

FOIA in the Supreme Court of Virginia: A Mid-Year Update

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In the first half of 2022, the Supreme Court of Virginia issued one Freedom of Information Act decision and granted two appeals involving the Act.

Although issues involving public records and public meetings may be part of a local government attorney's routine practice, it is not as often that the Supreme Court of Virginia addresses those issues. The Supreme Court did not issue any Freedom of Information Act (FOIA) decisions in 2021, and it issued five over the four years preceding. As of 2022's midpoint, there is one FOIA decision from the Supreme Court, and the Court has granted two other appeals involving FOIA issues.

Decision on Mandamus Relief and Closed-Meeting Certifications

Suffolk City School Board v. Story stemmed from a school board member's FOIA action against her school board and fellow school board members. No. 201334 (Jan. 20, 2022). The Supreme Court reversed the circuit court's award of a writ of mandamus and its holding that the school board's manner of certifying closed meetings violated FOIA. The Court remanded on the issue of attorney fees and costs, as there were still FOIA violations not at issue in the appeal.

The mandamus question concerned the circuit court's award of the writ to require that, if any school board member is ever dissatisfied with FOIA advice requested and obtained from the school board's counsel, then the school board must seek guidance from the Virginia Freedom of Information Advisory Committee (the "Committee") if the dissatisfied member so requests. On appeal, the Supreme Court agreed with the school board's argument that a writ of mandamus cannot compel such action. The school board's decision on whether to seek the Committee's guidance is "entirely discretionary," and it is well-settled that a writ of mandamus compels a public official's performance of a ministerial duty but not a discretionary act. The Supreme Court disagreed with the appellee's arguments, which referenced FOIA's remedial purposes and asserted that the school board procedurally defaulted on the issue.

The certification question concerned FOIA's requirement that, upon concluding a closed meeting, a public body must reconvene in an open meeting and vote on a certification that the closed meeting only involved matters of public business that were lawfully exempt from the openness requirement and were identified in the motion to

convene the closed meeting. Va. Code § 2.2-3712(D). The circuit court held that the school board violated FOIA by reading only the title of the written certification aloud between reconvening and voting. The Supreme Court reversed, holding that the school board's "short-form certification" did not violate FOIA. In the Court's words, "nothing in [FOIA] requires that the certification of a closed meeting be read aloud during a public meeting," and "requiring that the certification be read aloud after each closed meeting serves little, if any, purpose" because "the certification vote will essentially be the same for each closed meeting." The Court further noted that the General Assembly presumably intended to allow short-form certifications, as FOIA's silence on the matter contrasted to its prohibition of "general references" in connection with motions to convene closed meetings. *Compare* Va. Code § 2.2-3712(D), *with id.* § 2.2-3712(A).

The Supreme Court decided *Story* by unpublished order; however, it appears to have precedential value as the decision's rationale is discernible from the order's text. *Cf. Sheets v. Castle*, 263 Va. 407, 411-12 (2002).

Granted Appeals Involving FOIA

Hawkins v. Town of South Hill is likely the next FOIA decision to come from the Supreme Court. No. 210848 (Mar. 2, 2022); *see also* 107 Va. Cir. 212 (Mecklenburg Cnty. 2021). The appellant contends that the circuit court erred in its holdings that records related to certain employment matters were exempt from disclosure, that he was not the prevailing party, and that he was not entitled attorney fees or costs. The Court granted the appeal on March 2, and briefing closed on May 20.

Berry v. Board of Supervisors of Fairfax County also deserves mention. No. 211143 (May 19, 2022). The case more directly concerns a county's authority to replace a zoning ordinance and whether the board of supervisors violated FOIA's open-meeting requirements. The Supreme Court granted the appeal on May 19, and briefing is underway.

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