

From: **Phil Abraham** <[pabraham@vectrecorp.com](mailto:pabraham@vectrecorp.com)>  
Date: Tue, Dec 5, 2023 at 3:44 PM  
Subject: Draft Enactment Clause on Berry not Retroactive  
To: Alan Gernhardt <[agernhardt@dls.virginia.gov](mailto:agernhardt@dls.virginia.gov)>

Alan: As we discussed, I am writing in response to the mention of the issue of the retroactivity of the Berry decision at the last meeting of the Meeting Subcommittee of the FOIA Council. Below is the text of a legislative proposal that has been submitted for drafting for introduction at the 2024 Session. While this is not a proposed substantive change to FOIA, I wanted to share it for posting as a courtesy to the Council and interested parties. The draft language was prepared by a coalition of representatives of the development and legal communities as well as local government.

This proposal make no change to the existing language in § 2.2-3708.2. Our intent is to simply add an enactment clause to a reenactment of that section that provides retroactive protection to those who obtained and relied in good faith upon local government approvals that were granted during the COVID state of emergency. All such approval were made prior to the ruling in the Berry case and were not challenged as part Berry.

The enactment clause to the current § 2.2-3708.2 that we propose would read as follows:

**“2. The provisions of this section are declarative of existing law since March 20, 2020, with respect to the Governor’s declared state of emergency due to COVID-19. For any meeting by a public body using electronic communication means occurring from that date until July 1, 2021, the meeting and any action taken at it is hereby validated with respect to the Virginia Freedom of Information Act if the body provided public notice, public access, and public comment commensurate with the requirements of § 2.2-3708.2 and with §§ 2.2-3710 to -3712.”**

This is a narrow and targeted approach to the issue of retroactivity that is limited to approvals granted during the COVID state of emergency and were otherwise made in compliance with the FOIA notice and comment provisions listed. I appreciate your posting this comment to the FOIA Council website. I plan to be at the December 14 meeting of the Council if there are any questions. Thank you for your assistance with these comments. Regards, Phil

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