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The Marsh Trilogy: The Virginia Supreme Court Examines the Freedom of Information Act

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THE MARSH TRILOGY: THE VIRGINIA SUPREME COURT EXAMINES THE FREEDOM OF INFORMATION ACT

I. INTRODUCTION

The Virginia Freedom of Information Act[1] ("the Act" or "the Virginia Act") requires that all meetings of public bodies be open to the public. One of the purposes of the Act is "to ensure to the people . . . free entry to meetings of public bodies wherein the business of the people is being conducted."[2] In three cases decided March 12, 1982, the Virginia Supreme Court examined some of the exceptions to this general requirement provided by the Act in section 2.1-344 of the Virginia Code. This section provides the specific purposes for which "executive or closed meetings" may be held[3] and the procedure for closing meetings for these purposes.[4]

In *Marsh v. Richmond Newspapers*,[5] *Nageotte v. Board of Supervisors*,[6] and *City of Danville v. Laird*,[7] the Virginia Supreme Court injected

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1. VA. CODE ANN. §§ 2.1-340 to -346.1 (Repl. Vol. 1979 & Cum. Supp. 1982). The Act provides that "[e]xcept as otherwise specifically provided by law . . . all meetings shall be public meetings." *Id.* § 2.1-343 (Cum. Supp. 1982). "Public body" is defined under the Act as

> any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of State institutions of higher education; and other organizations, corporations or agencies in the Commonwealth, supported wholly or principally by public funds.

Id. §§ 2.1-341(e), (a) (Cum. Supp. 1982). A "public meeting" is defined as "a meeting at which the public may be present." *Id.* § 2.1-341(d) (Cum. Supp. 1982).

2. *Id.* § 2.1-340.1 (Repl. Vol. 1979). This section further provides that the provisions of the Act

> shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exception or exemption from applicability shall be narrowly construed in order that no thing which should be public may be hidden from any person.

3. *Id.* § 2.1-344(a) (Cum. Supp. 1982) enumerates twelve specific purposes for which an executive or closed meeting may be held. It provides that "executive or closed meetings may be held only" for these purposes. *See infra* notes 55-58 and accompanying text.

4. The proper procedure for closing a meeting to the public is by the adoption during an open meeting of a motion to go into executive session. The closure motion must state the purpose for which the meeting is to be closed and must refer specifically to the applicable statutory exemption. *Id.* § 2.1-344(b) (Cum. Supp. 1982).

This subsection further provides that the considerations of the public body while in executive session are to be restricted to the purposes exempted in subsection (a) from the general requirements of the Act. *Id.* § 2.1-344(a).

5. 223 Va. ___, 288 S.E.2d 415 (1982).

6. 223 Va. ___, 288 S.E.2d 423 (1982).

shade into the state's "sunshine law," clarified the procedure for closing meetings, and addressed the propriety of awarding certain remedies for violations of the Act. This comment examines the court's interpretation of the Act regarding these issues, and assesses the potential impact of these decisions on future applications or interpretations of the Act.

II. THE MARSH TRILOGY

A. *Marsh v. Richmond Newspapers*

Marsh involved a joint meeting[8] of the Richmond City Council and the Chesterfield and Henrico County Boards of Supervisors held in 1979 to discuss "issues pertaining to the construction of the I-295 Circumferential Highway and other matters relating to regional cooperation."[9] A short, four-item agenda was published for the meeting.[10] Following scheduled opening remarks by the Mayor of Richmond, the Vice Mayor offered a motion to go into executive session,[11] citing section 2.1-344(a)(6) of the Act as the statutory exemption permitting the meeting to be closed.[12] After a short discussion during which Mayor Marsh referred to a "presenta-

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7. 223 Va. ___, 288 S.E.2d 429 (1982).

8. VA. CODE ANN. § 2.1-344(d) (Cum. Supp. 1982) expressly permits joint meetings between two or more public bodies, but provides that "these conferences shall be subject to the same regulations for holding executive or closed sessions as are applicable to any other public body."

9. *Marsh*, 223 Va. at ___, 288 S.E.2d at 417. I-295 is a proposed part of the Interstate Highway System intended to bypass the city of Richmond through the eastern portion of Henrico and Chesterfield counties. The "regional cooperation" mentioned in the closure motion involved essentially the sharing of costs for the planning, construction, and maintenance of the highway, as well as the sharing of costs for other services provided by the three political subdivisions.

10. The agenda provided for: 1) a welcome by Henry L. Marsh, III (then mayor of the City of Richmond, and a defendant in the original suit); 2) introductory statements concerning the purpose of the meeting; 3) presentation of proposals by Mayor Marsh; and 4) general discussion. *Id.*

11. Vice Mayor Kemp's motion stated:

> The announced purpose of this meeting is to discuss the issues pertaining to the construction of the I-295 Circumferential Highway and other matters relating to regional cooperation.
>
> Consideration of these subjects necessarily involve [sic] "legal matters within the jurisdication [sic] of the" City. Section 2.1-344(6) of the Code of Virginia (Freedom of Information Act) permits the Council to discuss such matters in Executive Session.
>
> I, therefore, move that Council go into Executive Session for the purposes [sic] of discussing the matters hereinabove enumerated.

Id.

12. VA. CODE ANN. § 2.1-344(a)(6) (Cum. Supp. 1982) provides that an executive or closed meeting may be held for "[c]onsultation with legal counsel and briefings by staff members, consultants or attorneys, pertaining to actual or potential litigation, or other legal matters within the jurisdiction of the public body, and discussions or consideration of such matters without the presence of counsel, staff, consultants, or attorneys." This section is commonly referred to as the "legal matters" exception.

tion of proposals" item on the agenda, the Vice Mayor's motion was approved by a voice vote, and the meeting was closed. Following the executive session, Mayor Marsh disclosed in a press release the topics which had been discussed.[13] The press release also stated that no decisions had been made in the closed meeting.

Richmond Newspapers and a reporter who had been excluded from the meeting brought suit against Mayor Marsh and the other members of the Richmond City Council, alleging that the meeting had been closed in violation of the Act. The trial court agreed, finding that the motion to close the meeting did not comply with the Act's procedural requirements and that the matters discussed were not within the "legal matters" exemption provided by section 2.1-344(a)(6) of the Virginia Code.[14] The trial court permanently enjoined the Council members from closing any meeting except for purposes permitted under the Act and from discussing any nonexempt topics while in executive session. In its order, the trial court prescribed procedural steps for the Council to take before convening in executive session[15] and defined "legal matters" for purposes of invoking that exemption from the Act.[16]

On appeal, the supreme court faced three questions: 1) whether the Vice Mayor's motion to close the Council's meeting to the public complied with the Act; 2) whether the Council's discussion came within the Act's exemption for "legal matters"; and 3) whether the trial court erred in awarding injunctive relief.

The court began its discussion by tracing the legislative history of the Act, noting that several substantial amendments had been made to the

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13. The press release stated that the following topics had been discussed:
1) The location and construction of the proposed circumferential highway;
2) The probable effect of the highway on the location of future industrial and commercial development within the region;
3) The effect that the recent "annexation legislation package" (House Bills 599, 602 and 603) will have upon the three jurisdictions;
4) The relative tax burdens of the City and the adjacent counties;
5) The cost of regional services and facilities that are provided by the City;
6) Potential procedures for the counties to participate in the cost of regional services and facilities.

Marsh, 223 Va. at ___, 288 S.E.2d at 418.

14. *Marsh*, 223 Va. at ___, 288 S.E.2d at 418.

15. The trial court's order provided that the City Council must: 1) "state and record in open meeting" the subjects to be discussed in executive session, and the statutory exemptions relied upon; 2) "record in open meeting an affirmative vote by members to go into executive session"; and 3) limit discussion during executive session to those topics disclosed in the first step. *Marsh*, 223 Va. at ___, 288 S.E.2d at 419.

16. The trial court decreed that " 'legal matters' include[d] only those legal matters as to which the public disclosure of facts or opinions would likely damage the City's interests and as to which confidentiality is reasonably essential to protect those interests." *Marsh*, 223 Va. at ___, 288 S.E.2d at 418-19.

Act in 1976. Specifically, the policy statement contained in section 2.1-340.1 of the Act was added,[17] the exemption for "legal matters" contained in section 2.1-344(a)(6) was expanded to cover "actual or potential litigation,"[18] and provisions for civil penalties for "willful and knowing" violations of the Act were added by section 2.1-346.1.[19] The court also noted that although every state has a statute with a purpose similar to that of the Virginia Act,[20] "[t]he Act differs from all others in certain respects, so

17. 1976 Va. Acts ch. 467.

18. *Id.*

19. *Id.*

20. Every state and the District of Columbia now have some type of "open meeting" or "freedom of information" statute: ALA. CRIM. CODE § 13A-14-2 (1978); ALASKA STAT. §§ 44.62.310, .312 (1980); ARIZ. REV. STAT. ANN. §§ 38-431. to -431.09 (Supp. 1982); ARK. STAT. ANN. §§ 12-2801 to -2807 (Repl. Vol. 1979 & Cum. Supp. 1981); CAL. GOV'T CODE §§ 11120-11131 (West 1980 & Cum. Supp. 1982); *Id.* §§ 54950-54961 (West 1966 & Cum. Supp. 1982); COLO. REV. STAT. §§ 24-6-101 to -402 (1974 & Cum. Supp. 1981); CONN. GEN. STAT. ANN. §§ 1-18a to -21k (West 1969 & Cum. Supp. 1982); DEL. CODE ANN. tit. 29, §§ 10001-10005 (Repl. Vol. 1979); *Id.* § 10112 (Cum. Supp. 1980); D.C. CODE ANN. § 1-1504 (1981) (open meetings); *Id.* §§ 1-1521 to -1529 (1981 & Supp. 1982) (freedom of information); FLA. STAT. ANN. § 286.011 (West 1975 & Cum. Supp. 1982); GA. CODE ANN. §§ 50-14-1 to -4 (Cum. Supp. 1982) (renumbered and re-enacted in 1981); HAWAII REV. STAT. §§ 92-1 to -13, -41, -71 (Repl. Vol. 1976); IDAHO CODE §§ 67-2340 to -2347 (1980); ILL. ANN. STAT. ch. 102, §§ 41-46 (Smith-Hurd Cum. Supp. 1982-83); IND. CODE ANN. §§ 5-14-1-1 to -6 (Burns 1974); *Id.* § 5-14-1.5-1 to -7 and 5-14-2-1 to -8 (Burns Supp. 1982); IOWA CODE ANN. §§ 28A.1-.9 (West 1978 & Cum. Supp. 1982-83); KAN. STAT. ANN. §§ 75-4317 to -4320 (1977 & Cum. Supp. 1981); KY. REV. STAT. ANN. §§ 61.805-.850 (Baldwin 1969) (open meetings); *Id.* §§ 61.870-.884 (open records); LA. REV. STAT. ANN. §§ 42:4.1-:12 (West Cum. Supp. 1982); ME. REV. STAT. ANN. tit. 1, §§ 401-410 (1979 & Cum. Supp. 1981-82); MD. ANN. CODE art. 23A, § 8, art. 25, § 5 (Repl. Vol. 1981); *Id.* art. 41, § 14 (Repl. Vol. 1978); MASS. ANN. LAWS ch. 39, §§ 23A, B (Michael Law. Co-op 1973 & Cum. Supp. 1982); MICH. COMP. LAWS ANN. §§ 15.261-.275 (1981 & Cum. Supp. 1982-83); MINN. STAT. ANN. § 471.705 (West 1977 & Cum. Supp. 1982); MISS. CODE ANN. §§ 25-41-1 to -17 (Cum. Supp. 1981); MO. ANN. STAT. §§ 610.010-.030 (Vernon 1979); MONT. CODE ANN. §§ 2-3-101 TO -114 (1981) (notice); *Id.* §§ 2-3-201 to -221 (1981) (open meetings); NEB. REV. STAT. §§ 84-1408 to -1414 (Reissue Vol. 1981); NEV. REV. STAT. §§ 241.010-.040 (1979); N.H. REV. STAT. ANN. §§ 91-A:1-:8 (Repl. Vol. 1977 & Cum. Supp. 1981); N.J. STAT. ANN. §§ 10:4-6 to -21 (West 1976 & Cum. Supp. 1982-83); N.M. STAT. ANN. §§ 10-15-1 to -4 (Repl. Pamp. 1980 & Cum. Supp. 1982); N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Cum. Supp. 1981-82); N.C. GEN. STAT. §§ 143-318.9-.18 (Cum. Supp. 1981); N.D. CENT. CODE §§ 44-04-18 to -21 (Repl. Vol. 1978 & Supp. 1981); OHIO REV. CODE ANN. § 121.22 (Baldwin 1982); OKLA. STAT. ANN. tit. 25, §§ 301-314 (West Cum. Supp. 1981-82); OR. REV. STAT. §§ 192.410-.500 (Repl. Part 1981) (public records); *Id.* §§ 192.610 to .695 (public meetings); PA. STAT. ANN. tit. 65, §§ 251-269 (Purdon 1959 & Cum. Supp. 1982-83); R.I. GEN. LAWS §§ 42-46-1 to -10 (1977 & Cum. Supp. 1981); S.C. CODE ANN. §§ 30-4-10 to -110 (Law. Co-op Cum. Supp. 1981); S.D. CODIFIED LAWS ANN. §§ 1-25-1 to -4 (1980); TENN. CODE ANN. §§ 8-44-101 to -107 (Repl. Vol. 1980 & Cum. Supp. 1982); TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Cum. Supp. 1982) (open meetings); *Id.* art. 6252-17A (public records); UTAH CODE ANN. §§ 52-4-1 to -9 (REPL. VOL. 1981); VT. STAT. ANN. tit. 1, §§ 311-314 (Cum. Supp. 1982) (open meetings); *Id.* tit. 1 §§ 315-320 (public records); VA. CODE ANN. §§ 2.1-340 to -346.1 (Repl. Vol. 1979 & Cum. Supp. 1982); WASH. REV. CODE ANN. §§ 42.30.010 to .920 (1972 & Cum. Supp. 1982); W. VA. CODE §§ 6-9A-1 to -7 (Repl. Vol. 1979 & Cum. Supp. 1982); WIS. STAT. ANN. §§ 19.81-.98 (West Cum. Supp. 1981-82); WYO. STAT. ANN. §§ 9-11-101 to -107 (Republished Ed. 1977 & Cum. Supp. 1982).

that cases from other states construing their statutes are not helpful to us in our analysis."[21]

The court reversed the trial court's finding on the first issue, and held that the Vice Mayor's motion to go into executive session satisfied the requirements of the Act.[22] The court agreed with the Council members that a closure motion which tracks the language of the statute, refers to a specific exemption of the Act by section, paragraph, and subparagraph, and quotes the language of that exemption is sufficient to satisfy the requirements of the Act, provided that the motion also identifies the agenda item to which the specific exemption applies.[23]

Compliance with these procedural requirements for the closure motion apparently eliminates the necessity for any type of substantive disclosure of the topic to be discussed in executive session, for the court went on to state that public bodies are entitled to make the initial determination that an executive session is necessary. The court noted that the "liberal construction/narrow exemption" requirement of section 2.1-340.1

> does not preclude a commonsense application of the Act. A governing body is entitled to make the initial determination that an executive or closed meeting is necessary under a specified exemption to consider a subject on the agenda. The decision whether to convene in executive session must be made by members of the responsible entity who often possess information as to the subject matter that is not necessarily possessed by others. It is neither necessary nor in the public interest to require as a prerequisite to closing a meeting pursuant to § 2.1-344(a)(6) that the governing body disclose in detail the legal matters or the legal issues to be discussed. To do so would tend to defeat the very confidentiality that the exemption safeguards.[24]

The court resolved the second issue by affirming the trial court's finding that the Council had discussed matters beyond the scope of the statutory exemption for "legal matters." The court noted that "[t]he need to keep secret the City's position . . . was minimal, if not nonexistent,"[25] because the representatives of all parties to any potential litigation were present at the executive session. Therefore, the topics discussed were not "sensitive information for litigation purposes"[26] and were not within the scope of the statutory exemption. The court also found that the "potential litigation" asserted by the Council was too speculative to be exempt under a "narrow construction" of the Act, as there was merely "a threat

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21. *Marsh*, 223 Va. at ___, 288 S.E.2d at 420.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at ___, 228 S.E.2d at 421.
26. *Id.*

to litigate unless potential adversaries were willing to negotiate."[27] The court, however, did not rule on the appropriateness of the trial court's rather restrictive definition of "legal matters." Rather, it found the definition to be ancillary to the trial court's order granting injunctive relief, and the definition thus fell with the injunction itself.[28]

Finally, the court considered the propriety of awarding injunctive relief for the Council's violation of the Act. The court noted that a 1976 amendment to the Act[29] had reversed the presumption that "a public official will obey the law" which had controlled the court's 1976 decision in *WTAR Radio-TV v. Virginia Beach*.[30] Nevertheless, the court held that the trial court had abused its discretion in granting an injunction against future violations of the Act. Although it recognized that the 1976 amendment permits a court to award injunctive relief based on a single violation of the Act,[31] the court held that the amendment merely "permits a trial court to infer from a single violation that future violations will follow."[32] Because injunctive relief is "extraordinary," the court stressed that the granting of such relief is "still predicated on the probability that future violations will occur."[33] The trial court had not inferred a probability of future violations of the Act, therefore, the granting of injunctive relief was inappropriate.

B. *Nageotte v. Board of Supervisors of King George County*

Nageotte primarily involved a series of meetings held by the entire Board of Supervisors of King George County in 1978 and 1979. At each of the meetings the Board retired into executive session on the motion of one of its members, either "to receive advice of legal counsel" or to discuss "personnel matters."[34] Also at issue were two gatherings of less than

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27. *Id.*

28. *Id.* at ___, 228 S.E.2d at 422.

29. 1976 Va. Acts ch. 709 (codified at VA. CODE ANN. § 2.1-346 (Repl. Vol. 1979)).

30. 216 Va. 892, 223 S.E.2d 895 (1976). *WTAR* involved an alleged violation of the Act by the City Council of Virginia Beach in closing a council meeting to the public in 1974. The issue before the Virginia Supreme Court was the propriety of the trial court's refusal to grant an injunction against possible future violations of the Act. The supreme court held that good cause for the granting of the injunction had not been shown and affirmed the trial court's refusal to grant injunctive relief. The basis for the court's holding was that the petition for injunctive relief "contained no allegations from which a future violation of the Act could be apprehended with reasonable probability." *Marsh*, 223 Va. at ___, 288 S.E.2d at 421-22.

31. The 1976 amendment to the Act provides in pertinent part: "A single instance of denial of such rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. . . ." 1976 Va. Acts ch. 709 (codified at VA. CODE ANN. § 2.1-346 (Repl. Vol. 1979)).

32. *Marsh*, 223 Va. at ___, 288 S.E.2d at 422.

33. *Id.*

34. *Nageotte*, 223 Va. at ___, 288 S.E.2d at 424-25.

the full Board with the county administrator and the Attorney General, respectively.[35] Nageotte and others brought suit against the Board on grounds that its members had: 1) conducted meetings without proper public notice; 2) failed to maintain records of these meetings and make such records available for inspection; and 3) held executive or closed meetings in violation of section 2.1-344 of the Act.[36] In addition to the relief specifically authorized under the Act,[37] Nageotte sought to have the actions of the Board taken pursuant to these meetings invalidated.

The trial court found that the Board had not violated the Act and dismissed with prejudice Nageotte's motion to reconsider its judgment. On appeal, the supreme court limited its review to whether the trial court erred in finding no violation of the Act in the Board's failure to state the specific purpose for going into executive session and its failure to give public notice and record minutes of gatherings of less than the full Board.

The court held that the trial court had erred in finding no violation of the Act in the Board's failure to specify the purpose for going into executive session in its closure motion. Referring to *Marsh,* the court held that merely stating that an executive session would be held for "legal advice" was insufficient to invoke the Act's exemption for "legal matters."[38] It emphasized that the Act required the closure motion both to follow the language of the statutory exemption and to identify the agenda item to be

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35. The Act expressly provides for "unofficial" gatherings of less than a full public body under certain circumstances.

> Nothing in this chapter shall be construed to make unlawful the gathering or attendance of two or more members of a body or entity at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the body or entity.

VA. CODE ANN. § 2.1-341(a) (Cum. Supp. 1982).

The two gatherings at issue in *Nageotte* were, first, a meeting between two members of the Board of Supervisors and the County Administrator on November 12, 1979. This meeting was held to discuss the administrator's inability to attend a Virginia Association of Counties conference that day and the topics he wished to have considered at the conference. *Nageotte,* 223 Va. at ___, 288 S.E.2d at 427. The second meeting, attended by all three members of the Board and the Attorney General of Virginia on November 20, 1979, was held to discuss the respective duties of the state and the county in issuing permits for the project which previously had been considered in executive session. *Id.* at ___, 288 S.E.2d at 427-28. The supreme court upheld the trial court's "implicit" finding that these gatherings were not "meetings" within the meaning of section 2.1-341 of the Act. *Id.* at ___, 288 S.E.2d at 428.

36. *Nageotte,* 223 Va. at ___, 288 S.E.2d at 424.

37. The Act provides for a writ of mandamus or injunctive relief, as well as the awarding of costs and reasonable attorney's fees. VA. CODE ANN. § 2.1-346 (Repl. Vol. 1979). It also provides for the imposition of a civil penalty, from twenty-five to five hundred dollars, upon any member of a public body found to have committed a "willful and knowing" violation of the Act. *Id.* § 2.1-346.1.

38. *Nageotte,* 223 Va. at ___, 288 S.E.2d at 426.

discussed.[39] With respect to the Board's executive sessions held for the purpose of discussing "personnel matters," however, the court held that "it is not necessary to identify the personnel" involved in the motion to close the meeting. The court stated that such a requirement would be "unnecessary and disruptive."[40]

Despite the defects in the Board's motions to close its meetings, the court refused Nageotte's request to invalidate the actions taken by the Board, because "the Board [had] voted in open meeting on all matters relating to [the subject of their meetings] in compliance with § 2.1-344(c)."[41] Citing a series of decisions on this point from other jurisdictions, the court stated in a footnote that "[u]nless there is a specific statutory provision for invalidation, courts are 'generally wary' of imposing 'such penalty for violation of "open meeting" or "right to know" statutes.' "[42] The court then declared that "[u]nder § 2.1-344(c) the validity of actions taken by the Board in open meetings is not affected by violations of the Act, regardless of what was done or said in executive sessions."[43]

The court affirmed the trial court's finding that the "informal" gatherings of less than the full Board were not "meetings" within the meaning of the Act. Although informal gatherings may constitute "meetings" for purposes of the Act,[44] the trial court had determined that the gathering of two Board members with the county administrator was not a "meeting" because the matters discussed were unrelated to the topics for which the executive sessions had been called. The trial court also had found that the gathering of three Board members with the Attorney General was not a "meeting" because it had not been arranged to conduct any public business, but merely to seek information regarding the Board's legal responsibilities concerning the state. Because these gatherings were not "meetings" under the Act, they were not subject to the requirements of notice

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39. *Id.*

40. *Id.*

41. *Id.* at ___, 288 S.E.2d at 427.

42. *Id.* at ___ n.2, 288 S.E.2d at 427 n.2. The cases relied upon by the court include: Wilmington Federation of Teachers v. Howell, 374 A.2d 832, 835 (Del. 1977) (court refused to invalidate action taken pursuant to illegally closed school board meeting) (citing Sullivan v. Credit River Township, 299 Minn. 170, 217 N.W.2d 502 (1974) (court refused to issue mandamus ordering town to rescind actions taken in improperly closed meeting)); Carter v. City of Nashua, 113 N.H. 407, 408, 308 A.2d 847 (1973) (failure to comply with ordinance requiring notice of meeting did not invalidate actions taken at meeting); *See also* Comment, *Open Meeting Statutes: The Press Fights for the Right to Know,* 75 HARV. L. REV. 1199, 1213-14 (1962); *See generally* Annot., 38 A.L.R. 3d 1070 (1971).

43. *Nageotte,* 223 Va. at ___, 288 S.E.2d at 428.

44. VA. CODE ANN. § 2.1-341(a) (Cum. Supp. 1982) defines "meeting" to include "an informal assemblage of (i) as many as three members, or (ii) a quorum, if less than three, of the constituent membership" for purposes of the Act, whether or not minutes are taken or votes are cast.

and recordation of minutes.[45]

The court also affirmed the trial court's denial of injunctive relief for the full Board's violations of the Act. The court reiterated its holding in *Marsh,* that although "a single violation of the Act is sufficient to permit the granting of relief based on the inference that future violations will occur," such relief is "extraordinary and drastic [and] is not to be casually or perfunctorily ordered. . . ."[46] The court seemed to place great emphasis on the fact that the Board's violations of the Act had been committed "in good faith with the advice of counsel. . . ."[47] Indeed, the court termed the violations "insubstantial" and held that the trial court's failure to find a violation of the Act in the Board's actions was harmless error.[48]

C. *City of Danville v. Laird*

City of Danville involved a "special meeting" convened by the Danville City Council in 1979. An agenda published for the meeting contained only two items of business: 1) "[c]onsideration of the appeal" of certain zoning action taken by the city which had been invalidated by a trial court; and 2) discussion of a "[r]esolution authorizing and approving" a proposed decree in other, unrelated litigation pending in federal court.[49] A motion to convene in executive session was offered by a member of the Council,[50] based on the "legal matters" exemption of section 2.1-344(a)(6) of the Act, and was adopted. The motion, however, failed to state whether both of the agenda items would be discussed. Following the executive session, the Council reconvened in public session, discussed the zoning issue, and adopted a new zoning ordinance.

Laird and others filed suit seeking primarily to have the Council's actions declared invalid, to permanently enjoin the Council from violating the Act, and to prohibit the rezoning of certain property. Based on its finding that the Council had violated the Act in failing to designate the agenda item to be discussed in executive session, the trial court issued a writ of mandamus requiring the disclosure of actions taken during the

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45. *Nageotte,* 223 Va. at ___, 288 S.E.2d at 428.
46. *Id.*
47. *Id.*
48. *Id.*
49. *City of Danville,* 223 Va. at ___, 288 S.E.2d at 430.
50. The closure motion stated:

> Mr. President, I move that this meeting be recessed and that the Council immediately reconvene in Executive Closed Meeting for the purpose of consultation with legal counsel and briefings by staff members and attorneys pertaining to actual and potential litigation and other legal matters within the jurisdiction of the Council as permitted by Subsection (a), Paragraph (6) of Section 2.1-344 of the Code of Virginia (1950), as amended.

Id.

executive session.[51] The supreme court reversed, holding that there was no violation of the Act. The court stated that it was "apparent" that only legal matters would be discussed, because "[b]oth items on the agenda related to actual pending litigation."[52] The court took note of the "liberal construction/narrow exemption" language of section 2.1-340.1 of the Act, but found that the Council had not been trying to "hide anything," and that its motion to close the meeting satisfied the requirements of the Act.[53]

III. The Potential Impact of the Marsh Trilogy

Although the Virginia Act specifically mandates "openness" in government,[54] commentators have recognized a variety of areas in which some secrecy is beneficial, even vital, to the protection of such legitimate public interests as attracting competent state employees and obtaining real property at reasonable prices.[55] In recognition of these interests, the Act itself provides for the closing of meetings in order to discuss the various topics set out in section 2.1-344(a). The exempted topics contained in this section may be grouped into three broad categories: 1) private personnel matters;[56] 2) business matters relating to the acquisition or use of real property, the prospective placement of business or industry, and the acquisition, investing, or use of public money;[57] and 3) actual or potential legal matters.[58] In these areas, there has been a legislative determination that the public's "right to know" is outweighed by individual privacy rights, the danger of premature or incorrect disclosure of information, or the need to protect the legitimate interests of public bodies involved in litigation, respectively.

Permitting such matters to be discussed in private reflects a sound public policy decision. Circumstances under which the public interest would not be served by complete exposure are readily apparent. Publicity in personnel matters, such as the decision to hire, promote, or dismiss an employee, could involve a substantial invasion of individual privacy with little counter-balancing benefit to the public. The morale of public employees as well as the state's ability to attract and retain highly qualified

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51. The order of the trial court declared the executive session "void and illegal," required disclosure of the "activities, consideration, and discussion" conducted by the City Council during the executive session, and awarded court costs and attorney's fees. *Id.*

52. *Id.* at ___, 288 S.E.2d at 431.

53. *Id.*

54. *See supra* notes 1-2.

55. For a discussion of these and other areas where secrecy may be beneficial to the operation of government, see Comment, *Open Meeting Statutes: The Press Fights for the Right to Know*, 75 Harv. L. Rev. 1199, 1208-09 (1962).

56. Va. Code Ann. §§ 2.1-344(a)(1), (1a), (3), (8), (10) (Cum. Supp. 1982).

57. Va. Code Ann. §§ 2.1-344(a)(2), (4), (5), (7), (7a) (Cum. Supp. 1982).

58. Va. Code Ann. § 2.1-344(a)(6) (Cum. Supp. 1982).

individuals would be impaired.[59] Publicity of pending business decisions could have a direct and dramatic effect on the value of property. Where a public body is about to buy or sell real estate, premature disclosure of the body's decision could work directly against the public interest to the benefit of private interests. Similarly, publicity concerning pending or potential legal matters could put public bodies at a distinct disadvantage both in terms of litigation strategy and settlement attempts. Proper preparation of trial or negotiation strategy requires a frank and open appraisal of possible liabilities and benefits, the consideration of alternatives, and the estimation of chances of success. This type of discussion is unlikely to occur where all meetings must be held in public.

To require a public body to disclose the details of matters which have been specifically exempted from such disclosure by the legislature would defeat the purpose of the exemptions and would impair the legitimate public interests served by the exemptions. The court's approach recognizes the need to balance the competing interests involved in the decision to close a meeting, as well as the need of public bodies to have the ability to discuss certain topics in executive session without disclosing the details prior to closing the meeting. The *Marsh* trilogy appears to broaden the power of public bodies to convene in executive session, by allowing them to make the initial determination to close a meeting independent of any check save that of court review after the fact.

A. *The Power of "Initial Determination" and Safeguards Against its Abuse*

In *Marsh*, the court implicitly recognized the inconsistency of providing an exemption from the general "open meeting" requirement only to require the full disclosure of the details of topics to be discussed in executive session. Because the members of a public body often possess information "not necessarily possessed" by members of the general public,[60] they are often the only ones in a position to assess the need for an executive session. Requiring disclosure of details of the topics to be discussed in executive session would invite criticism and litigation concerning the decision to close a meeting by persons without access to all the relevant information, while impairing the legitimate public interests served by discussing certain topics in private. Stating that the statutory requirement of narrowly drawn exceptions did not preclude "a commonsense application of the Act,"[61] the court held that public bodies must have the power to make the "initial determination" that an executive session should be held.[62] Read in light of the policy statement of the Act, which mandates

59. *See* Comment, *supra* note 55, at 1208.
60. *Marsh*, 223 Va. at ___, 288 S.E.2d at 420.
61. *Id.*
62. *Id.*

that exceptions to the Act be narrowly construed,[63] this power of "initial determination" appears to expand significantly the ability of public bodies to meet in executive session.

However, there are dangers that this power might be abused. It is possible that nonexempt topics could be discussed and decisions made in private under the guise of a proper purpose stated in the motion to close a meeting. To prevent such abuses, the court delineated in the *Marsh* trilogy four safeguards which serve to insure that the power of "initial determination" will not be used to defeat the public interest in open meetings except where necessary to serve a stronger interest in secrecy, such as those discussed above. Together, the four safeguards serve to emphasize the duty to provide free access to meetings of public bodies whenever possible. They insure statutory compliance by requiring the demonstration of both a proper purpose and the proper procedure for closing a meeting. They also insure that a permanent public record is kept of the actions of public bodies, and they provide notice to the public of all topics considered in executive session.

1. The Closure Motion

The first of these four safeguards is the statutory requirement recognized by the court in *Marsh* that the closure motion track the language of the statute, refer to a specific statutory exemption, and quote the language of the exemption.[64] These requirements insure at least minimal compliance with the Act by requiring that before a meeting is closed, the public body consciously identify a statutorily recognized purpose for doing so, and that it comply with the procedural requirements for the closure motion. The requirements also serve to emphasize the duty of public bodies to allow open access to meetings, subject only to specific and narrowly drawn exceptions for certain topics which must be identified in public in order to justify the closing of a meeting. Finally, the requirements insure that a public record is preserved in case of a later court challenge of the decision to convene in executive session or of the scope of the topics discussed therein. The availability of the option of a court challenge by an aggrieved citizen is an important safeguard against abuse in itself. The requirement that the closure motion identify a specific purpose for closing a meeting makes this remedy more meaningful by insuring a public record on which to base a challenge.

2. Identification of Agenda Items

The second safeguard is the requirement recognized in *Marsh* that the closure motion refer specifically to the agenda item to which the statutory

63. VA. CODE ANN. § 2.1-340.1 (Repl. Vol. 1979).
64. *Marsh*, 223 Va. at ___, 288 S.E.2d at 420.

exemption applies.[65] This requirement insures a complete public record as well as notice to interested citizens of the topic or topics which are to be discussed in executive session. Although the details of the topics to be considered need not be disclosed,[66] disclosure of the general topic of consideration serves to insure that the discussions in executive sessions will bear a relationship to the statutory ground of exemption claimed in the closure motion. In *City of Danville,* however, the court appeared to deemphasize this requirement. Where the only two items on the Council's agenda related to pending litigation,[67] the court found that the Council's failure to identify specifically the agenda item or items which were to be discussed was not a violation of the Act, because it was "apparent" that only legal matters would be discussed.[68]

Although the court in *Nageotte* expressly declined to decide whether more than one exempt topic could be discussed in a single executive session,[69] it left open the possibility that a single closure motion could encompass the discussion of several exempt topics. Although it is not clear how far this possibility might be carried, the court's emphasis on a "commonsense application of the Act"[70] indicates that a public body might not have to reconvene in public in order to vote to consider in executive session an exempt topic closely related to the agenda item identified in the original closure motion. The danger in this interpretation is that as the topic being discussed becomes less related to the agenda item identified in the original closure motion, its connection with the claimed statutory exemption becomes less "apparent," and citizens are increasingly unaware of the actions taken during the executive session.

By leaving open the possibility that more than one exempt topic could be discussed in a single executive session, the court recognized the need for some flexibility in the format of executive sessions without requiring unduly broad disclosure of the details of topics to be discussed. However, requiring that all topics which will be discussed be both listed on the agenda and specifically referred to in the closure motion provides a more certain protection against the abuse of the power to meet in executive session. Under this more strict construction, discussion in executive session going beyond the listed agenda items would violate the Act, even though the additional topics discussed were in fact statutorily exempt.

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65. *Id.*

66. *Id.*

67. *City of Danville,* 223 Va. at ___, 288 S.E.2d at 430.

68. The court stated that "[b]oth items on the agenda related to actual pending litigation. It is apparent that Council desired to confer with its attorney in closed session about both items." *Id.* at ___, 288 S.E.2d at 431.

69. The court "[a]ssum[ed], without deciding, that two exempt topics could be discussed in the same [executive] session. . . ." *Nageotte,* 223 Va. at ___, 288 S.E.2d at 426. *See also Marsh,* 223 Va. at ___, 288 S.E.2d at 421.

70. *Marsh,* 223 Va. at ___, 288 S.E.2d at 420.

The drawback to this interpretation is that it could unduly limit the power of public bodies to discuss effectively certain matters in private, and thus impair the public interest served by the exemptions to the Act. Such a strict requirement could also unduly disrupt meetings of public bodies by requiring that they reconvene in public each time the discussion moves to a closely related but unlisted topic. For example, where two exempt topics are so closely related that they cannot be separately identified without substantially disclosing the details of one or both, it would make little sense to require each topic to be listed separately, or to require the public body to reconvene in public to vote to consider a second, inseparably related topic. The public interest as well as the spirit of the Act would be served as well by the initial single disclosure in many instances.

3. The Good Faith Requirement

A requirement that public bodies make the decision to convene in executive session in good faith is implicit in the *Marsh* and *Nageotte* decisions. For this reason, a decision to convene in executive session which is not made in good faith and which results in the consideration of nonexempt topics will constitute a "willful and knowing" violation of the Act, subjecting the participating members of the public body to the risk of civil penalties.[71] In *Nageotte,* however, no civil penalties were imposed on the Board members for their violations of the Act, because the violations were committed "in good faith with the advice of counsel."[72] Similarly, the court refused to grant injunctive relief, emphasizing the Board's good faith in its finding that future violations of the Act were unlikely.[73]

4. The "No Final Action" Requirement

A fourth safeguard is the Act's mandate that no action taken in executive session is effective unless it is passed during an open meeting.[74] In *Nageotte,* compliance with this mandate was one basis for the court's refusal to invalidate the actions of the Board. Although this requirement would seem to prohibit a public body from taking any final action during a closed meeting, there is a danger that without additional protections, open meetings could degenerate into sessions of pro forma ratification of actions taken during executive sessions. However, the Act further re-

71. VA. CODE ANN. § 2.1-346.1 (Repl. Vol. 1979).

72. *Nageotte,* 223 Va. at ___, 288 S.E.2d at 428.

73. *Id.*

74. VA. CODE ANN. § 2.1-344(c) (Cum. Supp. 1982) provides in pertinent part:

> No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in an executive or closed meeting shall become effective unless such public body, following such meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation or motion which shall have its substance reasonably identified in the open meeting.

quires that the substance of the action taken in executive session be "reasonably identified in the open meeting."[75] This requirement, added in 1980, insures both a public record and topical notice of all actions taken in executive session. If interpreted consistently with the court's reading of the "identification of agenda items" requirement, the substance of actions taken in executive session need not be revealed more extensively than a public vote on the final action would require. However, even a "reasonable identification" of the subject matter serves the purpose of minimizing the danger that a public body will abuse its discretion by conducting the bulk of its business behind closed doors.

B. *Appropriate Remedies for Violations of the Act*

1. The Validity of Actions Taken in Violation of the Act

In *Nageotte,* the court made it clear that invalidation of actions voted on in open meetings is not a proper remedy for violations of the Act committed in executive session.[76] However, the court left open the possibility that actions taken in executive session and not ratified in an open meeting could be invalidated.[77] The potential danger of routine ratification of actions taken in executive session was not addressed by the court. As discussed above, this danger is minimized by the "reasonable identification" requirement which insures that the substance of actions taken in executive session and ratified in an open meeting is disclosed in public. It is not clear from the court's discussion whether the discussion of exempt and nonexempt topics in executive session would be treated differently for purposes of determining the validity of actions later voted on in public.

The cases cited in *Nageotte* in the court's refusal to invalidate the Board's actions reflect a strong tendency to permit public ratification to validate otherwise invalid actions taken in private, unless there is specific statutory authorization permitting the actions to be invalidated.[78] In particular, the court's statement that "the validity of actions taken . . . in open meetings is not affected by violations of the Act, regardless of what was done or said in executive sessions"[79] indicates a willingness to allow rather extensive private discussions, and a reluctance to permit the invalidation of actions without specific statutory authorization.

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75. *Id.*

76. *See supra* note 42. *See also* Cooper v. Arizona Western College, 125 Ariz. 463, 610 P.2d 465 (Ariz. App. 1980) (a public body may ratify in open session an illegal act taken during a closed session, notwithstanding an express statutory provision voiding closed-session decisions); Hawkins v. City of Fayette, 604 S.W.2d 716, 723-25 (Mo. App. 1980) (discussion of cases representing split of authority regarding validity of actions taken in violation of open meeting act).

77. *Nageotte,* 223 Va. at ___, 288 S.E.2d at 427.

78. *Id.*

79. *Id.* at ___, 288 S.E.2d at 428.

One of the strongest reasons supporting the continued validity of actions taken in closed meetings is that since "[b]oth citizens and officials rely on governmental decisions in planning their everyday affairs, . . . to allow the subsequent invalidation of such decisions simply because they were made in violation of ambiguously drawn open meeting laws would create a substantial amount of undesirable uncertainty."[80] This uncertainty could be highly disruptive of the conduct of ordinary business and governmental affairs, by encouraging procedural attacks on the decisions of public bodies which were adverse to the interests of the attacker. For example, a decision to purchase property for public use could be attacked by any citizen, whether his interests were affected or not, simply because some discussion of the topic had taken place in executive session.

2. The Propriety of Injunctive Relief

In *Marsh,* the court effectively revitalized its 1976 decision in *WTAR Radio-TV v. Virginia Beach.*[81] Although the *WTAR* case was effectively superseded by a 1976 amendment to the Act, the court revived the reasoning of *WTAR* by holding in *Marsh* that the grant of injunctive relief is "still predicated on the probability" of future violations of the Act.[82] The 1976 amendment expressly provides that the award of remedies granted by the Act may be predicated on a single violation of the Act.[83] However, in *Marsh,* the court restricted the availability of the remedy of permanent injunctions by restricting the discretion of trial courts to grant it. Because injunctive relief places the enjoined party under the continuing supervision of the trial court which makes the award, the supreme court's limitation on the discretion of trial courts to grant this remedy is consistent with its attempt to safeguard the confidentiality of legitimate discussions of exempt topics in executive session.

The requirement that the award of injunctive relief be based on the *probability* of future violations of the Act could be construed to require a demonstration of bad faith in order to justify the exercise of the trial court's discretion in granting an injunction based on a single violation of the Act. As noted above, the Board of Supervisors' lack of bad faith was a basis for the court's refusal to impose civil penalties or injunctive relief in *Nageotte.* It is possible that only repeated violations of the Act might evidence the requisite bad faith in certain cases. Thus, the effect of the 1976 amendment may have been restricted to situations where there have been more than one violation of the Act by a single public body, or where there has been a single violation so egregious as to evidence bad faith in itself. In these situations, a trial court might find that another violation of

80. Comment, *supra* note 55 at 1214.
81. 216 Va. 892, 223 S.E.2d 895 (1976).
82. *Marsh,* 223 Va. at ___, 288 S.E.2d at 422.
83. VA. CODE ANN. § 2.1-346 (Repl. Vol. 1979).

the Act was "reasonably probable," and the granting of injunctive relief would be within the court's discretion.

IV. Conclusion

In *Marsh* and its companion cases, the Virginia Supreme Court redefined and expanded the power of public bodies to meet in private. In an effort to balance the benefits of allowing closed meetings against the inherent dangers of abuse, the court mandated specific procedures for closing meetings to the public. By requiring that discussion topics be both listed on the agenda and referred to in the closure motion, the court may have restricted the possible breadth of discussion to the topics listed and those integrally related to the listed topics. However, whether discussion in the closed meeting must be strictly limited to the listed agenda items appears to remain an open question. The court endeavored to minimize possible disruption of the functioning of government and of business by holding that the validity of actions taken in public is not affected by actions taken in executive session, and by restricting the discretion of trial courts to grant injunctions as a remedy for violations of the Act.

Although the *Marsh* trilogy reflects a rather expansive reading of the power of public bodies to close meetings, the safeguards delineated by the court against the abuse of this power serve to insure that the purposes of the Act are not defeated. These safeguards insure that there is minimal compliance with the statutory requirements and that interested citizens are given some notice as to the reason for closing a meeting. The safeguards recognized in these cases appear to strike an appropriate balance between the public's "right to know" and the public interest in the effective and efficient administration of public business which is served by permitting the private consideration of certain matters.

Steven L. Higgs