents were private records not subject to FOIA and second, that

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193. *Lee*, 369 F. Supp. 2d at 534 (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (“[T]he basic purpose of the [federal] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”) (internal quotation marks omitted)).

194. *Id.* at 535.

195. *Lee*, 458 F.3d at 195.

196. *Id.* at 200 (citing *Tolchin v. Sup. Ct. of N.J.*, 111 F.3d 1099, 1111 (3d Cir. 1997)).

197. *Tolchin*, 111 F.3d at 1102.

198. 458 F.3d at 198–99.

199. *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439, 448 (E.D. Va. 2011).

200. *Id.* at 443.

201. *Id.*

he was not a Virginia citizen.<sup>202</sup> Meanwhile, Hurlburt, a citizen of California, invoked FOIA when requesting records of tax assessments from Henrico County, and Stewart, a citizen of West Virginia, applied to Virginia Tech for records relating to the compensation of senior officials, including the University's president.<sup>203</sup> These requests also were refused on the grounds that the requestors were not Virginia citizens.<sup>204</sup> McBurney, Hurlburt, and Stewart all sued in the United States District Court for the Eastern District of Virginia, asking for declaratory judgments and injunctive relief.<sup>205</sup> Their cases were consolidated, and then summarily dismissed.<sup>206</sup> Stewart's suit was dismissed after the court determined that the attorney general of Virginia, the only defendant against whom she had proceeded, was not a proper defendant.<sup>207</sup> She did not appeal.<sup>208</sup> McBurney, Hurlburt, and Stewart appealed from the district court's dismissal of their claims on the grounds that they lacked standing.<sup>209</sup> On appeal, the Fourth Circuit upheld Stewart's dismissal but found that both McBurney and Hurlburt had standing sufficient for their claims to be heard and remanded for decision on the merits.<sup>210</sup>

On remand, the district court granted summary judgment for the defendants after determining that neither McBurney nor Hurlburt had suffered an injury to an interest protected by the Privileges and Immunities Clause.<sup>211</sup> McBurney had suggested that among the rights guaranteed by Article IV, Section 2 was the right to advocate one's own case.<sup>212</sup> Hurlburt had suggested a right to do business on an equal footing with Virginia citizens in competition.<sup>213</sup> Judge Spencer found neither among the collection of rights protected by the clause.<sup>214</sup> In McBurney's case, Judge Spencer drew a distinction between the right well-established

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202. *Id.*

203. *McBurney v. Mims*, No. 3:09-CV-44, 2009 WL 1209037, at \*2 (E.D. Va. May 1, 2009).

204. *Id.*

205. *Id.* at \*1.

206. *Id.* at \*1, \*7.

207. *Id.* at \*4.

208. *See McBurney v. Cuccinelli*, 616 F.3d 393, 396 (4th Cir. 2010).

209. *Id.*

210. *Id.* at 404.

211. *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439, 446–47, 453 (E.D. Va. 2011).

212. *Id.* at 449–50.

213. *Id.* at 450.

214. *Id.*

under Article IV, Section 2 to equal access to the courts and McBurney's putative right to equal convenience in advocating for his own interest.<sup>215</sup> With respect to equal access to the courts of Virginia, were McBurney to file an action as a suitor from elsewhere, he would be entitled to the same discovery as a suitor from the Commonwealth.<sup>216</sup> In Hurlburt's case, Judge Spencer drew a distinction between the right well established under Article IV, Section 2 to engage in a common calling free of unequal state regulation and Hurlburt's putative right to suffer no inconvenience unknown to his Virginia competitors.<sup>217</sup>

On appeal, the Fourth Circuit affirmed.<sup>218</sup> The court of appeals agreed with the court below that what is protected by Article IV, Section 2 is the right to pursue a common calling, not a right to more generally pursue one's economic interest.<sup>219</sup> Reserving Virginia's FOIA access to Virginians does not prejudice an outsider's protected pursuit of a common calling; it may affect it indirectly, but that does not rise to the level of a violation of Article IV, Section 2.<sup>220</sup> In the view of the court of appeals, a general right of access to a state's records "simply does not 'bear [] upon the vitality of the Nation as a single entity' such that VFOIA's citizen-only provision implicates the Privileges and Immunities Clause."<sup>221</sup>

Turning to *Lee v. Minner*, the Fourth Circuit observed that the right to "to engage in the political process with regard to matters of both national political and economic importance," on which that case was based, has not been found by the Supreme Court among the fundamental rights covered by Article IV, Section 2, and anyway was not implicated by the claims of either plaintiff in this case.<sup>222</sup>

Called upon to assess the constitutionality of reserving state FOIA access for forum citizens, two federal circuits have now tak-

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215. *Id.* at 449.

216. *Id.*

217. *Id.* at 447.

218. *McBurney v. Young*, 667 F.3d 454, 470 (4th Cir. 2012).

219. *Id.* at 464–65.

220. *See id.* at 463–64.

221. *Id.* at 466 (quoting *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978)) (alteration in original).

222. *Id.* at 465–67 (quoting *Lee v. Minner*, 458 F.3d 194, 199 (3d Cir. 2006)). As for the dormant Commerce Clause objection, because Virginia's FOIA cannot be regarded as economic regulation, it cannot run afoul of the clause. *Id.* at 469–70.

en Article IV, Section 2 in different directions. Appreciative of the important role transparency can play in improving government, the Third Circuit ventured to the edge of the envelope of public interests that may persuade preemption of state limits on federal constitutional grounds.<sup>223</sup> Unsurprisingly, the Fourth Circuit was unwilling to follow, that is, to blaze a constitutional trail in advance of the Supreme Court of the United States. For at least the near future, therefore, access to information in the custody of Virginia government is limited legally to citizens of the Commonwealth and, practically, to those outsiders who can engage citizens of the Commonwealth for their research.<sup>224</sup> A petition by McBurney and Hurlburt for writ of certiorari was granted by the Supreme Court of the United States on October 5, 2012.<sup>225</sup> The Court called for briefing on the question of whether Article IV, Section 2 and the dormant Commerce Clause allow a state to deny citizens of other states the same right of access to public records that the state affords its own citizens.<sup>226</sup>

It should be noted that it is fairly common for public bodies to honor out-of-state requests, even when they are not required to by law.<sup>227</sup> In the coalition's view, because the citizenship restriction does not entirely prevent a noncitizen from accessing Virginia's public records, denying his or her request on that basis "seems to be saying no just for the sake of saying no."<sup>228</sup>

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223. See *Lee*, 458 F.3d at 200.

224. 2010 REPORT, *supra* note 135, at 5.

225. *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012), *cert. granted* 81 U.S.L.W. 3193 (U.S. Oct. 5, 2012) (No. 12-17).

226. *Id.*

227. 2010 REPORT, *supra* note 135, 5-6. In 2010, the Virginia FOI Advisory Council appointed the Rights and Remedies Subcommittee to study House Bill 641, which sought to expand the right to make FOIA requests in Virginia to non citizens of the state. *Id.* at 2-5. Several representatives commented that their respective agencies usually honor out-of-state requests. *Id.* at 5 ("Council member Spencer agreed and stated that she handles numerous out-of-state FOIA requests on behalf of the Virginia State Bar daily. She stated that most of these requests are from data aggregators and she successfully negotiates a deal with them on their requests. The State Bar usually honors out-of-state requests, but if the records requested are voluminous, they charge for their production. Other state agencies also commented on their experience with out-of-state requests. A representative of the Department of Medical Assistance Services (DMAS) indicated that DMAS never denied a FOIA request based on citizenship. However, because the number of requests became overwhelming, DMAS began charging for the production of the requested records. A representative of the Department of Motor Vehicles (DMV) states that DMV usually honors out-of-state requests and it is not a big problem for them. VDOT indicated that they also honor out-of-state requests unless the requested records are voluminous.").

228. VA. COAL. FOR OPEN GOV'T, VIRGINIA'S CITIZEN-ONLY FOIA LIMITATION (July 8,

At the time of the council's report to the General Assembly, the *McBurney* case was still unresolved.<sup>229</sup> Therefore, the council decided to postpone any recommendations until the Fourth Circuit had reached a decision, and, thus, "it was agreed that HB641 as referred to the Council [would] not go forward."<sup>230</sup> But now that the Fourth Circuit has spoken, it will be interesting to see what other arguments proponents of open government come up with to expand FOIA to include noncitizens. One such argument is that "[p]eople who do not live in Virginia can have legitimate concerns about what Virginia government does. If they are willing to pay for the records like anyone else, government should turn them over."<sup>231</sup> Alabama, Arkansas, Georgia, New Hampshire, New Jersey, and Tennessee are the only states that currently have a citizenship-based restriction on FOIA access.<sup>232</sup> Perhaps Virginia will soon follow the majority. As Megan Rhyne, executive director for the Virginia Coalition for Open Government puts it, "We should open our records up to everyone, if for no other reason than to remind everyone else why Virginia is a special place."<sup>233</sup>

### C. *Enforcement*

When a citizen suspects that a public official or public body has violated FOIA, he or she may file suit under section 2.2-3713 of the act.<sup>234</sup> The 2010 revisions allow for such an action to be brought in the name of an individual even when the original FOIA request was made by the individual's attorney in a representative capacity, and not by the individual himself.<sup>235</sup> The 2011 revisions require that the petition be received (by the party it is

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2010), <http://www.opengovva.org/foi-blog-list/1403-virginias-citizens-only-foia-limitation>.

229. 2010 REPORT, *supra* note 135, at 5.

230. *Id.* at 6.

231. Editorial, *Widen Access to Public Records*, ROANOKE TIMES, Oct. 28, 2011, at A13.

232. *See supra* note 187.

233. VA. COAL. FOR OPEN GOV'T, VIRGINIA'S CITIZEN-ONLY FOIA LIMITATION, *supra* note 228.

234. VA. CODE ANN. § 22-3173(A) (Repl. Vol. 2011).

235. Act of Apr. 9, 2010, ch. 299, 2010 Va. Acts 421, 422 (codified as amended at VA. CODE ANN. § 2.2-3713(A) (Repl. Vol. 2011)).

brought against) at least three business days before it is filed.<sup>236</sup> Once filed, it must be heard within seven days.<sup>237</sup>

The General Assembly also made a significant change to the violations and penalties section by doubling both the minimum and maximum civil penalties for willful and knowing violations.<sup>238</sup> This change came after UVA denied the existence of records relating to climate scientist Michael Mann.<sup>239</sup> Delegate Marshall, who sponsored this bill, made a FOIA request to UVA, which UVA denied.<sup>240</sup> UVA later relented and released thousands of pages of emails after the American Tradition Institute (“ATI”) requested judicial assistance in bringing the school into compliance with FOIA.<sup>241</sup> Delegate Marshall introduced the bill because he considered inadequate the penalty then available.<sup>242</sup> Previously, the civil penalties ranged from \$250 to \$1000.<sup>243</sup> After the 2011 amendment, they now range from \$500 to \$2000.<sup>244</sup> For subsequent violations, the fines now range from \$2000 to \$5000, whereas previously, they ranged from \$1000 to \$2500.<sup>245</sup> These penalties are paid into the Literary Fund.<sup>246</sup> The Violations and Penalties section also was amended to clarify that the civil penalties may be imposed on *officers and employees* of public bodies as well.<sup>247</sup>

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236. Act of Mar. 15, 2011, ch. 133, 2011 Va. Acts 216, 216–17 (codified as amended at VA. CODE ANN. § 2.2-3713(C) (Repl. Vol. 2011)); Act of Apr. 6, 2011, ch. 783, 2011 Va. Acts 1311, 1312 (codified as amended at VA. CODE ANN. § 2.2-3713(C) (Repl. Vol. 2011)).

237. VA. CODE ANN. § 2.2-3713(C) (Repl. Vol. 2011 & Supp. 2012).

238. Act of Mar. 22, 2011, ch. 327, 2011 Va. Acts 453, 453 (codified as amended at VA. CODE ANN. § 2.2-3714 (Repl. Vol. 2011)).

239. *ATI Praises Va. House Passage of Strengthened FOIA Law*, AM. TRADITION INST. (Feb. 9, 2011), <http://www.atinstitute.org/ati-praises-va-house-passage-of-strengthened-foia-law/> [hereinafter ATI].

240. Paige Winfield Cunningham, *Marshall Wants FOIA Changes*, DAILY PRESS, Jan. 23, 2011, at A9.

241. Christopher C. Horner, *UVA Goes All-in on Climate Gate FOIA Coverup*, AM. TRADITION INST. (Aug. 27, 2011), <http://www.atinstitute.org/atis-horner-uva-goes-all-in-on-climategate-foia-cover-up/>.

242. ATI, *supra* note 239.

243. *Id.*

244. VA. CODE ANN. § 2.2-3714 (Repl. Vol. 2011).

245. *Compare id.*, with *id.* (Repl. Vol. 2008).

246. *Id.* (Repl. Vol. 2011).

247. Act of Mar. 22, 2011, ch. 327, 2011 Va. Acts 453, 453 (codified as amended at VA. CODE ANN. § 2.2-3714 (Repl. Vol. 2011)).

Although FOIA authorizes penalties, judges rarely impose them. In past cases, a penalty was imposed only twice, and at least one of them was overturned on appeal.<sup>248</sup> One may presume that by increasing the amounts, the legislature has signaled its expectation that penalties will be imposed. It will be interesting to see if penalties are imposed more often after this.

As the law now stands, the only way to enforce FOIA is with a lawsuit.<sup>249</sup> Advocates of open government have argued for alternative enforcement vehicles that are less costly and less time-consuming.<sup>250</sup> Some states, such as Kentucky, Nebraska, and Georgia, empower their attorney general to investigate and resolve FOIA disputes.<sup>251</sup> In Virginia, although the attorney general may issue opinions about FOIA compliance, he is not authorized to investigate or to make binding decisions.<sup>252</sup> Some proponents of open government have suggested that the FOI Advisory Council should have authority to investigate FOIA violations.<sup>253</sup> The council handles thousands of FOIA inquiries, issues opinions, studies changes to FOIA, and trains government officials on compliance.<sup>254</sup> Nevertheless, it lacks enforcement authority.<sup>255</sup> On the other hand, FOIA requires courts to hear FOIA cases within seven days of filing.<sup>256</sup> This places a strain on dockets; indeed, Saturday hearings are commonplace in FOIA cases.<sup>257</sup> Moreover, since FOIA cases are heard in general district and circuit courts, FOIA sometimes is interpreted differently in different parts of the state.<sup>258</sup> Given that the FOI Advisory Council is the organization most knowledgeable on FOIA matters, it makes sense that it

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248. VA. COAL. FOR OPEN GOV'T, LIGHT TOUCH FOR FOIA IN 2011, *supra* note 175. Compare VA. CODE ANN. § 2.2-3714 (Repl. Vol. 2011), with WASH. REV. CODE ANN. § 42.56.550 (West Cum. Supp. 2012) (allowing the courts in Washington state to award plaintiffs one hundred dollars for each day their request is denied wrongfully).

249. VA. CODE ANN. § 2.2-3713 (Repl. Vol. 2011 & Supp. 2012).

250. See, e.g., Megan Rhyne, *The Power to Enforce FOIA*, VA. COAL. FOR OPEN GOV'T, <http://www.opengovva.org/newsletter/january-2012/1568-the-power-to-enforce-foia> (last visited Oct. 15, 2012) [hereinafter POWER TO ENFORCE FOIA].

251. KY. REV. STAT. ANN. § 61.880 (Repl. Vol. 2004); NEB. REV. STAT. ANN. § 84-712.03 (Cum. Supp. 2006); GA. CODE ANN. § 50-18-73(A) (2009).

252. POWER TO ENFORCE FOIA, *supra* note 250.

253. *Id.*

254. *Id.*

255. *Id.*

256. VA. CODE ANN. § 2.2-3713(C) (Repl. Vol. 2011 & Supp. 2012).

257. VML 2011 GUIDE, *supra* note 131, at 14.

258. POWER TO ENFORCE FOIA, *supra* note 250.

should have enforcement authority, even if it is only to mediate FOIA disputes.

#### D. *New Exemptions*

The policy underlying FOIA is to ensure “the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted.”<sup>259</sup> To further this objective, the act goes on to say “This chapter 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.”<sup>260</sup> However, this policy of “ready access” and “increased awareness” is not absolute, and the General Assembly has identified instances in which certain information is exempt from mandatory disclosure.<sup>261</sup>

FOIA currently has more than one hundred exemptions<sup>262</sup> for disclosing records, organized in different sections of the statute.<sup>263</sup> The federal FOIA has only nine.<sup>264</sup> Several of the exemptions in FOIA are only applicable to specific agencies while others are more generally applicable.<sup>265</sup> Just because an exemption is available does not mean the public body has to apply it.<sup>266</sup> Public bodies are charged to use their discretion and construe exemptions narrowly in order to ensure that nothing which ought to be public is kept hidden.<sup>267</sup> Furthermore, it is the public body that “bear[s] the burden of proof to establish an exemption by a preponderance of the evidence.”<sup>268</sup>

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259. VA. CODE ANN. § 2.2-3700 (Repl. Vol. 2011 & Supp. 2012).

260. *Id.*

261. *Taylor v. Worrell Enters., Inc.*, 242 Va. 219, 224, 409 S.E.2d 136, 139 (1991).

262. *FOIA Exemptions of General Applicability*, VA. FREEDOM OF INFO. ADVISORY COUNCIL, [http://foiacouncil.dls.virginia.gov/Applicability\\_Exemptions/General\\_Exemptions.htm](http://foiacouncil.dls.virginia.gov/Applicability_Exemptions/General_Exemptions.htm) (last visited Oct. 15, 2012).

263. VML 2011 GUIDE, *supra* note 131, at 11.

264. 5 U.S.C. § 552(a) (2006 & Supp. IV 2010).

265. *FOI Citizens' Guide*, VA. COAL. FOR OPEN GOV'T, <http://www.opengovva.org/virginias-foia-resources> (last visited Oct. 15, 2012).

266. *Id.*

267. VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2011 & Supp. 2012).

268. *Id.* § 2.2-3713(E) (Repl. Vol. 2011 & Supp. 2012)

The act provides for “record exemptions,” which incorporate the types of records that are exempt from disclosure, and also “closed meeting exemptions” that allow for the discussion of exempt records to take place in closed meetings from which the public is excluded.<sup>269</sup>

### 1. Meetings

FOIA provides a broad definition of “meeting” so as to include every type that involves public business.<sup>270</sup> Location is usually irrelevant so that even if a council meets outside its chambers, at a private retreat, it is still considered a meeting as long as public business is discussed.<sup>271</sup> FOIA requires proper notice of a meeting.<sup>272</sup> There are specific notice requirements depending on the type of public business to be discussed.<sup>273</sup> In general, the public body is required to provide the “date, time, and location of its meetings by placing the notice in a prominent public location . . . .”<sup>274</sup> The Act also requires that the notice be posted in the public body’s clerk’s office or in the office of the chief administrator, as well as by electronic means, such as the public body’s website or electronic calendar.<sup>275</sup> Public bodies also are required to permit citizens to record, videotape, and photograph meetings.<sup>276</sup> Therefore, a public body may not hold a meeting at a location where recordings are prohibited, such as a courtroom.<sup>277</sup>

All meetings of public bodies are required to be open to the public unless an exemption applies.<sup>278</sup> The General Assembly added one new closed-meeting exemption in the 2010 session, which corresponds to one of the records exemptions. This exemption allows public bodies to hold closed meetings for the discussion or

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269. VML 2011 GUIDE, *supra* note 131, at 6, 9.

270. See VA. CODE ANN. § 2.2-3701 (Repl. Vol. 2011 & Supp. 2012).

271. VML 2011 GUIDE, *supra* note 131, at 4.

272. VA. CODE ANN. § 2.2-3707(C) (Repl. Vol. 2011 & Supp. 2012).

273. See VML 2011 GUIDE, *supra* note 131, at 5.

274. VA. CODE ANN. § 2.2-3707(C) (Repl. Vol. 2011 & Supp. 2012).

275. *Id.*

276. *Id.* § 2.2-3707(H) (Repl. Vol. 2011 & Supp. 2012).

277. VML 2011 GUIDE, *supra* note 131, at 5.

278. *Id.* at 3.

consideration of certain exempt records of the Virginia Tobacco Indemnification and Community Revitalization Commission.<sup>279</sup>

In the 2011 session, the General Assembly added a closed meeting exemption for the discussion by the Commercial Space Flight Authority (the “Authority”) of records relating to rate structures or charges for using the facilities of the Authority, the public disclosure of which would adversely affect its financial interest or bargaining position.<sup>280</sup>

## 2. Records Exemptions

The General Assembly passed six bills creating four new record exemptions in the 2010 session.<sup>281</sup> One of them excludes from the mandatory disclosure provisions of FOIA records that are submitted as part of a grant application including trade secrets and certain proprietary records disclosed to, provided to, or held by the Virginia Tobacco Indemnification and Community Revitalization Commission.<sup>282</sup> Other record exemptions added in the 2010 session included exemptions for (i) certain records of threat assessment teams at public institutions of higher education related to specific individuals,<sup>283</sup> (ii) certain records related to the Statewide Agencies Radio System and similar communications systems,<sup>284</sup> and (iii) financial account numbers and routing information from mandatory disclosure.<sup>285</sup>

In the 2011 session, the General Assembly added two new record exemptions.<sup>286</sup> The first creates an exemption from the man-

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279. VA. CODE ANN. § 2.2-3711(A)(44) (Supp. 2012).

280. Act of Mar. 25, 2011, ch. 541, 2011 Va. Acts 851, 857 (codified as amended at VA. CODE ANN. § 2.2-3711(A)(45) (Repl. Vol. 2011)).

281. 2010 UPDATE, *supra* note 135, at 1.

282. Act of Apr. 9, 2010, ch. 310, 2010 Va. Acts 438, 443 (codified as amended at VA. CODE ANN. § 2.2-3705.6(23) (Cum. Supp. 2010)); Act of Apr. 21, 2010, ch. 808, 2010 Va. Acts 1693, 1699 (codified as amended at VA. CODE ANN. § 2.2-3705.6(23) (Cum. Supp. 2010)).

283. Act of Apr. 11, 2010, ch. 456, 2010 Va. Acts 832, 833 (codified as amended at VA. CODE ANN. § 2.2-3705.4(8) (Cum. Supp. 2010)); Act of Apr. 11, 2010, ch. 524, 2010 Va. Acts 969, 970 (codified as amended at VA. CODE ANN. § 2.2-3705.4(8) (Cum. Supp. 2010)).

284. Act of Apr. 12, 2010, ch. 672, 2010 Va. Acts 1210, 1212 (codified as amended at VA. CODE ANN. § 2.2-3705.2(14) (Cum. Supp. 2010)).

285. Act of Apr. 11, 2010, ch. 553, 2010 Va. Acts 1016, 1017 (codified as amended at VA. CODE ANN. § 2.2-3705.1(13) (Cum. Supp. 2010)).

286. Act of Mar. 25, 2011, ch. 541, 2011 Va. Acts 851, 852 (codified as amended at VA. CODE ANN. § 2.2-3705.6(24) (Repl. Vol. 2011)); Act of Apr. 6, 2011, ch. 781, 2011 Va. Acts 1305, 1308 (codified as amended at VA. CODE ANN. § 2.2-3705.6(25) (Repl. Vol. 2011)).

datory disclosure requirements of FOIA for records of the Commercial Space Flight Authority relating to rate structures or charges for using the facilities of the Authority if public disclosure would adversely affect its financial interest or bargaining position.<sup>287</sup> It also exempts records the Authority receives from a private entity when 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 the records were made public, the financial interest or bargaining position of the Authority or private entity would be adversely affected.<sup>288</sup>

The second new record exemption created in 2011 provided for an exemption for documents and records of a proprietary nature provided by an agricultural landowner or operator as part of a state or federal regulatory enforcement action.<sup>289</sup>

By allowing for exemptions, the General Assembly recognizes “that the best interests of the Commonwealth may require that certain governmental records and activities not be subject to compelled disclosure.”<sup>290</sup> Nevertheless, open government advocates claim that “the General Assembly has whittled away” at FOIA by adding new exemptions each year.<sup>291</sup> FOIA may appear to have too many exemptions, but many of them only apply to specific agencies, and, as the statute clearly states, exemptions are to be narrowly construed so as not to undermine the policy of open government.<sup>292</sup>

One subject that is still under investigation by the Virginia FOIA Advisory Council is access to criminal and other law-enforcement records.<sup>293</sup> Based on the recommendation of the Criminal Investigative Records Subcommittee, the council decid-

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287. Ch. 541, 2011 Acts at 852.

288. *Id.*

289. Ch. 781, 2011 Acts 1308.

290. Taylor v. Worrell Enters., Inc., 242 Va. 219, 224, 409 S.E.2d 136, 139 (1991).

291. Editorial, *Virginia's Many Secrecy Excuses*, ROANOKE TIMES, Mar. 24, 2011, at A14.

292. VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2011 & Supp. 2012).

293. VA. FREEDOM OF INFO. ADVISORY COUNCIL, REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL 4 (2011), available at <http://foiacouncil.dls.virginia.gov/2011ar.pdf?OpenDocument>.

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ed not to make any changes to the existing exemption for criminal investigative records, but the subcommittee will continue to study the issues in 2012 due to the level of “interest in access to criminal investigative files and other law enforcement records.”<sup>294</sup>

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294. *Id.*