

November 27, 2023

Virginia Freedom of Information Advisory Council (the “Council”)
c/o Alan Gernhardt, Esq., Executive Director
Pocahontas Building, 10th Floor
900 East Main Street
Richmond, VA 23219

Via email: foiacouncil@dls.virginia.gov

Dear Mr. Gernhardt,

Pursuant to Code of Virginia § 30-179(1) and other applicable sections, please respond to the following:

- 1.) Under current law, if a meeting of a public body fails to adhere to the requirements set forth in Va. Code § 2.2-3707, may a court declare the meeting to be void *ab initio*? Does Va. Code § 2.2-3713 authorize/enable the right to bring such action? If not, please identify the authorizing/enabling statute for bringing such actions.
- 2.) Under current law, are the provisions of either Va. Code § 8.01-243 or Va. Code § 8.01-248 (or both) applicable to actions brought pursuant to Va. Code § 2.2-3713? If so, please specify which section(s).
- 3.) On March 23, 2023, the Supreme Court of Virginia issued an opinion in *Berry v. Board of Supervisors* (Record No. 211143) reversing the Fairfax County Circuit Court and finding the county’s 2021 zoning ordinance adopted in March 2021 (“Z-MOD”) to be void *ab initio*. To the extent that the Virginia Freedom of Information Advisory Council (hereinafter, the “Council”) believes that a petition or lawsuit seeking to declare as void *ab initio* a meeting of a public body (held pursuant to Va. Code § 2.2-3707) is not subject to any statute of limitations (under current law), please provide the Council’s legal basis (including references to any and all statutes, rules and case law) for such belief.
- 4.) As part of the knowledge and training described in and required by Va. Code § 2.2-3704.2(E), is it expected that a FOIA officer should have knowledge of and be competent in the provisions of Va. Code § 2.2-3707?
- 5.) Does the training identified and described in Va. Code §§ 2.2-3704.3 and 30-179(2) include training related to the provisions of Va. Code § 2.2-3707? Does the Council either expect or presume (or both) that the government officials, members and staff identified in Va. Code §§ 2.2-3704.3 and 30-179(2) are competent in the provisions of Va. Code § 2.2-3707?

Please respond in writing. The foregoing questions are not specific to any pending litigation. Your responses may be published. Thank you in advance.

Very truly yours,

Ramin Seddiq
PO Box 5533
McLean, VA 22103
ramins2536@gmail.com

To: Ramin Seddiq

Date: 11-27-23

1.) Under current law, if a meeting of a public body fails to adhere to the requirements set forth in Va. Code § 2.2-3707, may a court declare the meeting to be void *ab initio*? Does Va. Code § 2.2-3713 authorize/enable the right to bring such action? If not, please identify the authorizing/enabling statute for bringing such actions.

Response: Code § 2.2-3713 authorizes a petition for mandamus or injunction to be filed in the event of a FOIA violation, and § 2.2-3714 authorizes additional civil penalties. FOIA itself does not mention declaring an action taken by a public body to be void *ab initio*, but as you know, the Supreme Court of Virginia held that a zoning ordinance adopted during an electronic meeting was void *ab initio* in the case [Berry v. Bd of Supervisors](#) (2023) after determining that the board of supervisors lacked the authority to adopt the ordinance at such a meeting.

2.) Under current law, are the provisions of either Va. Code § 8.01-243 or Va. Code § 8.01-248 (or both) applicable to actions brought pursuant to Va. Code § 2.2-3713? If so, please specify which section(s).

Response: I do not know of any reported cases or published opinions on the issue, but anecdotally, I believe there was an unreported case where the two-year statute of limitations from § 8.01-248 was applied in a FOIA matter; § 8.01-248 is the statute this office has always referred to for FOIA petitions as it is the "catch-all" for personal actions.

3.) On March 23, 2023, the Supreme Court of Virginia issued an opinion in *Berry v. Board of Supervisors* (Record No. 211143) reversing the Fairfax County Circuit Court and finding the county's 2021 zoning ordinance adopted in March 2021 ("Z-MOD") to be void *ab initio*. To the extent that the Virginia Freedom of Information Advisory Council (hereinafter, the "Council") believes that a petition or lawsuit seeking to declare as void *ab initio* a meeting of a public body (held pursuant to Va. Code § 2.2-3707) is not subject to any statute of limitations (under current law), please provide the Council's legal basis (including references to any and all statutes, rules and case law) for such belief.

Response:

I believe you may be referring to commentary from Council member Cullen Seltzer; the Council as a whole has not taken a position on the matter. However, the legal definition the term "void *ab initio*" means void "from the start" or without legal effect "from the start," so it is inherent in the definition itself that a statute of limitations does not apply to something that never had legal effect in the first place.

4.) As part of the knowledge and training described in and required by Va. Code § 2.2-3704.2(E), is it expected that a FOIA officer should have knowledge of and be competent in the provisions of Va. Code § 2.2-3707?

Response: No, § 2.2-3704.2 does not require any specific subject matter or other contents for training FOIA officers. The original concept for requiring public bodies to have FOIA officers was to

provide someone who would be a point of contact for citizens making records requests. However, some FOIA officers do act to facilitate public meetings as well; for example, many clerks serve both capacities. For those reasons, we offer training on both records and meetings and encourage FOIA officers to take whichever training presentation best matches their role within the public body.

5.) Does the training identified and described in Va. Code §§ 2.2-3704.3 and 30-179(2) include training related to the provisions of Va. Code § 2.2-3707? Does the Council either expect or presume (or both) that the government officials, members and staff identified in Va. Code §§ 2.2-3704.3 and 30-179(2) are competent in the provisions of Va. Code § 2.2-3707?

Response: No, just as § 2.2-3704.2 does not require any specific subject matter or other contents for training FOIA officers, § 2.2-3704.3 and subdivision 2 of § 30-179 do not require any specific subject matter or other contents for training local officials. However, our training presentations designed for local officials do cover both records and meetings issues as well as other topics such as FOIA remedies.