

On Mon, Nov 27, 2023 at 10:30 AM McRoberts, Andrew R. <amcroberts@sandsanderson.com> wrote:

Thanks to the FOIA Council Subcommittee on Meetings for the opportunities to speak at the Subcommittee meeting on Wednesday. I write to follow up and speak to one issue which was raised after my opportunity to comment. Please pass this on to the Subcommittee.

At one point in Wednesday's meeting, staff mentioned § 2.2-3700, which says: "Any ordinance adopted by a local governing body that conflicts with the provisions of this chapter shall be void." This language has nothing to do with the *Berry* remedy issue, in which the Virginia Supreme Court, for the very first time, held that a violation of FOIA in meeting rendered the entire results of the meeting void *ab initio*. The statutory provision in 2.2-3700 staff referenced voids a local ordinance that *itself* conflicts with FOIA, not an ordinance (or any other action) whose *process of adoption* somehow violated FOIA. That's a huge difference!

In other words, under 2.2-3700, an ordinance that provided different or lesser standards than FOIA for transparency, or attempted to alter the application of FOIA locally would be void. This appears similar in purpose to the provision in 2.2-3100 in the Conflicts Act -- which, like FOIA in 2.2-3700, is also under discussion of the Conflicts Act's "purpose" -- that provides that the COIA is the "single body of law" related to conflicts. A purpose statement of intended preemption by the General Assembly, in other words. But the language in 2.2-3700 does not say that a public body's action in a meeting which violated FOIA is void *ab initio*. Or anything close.

Before *Berry*, voiding an action *ab initio* has never been a recognized remedy under FOIA. As I mentioned in the Subcommittee meeting, it ought to be the General Assembly's call whether such an expansive and painful remedy for all concerned is to be adopted. Traditionally, it has been. Perhaps as a matter of separation of powers, or simple deference to expressed intent of the legislature, the courts have deferred to the General Assembly on remedies provided in all manner of statutes and regulations which expressly provide internally for remedies. See *Concerned Taxpayers of Brunswick County* and the other cases I cited in my prior email contained in the agenda materials for the Subcommittee meeting.

Thanks for allowing me to follow up on the Subcommittee meeting. I welcome any questions and am glad to assist the Subcommittee and the Council as appropriate.

Best wishes,

Andrew McRoberts

Desk: 804-783-7211

Andrew R. McRoberts

Attorney

Sands Anderson PC

PO Box 1998, Richmond, VA 23218-1998

Direct: [\(804\) 783-7211](tel:8047837211) | Main: (804) 648-1636