

From: **McRoberts, Andrew R.** <amcroberts@sandsanderson.com>
Date: Mon, Nov 20, 2023 at 2:00 PM
Subject: RE: Draft legislative amendments to FOIA
To: foiacouncil@dls.virginia.gov <foiacouncil@dls.virginia.gov>
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Alan, please let me second Martin's proposed amendments of FOIA to address the serious Berry remedy issue, and the troublesome Wheeler issue, and submit this to the FOIA Council for its consideration.

I. The Berry Remedy Problem

On the former, the Berry Court seemingly overturned decades of Supreme Court authority without any discussion or rationale provided.

“When a statute provides for a specific remedy, ‘that remedy is exclusive unless the statute says otherwise.’ *Cherrie v. Va. Health Servs., Inc.*, 292 Va. 309, 315, 787 S.E.2d 855 (2016) (quoting *Concerned Taxpayers of Brunswick Cnty. v. Cnty. of Brunswick*, 249 Va. 320, 330, 455 S.E.2d 712 (1995) (citation omitted)). [Montgomery v. Commonwealth, 75 Va. App. 182, 204, 875 S.E.2d 101, 112 \(2022\)](#).

Concerned Taxpayers speaks about the application of this rule in the context of the procurement Act, which, like our FOIA, creates rights that did not exist at common law and provides specific statutory remedies:

“ [When] a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise.’ ” *Vasant & Gusler, Inc. v. Washington*, 245 Va. 356, 360, 429 S.E.2d 31, 33 (1993) (quoting *School Bd. v. Giannoutsos*, 238 Va. 144, 147, 380 S.E.2d 647, 649 (1989)). The Procurement Act “confers certain rights and obligations upon citizens of the Commonwealth, nongovernmental contractors, and governmental entities.” *W.M. Schlosser Co. v. Board of Supervisors*, 245 Va. 451, 456, 428 S.E.2d 919, 922 (1993). [Concerned Taxpayers of Brunswick Cnty. v. Cnty. of Brunswick, 249 Va. 320, 330, 455 S.E.2d 712, 717–18 \(1995\)](#).

The Berry Court, without explanation, added an additional remedy to the statutory remedies provided in FOIA – the striking down of the validity of the legislative act. In my 30 plus years of practicing in this area of the law, Berry was the first time I'd seen a FOIA violation result in the striking down of a legislative act. On its ruling regarding remedy, Berry should be reversed legislatively. Further, the legislative should make it clear that the remedies in FOIA are exclusive, which has been the law for decades, and – Berry aside – would be the law now. Lastly, the legislation should include an enactment clause saying this legislation reflects existing law, to protect legislative acts of governing bodies and make clear that Berry cannot be cited to strike down legislative acts for FOIA violations.

II. The Wheeler Problem.

Traditionally, local government officials have been advised that they can attend other public bodies' meetings to fact gather or listen to public input. For example, it is common for elected officials to attend planning commission public hearings. This is good for the decisions of elected officials, who should be informed when making legislation or public policy. Wheeler puts this practice into question.

While there are some odd facts in Wheeler that mean it may be distinguishable from the common practice of a supervisor attending a county planning commission meeting, there is no question that Wheeler has caused a chilling effect on local government officials' attendance at various community meetings. Given this, I suggest a clarifying 'safe harbor' be placed into FOIA that make clear that members of one public body can attend the meeting of another public body and it is not a meeting of the first public body unless it discusses or transacts public business, no matter the topic of the second public body's meeting or agenda item.

Please let me know if you have any questions or I can assist in any way.

Best wishes,

Andrew

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