

ESSAYS

CLOSED MEETINGS UNDER FOIA TURN FIFTY: THE OLD, THE NEW, AND WHAT TO DO

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INTRODUCTION

The Commonwealth of Virginia boasts the location of the first permanent English settlement in the nation and takes pride in its long history of meetings of representative bodies. Since 1968,¹ the Virginia Freedom of Information Act (“FOIA”) has ensured the public access to those meetings in order to provide that “[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.”² Although FOIA allows meetings to be closed to the public for various topics of discussion,³ one might expect to find that given Virginia’s long history and the law’s expectations of openness, Virginians would have long ago reached agreement on the law and practice surrounding open

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1. See Act of Apr. 4, 1968, ch. 479, 1968 Va. Acts 690 (codified as amended at VA. CODE ANN. §§ 2.2-340 to -346 (Cum. Supp. 1968)); Roger C. Wiley, *The Freedom of Information & Government Data Collection and Dissemination Practices Acts*, in HANDBOOK OF LOCAL GOVERNMENT LAW 23-1, 23-7 (Susan Warriner Custer ed., 13th ed. 2017) (noting that FOIA was adopted in 1968 and citing to *Roanoke City Sch. Bd. v. Times-World Corp.* for the proposition that meetings of public bodies in Virginia were not required to be open to the public under common law); see also *Roanoke City Sch. Bd. v. Times-World Corp.*, 226 Va. 185, 191, 307 S.E.2d 256, 258 (1983).

2. VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2017).

3. See *id.* § 2.2-3711(A) (Cum. Supp. 2018).

and closed meetings. However, since the beginning of 2016, legislators have pushed stricter penalties for violating FOIA,⁴ an elite public university found itself in a firestorm over a closed meeting,⁵ the Supreme Court of Virginia weighed in on a closed meeting case,⁶ and the Virginia Freedom of Information Act Advisory Council (“FOIA Council”) issued opinions reminding government entities of the nuances of the law.⁷ In a political environment that has become increasingly contentious,⁸ elected and appointed officials have reason to fear for the legal,⁹ ethical,¹⁰ and political¹¹ implications of their actions every time they enter a closed meeting.

The purpose of this article is to: (1) provide an overview of reasons for which closed meetings may lawfully be held and the mechanism for doing so (Part I); (2) discuss recent developments in case law, FOIA Council opinions, and proposed legislation related to closed meetings (Part II); and (3) offer some practical wisdom for conducting closed public meetings (Part III).

4. S.B. 630, Va. Gen. Assembly (Reg. Sess. 2018); H.B. 800, Va. Gen. Assembly (Reg. Sess. 2016); H.B. 61, Va. Gen. Assembly (Reg. Sess. 2016).

5. Advisory Op. Va. Freedom Info. Advisory Council 02 (2016); Derek Quizon, *FOIA Council: U. Va Board's Closed Session on Fund May Have Been in Violation*, DAILY PROGRESS (Aug. 12, 2016), https://www.dailyprogress.com/council-uva-board-may-have-violated-foia/article_a8da0dcf-e1ca-5439-98eb-d8c55c801987.html; Patrick Wilson, *U. Va. Rector Attacks FOIA Council, Defends Closed Meeting on \$2.3 Billion Fund*, VIRGINIAN-PILOT (Aug. 26, 2016), https://pilotonline.com/news/article_f920adc1-3365-5b66-b534-d96a93216542.html.

6. *Bragg v. Bd. of Supervisors*, 295 Va. 416, 813 S.E.2d 331 (2018).

7. *See, e.g.*, Advisory Op. Va. Freedom Info. Advisory Council 02 (2016); Advisory Op. Va. Freedom Info. Advisory Council 02 (2018). Readers can find opinions of the FOIA Council on the FOIA Council's website.

8. ROGER C. WILEY, LOCAL GOVERNMENT OFFICIALS' GUIDE TO THE VIRGINIA FREEDOM OF INFORMATION ACT, at VIII (6th ed. 2018); *see, e.g.*, Bill Atkinson, *Hopewell Council Meeting Turns into 'Fiasco'*, PROGRESS-INDEX (Aug. 13, 2018, 11:03 AM), <http://www.progress-index.com/news/20180810/hopewell-council-meeting-turns-into-fiasco> (reporting that a closed meeting “quickly turned into shouting matches over allegations of personal attacks among several council members”).

9. *See* VA. CODE ANN. § 2.2-3713 (Repl. Vol. 2017) (explaining procedures for enforcing FOIA); *id.* § 2.2-3714 (Cum. Supp. 2018) (making a willful and knowing violation of FOIA punishable by a civil penalty of \$500 to \$2000 for the first offense and \$2000 to \$5000 for subsequent offenses); *cf.* Sharon Pandak, Remarks at the Summer 2015 Local Government Attorney's Regional Seminar (June 26, 2015) (discussing types of consequences for officials who did not abide by the State and Local Government Conflict of Interest Act).

10. Public bodies must certify that they only discussed matters as permitted by law in a closed meeting. VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2017).

11. Generally speaking, public officials who engage in illegal and unethical behavior usually face political consequences.

Broadly speaking, FOIA rules fall into two different categories: (1) the rules that govern the public's access to public records¹² and (2) the rules that govern meetings of public bodies.¹³ A meeting is a gathering (either in person or electronically) of at least three members of a public body, or two members if two members constitute a quorum of the public body (including committees and subcommittees), to discuss public business.¹⁴ This article concerns itself with that portion of FOIA that governs closed meetings. A meeting is required to be open to the public, unless there is an exception allowing for a closed meeting.¹⁵ The rules for closed meetings apply to myriad public bodies across Virginia, ranging from sophisticated bodies with substantial resources, such as the Virginia General Assembly and the Fairfax County Board of Supervisors, to small bodies with scant resources, such as town councils of very small towns.¹⁶ FOIA's closed meeting rules also apply to special purpose public bodies, such as the boards of visitors of large public universities, local water and sewer authority boards, and economic development authorities.¹⁷

I. THE "OLD": LAWFUL REASONS FOR AND MECHANICS OF CLOSED MEETINGS¹⁸

As a preliminary matter, FOIA establishes a presumption of openness.¹⁹ FOIA begins by stating in Virginia Code section 2.2-

12. See VA. CODE ANN. §§ 2.2-3701, -3704 to -3706 (Repl. Vol. 2017 & Cum. Supp. 2018).

13. See *id.* §§ 2.2-3701, -3707 to -3712 (Repl. Vol. 2017 & Cum. Supp. 2018).

14. *Id.* § 2.2-3701 (Cum. Supp. 2018) (defining meeting). Note that "public forum[s], candidate appearance[s], or debate[s]" are also excluded from the definition of "meeting." *Id.*

15. *Id.* § 2.2-3707(A) (Cum. Supp. 2018).

16. See *id.* § 2.2-3701 (Cum. Supp. 2018) (defining public body).

17. See *id.*; *id.* § 2.2-3707.01 (Cum. Supp. 2018) (relating to General Assembly and closed meeting rules).

18. Roger Wiley has written two excellent works on FOIA. One is written in a question and answer format with an audience of all public officials. WILEY, *supra* note 8. The other is not inaccessible to the layman, but written with a more legally literate audience in mind. See Wiley, *supra* note 1. The goal of this article is to exclusively focus on the provisions of FOIA that deal with closed meetings in depth. In the author's opinion, the closed meeting portions of FOIA are the most difficult part of FOIA for an attorney to navigate.

19. Wiley, *supra* note 1, at 23-7; see *White Dog Publ'g, Inc. v. Culpeper Cty. Bd. of Supervisors*, 272 Va. 377, 385, 634 S.E.2d 334, 339 (2006); see also *Denton v. City Council of Hopewell*, 91 Va. Cir. 429, 430 (2015) (Hopewell City).

3700(B) that “[u]nless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public.”²⁰ Furthermore: (1) FOIA is to be liberally construed to require open meetings,²¹ (2) exemptions to open public meetings are to be narrowly construed,²² and (3) the public body bears the burden to show by a preponderance of the evidence that it complied with FOIA.²³

A. *When May a Closed Meeting Be Held*

Virginia Code section 2.2-3711(A) enumerates fifty-one different permitted purposes for closed meetings.²⁴ This article will focus its attention on the more commonly used exemptions relating to personnel issues,²⁵ scholastic issues,²⁶ real estate deals,²⁷ protection of the privacy of individuals unrelated to public business,²⁸ prospective business and industry,²⁹ actual or probable litigation,³⁰ consultation with legal counsel,³¹ building or Information Technology (“IT”) security,³² and discussion of the award of a public contract.³³ In the author’s experience as a local government attorney, closed meetings concerning topics other than the nine listed above are relatively uncommon.³⁴

20. VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2017).

21. *See id.*; *see also* *Media Gen. Operations, Inc. v. City Council of Richmond*, 64 Va. Cir. 406, 407 (2004) (Richmond City); Wiley, *supra* note 1, at 23-1.

22. “The provisions of 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. Any exemption from public access to public records or meetings shall be narrowly construed . . .” VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2017); *see also Media Gen. Operations, Inc.*, 64 Va. Cir. at 407; Wiley, *supra* note 1, at 23-1.

23. VA. CODE ANN. § 2.2-3713(E) (Repl. Vol. 2017 & Cum. Supp. 2018); *RF&P Corp. v. Little*, 247 Va. 309, 317–19, 440 S.E.2d 908, 913–15 (1994); Wiley, *supra* note 1, at 23-1.

24. VA. CODE ANN. § 2.2-3711(A) (Cum. Supp. 2018).

25. *Id.* § 2.2-3711(A)(1) (Cum. Supp. 2018).

26. *Id.* § 2.2-3711(A)(2) (Cum. Supp. 2018).

27. *Id.* § 2.2-3711(A)(3) (Cum. Supp. 2018).

28. *Id.* § 2.2-3711(A)(4) (Cum. Supp. 2018).

29. *Id.* § 2.2-3711(A)(5) (Cum. Supp. 2018).

30. *Id.* § 2.2-3711(A)(7) (Cum. Supp. 2018).

31. *Id.* § 2.2-3711(A)(8) (Cum. Supp. 2018).

32. *Id.* § 2.2-3711(A)(19) (Cum. Supp. 2018).

33. *Id.* § 2.2-3711(A)(29) (Cum. Supp. 2018).

34. For a brief discussion of the more common exemptions, see Wiley, *supra* note 1, at 23-15 to -19. For a brief discussion of some of the other exemptions, see Wiley, *supra* note 1, at 23-19 to -20.

1. Virginia Code Section 2.2-3711(A)(1)—Personnel Issues

Virginia Code section 2.2-3711(A)(1) offers several items for discussion: (a) the boundary between a permitted closed meeting discussion related to an employee and an unpermitted closed meeting topic related to a public policy issue, (b) elections versus appointments, (c) disagreement over the definition of “employee,” (d) whether the hiring of an independent contractor may be discussed in a closed meeting, and (e) the requirement that the public officers, appointees, or employees to be discussed in a closed meeting must be “specific.”³⁵

a. Discussions Regarding the Performance of an Employee Versus General Public Policy Discussion

Judicial and FOIA Council opinions have drawn a distinction between a permitted discussion related to “assignment, appointment, promotion, performance, demotion, salaries, disciplining, or resignation of specific public officers, appointees, or employees of any public body”³⁶ and an unpermitted discussion that goes beyond these narrow parameters into broader issues of public policy.³⁷ Boards, councils, and commissions should be careful not to plan to

35. The full text of Virginia Code section 2.2-3711(A)(1) allows a closed meeting discussion for the following purpose:

Discussion, consideration, or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining, or resignation of specific public officers, appointees, or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board. Nothing in this subdivision, however, shall be construed to authorize a closed meeting by a local governing body or an elected school board to discuss compensation matters that affect the membership of such body or board collectively.

VA. CODE ANN. § 2.2-3711(A)(1) (Cum. Supp. 2018).

36. *Id.*

37. See Wiley, *supra* note 1, at 23-15 to -16 (citing *Media Gen. Operations, Inc. v. City Council of Richmond*, 64 Va. Cir. 406 (2004) (Richmond City)).

have or drift into larger policy discussions when under the personnel exemption.³⁸

i. Discussing the “What” and Not the “Who”: *Media General Operations, Inc. v. City Council of Richmond*

In a case in point, *Media General Operations, Inc. v. City Council of Richmond*, Judge Hughes held that a section 2.2-3711(A)(1) closed session meeting was improper to address the City Manager’s handling of rising crime in Richmond,

even though Mayor McCullum is noted as reminding persons present that the purpose of the meeting was to scrutinize [City Manager] Jamison and his performance and even though some of the police officers present noted that Council members directed their attention to [City Manager] Jamison and his policy and programs relative to police department programs and procedures for handling the crime problem.³⁹

In reaching its decision the court noted that the focus of the meeting was not on the City Manager personally, but rather on the crime problem generally.⁴⁰ The court noted that “[a] reading of the transcripts reveal[ed] that, rather than a focus on Jamison personally as an employee and City Manager, the discussion ranged over the City’s plans and programs to meet soaring crime.”⁴¹

It is interesting to note that the court mentioned the fact that four high-ranking police officers were present at the closed meeting.⁴² If the City Council wanted to discuss the performance of their employee, the City Manager, why did four high-ranking police officers need to be present at the meeting? As a general matter of organizational practice, subordinates are not present at the performance evaluation of someone higher in the command structure than themselves. Although the court does not specifically state this, the presence of the officers suggested an intention to discuss more than simply Jamison.⁴³ As a result, the *purpose* was no longer

38. *See id.*

39. 64 Va. Cir. at 407.

40. *Id.*

41. *Id.* The transcripts were taken at depositions of officials who attended the closed meeting. *Id.*

42. *Id.* at 407.

43. *See id.*

about the lawful “who” (the City Manager), but about the unlawful “what” (rising crime).⁴⁴

ii. *Virginian-Pilot Media Cos. v. City of Norfolk School Board*

In considering the question of whether certain records were subject to disclosure under FOIA, the Norfolk City Circuit Court found that a closed meeting for the purpose of discussing a panel’s work product related to an investigation of personnel and testing irregularities was permitted.⁴⁵ The three-person panel was tasked with investigating testing irregularities at a middle school in the City of Norfolk.⁴⁶ Because the panel was “charged to, and did, investigate such matters,” a closed session meeting of the Norfolk City School Board on the subject was proper.⁴⁷

iii. “Directly Related” to the Personnel Matter: Advisory Opinion of Virginia FOIA Council 08 of 2002

An advisory opinion of the FOIA Council addressed a closed meeting discussion of the Portsmouth City Council regarding the City Manager’s decisions related to a music festival.⁴⁸ After a local music festival reported its financial troubles to the city, the City Manager individually contacted council members and awarded the music festival a \$10,000 grant and a \$65,000 loan.⁴⁹ After the music festival informed the city that would not be enough money, the Portsmouth City Council held a closed meeting, citing sections 2.2-3711(A)(1) (with the closed meeting motion invoking “personnel matters”),⁵⁰ 2.2-3711(A)(3) (with the closed meeting motion invoking “the acquisition or sale of real property for a public purpose”),⁵¹

44. *See id.*

45. *Virginian-Pilot Media Cos. v. City of Norfolk Sch. Bd.*, 81 Va. Cir. 450, 450–51, 459 (2010) (Norfolk City).

46. *Id.* at 453.

47. *Id.*

48. Advisory Op. Va. Freedom Info. Advisory Council 08 (2002).

49. *Id.* So long as City Council was not required to hold a vote on the release of these discretionary funds, these conversations were (and are) legal pursuant to Virginia Code section 2.2-3710(B). *See id.*

50. *Id.* (quoting VA. CODE ANN. § 2.2-3711(A)(1) (Repl. Vol. 2001)).

51. *Id.* (citing VA. CODE ANN. § 2.2-3711(A)(3) (Repl. Vol. 2001)). The reference to real estate apparently related to a surplus fund for a public concert hall in the city. *See id.*

and 2.2-3711(A)(7) (with the closed meeting motion invoking “legal matters requiring the advice of legal counsel”).⁵² The FOIA Council was informed that “the next day, without any sort of public discussion or vote, the manager announced” the award of a \$155,000 grant to the festival.⁵³

Although the FOIA Council noted that the motion to convene a closed meeting did not appear to be appropriately detailed,⁵⁴ it opined that “the only clear violation of FOIA . . . is procedural, and relates to the sufficiency of the motion to convene in a closed session.”⁵⁵ The FOIA Council did, however, note that it did not have a transcript of what was said in the closed meeting, and “if the discussion strayed to matters not directly related to the manager’s handling of the situation or the legality of making a loan, it would not be a proper discussion for a closed meeting.”⁵⁶ The FOIA Council further underscored that it would be inappropriate to discuss exactly how much money to give to the festival, the financial status of the festival, or public relations issues associated with the festival.⁵⁷ As in *Media General Operations, Inc.* and *Virginian-Pilot Media Cos.*, the *purpose* of the discussion seems to be dispositive in the FOIA Council’s determination of which conversations would be appropriate to have in a closed meeting, noting that discussion must be “directly related” to the personnel issue.⁵⁸

iv. Putting It All Together: The Purpose Test

Virginia Code section 2.2-3711(A) states that “closed meetings [may] only [be held] for the following *purposes*.”⁵⁹ In the case of *Media General Operations, Inc.*, the purpose shifted from that which was statutorily permitted, discussing the City Manager’s

52. *Id.* (citing VA. CODE ANN. § 2.2-3711(A)(7) (Repl. Vol. 2001)).

53. *Id.*

54. *Id.*; see *infra* Part I.B (discussing how to comply with proper procedures for entering and leaving closed meetings).

55. Advisory Op. Va. Freedom Info. Advisory Council 08 (2002).

56. *Id.*

57. *Id.*

58. *Id.*; see *Virginian-Pilot Media Cos. v. City of Norfolk Sch. Bd.*, 81 Va. Cir. 450, 459 (2010) (Norfolk City); *Media Gen. Operations, Inc. v. City Council of Richmond*, 64 Va. Cir. 406, 407 (2004) (Richmond City).

59. VA. CODE ANN. § 2.2-3711(A) (Cum. Supp. 2018) (emphasis added).

performance pertaining to rising crime, to the real purpose, the rising crime.⁶⁰ Conversely, in *Virginian-Pilot Media Cos.*, the court noted that the closed meeting was conducted for the purpose of discussing subject matter “touching upon personnel records.”⁶¹ In Advisory Opinion of Virginia FOIA Council 08 of 2002, only those comments “directly related” to the performance of the City Manager were held to be lawful section 2.2-3711(A)(1) closed meeting topics.⁶² Thus, a helpful question, for both courts adjudicating matters *post hoc* and for practitioners who are required to render split second opinions during a closed meeting conversation, to ask is “what is the *animating purpose* behind the closed meeting conversation in question?” In other words, “why was this meeting closed?” Is it truly to conduct a conversation about the permitted closed meeting topic (e.g., employee performance), or is it merely an excuse to talk about a broader conversation (e.g., rising crime levels or the merits of funding a local music festival) in a forum that is outside of the public eye? The utility of this purpose test stretches beyond Virginia Code section 2.2-3711(A)(1) to other open meeting exemptions set forth in Virginia Code section 2.2-3711(A).⁶³

b. Elections Versus Appointments

In *Denton v. City Council for the City of Hopewell*, the court held that “elections” of public officers, such as the mayor, may not be discussed in a closed meeting.⁶⁴ In *Denton*, the City Council went into a closed meeting to choose a new mayor and vice mayor.⁶⁵ Although an election by a group of seven city council members is substantively the same transaction as an appointment by a group of seven city council members, Hopewell’s City Charter, Virginia

60. *Media Gen. Operations, Inc.*, 64 Va. Cir. at 407.

61. *Virginian-Pilot Media Cos.*, 81 Va. Cir. at 460.

62. Advisory Op. Va. Freedom Info. Advisory Council 08 (2002).

63. See VA. CODE ANN. § 2.2-3711(A) (Cum. Supp. 2018)

64. 91 Va. Cir. 429, 431 (2015) (Hopewell City). Wiley notes although an opinion of the Attorney General stated that governing bodies could not discuss the choice of their presiding officer in a closed meeting, using the section 2.2-3711(A)(1) exemption to choose the presiding officer has been a long-standing practice of many local governing bodies. Wiley, *supra* note 1, at 23-16 (citing 2000 Op. Va. Att’y Gen. 24); see also WILEY, *supra* note 8, at 18–19.

65. *Denton*, 91 Va. Cir. at 429–30.

Code section 15.2-1422, and the meeting minutes called this exercise an “election” instead of an “appointment.”⁶⁶ Judge Sharrett held that although there was “little distinction” between elections and appointments, the General Assembly had used different words to describe them, and because exemptions to FOIA are narrowly construed, a closed meeting to discuss the election of the mayor and vice mayor positions was illegal.⁶⁷ In a silver lining for the City of Hopewell, the plaintiff’s request for attorney’s fees was denied.⁶⁸ Although *Denton* puts public bodies on notice that discussing an “appointment” in a closed meeting is appropriate while discussing an “election” in a closed meeting is not,⁶⁹ it shows just how narrowly courts can interpret the closed meeting exemptions in FOIA.⁷⁰

c. Disagreement over the Definition of “Employee”

There is some question over how far down the organizational structure chart an employee may be in order to be the subject of a section 2.2-3711(A)(1) closed meeting.⁷¹ Two Attorney General opinions state that only employees who report directly to the governing body (e.g. city manager and city attorney) could be the subject of a section 2.2-3711(A)(1) closed meeting,⁷² but these attorney general’s opinions have been criticized elsewhere and are widely disregarded by local governments.⁷³

d. Independent Contractors

A 2018 FOIA Council Opinion discussed hiring a private investigator as an independent contractor to investigate a break-in to a

66. VA. CODE ANN. § 15.2-422 (Repl. Vol. 2018); HOPEWELL CITY, VA., CHARTER ch. IV, sec. 4 (2018); CITY OF HOPEWELL CITY COUNCIL, CITY COUNCIL REORGANIZATION & SPECIAL MEETING MINUTES 1 (2015); see *Denton*, 91 Va. Cir. at 431–32.

67. *Denton*, 91 Va. Cir. at 431–32.

68. *Id.* at 432.

69. *See id.*

70. *See id.*

71. This issue is covered in Wiley, *supra* note 1, at 23-16 to -17 (stating that the practice of local governments is to conduct closed session meetings for employees regardless of whether or not such employees report directly to the governing body, discussing attorney general’s opinions and other work on the subject).

72. 1998 Op. Va. Att’y Gen. 9, 10–11; 2000 Op. Va. Att’y Gen. 19, 20, 23.

73. *See* Wiley, *supra* note 1, at 23-16 to -17; WILEY, *supra* note 8, at 18–19.

government office.⁷⁴ The FOIA Council Opinion stated that the term “employee” is broad enough to include an independent contractor.⁷⁵ The FOIA Council Opinion quoted *Dressner v. Commonwealth* in saying that “[a]n undefined term must be given its ordinary meaning, given the context in which it is used.”⁷⁶ Quoting the dictionary, the FOIA Council Opinion noted that “‘employment’ is defined as ‘1. a. The act of employing. b. The state of being employed. 2. The work in which one is engaged; business. 3. An activity to which one devotes time,’”⁷⁷ and that “[t]he term ‘employ’ is defined as ‘1. To put to use or service. 2. To devote or apply (time, for example) to some activity. 3 a. To engage the services of; put to work. b. To provide with gainful work.’”⁷⁸ Based on these definitions, the FOIA Council opined that an independent contractor is employed to perform a task, like “investigat[ing] a break-in.”⁷⁹ Thus, an independent contractor, such as a private investigator, could be a “‘candidate for employment’ and may be the subject of a closed meeting discussion, consideration, or interview under subdivision A 1 of § 2.2-3711.”⁸⁰

e. Specific People Requirement

Virginia Code section 2.2-3711(A)(1) requires that “specific public officers, appointees, or employees of a public body” be discussed if the discussion is in a closed meeting.⁸¹ A 1980 opinion of the Attorney General stated that “[t]he fact that a reduction in garbage collections would affect the work schedules of city garbage collection employees does not make applicable § 2.1-233(A)(1) [now section 2.2-3711(A)(1)], authorizing executive discussion of personnel matters” because the reduction in garbage collections was not a

74. Advisory Op. Va. Freedom Info. Advisory Council 02 (2018).

75. *Id.*

76. *Id.* (citing *Dressner v. Commonwealth*, 285 Va. 1, 9, 736 S.E.2d 735, 739 (2013) (Powell, J., dissenting) (alterations in original)).

77. *Id.* (quoting *Employment*, THE AMERICAN HERITAGE DICTIONARY (2d College ed. 1982)).

78. *Id.* (quoting *Employ*, THE AMERICAN HERITAGE DICTIONARY (2d College ed. 1982)).

79. *Id.*

80. *Id.*

81. VA. CODE ANN. § 2.2-3711(A)(1) (Cum. Supp. 2018); see Wiley, *supra* note 1, at 23-16.

personnel matter.⁸² A 2015 FOIA Council Opinion stated that a board of supervisors could not meet in a closed meeting to discuss increasing their own salaries because the exemption applies to discussions related to “specific public officers, appointees, or employees of any public body.”⁸³

2. Virginia Code Section 2.2-3711(A)(2)—Certain Scholastic Information

The text of Virginia Code section 2.2-3711(A)(2) permits a closed meeting discussion for the purpose of discussing certain scholastic information.⁸⁴ *Virginian-Pilot Media Cos.* noted that a closed meeting to discuss testing irregularities would be permitted for discussion related to “disciplinary matters or any other matters that would involve the disclosure of information contained in a scholastic record concerning any student of . . . any state school system.”⁸⁵ A FOIA Council Opinion clarifies that because FOIA is intended to be construed narrowly, this exemption only applies to “discussion of admission or disciplinary matters concerning a student” and would not apply to a desire to discuss a religious exemption in a closed meeting.⁸⁶

82. 1980 Op. Va. Att’y Gen. 387, 388; *see also* Wiley, *supra* note 1, at 23-16.

83. Advisory Op. Va. Freedom Info. Advisory Council 06 (2015). Such a discussion is now explicitly prohibited by statute. VA. CODE ANN. § 2.2-3711(A)(1) (Cum. Supp. 2018); *see also* Wiley, *supra* note 1, at 23-16.

84. VA. CODE ANN. § 2.2-3711(A)(2) (Cum. Supp. 2018). Discussion is allowed for the following purpose:

Discussion or consideration of admission or disciplinary matters or any other matters that would involve the disclosure of information contained in a scholastic record concerning any student of any public institution of higher education in the Commonwealth or any state school system. However, any such student, legal counsel and, if the student is a minor, the student’s parents or legal guardians shall be permitted to be present during the taking of testimony or presentation of evidence at a closed meeting, if such student, parents, or guardians so request in writing and such request is submitted to the presiding officer of the appropriate board.

Id.

85. *Virginian-Pilot Media Cos., L.L.C. v. City of Norfolk Sch. Bd.*, 81 Va. Cir. 450, 460 (2010) (Norfolk City).

86. Advisory Op. Va. Freedom Info. Advisory Council 19 (2000) (opining, however, that a request for a religious exemption could be discussed in a closed session meeting of a school board).

3. Virginia Code Section 2.2-3711(A)(3)—Acquisition and Disposition of Real Property

This is a fairly straightforward topic. Virginia Code section 2.2-3711(A)(3) allows a closed meeting for the following purpose: “[d]iscussion or consideration of the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.”⁸⁷

The bargaining position or negotiating strategy of the public body must be at stake in order to invoke the section 2.2-3711(A)(3) exemption.⁸⁸ A FOIA Council Opinion stated that an attempt to renegotiate a purchase price by a public body purchasing real estate would be permissible under FOIA because it impacted bargaining power, but any discussion that did not impact bargaining power, such as whether or not to extend an option with an already set strike price for another six months, would not be a permissible topic in a closed meeting.⁸⁹

In a fact pattern involving the sale of a public building for \$10 in a process that appears to have only involved serious talks with one potential buyer, a FOIA Council Opinion noted that there was no requirement that the public body have multiple negotiating partners to invoke the section 2.2-3711(A)(3) exemption.⁹⁰ One negotiating partner was sufficient, and the opinion noted that the buyer could have attended a public session of the public body and heard the discussion relating to the sale of property, which could undermine the bargaining position of the public body.⁹¹

4. Virginia Code Section 2.2-3711(A)(4)—Protection of the Privacy of Individuals Unrelated to Public Business

Virginia Code section 2.2-3711(A)(4) allows a closed meeting for the following purpose: “[t]he protection of the privacy of individuals

87. VA. CODE ANN. § 2.2-3711(A)(3) (Cum. Supp. 2018).

88. *Id.*

89. Advisory Op. Va. Freedom Info. Advisory Council 13 (2007).

90. Advisory Op. Va. Freedom Info. Advisory Council 03 (2013).

91. *Id.*

in personal matters not related to public business.”⁹² This exemption might be invoked to discuss the illness of an individual.⁹³ A FOIA Council Opinion stated that the section 2.2-3711(A)(4) exemption is “for the protection of the privacy of individuals in personal matters not related to public business”⁹⁴ and “[t]he discussion of the religious beliefs of a particular family within the school system is a personal matter, and does not seem to fall under the public business conducted by the school board.”⁹⁵ Thus, a discussion of a religious exemption seems to be a permissible closed meeting topic.⁹⁶

5. Virginia Code Section 2.2-3711(A)(5)—Prospective Business and Industry

Given the desire of many local government officials to attract new businesses and industries and expand existing businesses and industries, the section 2.2-3711(A)(5) exemption is one that is often invoked.⁹⁷ It states that a closed meeting may be held for the following purpose: “[d]iscussion concerning a prospective business or industry or the expansion of an existing business or industry where no previous announcement has been made of the business’ or industry’s interest in locating or expanding its facilities in the community.”⁹⁸

The section 2.2-3711(A)(5) exemption only applies to cases “where no previous announcement has been made of the business’ or industry’s interest in locating or expanding its facilities in the community.”⁹⁹ A FOIA Council Opinion stated that in the case of a restaurant that had already announced its plans to locate in the community, the exemption no longer applied.¹⁰⁰

92. VA. CODE ANN. § 2.2-3711(A)(4) (Cum. Supp. 2018).

93. See Wiley, *supra* note 1, at 23-17.

94. Advisory Op. Va. Freedom Info. Advisory Council 19 (2000) (emphasis omitted).

95. *Id.*

96. *Id.*

97. See VA. CODE ANN. § 2.2-3711(A)(5) (Cum. Supp. 2018).

98. *Id.*

99. *Id.*

100. Advisory Op. Va. Freedom Info. Advisory Council 26 (2001).

In *Ripol v. Westmoreland County Industrial Development Authority*, the Westmoreland County Circuit Court found a FOIA violation on other grounds (including insufficient description of the closed meeting subject matter), but held that a discussion related to an unannounced business was permissible under FOIA.¹⁰¹ The plaintiffs alleged that a meeting of business representatives with several landowners constituted an announcement of the project, but the court rejected this argument because the board of supervisors and industrial development authority boards were not aware of this meeting.¹⁰² *Ripol* offers a definition of what constitutes a “previous announcement”: “the correct interpretation of a ‘previous announcement’ under the statute is an announcement either to or by the public body and which results in or demonstrates that the members of the public body have some knowledge of the business opportunity apart from what is learned in the closed meeting.”¹⁰³ This definition may cause some confusion in that the only reason a public body would discuss an economic development project is if the prospect made some preliminary announcement or indication of interest to the public body. Thus, by “announcement,” the *Ripol* decision makes the most sense if it envisions a final announcement with the final agreement or package agreed upon by all parties. Even if the board of supervisors and industrial development authorities had known about the meeting with landowners, it should not have amounted to a “previous announcement” under Virginia Code section 2.2-3711(A)(5) in light of the following FOIA Council opinion offering insight on the section 2.2-3711(A)(5) exemption:

The exemption does not specify that such a discussion may only be held in closed session after the plans to expand are definite or finalized. The purpose and policy behind the exemption seems to be best interpreted as to aid the economic development process and protect the negotiation that accompanies a decision by a business to expand within a locality. The incentives offered by a locality to local businesses often change with the circumstances, and thus there is often the possibility that discussions may touch on a variety of potential options for both the locality and the business, such as monetary grants, tax credits, or land. Thus, the subject of discussion in the instant case falls within the scope of the discussions intended to be protected by the exemption. The public body is discussing a potential economic incentive that might be offered to a business or industry considering expanding in the locality.¹⁰⁴

101. 82 Va. Cir. 69, 72–74 (2010) (Westmoreland County).

102. *Id.* at 73.

103. *Id.*

104. Advisory Op. Va. Freedom Info. Advisory Council 45 (2001).

6. Virginia Code Section 2.2-3711(A)(7)—Actual or Probable Litigation

The exemptions set forth in Virginia Code sections 2.2-3711(A)(7) and 2.2-3711(A)(8) were, until 2017, one exemption under section 2.2-3711(A)(7).¹⁰⁵ Virginia Code section 2.2-3711(A)(7) now allows for a closed meeting when the purpose is:

Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body. For the purposes of this subdivision, “probable litigation” means litigation that has been specifically threatened or on which the public body or its legal counsel has a reasonable basis to believe will be commenced by or against a known party.¹⁰⁶

This is a fairly straightforward and narrow exemption, particularly now that it has been separated from Virginia Code section 2.2-3711(A)(8). As a cautionary tale to discussing too much under Virginia Code sections 2.2-3711(A)(7) or 2.2-3711(A)(8), the court in *Marsh v. Richmond Newspapers, Inc.* held that even though the mayor was an attorney, discussions related to negotiations to obtain various concessions from neighboring counties were generally too remote to be discussed as legal advice or litigation.¹⁰⁷ Legal counsel must be present for giving advice “regarding specific legal matters requiring the provision of legal advice” by counsel, but where there is actual or probable litigation, an attorney need not be present.¹⁰⁸

7. Virginia Code Section 2.2-3711(A)(8)—Consultation with Legal Counsel Regarding Specific Legal Matters

Virginia Code section 2.2-3711(A)(8) allows closed meetings for the purpose of “[c]onsultation with legal counsel employed or re-

105. See *infra* Part II.A.4.

106. VA. CODE ANN. § 2.2-3711(A)(7) (Cum. Supp. 2018).

107. *Marsh v. Richmond Newspapers, Inc.*, 223 Va. 255, 255–56, 288 S.E.2d 415, 420–21 (1982); see also *supra* Part I.A.1.a.iv.

108. Advisory Op. Va. Freedom Info Advisory Council 7 (2000) (quoting VA. CODE ANN. § 2.1-344(A)(8) (Cum. Supp. 1999)).

tained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel.”¹⁰⁹

This is a very frequently used provision because public bodies often need legal advice about a wide range of issues. Caution should be taken that the discussion is limited to “specific legal matters” and does not morph into broader policy discussion.¹¹⁰ Put another way, conversation should not stray “beyond the narrow construction of [the] exemptions” allowed for under FOIA.¹¹¹ This principle is repeated in *Robinson v. Brugiere*, which held the following in addressing a demurrer:

While it is proper for [a] . . . [b]oard of [s]upervisors to go into executive session for the purpose of consultation with legal counsel on specific legal matters requiring provision of legal advice under § 2.2-3711(A)(7) [now (A)(8)], this does not authorize a general discussion of the merits of a zoning application or a decision to approve the application while in executive session.¹¹²

8. Virginia Code Section 2.2-3711(A)(29)—Discussion of the Award of a Public Contract

The text of Virginia Code section 2.2-3711(A)(29) states that a closed meeting is allowed for the purpose of: “[d]iscussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body.”¹¹³ Although there is a FOIA Council opinion stating that the Roanoke City Council was permitted to hold a closed meeting to rank responses to a request for proposals,¹¹⁴ the Supreme Court of Virginia in *White Dog Publishing, Inc. v. Culpeper County Board of Supervisors* held that a board of supervisors could not hold a closed meeting to discuss modifications to a three-party contract between the county, the school

109. VA. CODE ANN. § 2.2-3711(A)(8) (Cum. Supp. 2018).

110. See *Marsh*, 223 Va. at 254–56, 288 S.E.2d at 420–21; see also *supra* Part I.A.1.a.iv.

111. Advisory Op. Va. Freedom Info. Advisory Council 08 (2002).

112. 72 Va. Cir. 109, 110 (2006) (Amherst County).

113. VA. CODE ANN. § 2.2-3711(A)(29) (Cum. Supp. 2018).

114. Advisory Op. Va. Freedom Info. Advisory Council 04 (2008); Wiley, *supra* note 1, at 23-19.

board, and an architect, as section 2.2-3711(A)(29) only allows for closed meeting conversations regarding negotiations vis-à-vis a vendor.¹¹⁵

a. Facts and Procedural History of *White Dog Publishing, Inc.*

In *White Dog Publishing, Inc. v. Culpeper County Board of Supervisors*, a board of supervisors convened in a closed meeting under what was then Virginia Code section 2.2-3711(A)(30), and is now section 2.2-3711(A)(29).¹¹⁶ The meeting happened during a contentious period between the Culpeper County Board of Supervisors (“Board”) and the School Board over the construction and renovation of school space.¹¹⁷ The architect/builder and the School Board had originally entered into a contract for the planning and design of the new construction and renovation, but the Board sought, and ultimately successfully obtained, an amendment of the contract with the architect/builder to add the Board as a party to the contract.¹¹⁸ The court stated that the Board

adopted a 13-item closed session motion that, in relevant part, cited Code § 2.2-3711(A)(30) and listed as one of the reasons for the closed session a discussion “with the County Attorney and staff [about] changes to a specific public contract where public discussion would adversely affect the bargaining and negotiating position of the County.”¹¹⁹

After a three-and-a-half-hour closed session meeting, the Board reconvened into an open meeting and adopted a motion to request that the architect review two different options for the completion of the project.¹²⁰

115. *White Dog Publ'g, Inc. v. Culpeper Cty. Bd. of Supervisors*, 272 Va. 377, 387, 634 S.E.2d 334, 340 (2006); Wiley, *supra* note 1, at 23-18 to -19.

116. *White Dog Publ'g, Inc.*, 272 Va. at 380–82, 634 S.E.2d at 336–37. Compare VA. CODE ANN. § 2.2-3711(A)(30) (Repl. Vol. 2005), with VA. CODE ANN. 2.2-3711(A)(29) (Cum. Supp. 2017).

117. *White Dog Publ'g, Inc.*, 272 Va. at 380–81, 634 S.E.2d at 336.

118. *Id.* at 381, 634 S.E.2d at 336.

119. *Id.* at 381–82, 634 S.E.2d at 336–37 (alterations in original).

120. *Id.* at 382, 634 S.E.2d at 337.

White Dog Publishing, Inc. (“White Dog”), the publisher of the local newspaper brought suit, alleging that:

[T]he Board had violated Code § 2.2-3712(A) by “failing to identify properly the subject matter of the closed session . . . [and] by conducting a closed session because none of the exemptions listed by the Board and, in fact, none of the exemptions found in . . . Code § 2.2-3711(A) justified the closure of the Meeting for the discussion of matters related to the construction of [a] high school.”¹²¹

White Dog requested a writ of mandamus to require the Board to produce the records associated with the closed meeting and to enjoin the Board from further FOIA closed meeting violations.¹²² White Dog also asked for an award of reasonable costs and attorney’s fees.¹²³

The Culpeper General District Court held that there was no FOIA violation.¹²⁴ The Culpeper County Circuit Court, on de novo appeal, found a technical FOIA violation because the closed meeting motion failed to meet the requirements for the disclosure of the subject matter of Virginia Code section 2.2-3712(A), but held that because the Board was party to the contract with the architect/builder, the closed meeting discussion itself was appropriate.¹²⁵ The circuit court did not award attorney’s fees to White Dog.¹²⁶

b. Supreme Court of Virginia Ruling in *White Dog Publishing, Inc.*

The Supreme Court of Virginia began by citing Virginia Code section 2.2-3700(B) for the propositions that (1) “FOIA ‘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’”¹²⁷ and (2) “[a]ny exemption from public access to . . . meetings shall be narrowly construed and

121. *Id.* at 382–83, 634 S.E.2d at 337 (third, fourth, and fifth alterations in original).

122. *Id.* at 383, 634 S.E.2d at 337.

123. *Id.* at 383, 634 S.E.2d at 337.

124. *Id.* at 383, 634 S.E.2d at 337.

125. *Id.* at 384–85, 634 S.E.2d at 338.

126. *Id.* at 385, 634 S.E.2d at 338. The circuit court, pursuant to Virginia Code section 2.2-3713(D) found that “special circumstances [made] such an award unjust.” *Id.* at 385, 639 S.E.2d at 338 (alterations in original) (citing VA. CODE ANN. § 2.2-3713(D) (Repl. Vol. 2005)).

127. *White Dog Publ’g, Inc.*, 272 Va. at 385, 634 S.E.2d at 339 (citing VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2005)).

no . . . meeting [shall be] closed to the public unless specifically made except pursuant to [FOIA] or other specific provision of law.”¹²⁸ On appeal, despite compelling arguments by the Board,¹²⁹ the supreme court noted that:

[T]he purpose of the exemption is to protect a public body’s bargaining position or negotiating strategy *vis-à-vis a vendor* during the procurement process. Under that exemption, the terms or scope of a public contract are proper subjects for discussion in a closed meeting of a public body only in the context of awarding or forming a public contract, or modifying such contract, and then only when such discussion in an open meeting would adversely affect the public body’s bargaining position or negotiating strategy regarding the contract.¹³⁰

The court further held that it did not matter that the meeting was held for the purpose of protecting the Board’s bargaining position *vis-à-vis* the School Board.¹³¹ The case was remanded with directions for reasonable attorney’s fees and costs to be paid by the public body, notwithstanding arguments that:

(1) the Board’s procedure to close a meeting has been followed for four years and no one has previously complained; (2) the violation was not willful and knowing; (3) the general district court’s ruling in favor of the Board on all issues and the lack of precedent on the precise issues presented demonstrate that reasonable attorneys and judges can disagree on the statutory requirements for a motion to close a public meeting; (4) the extensive research on FOIA and its requirements by [the County Attorney]; and (5) the closed meeting motion did not release the Board from its other obligations under FOIA as shown by the non-public agenda the Board followed during the closed meeting.¹³²

c. Lessons of *White Dog Publishing, Inc.*

White Dog Publishing, Inc. shows that the Supreme Court of Virginia places a great deal of weight upon the presumptions that

128. *Id.* at 385, 634 S.E.2d at 339 (alterations in original) (citing VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2005)).

129. *Id.* at 386, 634 S.E.2d at 339. The supreme court summarized the board’s interpretations of section 2.2-3711(A)(30) [now (A)(29)] as allowing for, “two distinct types of discussion [to] occur in a closed meeting: (1) discussion of the award of a public contract; and (2) discussion of the terms and scope of a public contract.” *Id.* at 386, 634 S.E.2d at 339.

130. *Id.* at 386–87, 634 S.E.2d at 339–40 (emphasis added).

131. *Id.* at 387, 634 S.E.2d at 340.

132. *Id.* at 388, 634 S.E.2d at 340.

FOIA is to be construed broadly and the exemptions are to be construed narrowly.¹³³ In light of this construction, public bodies are wise to be cautious about the topics that are chosen for a closed meeting discussion. Furthermore, despite a very compelling argument to the contrary, the *White Dog Publishing, Inc.* court remanded the case for a determination of awarding reasonable attorney's fees and costs to the plaintiff.¹³⁴ This gives public bodies an incentive not to litigate cases, especially on appeal, where there is any real chance of losing.

B. *Mechanics of a Closed Meeting*

The mechanics of holding a legal closed meeting are straightforward. In order to convene a closed meeting, a vote must be taken to go into a closed meeting¹³⁵ on a permitted closed meeting topic or topics.¹³⁶ While in a closed meeting, the governing body must only discuss the matters listed in the motion used to convene the closed meeting.¹³⁷ After the closed meeting is concluded, the governing body must approve a certification that it only discussed the matters listed in the motion used to convene the closed meeting.¹³⁸ The simplicity of these straightforward mechanics can be deceptive.¹³⁹

133. *See id.* at 385, 634 S.E.2d at 339.

134. *Id.* at 388–89, 634 S.E.2d at 340–41.

135. VA. CODE ANN. § 2.2-3712(A) (Repl. Vol. 2017). In order to hold a closed meeting: [A]n affirmative recorded vote [must be taken] in an open meeting approving a motion that (i) identifies the *subject matter*, (ii) states the *purpose* of the meeting as authorized in subsection A of § 2.2-3711 or other provision of law and (iii) cites the *applicable exemption* from open meeting requirements provided in subsection A of § 2.2-3711 or other provision of law.

Id. § 2.2-3712(A) (Repl. Vol. 2017) (emphasis added).

136. *Id.* § 2.2-3711(A) (Cum. Supp. 2018). A list of fifty-one permitted reasons to hold a closed meeting is given in section 2.2-3711(A). *Id.*; *see supra* Part I.A.

137. VA. CODE ANN. § 2.2-3712(C) (Repl. Vol. 2017).

138. *Id.* § 2.2-3712(D) (Repl. Vol. 2017).

139. *See, e.g.*, Advisory Op. Va. Freedom Info. Advisory Council 02 (2018); Advisory Op. Va. Freedom Info. Advisory Council 02 (2016); Advisory Op. Va. Freedom Info. Advisory Council 03 (2013); Advisory Op. Va. Freedom Info. Advisory Council 02 (2010); Advisory Op. Va. Freedom Info. Advisory Council 13 (2009); Advisory Op. Va. Freedom Info. Advisory Council 24 (2004); Advisory Op. Va. Freedom Info. Advisory Council 45 (2001).

1. More Details on “Captioning” the Closed Meeting Motion— Like Goldilocks Finding “Just Right”

The motion to enter the closed meeting must meet three criteria: it must “(i) identify the subject matter”¹⁴⁰ of the closed meeting, “(ii) state[] the purpose of the [closed] meeting”¹⁴¹ and “(iii) cite[] the applicable exemption from open meeting requirements provided in subsection A of § 2.2-3711 or other provision of law.”¹⁴² Although this language is not officially referred to as the “captioning” of the closed meeting motion, it is helpful to refer to it as the “captioning” here.

In a number of opinions, the FOIA Council has given guidance on satisfying the criteria of section 2.2-3712(A).¹⁴³ A 2010 FOIA Council opinion discusses the three requirements of section 2.2-3712(A), which requires a proper motion to go into a closed meeting, noting that if any one of the three statutory elements is missing, the motion will be insufficient.¹⁴⁴ The second and third elements (the purpose of the closed meeting and citing the code provision allowing for the closed meeting) of the closed meeting language require little more than citing the code section and quoting the relevant language from section 2.2-3711(A), but satisfying the first element—the subject matter of the meeting—can be a little more difficult.¹⁴⁵

In 2001, the FOIA Council set forth a “Goldilocks balance,” opining that to satisfy the first element (identification of the subject matter), “[t]he subject need not be so specific as to defeat the reason

140. VA. CODE ANN. § 2.2-3712(A) (Repl. Vol. 2017).

141. *Id.*

142. *Id.*; see Wiley, *supra* note 1, at 23-14 (providing a succinct summary of section 2.2-3712(A) compliance and overview of authorities); WILEY, *supra* note 8, at 23.

143. See, e.g., Advisory Op. Va. Freedom Info. Advisory Council 02 (2018); Advisory Op. Va. Freedom Info. Advisory Council 02 (2016); Advisory Op. Va. Freedom Info. Advisory Council 03 (2013); Advisory Op. Va. Freedom Info. Council 02 (2010); Advisory Op. Va. Freedom Info. Advisory Council 13 (2009); Advisory Op. Va. Freedom Info. Advisory Council 24 (2004); Advisory Op. Va. Freedom Info. Advisory Council 45 (2001).

144. Advisory Op. Va. Freedom Info. Advisory Council 02 (2010) (citing VA. CODE ANN. § 2.2-3712(A) (Repl. Vol. 2008)).

145. See, e.g., Advisory Op. Va. Freedom Info. Advisory Council 02 (2018); Advisory Op. Va. Freedom Info. Advisory Council 02 (2016); Advisory Op. Va. Freedom Info. Advisory Council 03 (2013); Advisory Op. Va. Freedom Info. Council 02 (2010); Advisory Op. Va. Freedom Info. Advisory Council 13 (2009); Advisory Op. Va. Freedom Info. Advisory Council 24 (2004); Advisory Op. Va. Freedom Info. Advisory Council 45 (2001).

for going into a closed session, but should at least provide the public with general information as to why the closed session will be held.”¹⁴⁶ The advisory opinion suggested, for example, that a closed meeting regarding employee discipline should be captioned as a discussion of disciplinary action against an employee rather than a more general reference to a personnel matter.¹⁴⁷ The opinion ultimately concluded that the following “caption” complied with section 2.2-3712(A):

Motion to enter closed meeting as allowed by Virginia Code section 2.1-344(A)(5) [now section 2.2-3711(A)(5)] for briefing of members of the Board on a potential request to the County for financial assistance necessary to obtain state financial assistance to contribute to funding of possible expansion of an existing business or industry where no previous announcement has been made of the business’ or industry’s interest in expanding its facilities in the community.¹⁴⁸

In 2004, the FOIA Council opined that the Town of Culpeper had not properly captioned a closed meeting where termination of the Treasurer was discussed because their motion only referred to “issues relating to a specifically named individual” because this description neither “(i) identif[ie]d the subject matter [nor] (ii) state[d] the purpose of the closed meeting.”¹⁴⁹ Proper statements of the subject matter would include “an update on the Washington vs. Town of Culpeper case” or “appointments to the Architectural Review Board and Culpeper Parking Authority.”¹⁵⁰ The opinion stated:

[T]he subject need not be so specific as to defeat the reason for going into closed session, but should at least provide the public with general information as to why the closed session will be held. For example, a public body might state that the subject of a closed session would be to discuss disciplinary action against an employee of the public body. This statement goes a step beyond just stating that the purpose of the meeting is to consider a personnel matter, but does not go so far as to disclose the identity of the individual being discussed and defeat the reason for the closed session.¹⁵¹

146. Advisory Op. Va. Freedom Info. Advisory Council 45 (2001).

147. *Id.*

148. *Id.*

149. Advisory Op. Va. Freedom Info. Advisory Council 24 (2004).

150. *Id.*; see Wiley, *supra* note 1, at 23-14.

151. Advisory Op. Va. Freedom Info. Advisory Council 24 (2004) (quoting Advisory Op. Va. Freedom Info. Advisory Council 08 (2002)).

In 2009, the FOIA Council stated that Virginia Code section 2.2-3712 requires more than a quotation or paraphrasing of language from section 2.2-3711(A)—FOIA requires that the subject matter of the meeting be disclosed.¹⁵² Although sensitive information related to the subject matter of the closed meeting should not be compromised by the resolution and certification, enough information should be given so that the subject matter can be reasonably identified.¹⁵³ In the words of the above mentioned FOIA Council Opinion, “more than a general reference to the statutory exemption” should be provided “without revealing information that would spoil a deal or reveal legal advice.”¹⁵⁴ Instead of paraphrasing language from Virginia Code sections 2.2-3711(A)(3) and 2.2-3711(A)(7), the FOIA Council stated that the resolution could have stated: “to convene a closed meeting regarding the acquisition of real property from a university and to receive legal advice from counsel regarding this transaction pursuant to subdivisions A 3 and A 7 of § 2.2-3711.”¹⁵⁵

The FOIA Council has used a similar framework to that of previous opinions of the FOIA Council and clarified that: (1) a citation to relevant code sections should be included even if the motion is otherwise sufficient, (2) “legal contracts” was not a sufficient description of the subject matter element of section 2.2-3712(A), and (3) a good practice is to use separate motions to make it clear the subject, purpose, and relevant cite of each closed meeting item.¹⁵⁶

Applying the foregoing analysis, the FOIA Council has pronounced that a closed meeting motion to discuss the sale of an old school, pursuant to Virginia Code section 2.2-3711(A)(3) that clearly met the second and third elements of section 2.2-3712(A) also met the first “subject matter” element by stating “Specifically: Unsolicited Confidential Proposal,” although the opinion commended the town council for providing more detail in subsequent closed meeting motions dealing with the subject.¹⁵⁷ The opinion stated that “as a matter of best practices, greater specificity in

152. Advisory Op. Va. Freedom Info. Advisory Council 13 (2009).

153. *Id.*

154. *Id.*

155. *Id.*

156. Advisory Op. Va. Freedom Info. Advisory Council 02 (2010); *see Wiley, supra* note 1, at 23-14.

157. Advisory Op. Va. Freedom Info. Advisory Council 03 (2013).

identifying the subject of a closed meeting is recommended whenever possible.”¹⁵⁸

A recent FOIA Council Opinion dealing with a closed meeting of the University of Virginia Board of Visitors offers further insight into the requirements of section 2.2-3712(A).¹⁵⁹

2. Truth or Consequences: Certification Resolution at the Conclusion of a Closed Meeting

After a closed meeting, the public body must vote on the certification resolution. Virginia Code section 2.2-3712(D) states:

At the conclusion of any closed meeting, the public body holding such meeting shall immediately reconvene in an open meeting and shall take a roll call or other recorded vote to be included in the minutes of that body, certifying that to the best of each member’s knowledge (i) only public business matters lawfully exempted from open meeting requirements under this chapter and (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the meeting by the public body. Any member of the public body who believes that there was a departure from the requirements of clauses (i) and (ii), shall so state prior to the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body.¹⁶⁰

As a corollary, a public body can not have a closed meeting without an open meeting.¹⁶¹ The FOIA Council has advised that Virginia Code section 2.2-3712(D) “appear[s] to require a type of vote which is recorded in the minutes that allows the public to determine the vote of each member present.”¹⁶²

The minutes should contain a detailed account of the motion to go into a closed meeting as well as the exact text of the certification resolution.¹⁶³ Virginia Code section 2.2-3712(C) states that “[t]he

158. *Id.*; see Wiley, *supra* note 1, at 23-14.

159. See Advisory Op. Va. Freedom Info. Advisory Council 02 (2016) (addressing a closed meeting of the University of Virginia Board of Visitors, which is discussed *infra* at Part II.D, and offering further insight into the requirements of section 2.2-3712(A)).

160. VA. CODE ANN. § 2.2-3712(D) (Repl. Vol. 2017).

161. See *id.* § 2.2-3712(A) (Repl. Vol. 2017).

162. Advisory Op. Va. Freedom Info. Advisory Council 02 (2016); see Wiley, *supra* note 1, at 23-15.

163. See VA. CODE ANN. § 2.2-3712(A) (Repl. Vol. 2017); Advisory Op. Va. Freedom Info. Advisory Council 06 (2007) (“To be in compliance with the requirements of FOIA, it is best

public body holding a closed meeting shall restrict its discussion during the closed meeting only to those matters specifically exempted from the provisions of this chapter and identified in the motion required by subsection A.”¹⁶⁴ If a member believes that there has been a departure from the allowed-for closed meeting topics, they are required to vote “no” and state the substance of the departure from the allowed-for discussion.¹⁶⁵

II. THE NEW: RECENT DEVELOPMENTS—REVIEW AND COMMENTARY

A. *Legislative Activity*

1. House Bill 61 (2016)—Criminalization of FOIA Violations

In 2016, Delegate Morris sponsored a bill that would have added a Virginia Code section 2.2-3713.1, reading: “In addition to the provisions of §§ 2.2-3713 and 2.2-3714, any officer, employee, or member of a public body who, without legal excuse or justification, deliberately, willfully, and knowingly violates § 2.2-3704, 2.2-3705.1 through 2.2-3705.8, 2.2-3706, 2.2-3707, 2.2-3708, 2.2-3708.1, 2.2-3710, 2.2-3711, or 2.2-3712 is guilty of a class one misdemeanor.”¹⁶⁶ In 2016, House Bill 61 did not make it out of subcommittee, but one year prior, in the 2015 General Assembly Session, a substantially similar bill was approved by a vote of ninety-nine to one in the House of Delegates before being killed in the Senate of Virginia.¹⁶⁷

to include in the minutes all motions to convene closed meetings and the certifications thereof by quoting such motions and certifications verbatim. This practice leaves no doubt as to . . . the contents of such motions and certifications.”)

164. VA. CODE ANN. § 2.2-3712(C) (Repl. Vol. 2017).

165. *Id.* § 2.2-3712(D) (Repl. Vol. 2017).

Any member of the public body who believes that there was a departure from the requirements of clauses (i) and (ii) [setting forth the certification statement], shall so state prior to the [certification] vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body.

Id.; see also Advisory Op. Va. Freedom Info. Advisory Council 02 (2016).

166. H.B. 61, Va. Gen. Assembly (Reg. Sess. 2016).

167. See H. JOURNAL, House of Delegates of Va., Reg. Sess. 26 (2016); see also H. JOURNAL, House of Delegates of Va., Reg. Sess. 568 (2015).

2. House Bill 800 (2016)—Recordings of Closed Meetings

In 2016, Delegate Morris also sponsored a bill that would have required that a recording of every closed meeting held pursuant to FOIA be made and kept for two years.¹⁶⁸ These recordings would have been exempt from disclosure under FOIA, but their production could have been compelled as part of an action to enforce the provisions of FOIA.¹⁶⁹ House Bill 800 did have fiscal implications,¹⁷⁰ and the bill was not reported out of the house to the senate.¹⁷¹

3. Senate Bill 630 (2018)—Fine for Erroneous Closed Meeting Certification

Senate Bill 630 would have amended Virginia Code section 2.2-3714 regarding violations and penalties to add that:

In addition to any penalties imposed pursuant to subsections A and B, if the court finds that a member of a public body voted to certify a closed meeting in accordance with subsection D of § 2.2-3712 and at the time of such certification such certification was not in accordance with the requirements of clause (i) or (ii) of subsection D of § 2.2-3712, the court ~~shall~~ may] impose on each member voting to certify in his individual capacity, whether or not a writ of mandamus or injunctive relief is awarded, a civil penalty of \$500, which amount shall be paid into the Literary Fund.¹⁷²

Senate Bill 630 was approved by the senate by a vote of thirty-one to eight,¹⁷³ but was continued to the 2019 session of the General Assembly by the house¹⁷⁴ with a directive for the FOIA Council to study the bill prior to the 2019 session of the General Assembly.¹⁷⁵

168. H.B. 800, Va. Gen. Assembly (Reg. Session. 2016).

169. *Id.*

170. See VA. DEP'T OF PLANNING AND BUDGET, 2016 FISCAL IMPACT STATEMENT: H.B. 800 (Jan. 28, 2016), <http://lis.virginia.gov/cgi-bin/legp604.exe?161+oth+HB800F122+PDF>.

171. H. JOURNAL, House of Delegates of Va., Reg. Sess. 98 (2016).

172. S.B. 630, Va. Gen. Assembly (Reg. Session. 2018) (alterations in original).

173. S. JOURNAL, Senate of Va., Reg. Sess. __ (2018), <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=181&typ=bil&val=SB630> (last visited Oct. 1, 2018).

174. H. JOURNAL, House of Delegates of Va., Reg. Sess. __ (2018), <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=181&typ=bil&val=SB630> (last visited Oct. 1, 2018).

175. Suggested Agenda, Va. Freedom Info. Advisory Council (2018), <http://foiacouncil.dls.virginia.gov/ag040418.pdf> (last visited Oct. 1, 2018).

4. Creation of Virginia Code Section 2.2-3711(A)(8): Division of Advice of Legal Counsel and Litigation Related Matters

In 2017, a new Virginia Code section 2.2-3711(A)(8) was added.¹⁷⁶ It placed “[c]onsultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel” into Virginia Code section 2.2-3711(A)(8), separating it from Virginia Code section 2.2-3711(A)(7), which now exclusively concerns matters pertaining to actual or probable litigation.¹⁷⁷

5. Discussion and Lessons from Recent Legislation

Enforcement of the closed meeting rules of FOIA has generated several bills and a good deal of discussion in recent sessions of the General Assembly, showing that closed meeting FOIA compliance is a hot-button issue. It is important for public bodies to ensure compliance with FOIA; otherwise, they may be complicit in inspiring legislation for stricter regulations and penalties. On the other hand, the General Assembly should be careful not to go too far with new penalties and rules for closed meetings, as such legislation may have unintended consequences.¹⁷⁸ Legislation criminalizing FOIA violations could also cause problems for the interpretation of FOIA because FOIA is to be construed broadly,¹⁷⁹ but criminal statutes are to be construed against the prosecution and in favor of the accused.¹⁸⁰ It could also result in politically motivated prosecutions of members of public bodies. As has been seen, the closed meeting exemptions of FOIA are not intuitive and holding elected

176. Act of Mar. 16, 2017, ch. 616, 2017 Va. Acts 1033, 1037 (codified as amended at VA. CODE ANN. § 2.2-3711(A)(8) (Repl. Vol. 2017)).

177. Compare VA. CODE ANN. § 2.2-3711(A)(7)–(8) (Cum. Supp. 2018), with *id.* § 2.2-3711(A)(7) (Repl. Vol. 2017). Subsections 2.2-3711(A)(7) to 2.2-3711(A)(8) continue to clarify that a closed meeting is not allowed merely because an attorney is present. *Id.* § 2.2-3711(A)(7)–(8) (Cum. Supp. 2018).

178. See Jeffrey M. Jones, *Record-High 77% of Americans Perceive Nation as Divided*, GALLUP (Nov. 21, 2016), <https://news.gallup.com/poll/197828/record-high-americans-perceive-nation-divided.aspx>; cf. WILEY, *supra* note 8, at VIII (“The highly contentious political culture that has spread from federal and state levels of government into our local government organizations will also increase scrutiny of closed meeting practices . . .”).

179. VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2017).

180. *Law v. Commonwealth*, 39 Va. App. 154, 158, 571 S.E.2d 893, 895 (2002) (quoting *Waldrop v. Commonwealth*, 255 Va. 210, 214–15, 495 S.E.2d 822, 825 (1998)) (“[T]he rules of statutory construction require that courts strictly construe criminal statutes against the Commonwealth and ‘in favor of an accused’s liberty.’”).

officials of very low-resource public bodies (such as very small towns) criminally responsible for violations of FOIA may result in additional compliance costs that would represent a significant financial burden on small public bodies with no legal counsel or limited access to legal counsel. It would also not be surprising if, due to some of the foregoing concerns, criminalizing FOIA violations had a mild chilling effect that dissuaded especially conscientious and/or risk averse citizens from serving on public bodies.

Another reason not to criminalize closed meeting violations is that at such point holding closed sessions might become inadvisable because of the risk of a criminal charge being brought for an oversight. Public bodies might instead have the chair or another official poll each member of the public body, which would be inefficient and, in cases of elected public bodies, less democratic because all the members of the public body would not discuss the sensitive matter together and whomever polls each member may have additional de facto power over the decision.

Many of these concerns also apply to a lesser extent to the heightened civil penalties that were proposed under Senate Bill 630 in 2018. It is interesting and may concern some that Senate Bill 630 does not explicitly require any willfulness or knowledge on behalf of the member of the public body in order for such member to be subject to its \$500 penalty.¹⁸¹ Thus, depending on how the courts would interpret the provision if it became law, an individual acting completely in good faith could have to pay a \$500 fine for attempting to provide public service.

It is worth mentioning that under present law, “[a]ny person . . . denied the rights and privileges conferred by [FOIA] may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause.”¹⁸² In one of these proceedings, if the court “finds that a violation was willfully and knowingly made, [the court] shall impose upon such officer, employee, or member in his individual capacity . . . a civil penalty of not less than \$500 nor more than \$2,000.”¹⁸³ The penalty increases to an amount between \$2000 and

181. S.B. 630, Va. Gen. Assembly (Reg. Sess. 2018).

182. VA. CODE ANN. § 2.2-3713(A) (Repl. Vol. 2017 & Cum. Supp. 2018).

183. *Id.* § 2.2-3714 (Cum. Supp. 2018); *see* RF&P Corp. v. Little, 247 Va. 309, 320, 440

\$5000 on subsequent violations.¹⁸⁴ The FOIA defendant must pay “reasonable costs, including costs and reasonable fees for expert witnesses and attorneys’ fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust.”¹⁸⁵ One way to push public bodies to comply with FOIA is to make it easier for plaintiffs to bring FOIA cases against governing bodies, and in the next case to be discussed, the Supreme Court of Virginia seems to have done exactly that.

B. *Bragg v. Board of Supervisors of Rappahannock County*

In *Bragg v. Board of Supervisors of Rappahannock County*, the Supreme Court of Virginia issued its most substantial opinion on a closed meeting FOIA case since the 2006 case of *White Dog Publishing, Inc.*¹⁸⁶ A case seeking enforcement under FOIA must be “supported by an affidavit showing good cause.”¹⁸⁷ In *Bragg*, the Supreme Court of Virginia addressed what constitutes “an affidavit showing good cause.”¹⁸⁸

1. Facts of *Bragg*

In *Bragg*, a citizen brought a suit under FOIA alleging that the Board of Supervisors of Rappahannock County had “engaged in a pattern of systematically violating the open meeting requirements of FOIA”¹⁸⁹ during five closed meetings that the Board supposedly held “for the purpose of discussing, among other things, how it would replace the outgoing County Attorney.”¹⁹⁰ The plaintiff had

S.E.2d 908, 915) (1994) (citations omitted) (“The terms ‘willfully’ and ‘knowingly’ are separate and distinct elements that must be proved before a penalty can be imposed Conduct is ‘willful’ when it is intentional The term ‘knowingly,’ when used in an prohibitory statute, is usually held to import a knowledge of the essential facts from which the law presumes a knowledge of the legal consequences arising therefrom.”)

184. VA. CODE ANN. §2.2-3714 (Cum. Supp. 2018).

185. *Id.* § 2.2-3713(D) (Repl. Vol. 2017).

186. 295 Va. 416, 416, 813 S.E.2d 331, 331 (2018); *see also* *White Dog Publ’g, Inc. v. Culpeper Cty. Bd. of Supervisors*, 272 Va. 377, 634 S.E.2d 334 (2006).

187. VA. CODE ANN. § 2.2-3713(A) (Repl. Vol. 2017 & Cum. Supp. 2018).

188. *Bragg*, 295 Va. at 423–26, 813 S.E.2d at 334–35.

189. *Id.* at 419, 813 S.E.2d at 332.

190. *Id.* at 419, 813 S.E.2d at 332.

included two statements as exhibits with her pleading.¹⁹¹ The first statement was notarized and made by one of the members of the Board of Supervisors of Rappahannock County, and it stated that matters were discussed during the closed meetings other than those for which purpose the closed meeting was convened.¹⁹² This first statement, referred to by the court as the “Frazier Acknowledgement,” stated that it had been imprudent and in error for the board member to vote to certify that the closed meetings were lawfully held.¹⁹³ The second statement was an affidavit of the plaintiff, referred to by the court as the “Bragg Affidavit,” which stated (under oath) that the allegations in her petition were “true and correct, except to the extent therein stated to be on information, and to such extent she believe[d] them to be true.”¹⁹⁴

2. Procedural History in *Bragg*

Among other pleadings, the board of supervisors filed a motion to dismiss, which the Rappahannock County Circuit Court granted because of insufficiencies in the Frazier Acknowledgment and the Bragg Affidavit.¹⁹⁵ The circuit court held that “the Frazier Acknowledgement was not a proper affidavit because ‘[t]here [was] no showing that the document was sworn and it contain[ed] no *jurat*.’”¹⁹⁶ The circuit court further noted that even if the affidavit were proper, the Frazier Affidavit did not show “good cause” because of Frazier’s previous certification votes that the closed meetings had in fact been lawful.¹⁹⁷ The circuit court held that the Bragg Affidavit did not qualify as an “affidavit showing good cause”

191. *Id.* at 419–20, 813 S.E.2d at 332.

192. *Id.* at 419–20, 813 S.E.2d at 332.

193. *Id.* at 419–20, 813 S.E.2d at 332.

194. *Id.* at 420, 813 S.E.2d at 332.

195. *Id.* at 421, 813 S.E.2d at 332.

196. *Id.* at 421, 813 S.E.2d at 332–33 (alterations in original). Justice Lemons noted in a footnote that:

A “*jurat*” is a certification by a public officer (usually a notary public) stating when and before what authority an affidavit or deposition was made, typically commencing with the language “Subscribed and sworn to before me.” It typically “certifies three things: (1) that the person signing the document did so in the officer’s presence, (2) that the signer appeared before the officer on the date indicated, and (3) that the officer administered an oath of affirmation to the signer, who swore to or affirmed the contents of the document.”

Id. at 421 n.1, 813 S.E.2d at 333 n.1 (citing *Jurat*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

197. *Id.* at 421, 813 S.E.2d at 333.

because the Bragg Affidavit was “stated to be on information” and the Bragg Affidavit did not detail the information.¹⁹⁸

3. Supreme Court of Virginia Ruling in *Bragg*

The Supreme Court of Virginia awarded an appeal to plaintiff Bragg.¹⁹⁹ After noting that it would review the circuit court’s interpretations of the statute and dismissal of the plaintiff’s petition de novo,²⁰⁰ the Supreme Court of Virginia discussed the “affidavit showing good cause” requirement of Virginia Code section 2.2-3713(A).²⁰¹ Quoting Virginia Code section 8.01-280, the court noted that “when an affidavit is required in support of any pleading or as a prerequisite to the issuance thereof, *it shall be sufficient if the affiant swear that he believes it to be true.*”²⁰² Because the Bragg Affidavit stated that all of the allegations in the petition were “either true or believed to be true,”²⁰³ the Bragg Affidavit satisfied Virginia Code section 8.01-280 and thus also satisfied Virginia Code section 2.2-3713(A).²⁰⁴ The Supreme Court of Virginia held that the circuit court further erred in holding that a reference to “information” in the affidavit was not specific enough—the supreme court stated that it was quite clear: board member Frazier had admitted the board’s closed meeting discussions were improper.²⁰⁵

Next, the Supreme Court of Virginia addressed the arguments that (i) the Frazier Acknowledgment was not an affidavit and (ii) Frazier’s prior certification that the closed meeting properly “es-topped” the Frazier Acknowledgment from being used against the board of supervisors.²⁰⁶ The supreme court conceded that the Frazier Acknowledgment was not an affidavit, but it did not matter: the Frazier Acknowledgment was part of the pleadings, and the

198. *Id.* at 421, 813 S.E.2d at 333.

199. *Id.* at 421, 813 S.E.2d at 333,

200. *Id.* at 423, 813 S.E.2d at 334.

201. *Id.* at 423–24, 813 S.E.2d at 334 (citing VA. CODE ANN. § 2.2-3713(A) (Repl. Vol. 2017 & Cum. Supp. 2018)).

202. *Id.* at 424, 813 S.E.2d at 334 (quoting VA. CODE ANN. § 8.01-280 (Repl. Vol. 2015)).

203. *Id.* at 424, 813 S.E.2d at 334.

204. *Id.* at 424, 813 S.E.2d at 334.

205. *Id.* at 424, 813 S.E.2d at 334.

206. *Id.* at 425, 813 S.E.2d at 334–35.

Bragg Affidavit satisfied the section 2.2-3713(A) “affidavit showing good cause” requirement.²⁰⁷ The supreme court also noted that nothing about the section 2.2-3712(D) certification process prevented board member Frazier from changing his position and later stating that the closed meeting was improper.²⁰⁸ At the motion to dismiss stage, “the admissions in the Frazier Acknowledgment should have been accepted as true.”²⁰⁹

For these reasons, the supreme court overturned the circuit court ruling granting the Board of Supervisors’ motion to dismiss.²¹⁰

4. Lessons from *Bragg*

While the ruling in *Bragg* is not surprising, and the holding is narrow (dealing primarily with what constitutes an “affidavit showing good cause” under Virginia Code section 2.2-3713(A), it should strike fear into the hearts of the members of public bodies who discuss unlawful items in closed meetings. All it takes is a board or council member changing his mind²¹¹ after certifying that the closed meeting was proper and sharing that with someone else, who could be or know a FOIA plaintiff.

There are also questions of how far *Bragg* might extend. What if a board member informs the FOIA plaintiff of the closed meeting violation verbally (or the FOIA plaintiff so alleges) and the FOIA plaintiff signs the “affidavit showing good cause” on that “information”? What if a plaintiff infers from actions taken by the board that they must have had an illegal closed meeting discussion?

207. *Id.* at 424, 813 S.E.2d at 334–35 (quoting VA. CODE ANN. § 2.2-3713(A) (Repl. Vol. 2017 & Cum. Supp. 2018)).

208. *Id.* at 425–26, 813 S.E.2d at 335 (quoting VA. CODE ANN. § 2.2-3712(D) (Repl. Vol. 2017)).

209. *Id.* at 426, 813 S.E.2d at 335.

210. *Id.* at 426, 813 S.E.2d at 335.

211. Elected officials might come to see their FOIA certification vote differently for a number of reasons. A conscientious board member might feel confused or pressured at the moment of the certification, change his mind, and confess his conscience to a constituent (or a newspaper reporter). A less conscientious board member could also have changed political or personal incentives. Old allies might become enemies and disclosing a closed meeting violation could help a board member achieve a new political purpose or get revenge. A board member might even simply suffer from a poor memory, get confused, and tell someone that they talked about something in a closed meeting that was in fact not discussed.

What if a plaintiff reads about the violation in the newspaper? How far does “good cause” stretch? At some point, “good cause” must no longer be good cause and frivolous litigation could be dismissed for failure to provide an “affidavit showing good cause,” but it is not immediately clear where that line might be. It is possible that a future court might find that some plaintiffs with attenuated connections to the facts of the alleged FOIA violation do not meet the section 2.2-3713(A) requirement that a plaintiff must have been “denied the rights and privileges” of FOIA.²¹²

While *White Dog Publishing, Inc.* shows that the exemptions to FOIA’s open meeting requirements are “narrowly construed” against the public body,²¹³ *Bragg* loosely suggests that the Supreme Court of Virginia has: (1) signaled that lower courts should be hesitant to dismiss FOIA plaintiff’s lawsuits on technical grounds and (2) the courts are “open for business” to hear FOIA closed meeting cases.²¹⁴ *Bragg* gives public bodies across Virginia good reason to ensure that they are complying with FOIA. Moreover, *Bragg* seems to give potential FOIA plaintiffs a better avenue for judicial remedies to closed meeting violations, and the General Assembly may want to give FOIA plaintiffs time to pursue the avenue opened to them by *Bragg* before pursuing additional legislative changes to FOIA’s closed meeting remedies provisions.

C. *Moody v. City of Portsmouth*

1. Background and Facts

The plaintiff in *Moody v. City of Portsmouth* was one of seven members of the Portsmouth City Council.²¹⁵ On September 8, 2015, the City Council changed its rules to allow fines to be imposed on Council members.²¹⁶ On December 8, 2015, Moody disclosed on his Facebook page the Portsmouth City Council’s plans to discuss in a closed meeting “our Confederate War monument as it pertains to

212. VA. CODE ANN. § 2.2-3713(A) (Repl. Vol. 2017).

213. *White Dog Publ’g, Inc. v. Culpeper Cty. Bd. of Supervisors*, 272 Va. 377, 385, 387, 634 S.E.2d 334, 339–40 (2006) (quoting VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2005)).

214. *Bragg*, 295 Va. at 426, 813 S.E.2d at 335.

215. *Moody v. City of Portsmouth*, 93 Va. Cir. 455, 465 (2016) (Portsmouth City).

216. *Id.* at 456.

the Danville Case.”²¹⁷ The Council met in a closed meeting that night (i) “to consult with legal counsel about actual or probable litigation regarding the relocation of a Confederate monument” pursuant to section 2.2-3711(A)(7),²¹⁸ and (ii) “to discuss performance of a Council member.”²¹⁹ During this closed meeting, other Council members voiced frustration arising from Moody’s public discussions of legal matters and worried that Moody’s disclosure “jeopardized Council’s ability to discuss legal problems with legal counsel.”²²⁰

A little more than one month later, on January 12, 2016, the Council again convened a closed meeting, part of which had the purpose of discussing Moody’s performance under Virginia Code section 2.2-3711(A)(1).²²¹ At this meeting, a document prepared by the Mayor with assistance from the City Attorney was circulated, which five members signed.²²² That letter stated that a \$1500 fine was being imposed on Moody by the Council and that Moody would be given an opportunity to contest the fine in a closed meeting of the Council if he notified them of his desire to contest the fine within seven days.²²³ Moody paid the \$1500 fine that evening.²²⁴

217. *Id.* at 455.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 456.

222. *Id.* The letter stated in part:

It is with regret and out of a need to protect the interests of the City of Portsmouth that we have decided to take action to discipline you . . . It has been determined that you are subject to a fine, for your conduct. It has also been determined that a fine of \$1500 would be appropriate given the alleged conduct.

Id. (alteration in original). The letter further stated:

If you wish to contest the fine, you may notify the city Council within seven days [and] Council will provide you an opportunity to present an argument or defense in closed session meeting. Upon hearing from you, the Council may take action in open session to impose the aforementioned fine. If you do not contest, you will be deemed to have agreed to the fine.

Id. (alteration in original).

223. *Id.* at 457.

224. *Id.*

2. Arguments and Court Decision

Judge Hammond noted that “[t]he narrow question presented is whether Virginia law required that Council vote in an open meeting on whether to authorize the January 12 Letter advising Moody of the \$1500 fine” if he did not appeal to the Council within seven days.²²⁵ Plaintiff Moody argued that action may only be taken at an open public meeting and must be recorded in the minutes.²²⁶ The defendants argued signing and delivering the letter was not an action because Moody could appeal the letter, and “no official decision would be reached until after the seven days expired.”²²⁷ Defendants also pointed out that Moody’s decision to pay the fine “short-circuited” the framework set forth in the letter that was signed in the closed meeting.²²⁸

Judge Hammond held that the execution of the letter fining Moody constituted a violation of FOIA.²²⁹ In so doing, she cited Virginia Code section 2.2-3700(B), noting that “[a]ll of the procedures in the FOIA for closing meetings under narrow exemptions and for voting only in public, are designed to promote public access.”²³⁰ She noted that the letter expressed that a decision had been made because (i) the letter stated “we have decided to take action to discipline [Moody]”²³¹ and (ii) the fine had been set at \$1500.²³² Although, for the purposes of the *Moody* opinion, Judge Hammond assumed that the performance of a council member was an appropriate closed meeting topic under Virginia Code section 2.2-3711(A)(1), she noted the existence of an opinion of the Virginia Attorney General that concluded that a school board could not meet in a closed meeting to discuss the selection of its chair and vice-chair.²³³

225. *Id.*

226. *Id.*; see VA. CODE ANN. § 2.2-3712(H) (Repl. Vol. 2017) (“Except as specifically authorized by law, in no event may any public body take action on matters discussed in any closed meeting, except at an open meeting for which notice was given as required by § 2.2-3707.”); *id.* § 2.2-3707(H) (Cum. Supp. 2018) (“Minutes shall be in writing and shall include . . . (c) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken.”).

227. *Moody*, 93 Va. Cir. at 457.

228. *Id.*

229. *Id.* at 458.

230. *Id.* at 457 (citing VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2014)).

231. *Id.* at 456–57.

232. *Id.* at 456.

233. *Id.* at 457–58; 2000 Op. Va. Att’y Gen. 24, 25; see also Wiley, *supra* note 1, at 23-15.

3. Lessons from *Moody*

The holding in *Moody* is a narrow one and it is a Portsmouth City Circuit Court case, not a Supreme Court of Virginia case, but like *White Dog Publishing, Inc.*, and *Denton*, *Moody* illustrates that Virginia courts take FOIA's section 2.2-3700(B) presumption of openness very seriously.²³⁴ Moreover, although straw polls and the development of consensus are allowed in a closed meeting,²³⁵ if there is any question that a vote of the board or council might be required to take an action (as opposed to action that can be taken administratively), then it should be voted on in an open meeting prior to such action being taken.²³⁶

D. *Opinion of FOIA Council: UVA Board of Visitors*

1. Background and Facts

In the summer of 2016, the University of Virginia ("UVA") found itself in newspaper headlines across the Commonwealth of Virginia relating to controversy over: (1) a closed meeting of its Board of Visitors, (2) disclosure to the public and criticism of a \$2.3 billion investment fund by a member of the Board of Visitors, Helen Dragas, and (3) a FOIA Council Opinion in response to questions posed to the FOIA Council by Dragas' attorney.²³⁷ Although the facts of what happened at the meeting were sharply disputed,²³⁸ if the facts posed to the FOIA Council were correct, there appeared to have been violations of FOIA at the UVA Board of Visitors closed

234. See *Moody*, 93 Va. Cir. 455 at 457; see also *White Dog Publ'g, Inc., v. Culpeper Cty. Bd. of Supervisors*, 272 Va. 377, 385, 634 S.E.2d 334, 339 (2006); *Denton v. City Council of the City of Hopewell*, 91 Va. Cir. 429, 430–31 (2015) (Hopewell City).

235. Advisory Op. Va. Freedom Info. Advisory Council 15 (2002); Wiley, *supra* note 1, at 23-13 to -14.

236. See *Moody*, 93 Va. Cir. at 457–58.

237. Advisory Op. Va. Freedom Info. Advisory Council 02 (2016). Although UVA is not specifically mentioned as being the institution in question in the opinion, press reports make it clear that the opinion did concern UVA. See Wilson, *supra* note 5; Quizon, *supra* note 5.

238. Quizon, *supra* note 5; Wilson, *supra* note 5. It is important to note that throughout its opinion the FOIA Council did not make findings of fact, instead answering the questions with the fact patterns posed by Dragas' attorney without necessarily adopting those factual assertions as true. See Advisory Op. Va. Freedom Info. Advisory Council 02 (2016). The Daily Progress quotes Alan Gernhardt of the FOIA Council as stating "[w]e don't get in the middle of fights" and "[i]f people have a dispute over the facts, they can go to court." Quizon, *supra* note 5.

session meeting.²³⁹ Dragas' attorney relayed several facts and asked several questions of the FOIA Council, which the FOIA Council addressed.²⁴⁰ The closed meeting motion provided to the FOIA Council by Dragas' attorney read:

I move that the Board of Visitors go into closed session to discuss the appointment, reappointment, performance, assignment, and compensation of specific University faculty; and to consult with legal counsel regarding a litigation report and specific legal and regulatory matters requiring the provision of legal advice where discussion in an open meeting would adversely affect the negotiating posture of the University. The relevant exemptions are sections 2.2-3711(A)(1) and (7) of the *Code of Virginia*.²⁴¹

Dragas' attorney further relayed to the FOIA Council that the following was discussed in the closed session meeting: (1) two employees who managed UVA's funds were commended at the meeting, (2) no litigation was discussed, (3) the meeting was "focused on principles for spending the money that now comprises the fund," and (4) board members were informed that there were concerns over confidentiality and that they should not discuss the fund with legislators or the press.²⁴² Dragas' attorney related to the FOIA Council that after the closed meeting was held, a certification vote was taken, but only "aye" votes "were solicited and no 'nay' votes were requested."²⁴³ Lastly, Dragas' attorney noted that a board member later "stated that the minutes should reflect that the member did not vote on the certification due to questions and concerns"²⁴⁴ about the legality of the meeting under FOIA.²⁴⁵

2. Preliminary Discussion by FOIA Council

Prior to answering any of the questions posed to it, the FOIA Council first reviewed the law governing closed meetings, beginning by noting the broad intent of FOIA set forth in Virginia Code

239. Advisory Op. Va. Freedom Info. Advisory Council 02 (2016).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* The implication is apparently that board members were not really given a chance to vote "nay." *Id.*

244. *Id.*

245. *Id.*

section 2.2-3700(B): FOIA is intended to open the affairs of government to the public and exemptions are to be construed narrowly.²⁴⁶ The FOIA Council continued by noting the Virginia Code section 2.2-3712(A) requirement for a motion “that (i) identifies the subject matter, (ii) states the purpose of the meeting and (iii) makes specific reference to the applicable exemption from open meeting requirements.”²⁴⁷ The FOIA Council noted that each closed meeting must conclude with a section 2.2-3712(D) certification of the propriety of the closed meeting.²⁴⁸ Finally, the FOIA Council noted that in the past, it had advised board members who disagreed with the section 2.2-3712(D) certification to “comply with the procedural requirements set out in FOIA”²⁴⁹—which would require (i) that the member disclose the alleged departure from the permitted discussion that took place and (ii) that such disclosure be recorded in the minutes.²⁵⁰

3. First Question: Sufficiency of Closed Meeting Motion and Certification

The FOIA Council was first asked whether the language of the motion to go into and certification to come out of the closed meeting was legally sufficient under FOIA.²⁵¹ The FOIA Council first addressed the sufficiency of the section 2.2-3711(A)(1) closed meeting motion language relating to the two employees.²⁵² The opinion noted that of the three requirements for a closed session meeting motion, the purpose was met by “the appointment, reappointment, performance, assignment, and compensation of specific University Faculty” language.²⁵³ The citation requirement was met by the reference to Virginia Code section 2.2-3711(A)(1).²⁵⁴ The FOIA Council next addressed the requirement that the motion to go into a closed session meeting “identifies the subject matter,” and criticized the mention of “specific University Faculty” because it was

246. *Id.* (citing VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2014)).

247. *Id.* (citing VA. CODE ANN. § 2.2-3700(A) (Repl. Vol. 2014)).

248. *Id.* (citing VA. CODE ANN. § 2.2-3700(D) (Repl. Vol. 2014)).

249. *Id.*

250. *Id.* (citing VA. CODE ANN. § 2.2-3712(D) (Repl. Vol. 2014)).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

not very specific.²⁵⁵ Quoting Virginia Code section 2.2-3712(A), the FOIA Council reiterated that “a ‘general reference to the [requirements of FOIA], the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting.”²⁵⁶ The FOIA Council advised “greater specificity” by the UVA Board of Visitors; they could have “provid[ed] additional information such as whether they are tenured or non-tenured, by identifying their department(s), or in any number of other ways.”²⁵⁷ Nevertheless, the opinion stopped short of definitively labeling this lack of specificity as a FOIA violation because the motion specified that the faculty were “University faculty” and not “administrative, information technology, maintenance, law enforcement, or some other category of employees.”²⁵⁸

The FOIA Council next addressed the sufficiency of the section 2.2-3712(A) language relating to consultation with legal counsel pursuant to Virginia Code section 2.2-3711(A)(7).²⁵⁹ Although the requirements for a citation to a code section and a description of the purpose of the meeting seemed to the FOIA Council to have been met, neither a vague reference to a litigation “report,” nor a reference to the meaninglessly broad category of “‘regulatory’ matters,” qualified as anything more than a “general reference to . . . the subject matter of the closed meeting.”²⁶⁰ Thus, the FOIA Council opined that the part of the motion relating to Virginia Code section 2.2-3711(A)(7) “appear[ed] to be insufficient” under FOIA.²⁶¹

At this point in the opinion, the FOIA Council reiterated that board members who believed a violation of FOIA occurred should have stated so at the time of the section 2.2-3712(D) certification resolution.²⁶² Furthermore, the FOIA Council stated that “the statutory remedy for a FOIA violation is a petition for mandamus or

255. *Id.*

256. *Id.* (quoting VA. CODE ANN. § 2.2-3712(A) (Repl. Vol. 2014)).

257. *Id.*

258. *Id.*

259. *Id.* Virginia Code section 2.2-3711(A)(7) was split into sections 2.2-3711(A)(7) and 2.2-3711(A)(8) in the next regular session of the General Assembly after this FOIA Council opinion was published. Act of Mar. 16, 2017, ch. 616, 2017 Va. Acts 1033, 1037 (codified as amended at VA. CODE ANN. § 2.2-3712(A)(7)–(8) (Repl. Vol. 2014)).

260. Advisory Op. Va. Freedom Info. Advisory Council 02 (2016).

261. *Id.*

262. *Id.*

injunction supported by an affidavit showing good cause as set forth in § 2.2-3713.”²⁶³

4. Second Question: What Would Have Constituted a FOIA Violation in Closed Meeting Discussion

The second question asked whether the board of visitors violated FOIA and whether or not there was any remedy, assuming that “the primary purpose of discussing the fund during the closed meeting was neither to discuss any personnel matters nor to request/receive legal advice.”²⁶⁴ The opinion noted that “it would be a violation to hold a closed meeting to discuss a fund when the motion to convene the closed meeting was for the purposes of discussion of personnel, legal matters and litigation.”²⁶⁵ The FOIA Council further noted that there is no exemption from FOIA allowing for general discussions of budgetary issues, although certain related issues (e.g., real estate acquisition) do have enumerated exceptions under FOIA.²⁶⁶ The FOIA Council reiterated that “FOIA does not provide for a remedial action to be taken by the public body once a violation has occurred” and that if a member believed that there was an unlawful closed meeting, the member should vote “no” to the certification resolution and describe what the member believes to be the unlawful closed meeting discussion.²⁶⁷

5. Third Question: Proper Procedures for Certification and Options to Address Mistakes

The third question asked about the proper procedure regarding the certification of a closed meeting and what method there might be to correct mistakes.²⁶⁸ The FOIA Council noted that “subsection D of § 2.2-3712 requires a ‘roll call or other recorded vote’ when certifying a closed meeting.”²⁶⁹ Dragas’ attorney relayed to the FOIA Council that only “aye” votes had been solicited and that she

263. *Id.*

264. *Id.*

265. *Id.* It is important to note that the opinion did not actually find a violation here. See *supra* note 238.

266. Advisory Op. Va. Freedom Info. Advisory Council 02 (2016).

267. *Id.*

268. *Id.*

269. *Id.* (quoting VA. CODE ANN. § 2.2-3712 (Repl. Vol. 2014)).

had not been invited to vote “nay.”²⁷⁰ The FOIA Council noted that the dictionary definition of “roll call” was the “reading aloud of a list of names of people, as in a classroom or military post, to determine who is absent.”²⁷¹ Using the principles of *ejusdem generis*²⁷² and *noscitur a sociis*,²⁷³ the FOIA Council reasoned that the term “other recorded vote” should be given a similar import to “roll call” vote.²⁷⁴ The opinion did state that “[i]f the vote was in fact unanimous agreement by all members present, and the minutes reflected this fact as well as the members present, then the vote described would be sufficient.”²⁷⁵ To the FOIA Council, “it appear[ed] that the board may have misconstrued a member’s silence for tacit agreement, and the member may have failed to correct that misunderstanding until some later time.”²⁷⁶ In light of this, the FOIA Council advised that a roll call vote calling the name of each member is advisable.²⁷⁷

6. Fourth Question: Board Member Obligations Re: Possible FOIA Violation

The “fourth question asked what action, if any, are individual board members expected, allowed, and/or legally obligated to take

270. *Id.*

271. *Id.* (citing *Ejusdem Generis*, AMERICAN HERITAGE DICTIONARY 1069 (2d College ed. 1982)).

272. *Id.* (citing *Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity, Inc.*, 266 Va. 455, 470, 587 S.E.2d 701, 710 (2003)). The FOIA Council noted that the principle of *ejusdem generis* meant that “when items with a specific meaning are listed together in a statute, and are followed by words of general import, the general words will not be construed to include matters within their broadest scope but only those matters of the same import as that of the specific items listed.” *Id.*

273. Advisory Op. Va. Freedom Info. Advisory Council 02 (2016) (citing to *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 432, 722 S.E.2d 626, 633 (2012)). The FOIA Council had the following to say about *noscitur a sociis*:

The maxim of *noscitur a sociis* provides that the meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases. When general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words.

Id.

274. Advisory Op. Va. Freedom Info. Advisory Council 02 (2016).

275. *Id.*

276. *Id.*

277. *Id.*; see also WILEY, *supra* note 8, at 24.

when they have questions or concerns relating to FOIA open meeting violations by the board on which they sit.”²⁷⁸ The FOIA Council reiterated that the section 2.2-3712(D) certification at the conclusion of a closed meeting requires board members who disagree with the certification to vote “no” and explain the departure from the permitted discussion in the closed meeting.²⁷⁹

7. Final Question: Sources of Legal Guidance and Mandatory Reporting Provisions

A final question asked (i) who board members should consult for legal guidance and (ii) if there were any mandatory reporting requirements concerning violations.²⁸⁰ The FOIA Council opinion noted that UVA Board of Visitors members could always contact the FOIA Council, their own attorney, or the UVA’s legal counsel provided by the Virginia Attorney General’s Office.²⁸¹ Finally, the FOIA Council noted that “FOIA does not impose any mandatory reporting requirements regarding questions, concerns or violations.”²⁸²

8. Lessons from FOIA Opinion re: UVA Board of Visitors

There are several lessons from the UVA Board of Visitors FOIA opinion. First of all, it is a reminder to public bodies of just how important it is to comply with FOIA. What public body wants the public relations nightmare of speculation that the public body violated FOIA and held an illegal closed meeting?²⁸³

Second, the apparently flawed motion to go into a closed session meeting, although a technical shortcoming, did appear to be a violation of FOIA. A technical violation of FOIA is not a good place to begin either a legal or a public relations fight. Legally, even if only

278. Advisory Op. Va. Freedom Info. Advisory Council 02 (2016).

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Cf.* Atkinson, *supra* note 8 (discussing an acrimonious closed meeting of Hopewell City Council, after which the City Council reportedly admitted that they had not complied with FOIA).

a technical violation has been committed, it gives a plaintiff credibility right off the bat and makes it easier to make an “affidavit showing good cause,”²⁸⁴ which could lead to further discovery and more headaches for the public body. In the public relations arena, the public may view a violation of FOIA, however technical, as just as bad as a more substantive violation of FOIA.

Third, there is a lesson for individual board members that if a board member does believe that there has been a FOIA violation in a closed session meeting, the board member should vote “no” and state the substance of the violation, or else that member will become part of the violation.²⁸⁵ Finally, this opinion demonstrates that public bodies should leave nothing to chance when voting on section 2.2-3712(D) certifications, and should hold a roll call vote, requiring each member to vote “yes” or “no.”²⁸⁶

III. WHAT TO DO: PRACTICAL INSIGHTS FOR CONDUCTING CLOSED MEETINGS

A. *Lay the Groundwork and Explain the Boundaries*

In virtually all attorney-client representations, diligence and good communication with the client are indispensable.²⁸⁷ Preparing a government client for a closed session meeting is no exception. The request that a particular item be discussed on a closed session meeting agenda often comes from one public official. Although the fast pace of the modern practice of law can crowd schedules and items for a closed meeting do occasionally arise at the last minute, ideally the government attorney should have a discussion with the official requesting that the closed session meeting topic be placed on the agenda to discuss exactly what that closed session meeting topic entails. Local government attorneys may also find it helpful to advise that the attorney be permitted to review a copy of any proposed closed session meeting resolution in advance.

284. See VA. CODE ANN. § 2.2-3713(A) (Repl. Vol. 2017); *Bragg v. Bd. of Supervisors of Rappahannock County*, 295 Va. 416, 423, 813 S.E.2d 331, 334 (2018).

285. See Atkinson, *supra* note 8 (noting that members admitted after coming out of closed session that they had violated FOIA).

286. See Advisory Op. Va. Freedom Info. Advisory Council 02 (2016).

287. See VA. RULES OF PROF'L CONDUCT R. 1.3–1.4 (Repl. Vol. 2018).

This discussion and/or review serves several purposes. First, based on the discussion with the client, the government attorney can determine if the topic does in fact fall within the permitted closed session meeting topics allowed for by Virginia Code section 2.2-3711(A), or is otherwise allowed by law. This conversation affords the local government attorney time to craft a closed session meeting resolution “caption” that complies with Virginia Code section 2.2-3712(A) without disclosing too much.²⁸⁸ A topic that is well “captioned” in the closed session meeting resolution also lays the groundwork for a good closed session meeting—the topic for conversation has been well defined, and covers what needs to be covered, but does not allow for conversation beyond that. Since the “caption” is read in the motion to go into the closed session meeting and in the certification when coming out of a closed session meeting, a descriptive caption can serve as a well understood “fence” to keep members from discussing prohibited topics in a closed session meeting. Second, the attorney can advise on the boundaries of the closed meeting conversation. This advice prevents a client from going into a closed meeting believing that they will be able to have a wide-ranging conversation, only to be advised by the government attorney in front of all present in the closed meeting halfway through the conversation that what they have discussed so far is allowed, but further conversation would violate FOIA. Third, as many of these conversations are held over time, the client will develop a nuanced understanding of the law governing closed meetings, will need less legal advice, and the organizational client will develop or deepen a culture of compliance with FOIA.

B. *Alternatives to Closed Meetings*

For some topics, a closed meeting is simply not allowed by FOIA. The best option is always to hold an open meeting to discuss such a topic. However, there are occasions where a public conversation is not appropriate. Roger C. Wiley notes that public officials have claimed that prematurely holding discussions on difficult topics in open session can further complicate matters.²⁸⁹ Under such circumstances, the chief administrative officer, or other senior staff

288. See *supra* Part I.B.1.

289. WILEY, *supra* note 8, at 5–7.

member of a government body, can discuss the matter with board members either one at a time or two at a time (so long as the two members do not constitute a quorum of a committee).²⁹⁰ In some cases, the chair (or mayor) of the public body may choose to discuss a matter with one other board (or council) member at a time.

C. *Add Solemnity to the Occasion of Closed Meetings*

Symbols and customs adding solemnity to occasions have long been understood to cause humans to take certain situations more seriously. Judges wear robes, law enforcement officers wear badges, weddings celebrants exchange vows, and deponents raise their right hand when swearing to tell the truth at a deposition. In each case, these symbols or customs add gravity to the ceremony or situation at hand. Government attorneys and elected officials conducting a closed session meeting might be able to learn something from this principle. When the motion to go into the closed session meeting is read in a public meeting the voice of the reader can be monotone and rushed. Distractions abound in the audience as those who have not already left fumble for their bags, phones, and notebooks and begin to walk out of the chamber. Board members of public bodies could almost be forgiven for scarcely comprehending what is in the section 2.2-3712(D) motion to enter a closed session meeting.

Elected officials, staff, and government attorneys should treat both the section 2.2-3712(A) motion to enter the closed meeting and the section 2.2-3712(D) certification with great respect. First of all, where at all possible a written script of both the motion to enter the closed meeting and the certification resolution should be prepared in advance, and the government attorney or public body clerk should keep a script for convening and certifying closed meetings in unforeseen or “emergency” situations.²⁹¹ The clerk or other

290. See VA. CODE ANN. § 2.2-3701 (Cum. Supp. 2018) (defining “meeting”); *id.* § 2.2-3707(A) (Cum. Supp. 2018) (requiring that, unless there is an exception, all meetings be open to the public).

291. If meetings of public bodies are well planned, such instances should be rare, but there are occasions when a closed session meeting becomes necessary in the middle of a meeting. For example, a sensitive legal issue could arise and elected officials could begin to publicly discuss items that would adversely affect the public body’s legal position. A short closed meeting for of the public body to receive legal advice about the matter under Virginia Code section 2.2-3711(A)(8) would be warranted.

official who reads the motion to convene, the closed session meeting, and the certification resolution should read the language slowly and clearly. The reader may also want to invite all present to pay close attention to the language and emphasize that the process is required by FOIA. If the public body has a member who is new or unfamiliar with the rules governing closed meetings, the government attorney should briefly explain how the process works and emphasize that only matters listed in the section 2.2-712(A) motion to go into closed meeting should be discussed in the closed meeting.

Ignorance of FOIA should not be an excuse. In addition to the solemnity of the section 2.2-3712(A) and 2.2-3712(D) motions to enter closed meeting and certify the closed meeting, Virginia Code section 2.2-3702 requires:

Any person elected, reelected, appointed or reappointed to any body not excepted from [FOIA] shall (i) be furnished by the public body's administrator or legal counsel with a copy of [FOIA] within two weeks following election, reelection, appointment or reappointment and (ii) read and become familiar with the provision of [FOIA].²⁹²

Public bodies should make sure that they comply with Virginia Code section 2.2-3702. Members can be encouraged and reminded to read over FOIA for themselves upon taking or retaking office. Providing a copy of the Local Government Officials' Guide²⁹³ to FOIA to members of public bodies upon taking or retaking office may also be helpful, especially if there are concerns about lack of compliance with FOIA.

D. *Nonmembers of the Public Body in the Room*

Nonmembers of public bodies are allowed in a closed meeting "if such persons are deemed necessary or if their presence will reasonably aid the public body in its consideration of a topic that is a subject of the meeting."²⁹⁴ It is obviously helpful if there is an attorney in the room during a closed meeting to offer opinions of what may and may not be discussed.

292. VA. CODE ANN. § 2.2-3702 (Repl. Vol. 2017); see Wiley, *supra* note 1, at 23-1.

293. WILEY, *supra* note 8.

294. VA. CODE ANN. § 2.2-3712(F) (Repl. Vol. 2017); see Wiley, *supra* note 1, at 23-14.

E. *Voting*

Virginia Code section 2.2-3710(A) generally prohibits voting in a closed session meeting.²⁹⁵ Furthermore, Virginia Code section 2.2-3712(H) states “[e]xcept as specifically authorized by law, in no event may any public body take action on matters discussed in any closed meeting, except at an open meeting for which notice was given as required by § 2.2-3707.”²⁹⁶ Votes in public session must be specific and cannot vaguely reference closed session meeting discussions.²⁹⁷ The FOIA Council has expressed that a city council could meet in a closed session meeting to discuss appointing a new member of city council to fill a vacant seat.²⁹⁸ Whether this discussion in a closed session meeting took the form of a straw poll or a consensus was immaterial, as both were permissible, but no binding official action could be taken outside of a vote in open session.²⁹⁹ In *Moody v. City of Portsmouth*, discussed in more detail in Part II.C, an illegal action was deemed to have been taken when a majority of council members signed a letter determining that another council member was to be fined.³⁰⁰

F. *Choose Topics Wisely and Stay on Topic*

Obviously, care should be taken that topics chosen for closed meetings comport with the exemptions available in Virginia Code

295. VA. CODE ANN. § 2.2-3710(A) (Repl. Vol. 2017) (“Unless otherwise specifically provided by law, no vote of any kind of the membership, or any part thereof, of any public body shall be taken to authorize the transaction of any public business, other than a vote taken at a meeting conducted in accordance with the provisions of this chapter. No public body shall vote by secret or written ballot, and unless expressly provided by this chapter, no public body shall vote by telephone or other electronic communication means”); see WILEY, *supra* note 8, at 8.

296. VA. CODE ANN. § 2.2-3712(A) (Repl. Vol. 2017).

297. Advisory Op. Va. Freedom Info. Advisory Council 01 (2005) (opining that a vote to “to approve the recommendation of the School Board in Personnel Case #45-50 as recommended in Closed Session” was not detailed enough because the substance of the action was not reasonably identified in the open meeting); see also Advisory Op. Va. Freedom Info. Advisory Council 24 (2004) (opining that action to terminate town treasurer was not effective until after formal vote to do so taken in open session); see WILEY, *supra* note 8, at 23.

298. Advisory Op. Va. Freedom Info. Advisory Council 15 (2002).

299. *Id.*

300. *Moody v. City of Portsmouth*, 93 Va. Cir. 455, 458 (2016) (Portsmouth City); see Wiley, *supra* note 1 at 23-13 to -15 (discussing voting under FOIA).

section 2.2-3711(A), as discussed in Part I.A.³⁰¹ The process outlined in Part III.A can be helpful in organizing and preparing for a successful closed meeting.³⁰² Caution should be exercised that the purpose of the conversation is always the permitted purpose for which the meeting was convened.³⁰³ Once in a closed meeting, compliance with the boundaries of the closed meeting rules of FOIA is ultimately the responsibility of the members of the public body, but the local government attorney can play an important role in setting boundaries on the conversation.³⁰⁴

On occasion, public bodies enter closed meetings to discuss one topic and discover that a member of the public body or staff wants to discuss a related matter or perhaps even a different matter entirely. Very commonly, one of the fifty-one exemptions in Virginia Code section 2.2-3711(A) allows for the discussion to take place, but, if the topic was not properly listed in the motion to enter the closed meeting pursuant to Virginia Code section 2.2-3712(A), then the public body should go back into a public meeting, vote to certify their closed meeting pursuant to Virginia Code section 2.2-3712(D), and enter a new closed meeting pursuant to a valid section 2.2-3712(A) motion.³⁰⁵

G. Attorney's Fees Provisions and Close Call Cases

Virginia Code section 2.2-3713(D) grants reasonable fees to the plaintiff in a FOIA case if the plaintiff substantially prevails on the merits, “unless special circumstances would make an award unjust.”³⁰⁶ In *White Dog Publishing, Inc. v. Culpeper County Board of Supervisors*, attorney's fees were awarded to the plaintiff, despite the fact that the Culpeper County General District Court had ruled that there was no FOIA violation and the Culpeper County Circuit

301. VA. CODE ANN. § 2.2-3711(A) (Cum. Supp. 2018); *see supra* Part I.A.

302. *See supra* Part III.A.

303. *See supra* Part I.A.1.a.iv.

304. *See supra* Part III.A.

305. *See* VA. CODE ANN. § 2.2-3711(A) (Cum. Supp. 2018); *id.* § 2.2-3712(A), (D) (Repl. Vol. 2017); Wiley, *supra* note 1, at 23-14.

306. VA. CODE ANN. § 2.2-3713(D) (Repl. Vol. 2017) (“If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys’ fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust.”).

Court found only a technical violation.³⁰⁷ In *Denton v. City Council for the City of Hopewell*, attorney's fees were not awarded, likely because the case was such a close call, and Hopewell City Circuit Court conceded that there was "little distinction" between an illegal discussion concerning an election and a legal discussion concerning an appointment.³⁰⁸ Nevertheless, given the *White Dog Publishing, Inc.* decision to award fees to the plaintiff, public bodies have a significant disincentive to appeal circuit court cases that they do not like.³⁰⁹ Both *White Dog Publishing, Inc.* and *Denton* were close call cases, and public bodies should interpret FOIA's closed meeting provisions conservatively, given how strongly the courts interpret the presumption of openness in Virginia Code section 2.2-3700(B).³¹⁰

CONCLUSION

The purpose of this article was to: (1) provide an overview of reasons for which closed meetings may lawfully be held and the mechanism for doing so, outlined in Part I; (2) discuss recent developments in case law, FOIA Council opinions, and proposed legislation related to closed meetings, outlined in Part II; and (3) offer some practical wisdom for conducting closed public meetings, outlined in Part III. The importance of public bodies' compliance with the FOIA closed meeting rules has been stressed. Details of results from failing to follow the closed meeting rules have been reviewed. This article has raised concerns about the unintended consequences of increasing penalties for FOIA closed meeting violations and suggested that the recently decided case of *Bragg v. Board of Supervisors of Rappahannock County* may make it easier for plaintiffs to seek remedies for closed meeting violations.³¹¹ The author acknowledges the work that dedicated public servants like Roger

307. *White Dog Publ'g, Inc. v. Culpeper Cty. Bd. of Supervisors*, 272 Va. 377, 383–85, 388–89, 634 S.E.2d 334, 337–41 (2006).

308. *Denton v. City Council of the City of Hopewell*, 91 Va. Cir. 429, 431–32 (2015) (Hopewell City).

309. *See White Dog Publ'g, Inc.*, 272 Va. at 388–89, 634 S.E.2d 334, 340–41.

310. *See id.* at 385, 634 S.E.2d at 339; *Denton*, 91 Va. Cir. at 430–31; Wiley, *supra* note 1, at 23-1.

311. *Bragg v. Bd. of Supervisors of Rappahannock County*, 295 Va. 416, 426, 813 S.E.2d 331, 335 (2018).

Wiley,³¹² Maria Everett,³¹³ Alan Gernhardt,³¹⁴ and others have put into educating public bodies about FOIA. The author hopes that this article and other similar works by others play a role in helping public bodies comply with the closed meeting rules of FOIA as FOIA enters its next fifty years.

312. See Wiley, *supra* note 1; WILEY, *supra* note 8.

313. Maria Everett was the first Executive Director of the FOIA Council and served from 2000 to 2017. Dan Casey, *Doyenne of Open Government to Hang Up Her Hat*, ROANOKE TIMES (July 27, 2017), https://www.roanoke.com/news/dan_casey/casey-doyenne-of-open-government-to-hang-up-her-hat/article_36352d1b-0334-5399-8288-50221f199eee.html (last visited Oct. 1, 2018). Everett was the author of many FOIA Council opinions. See, e.g., Advisory Op. Va. Freedom Info. Advisory Council 02 (2016).

314. Alan Gernhardt succeeded Maria Everett as the Executive Director of the FOIA Council, and is an author of many FOIA advisory opinions. See, e.g., Advisory Op. Va. Freedom Info. Advisory Council 02 (2018).