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## Virginia Freedom of Information Advisory Council

### Meetings Subcommittee

September 6, 2023, at 1:00 p.m.

Senate Subcommittee Room 1, Pocahontas Building

[foiacouncil.dls.virginia.gov](https://foiacouncil.dls.virginia.gov)

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The Meetings Subcommittee (the Subcommittee) of the Virginia Freedom of Information Advisory Council (the Council) met with Delegate Mike A. Cherry, chair, presiding.<sup>1</sup> The meeting began with introductions and opening remarks followed by discussion. Materials presented at the meeting, as well as all written public comments, are accessible through the [Council's 2023 Subcommittees webpage](#).<sup>2</sup>

### Discussion and Public Comment: *Berry v. Board of Supervisors of Fairfax County*

The Subcommittee began the meeting with Cullen D. Seltzer, Esq., summarizing the *Berry* opinion. The Supreme Court held that a zoning ordinance adopted by Fairfax County at an electronic meeting conducted during the COVID-19 pandemic was *void ab initio* because the meeting failed to comply with the Freedom of Information Act's (FOIA) open meetings requirements. Bruce Potter asked if the Subcommittee could offer a statute of limitations on FOIA decisions for meeting violations. Mr. Seltzer thought that a statute of limitations could make it more difficult for the public but agreed that an unlawful meeting should not negate an action. Lola Rodriguez Perkins, Esq., stated that she was not opposed to a statute of limitations but believed it would be beneficial to have the court determine whether a hardship imposed by an unlawful meeting is such that it negates everything that may have taken place in a meeting.

The Subcommittee heard comments on *Berry* from the following members of the public:

- Megan Rhyne, Virginia Coalition for Open Government, explained that states such as Colorado, Idaho, and Missouri allow *void ab initio* remedies to undo an action that took place in a public meeting due to noncompliance with FOIA's open meeting requirements. She believed that a judge would use discretion to consider equities when deciding a remedy.
- Ramin Saddiq, a citizen of Virginia, echoed his support of Mr. Potter's and Ms. Rhyne's comments regarding the formulation of a remedy.

The discussion ended with Mr. Cullen recommending that the Subcommittee wait until the Supreme Court opinion is finalized before making a recommendation. Mr. Potter asked Council staff to draft potential language while other Subcommittee members directed staff to research how other states handle the issue.

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<sup>1</sup> **Members Present:** Delegate Mike A. Cherry (chair), Lola Rodriguez Perkins, Esq., Bruce Potter, and Cullen D. Seltzer, Esq.

**Members Absent:** William D. Coleburn

<sup>2</sup> An issue with the livestream occurred due to the link being conflated with the 2023 Special Session I of the General Assembly. It was resolved 20 minutes after the meeting began.

## Discussion and Public Comment: *Gloss v. Wheeler*

Mr. Seltzer provided an overview of *Gloss*. The Supreme Court ruled that five members of a county board of supervisors held an improper meeting in violation of FOIA under the facts of the case when they met with police officials and others in regard to protests that were held in the county concerning the death of George Floyd in Minnesota in 2020. The Supreme Court held that in the context of public meetings, "for a topic to constitute public business it must not just be something that conceptually could at some point come before a public body, but rather, the topic must be something that is either before the public body or is likely to come before the body in the foreseeable future."<sup>3</sup>

The Subcommittee heard comments on the Supreme Court's ruling from the following members of the public:

- Ed Reed, Two Capitols Consulting, speaking on behalf of the City of Hampton, stated that the ramifications of this decision have created some internal operating issues due to multiple members of a public body often attending community meetings. Mr. Reed offered the Subcommittee a draft of redlined language, which the City of Hampton put together, that offers concrete definitions of "public bodies" and "informative meetings." Delegate Cherry echoed Mr. Reed's sentiments expressing the chilling effect on civic engagement.
- Ms. Rhyne expressed that the issue is not necessarily the definition of "public business" but rather the discussion taking place at public events and that she does not believe any changes need to be made.

Delegate Cherry, Ms. Perkins, and Mr. Potter disagreed and stated that they believe some fix or clarity is needed. The discussion ended with Delegate Cherry directing staff to research how other states are handling the issue and to draft language clarifying that the definition of "meeting" in § 2.2-3701 of the Code of Virginia refers to the discussion or transaction of public business by the members of the public body.

## Next Meeting

Delegate Cherry directed staff to poll members of the Subcommittee about future meeting dates.

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For more information, see the [Council's website](#) or contact the Division of Legislative Services staff:

Alan Gernhardt, Esq., Executive Director  
Virginia Freedom of Information Advisory Council, DLS  
agernhardt@dls.virginia.gov  
804-698-1877

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<sup>3</sup> *Gloss v. Wheeler*, 887 S.E.2d 11, 2023 Va. LEXIS 22, Record No. 210779 (Va. 2023).

