

11-1-2008

Administrative Law

John Paul Jones

University of Richmond School of Law

Molly T. Geissenhainer

University of Richmond School of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

 Part of the [Administrative Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

John P. Jones & Molly T. Geissenhainer, *Administrative Law*, 43 U. Rich. L. Rev. 73 (2008).

Available at: <https://scholarship.richmond.edu/lawreview/vol43/iss1/7>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

ARTICLES

ADMINISTRATIVE LAW

John Paul Jones *

Molly T. Geissenhainer **

I. INTRODUCTION

This article selects from developments since May of 2007 in the law of Virginia pertaining to the work of administrative agencies state and local, as well as access to their meetings and information in their custody. Elsewhere in this issue of the *Annual Survey* can be found reports of developments in the laws these agencies are bound to carry out.

II. AMENDMENTS TO THE ADMINISTRATIVE PROCESS ACT

In 1984, the Virginia General Assembly was persuaded to establish a government gazette, the Virginia Register of Regulations (the “Register”), and to oblige state agencies to publish therein notices of public meetings, announcements that a new regulation was in the works, its initial and final drafts, and rationales both for taking up such a project and for the final version in which it would be promulgated.¹ The Register was supposed to

* Professor of Law, University of Richmond. LL.M., 1982, Yale University; J.D., 1980, University of San Diego; B.A., 1969, Marquette University. The authors wish to thank Gail Zwirner and Suzanne Corriell for their generous and expert assistance in the preparation of this article.

** J.D. Candidate, Class of 2009, University of Richmond School of Law.

1. Act of Feb. 29, 1984, ch. 5, 1984 Va. Acts 6 (codified as amended at VA. CODE ANN. § 2.2-4031 (Repl. Vol. 2008)); see John Paul Jones, *Legislative Changes to Virginia Administrative Rulemaking*, 19 U. RICH. L. REV. 107, 109–12 (1984). Eventually, a code of admin-

facilitate public participation in the making of laws and policies by the administrative agencies of the commonwealth. It probably has. It certainly has facilitated the work of paralegals. In 2007, the General Assembly amended the Administrative Process Act (“APA”), obliging agencies to publish what they had previously been printing in the Register on the Internet as well, at the Virginia Regulatory Town Hall.² The intent behind this initiative was to facilitate public participation in governing by agencies, and it probably will, too.

In 2008, the General Assembly returned to the subject of public participation in agency rulemaking. In 1984, the General Assembly had commanded state agencies to develop (and publish in the Register) guidelines for members of the public who might be interested in participating in the discussion leading up to the promulgation of a regulation.³ It was left to the discretion of each agency to decide what those guidelines might be, which meant to many agencies that each was left discretion to decide when and how to plagiarize guidelines published by another agency faster off the mark. A colorful chapter in Virginia’s history of public participation, guidelines promulgation has now been brought to a close in favor of greater efficiency; however, the season for a hundred flowers to bloom has passed.⁴ The Department of Planning and Budget (“DPB”) had until July 1, 2008, to produce “model” guidelines, and agencies have until the end of the year either to promulgate as their guidelines the DPB model or to adapt that model.⁵ An agency must have in place one or the other in order to make or amend a rule after the first of the year.⁶

istrative regulations followed. Act of Mar. 6, 1992, ch. 216, 1992 Va. Acts 278 (codified as amended at VA. CODE ANN. § 2.2-4103 (Repl. Vol. 2008)).

2. Act of Apr. 4, 2007, ch. 873, 2007 Va. Acts 2357 (codified at VA. CODE ANN. §§ 2.2-4007.01 to -.07 (Cum. Supp. 2007)); see Virginia Regulatory Townhall Home Page, <http://www.townhall.state.va.us> (last visited Oct. 16, 2008).

3. Act of Feb. 28, 1985, ch. 67, 1985 Va. Acts 78 (codified as amended at VA. CODE ANN. §§ 2.2-4007.01 to -.3 (Repl. Vol. 2008)); see Jones, *supra* note 1, at 110–12. For an example of these guidelines, see 4 VA. ADMIN. CODE §§ 25-10-10 to -80 (2005).

4. See Mao Tse-tung, Speech at Peking (Feb. 27, 1957), in JOHN BARTLETT, FAMILIAR QUOTATIONS 826 (Emily Morison Beck ed., 15th ed. 1980).

5. See Act of Mar. 4, 2008, ch. 321, 2008 Va. Acts ____.

6. *Id.*

III. ADMINISTRATIVE LAW IN RECENT CASES

A. *Application Version 1.1 and Something in Denmark*

The story behind *Loudoun Hospital Center v. Stroube* began in 2002, when Northern Virginia Community Hospital (“NVCH”), seeking to replace its hospitals in Arlington County and Fairfax County with one new facility, applied for a certificate of public need (“COPN”) to construct the new one but was denied by the Virginia Health Commissioner (the “Commissioner”).⁷ Thereafter, NVCH reapplied, while the Commissioner was considering COPN applications from Loudoun Hospital Center (“LHC”) and Inova Health Care Services (“Inova”).⁸ Eventually, the Commissioner awarded COPNs to NVCH and Inova but refused LHC.⁹

LHC appealed to the circuit court, arguing, among other things, that collateral estoppel barred the Commissioner from considering NVCH’s competing application because the issues it raised were the same as those that had been disposed of by the Commissioner’s decision on NVCH’s earlier application.¹⁰ In the circuit court, Judge Markow disagreed; but, “troubled” by evidence of *ex parte* contacts between the Commissioner and possible interested parties prior to the closing of the agency record, he set aside the Commissioner’s decisions on all three applications and remanded the case to the Commissioner.¹¹

The Commissioner then filed in the record for a new hearing evidence of the prior *ex parte* contacts—an e-mail to the Commissioner, letters from legislators, the description of a lunch between a member of the Governor’s staff and the Commissioner, and an e-mail between the hearing officer and another agency’s director.¹²

After that hearing, the Commissioner affirmed his initial rulings, declaring that he had not been influenced by the *ex parte*

7. *Loudoun Hosp. Ctr. v. Stroube*, 50 Va. App. 478, 487, 650 S.E.2d 879, 884 (Ct. App. 2007). The following account is based on the opinion of the Court of Appeals of Virginia.

8. *Id.*

9. *Id.* at 488, 650 S.E.2d at 884.

10. *See id.*

11. *Id.* at 488–89, 650 S.E.2d at 884–85.

12. *See id.* at 497–503, 650 S.E.2d at 889–92.

contacts.¹³ LHC again appealed to the circuit court, but Judge Markow remained convinced that collateral estoppel did not limit the Commissioner's review of NVCH's second application, and he could not be persuaded that the *ex parte* contacts improperly influenced the Commissioner's decisions.¹⁴

LHC then took its case to the Court of Appeals of Virginia, which affirmed the circuit court's decision.¹⁵ Writing for Judges Frank and Humphreys, Senior Judge Coleman concluded that, when presented with a claim of issue preclusion as applied to an administrative adjudication, a reviewing court could consider *de novo* the question of law, but was generally bound by the agency's findings of fact.¹⁶ In this case, a departmental hearing officer had made a finding of fact that the second application by NVCH differed from the first in several material respects, and the Commissioner had adopted that finding.¹⁷ Supported by substantial evidence, it could not be disregarded, and it drew the court of appeals to conclude that the two applications presented factual issues sufficiently different to foreclose collateral estoppel.¹⁸

This is sound reasoning, generally applicable. But notice that here it is applied to an adjudicative process for screening applications, and consider the broader implications of the contrary position advanced by LHC. If in such situations collateral estoppel operated as LHC had suggested, any applicant for a license would be allowed but one chance at a gold ring; that is, an applicant would be allowed to apply only once.¹⁹ As a result, enterprise would suffocate. The public interest is far better served by the decision here that when an agency screener rejects an application, it can be an invitation to revise and submit version 1.1—or 2.0.²⁰

Antecedent to the question of whether the second application raised issues sufficiently different to rule out collateral estoppel is the question of whether the Commissioner, or for that matter,

13. *Id.* at 489, 650 S.E.2d at 885.

14. *Id.* at 489–90, 650 S.E.2d at 885.

15. *Id.* at 487, 650 S.E.2d at 884.

16. *Id.* at 493, 650 S.E.2d at 887.

17. *Id.* at 494, 650 S.E.2d at 887.

18. *Id.*

19. *Id.* at 494–95, 650 S.E.2d at 887–88.

20. This assumes there is a good reason for the rejection. *Umstatted v. Centex Homes, G.P.*, 274 Va. 541, 650 S.E.2d 527 (2007), invites consideration of the risk of arbitrary rejection by screening authorities. See *infra* Part III.C.1.

any agency subject to the APA, has authority to dispose of a contested issue by resorting to collateral estoppel. How exactly did collateral estoppel become part of the law of the Department of Health? The APA is rather specific about the factual basis for a decision made in circumstances such as these—that is, after an informal hearing—but it says nothing about what law applies.²¹ The basic law, that which establishes the Department of Health and the office of Health Commissioner, both empowers the Board of Health to make regulations and applies the APA to that process.²² Without a properly promulgated regulation adopting collateral estoppel as the law of the Department of Health, how can the Commissioner embrace it? One answer might be that the common law of Virginia includes a common law of administrative procedure.²³ This case could be treated as circumstantial evidence of this fact precisely because the court of appeals proceeded so promptly to the corollary of whether the conditions for collateral estoppel existed.

But a contrary answer can be drawn from the APA's provision for judicial review.²⁴ If a reviewing court cannot find "an error of law as defined in § 2.2-4027," it must dismiss the appeal.²⁵ That seems to make the APA's list of reversible errors of law exclusive rather than representative, and there is no room in that list for erroneous rejection on the grounds of collateral estoppel. That either means the Commissioner could not in the first place rely on collateral estoppel for his rejection of the second petition, or else that the APA forestalls courts from correcting agencies when they misapply that bar in refusing that to which the applicant otherwise may have a right. Imagining what the legislator who passed the APA would have said, the former seems a better choice. A little prophylaxis can go a long way, so agencies with a yen for the utility of collateral estoppel might well consider drafting a notice of intended rulemaking.

How the courts in this case treated the *ex parte* communications is more disturbing, but hard to fault in light of the sorry

21. VA. CODE ANN. § 2.2-4019 (Repl. Vol. 2008).

22. *See id.* §§ 32.1-12, -24 (Repl. Vol. 2004).

23. No such assumption ought to be made about a pocket (post-*Erie*) of federal administrative law. *See* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524–25 (1978).

24. *See* VA. CODE ANN. § 2.2-4027 (Repl. Vol. 2008).

25. *Id.* § 2.2-4029 (Repl. Vol. 2008).

state of Virginia law. Both found that, after remand and the fresh hearing that followed, and in light of the formal denial by the Commissioner, LHC could not sustain its burden of proving by clear evidence that the *ex parte* contacts improperly influenced the decisions.²⁶ The court of appeals was satisfied, as Judge Coleman put it so intellectually, that the contacts did not intrude on “the calculus of consideration” of the decisionmakers.²⁷

It is really no excuse that the contacts came not with rival applicants but state legislators and executive officers;²⁸ the law that restricts construction of health facilities is clear about who plays what role in the process and on the exclusive basis for such decisions.²⁹ In *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, fortified by the clear language of the federal Administrative Procedure Act,³⁰ a three-judge panel assessed and condemned *ex parte* contacts by private and public strangers in a case in which it was to be determined whether the union had lost its exclusive right to represent the controllers by encouraging an unlawful strike.³¹ In this case, when the application is to be assessed with reference to a record, *ex parte* input should be promptly made a part of that record in order that interested parties may comment.³² That happened here, but only after remand.³³ It would not hurt to prohibit *ex parte* input so that outsiders are on notice and so that agency employees have both a duty and an excuse. Of course, convincing lawmakers to impose, by law, restrictions on their power to influence the decisions of the agencies to which they have been assigned is no mean feat.

26. See *Loudoun Hosp. Ctr. v. Stroube*, 50 Va. App. 478, 495–503, 650 S.E.2d 879, 888–92 (Ct. App. 2007).

27. *Id.* at 500, 650 S.E.2d at 890 (quoting *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.2d 163, 170 (D.C. Cir. 1983)).

28. “An administrative adjudication is ‘invalid if based in whole or in part on [legislative] pressures.’” *Id.* (quoting *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d at 1231, 1246 (D.C. Cir. 1971)) (alteration in original).

29. See VA. CODE ANN. § 32.1-102.3 (Cum. Supp. 2008).

30. 5 U.S.C. § 557(d) (2006).

31. 685 F.2d 547, 550–51 (D.C. Cir. 1982); see also *Portland Audubon Society v. Endangered Species Comm.*, 984 F.2d 1534, 1542–43 (9th Cir. 1993).

32. See *Prof'l Air Traffic Controller's Org.*, 685 F.2d at 561–62.

33. *Id.* at 557.

B. Counter-Intuitive Interpretations

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

—Lewis Carroll, *Through the Looking Glass*³⁴

Put another way, "[b]ecause the . . . test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'"³⁵ In two recent decisions by the Court of Appeals of Virginia, this rule of law was applied in support of interpretations that were anything but expressions of plain meaning.

The case of *Elbow Farm, Inc. v. Paylor* arose after the owner of a quarry that had been converted into a landfill applied to the Virginia Department of Environmental Quality ("DEQ") for a variance of groundwater monitoring requirements.³⁶ When DEQ refused, the applicant complained to the Chesapeake Circuit Court that the Director of DEQ (the "Director") had erred in, among other things, his predicate decision that the ground water at the quarry still formed part of an aquifer serving Hampton Roads.³⁷ In the view of the Director, when the solid waste regulations describe an aquifer as yielding substantial quantities of water to wells and springs, they mean a quantity of water sufficient for sampling.³⁸ Because samples could be collected, the Director ar-

34. LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 171 (Shocken Books 1979) (1872).

35. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

36. *Elbow Farm, Inc. v. Paylor*, No. 1611-06-1, 2007 Va. App. LEXIS 48, at *4-6 (Ct. App. 2007) (unpublished decision).

37. *See id.* at *2.

38. *See id.* at *11-13. "Aquifer" is defined in the Solid Waste Management Regulations as 'a geologic formation, group of formations, or a portion of a formation capable of yielding significant quantities of ground water to wells or springs.'" *Id.* at *11-12 (quoting 9 VA. ADMIN. CODE § 20-80-10 (2004)).

gued the ground water at the landfill was significant enough for the aquifer monitoring requirements to apply.³⁹

The circuit court sided with the Director, and the court of appeals affirmed unanimously.⁴⁰ In an opinion joined by Judges Frank and Petty, but apparently with no precedential value or significance intended,⁴¹ Senior Judge Willis wrote that the Director's application in a particular case of a term defined in his department's regulation deserves great deference from a reviewing court.⁴² Duly noted, but let us look more closely at the compound rule taken from *Virginia Alcoholic Beverage Control Commission v. York Street Inn, Inc.*: Words in a regulation must be construed to support the purpose of the basic law and the agency's interpretation is entitled to deference.⁴³ The former may be viewed as a limit to the latter.⁴⁴

In *York Street Inn*, the Virginia Alcoholic Beverage Control Commission ("ABC") had concluded that a platform on which five backgammon boards were inlaid was not a counter on which alcohol could be served under its regulation; the Supreme Court of Virginia agreed.⁴⁵ Such an interpretation probably serves the purpose of the ABC law from which the regulation derives and therefore deserves deference.

In *Elbow Farm*, if it mattered whether what was left of the aquifer at the landfill still fed the greater Columbia aquifer supplying the Hampton Roads area, the court is silent on the issue. The court's deference here is less on the basis of utility and more

39. *See id.* at *13.

40. *Id.* at *16.

41. Pursuant to Virginia Code section 17.1-413, the *Elbow Farm* opinion was not designated for publication. *See id.* at *1; *see also* VA. CODE ANN. § 17.1-413 (Repl. Vol. 2003 & Cum. Supp. 2008); *Friedberg v. Hague Park Apartments*, 61 Va. Cir. 589, 592 (Cir. Ct. 2001) (Norfolk City) (noting that unpublished court of appeals documents have no precedential value).

42. *Elbow Farm, Inc.*, 2007 Va. App. LEXIS 48, at *13 (citing Va. Alcoholic Beverage Control Comm'n v. York St. Inn, Inc., 220 Va. 310, 315, 257 S.E.2d 851, 855 (1979)).

43. *See* Va. Alcoholic Beverage Control Comm'n v. York St. Inn, Inc., 220 Va. 310, 315, 257 S.E.2d 851, 855 (1979).

44. We may, for the sake of convenience, choose to describe as deference the judicial embrace of an agency's interpretation (of its own regulation or of the basic law from which that regulation follows) that the court finds supportive of the purpose of the basic law. But that embrace comes from critical assessment, not instead of it. Strictly speaking, when a court defers in this context, it declines to substitute its judgment out of respect for the agency decider on one basis (e.g., expertise) or another (separation of powers).

45. *See York St. Inn, Inc.*, 220 Va. at 311-13, 257 S.E.2d at 852-53.

on the basis of office. The court in *Elbow Farm* also quotes *Beck v. Shelton*: “In construing statutory language that ‘is plain and unambiguous, we are bound by the *plain meaning* of that statutory language.”⁴⁶ Just how plain is it anyway that, so long as a sample can be taken, groundwater is an aquifer?

The case of *Shippers’ Choice of Virginia, Inc. v. Smith* arose after agents of the Department of Motor Vehicles (“DMV”) discovered Bobby Garrison in a classroom at the commercial driving school operated by Shippers’ Choice, apparently teaching without the teaching license required by law.⁴⁷ According to the record, he “was employed and compensated [by Shippers’ Choice] as a mechanic.”⁴⁸ After an administrative hearing, the DMV fined Shippers’ Choice five hundred dollars and suspended its school license for thirty days.⁴⁹ The school appealed, but the Circuit Court for the City of Richmond affirmed the administrative judgment that Shippers’ Choice had violated a DMV regulation.⁵⁰

The Court of Appeals of Virginia, after concluding that the DMV had ignored the plain language of both the statute and the regulation, sided with the school and reversed.⁵¹ Writing for Chief Judge Felton and Judge Clements, Judge Beales concluded that only instructors had to have teaching licenses and Garrison could not have been an instructor because he was not compensated for teaching the class.⁵² The school therefore could not be in violation.⁵³

Given what the agents reported observing and the school did not contest, one might well ask why someone speaking to students in a classroom session is not an instructor. As Judge Beales explained, the relevant statute defines an instructor as “any person, whether acting for himself as operator of a driver training school or for such school *for compensation*, who teaches, conducts classes, gives demonstrations, or supervises persons learning to

46. *Elbow Farm, Inc.*, 2007 Va. App. LEXIS 48, at *13 (quoting *Beck v. Shelton*, 267 Va. 482, 488, 593 S.E.2d 195, 198 (2004)) (emphasis added).

47. See *Shippers’ Choice of Va., Inc. v. Smith*, 52 Va. App. 34, 36–37, 660 S.E.2d 695, 696 (Ct. App. 2008).

48. *Id.* at 36, 660 S.E.2d at 696.

49. *Id.* at 37, 660 S.E.2d at 696.

50. *Id.*

51. *Id.* at 39–40, 660 S.E.2d at 697–98.

52. *Id.* at 39, 660 S.E.2d at 697.

53. *Id.* at 39–40, 660 S.E.2d at 697.

operate or drive a motor vehicle"; the DMV regulation incorporates that definition.⁵⁴ The court saw the qualification "for compensation" and concluded that, because Garrison was compensated by Shipper's Choice as a mechanic, he must have been teaching for free and therefore not unlawfully for want of a license.⁵⁵ In the view of the court, there was no room for interpretation because the language was clear.⁵⁶ Nothing was said about how this interpretation might comport with the purpose of the basic law. Those who envision a cadre of truckers prepared for our highways by some sorcerer's apprentice⁵⁷ should not relax; although the regulation has been tightened in some aspects, the definition of "instructor" remains unchanged.⁵⁸

C. Looking for Judicial Review in All the Wrong Places

In three cases, two of them arising from local government action on development applications and the third resulting in a judge's removal from office, the Supreme Court of Virginia further developed the law pertaining to judicial review of case decisions by administrative agencies.

1. If Not a Writ of Mandamus, Why Not a Declaratory Judgment?

In *Umstatted v. Centex Homes, G.P.*, the Supreme Court of Virginia reminded us of the verities that a writ of mandamus is not a remedy of right, but is issued in the court's discretion only when no other remedy will do, and then only to compel the performance of ministerial duties that do not involve discretion.⁵⁹ In this case, Centex, a land developer, applied to the Town of Leesburg for

54. *Id.* at 38, 660 S.E.2d at 697 (quoting VA. CODE ANN. § 46.2-1700 (Repl. Vol. 2005)) (emphasis added); 24 VA. ADMIN. CODE § 20-121-10 (Cum. Supp. 2008).

55. See *Shippers' Choice of Va., Inc.*, 52 Va. App. at 39-40, 660 S.E.2d at 697.

56. See *id.* at 39, 660 S.E.2d at 697.

57. Note that the school saw fit to appeal twice a small fine and a brief suspension. See *id.* at 37, 660 S.E.2d at 696. What vision of the future might encourage such expensive resistance? See *SORCERER* (Paramount Pictures 1977) (ill-trained but desperate drivers fail at carting truckloads of unstable dynamite on bad mountain roads and over rotten bridges).

58. See VA. CODE ANN. § 46.2-1700 (Repl. Vol. 2005); *Shippers' Choice of Va., Inc.*, 52 Va. App. at 387 n.3, 660 S.E.2d at 696 n.3; 24 VA. ADMIN. CODE § 20-121-10 (Cum. Supp. 2008).

59. 274 Va. 541, 545, 650 S.E.2d 527, 530 (2007).

permission to develop a residential subdivision, but its application was rejected for deficiencies in its plat.⁶⁰ The town's ordinance dictated rejection of such an application when the plat exhibited "significant deficiencies," and the town's Chief of Current Planning explained to Centex that its plat suffered from several such, including omission of deed book and tax map references for its land parcels and breach of a design standard that called for the placement of sewer lines "along rear lot lines rather than along the centerlines of public rights of way 'whenever possible.'"⁶¹

In response, the developer sued in Loudoun County Circuit Court for a writ of mandamus ordering town officials to accept its application and for a declaratory judgment that Centex had a right to the processing of its application in advance of a decision by the planning commission.⁶² Before the circuit court, Centex argued that while it would be entitled by law to judicial review in the event of an adverse decision by the planning commission,⁶³ it was without adequate remedy for the antecedent refusal of local officials to even accept its application in the first place.⁶⁴ The circuit court agreed and issued the writ without ruling on the request by Centex for a declaratory judgment in the alternative.⁶⁵

Judge Chamblin agreed with Centex that the developer had no remedy for any error of law or fact in the threshold judgment by the town rejecting Centex's application.⁶⁶ Having delegated to its planning commission the power to judge subdivision applications, the town nevertheless retained unreviewable discretion to keep any application from reaching the commission on grounds of "significant" deficiencies.⁶⁷ The several deficiencies found in this case illustrate the range of judgments left in the sole discretion of town officials, including the judgment that omission from the plat of tax map references was not trivial but significant, and that it

60. *Id.* at 544, 650 S.E.2d at 529.

61. *See id.*

62. *Id.*

63. *See id.* at 545, 650 S.E.2d at 529–30 (citing VA. CODE ANN. § 15.2-2260(E) (Repl. Vol. 2008)).

64. *Id.* at 545, 650 S.E.2d at 530.

65. *Id.*

66. *See id.*, 650 S.E.2d at 531.

67. *See id.* at 547, 650 S.E.2d at 531.

was possible to put sewer lines along rear lots where the developer thought it impossible.⁶⁸

The Supreme Court of Virginia unanimously reversed.⁶⁹ In an opinion by Senior Justice Russell, the court held that the writ of mandamus should not have issued in this case because it called for obedience by town officers entitled by law to exercise their discretion when rejecting subdivision applications and because an action for declaratory judgment offered Centex an adequate remedy in the alternative.⁷⁰ Respecting the nature of the duties involved, Justice Russell wrote that "the decision to be made by the Town's officials . . . involved considerable investigation of the submitted plans, the conditions existing on the subject land and in the surrounding area, and the exercise of discretion and judgment in applying the applicable statutes, ordinances and regulations to the conditions found to exist."⁷¹

Respecting a declaratory judgment, Justice Russell wrote for the court that this case is just what Virginia Code section 8.01-191 was designed for—that is, a controversy "over legal rights, without requiring one party to invade the asserted rights of another."⁷²

It would be nice to know that a developer in Centex's position could resort to a declaratory judgment action. But this was a case in which the developer disputed the lawfulness of a decision that required the town's decider to answer, as the Supreme Court of Virginia acknowledged, "a mixed question of law and fact."⁷³ The supreme court long ago concluded that the Declaratory Judgment Act was not intended for judicial correction of an agency's application of law to fact.⁷⁴ Admittedly, it was not an agency decision for which the judicial review provisions of the APA supplied a circuit court with review jurisdiction; by its own terms, the APA ap-

68. *Id.* at 544, 650 S.E.2d at 529.

69. *Id.* at 548, 650 S.E.2d at 531.

70. *See id.* at 547-48, 650 S.E.2d at 531.

71. *Id.* at 546, 650 S.E.2d at 530. *But see* Prince William County v. Hylton Enters., 216 Va. 582, 584, 221 S.E.2d 534, 536 (1976) (agreeing that mandamus would lie to compel action on development applications by local officials within specified times and that mandamus will lie against an inactive officer to tell that officer when to decide, but it will not lie to tell that officer how to decide).

72. *Umstattd*, 274 Va. at 548, 650 S.E.2d at 531. *See infra* Part III.C.2. for a discussion of *Miller v. Highland County*.

73. *See Umstattd*, 274 Va. at 546, 650 S.E.2d at 530.

74. *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970).

plies only to the decisions of state agencies, not to those of counties.⁷⁵ On the other hand, it was a decision about land use, and Virginia's statute on that subject explicitly provides for review of such decisions in a board of zoning appeal.⁷⁶

What the court said here about the inappositeness of the writ of mandamus is patently the law of the case, but what the court said about the appositeness of a declaratory judgment is not. It is obiter dictum, and dubious at that.

2. If Not a Writ of Mandamus, Why Not?

In *Miller v. Highland County*, the Supreme Court of Virginia held that a third party cannot challenge a conditional use permit ("CUP") in a bill of complaint for a declaratory judgment.⁷⁷ The controversy arose when Highland New Wind Development LLC ("New Wind") applied for a CUP to erect wind turbines and build an electrical generation substation on land zoned A-2.⁷⁸ The turbines would have stood taller than the zoning ordinance allowed for A-2 structures, so the board of supervisors amended the ordinance to authorize CUP for taller structures.⁷⁹ Then, after making a finding that it was in substantial accord with the comprehensive plan, the board issued New Wind its CUP.⁸⁰ Belatedly, New Wind got the planning commission to review the CUP for substantial accord, as was required by the state land use law.⁸¹ Property owners, including Miller and Brody, sued for declaratory judgments in Highland County Circuit Court.⁸²

75. See VA. CODE ANN. §§ 2.2-4001 to -4002 (Repl. Vol. 2008) (defining "agency" as "unit of the state government but excluding 'counties, and all local, regional or multijurisdictional authorities created under this Code'"); see also *County of Roanoke v. Friendship Manor Apartment Village Corp.*, No. 0394-85, 1985 WL 304641, at *1 (Va. Ct. App. Sept. 4, 1985) (unpublished decision).

76. VA. CODE ANN. § 15.2-2311(A) (Repl. Vol. 2008). In turn, decisions of the board of zoning appeals are subject to review by writ of certiorari in the circuit courts. *Id.* § 15.2-2314 (Repl. Vol. 2008); James W. Farrell, *Virginia CLE: Land Use Law in Virginia I-62 to I-63* (2002).

77. 274 Va. 355, 371, 650 S.E.2d 532, 539-40 (2007).

78. *Id.* at 361, 650 S.E.2d at 533.

79. *Id.*, 650 S.E.2d at 533-34.

80. *Id.*, 650 S.E.2d at 534.

81. *Id.*; see also VA. CODE ANN. § 15.2-2232 (Repl. Vol. 2008).

82. In Miller's bill of complaint, the county, but not the board of supervisors, was named as a defendant. *Miller*, 274 Va. at 362, 650 S.E.2d at 534. Conceding that generally a county may be sued in connection with its duties, the court nevertheless held that the board itself must be named as a defendant in an action based on Virginia Code section

In the circuit court, Judge Sheridan granted partial summary judgment for defendants New Wind and Highland County after concluding that the substantial-accord judgment rendered by the zoning commission post hoc did not impair the permit.⁸³ After a bench trial, the circuit court found the decision to issue the permit “fairly debatable” and therefore entered judgment for the defendants.⁸⁴

The Supreme Court of Virginia unanimously reversed the decision below in Miller’s case and ordered its dismissal because the bill of complaint had named the county rather than its board of supervisors, as required by statute in such an action.⁸⁵ At the same time, the court affirmed the decision below in Brody’s case, in which the board had been named correctly as defendant.⁸⁶ For reasons of its own—that is, because the land use law allows only the applicant to appeal from a planning commission decision in such a case⁸⁷—the court approved of the circuit court’s summary judgment for New Wind and Highland County.⁸⁸ In the view of the court, the Declaratory Judgment Act did not so entitle a third party.⁸⁹ Justice Keenan wrote for the court, reminding us generally that the declaratory judgment statute does not create or alter substantive rights; in particular, it does not create a right to appeal where one does not otherwise exist.⁹⁰

3. Where Can a Judge Get a Little Due Process?

Come we now to *Judicial Inquiry & Review Commission v. Shull*, in which the Supreme Court of Virginia found itself without jurisdiction to hear a judge complain that the Judicial Inquiry and Review Commission (the “Commission”) had denied him due

15.2-1404, such as this, and that the fault could not be treated as a misnomer under section 8.01-6 because the fault was not simply misnaming the right entity, but rather suing the wrong one. *Id.* at 364, 650 S.E.2d at 535–36. The board was named as a defendant in Brody’s bill of complaint. *See id.* at 372, 650 S.E.2d at 540.

83. *Id.* at 362, 650 S.E.2d at 534.

84. *Id.* at 363, 650 S.E.2d at 534.

85. *Id.* at 367–68, 650 S.E.2d at 537.

86. *Id.* at 372, 650 S.E.2d at 540.

87. VA. CODE ANN. § 15.2-2232(B) (Repl. Vol. 2008).

88. *Miller*, 274 Va. at 372–73, 650 S.E.2d at 540.

89. *Id.* at 372, 650 S.E.2d at 540.

90. *Id.* at 370, 372, 650 S.E.2d at 539–40 (citing *Shilling v. Jimenez*, 268 Va. 202, 204, 597 S.E.2d 206, 207 (2004) (holding that neighbors could not attack a decision approving a subdivision)).

process of law by refusing to allow him to confront and cross-examine his accusers in a hearing on whether his suspension from office should continue pending the completion of the Commission's investigation.⁹¹

Article VI, section 10 of the Constitution of Virginia calls for the General Assembly to create a Judicial Inquiry and Review Commission to investigate charges that would warrant the retirement, censure, or removal of a judge and authorizes the Commission to conduct hearings and subpoena witnesses and documents.⁹² When the Commission finds charges of misconduct to be well-founded, the same section authorizes the Commission to file a formal complaint before the Supreme Court of Virginia.⁹³ The court is then obliged to conduct a hearing of its own and to censure or remove a judge if the court determines that "the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice."⁹⁴ Not surprisingly, the Constitution of Virginia says nothing about what manner of hearing shall be provided by either the Commission or the court.⁹⁵

This case arose when the Commission suspended, with pay,⁹⁶ a judge of the juvenile and domestic relations court after it was reported that he had directed a woman seeking extension of a protective order to drop her pants and display the leg wound that she claimed was the work of her former husband.⁹⁷ During the

91. *Judicial Inquiry & Review Comm'n v. Shull*, 274 Va. 657, 667, 651 S.E.2d 648, 656 (2007). For more on the regulation of judicial conduct in Virginia, the Judicial Inquiry and Review Commission, and the *Shull* case, see Jeffrey D. McMahan, Jr., Comment, *Guarding the Guardians: Judges' Rights and Virginia's Judicial Inquiry and Review Commission*, 43 U. RICH. L. REV. 473 (2008).

92. VA. CONST. art. VI, § 10.

93. *Id.*

94. *Id.* The Constitution of Virginia also authorizes the Commission to investigate claims that a judge is disabled, and when it determines them to be well-founded, to alert the Supreme Court of Virginia. *Id.* If, after a hearing of its own, the court finds disability likely to be permanent and to seriously interfere with the judge's performance, then the court must order the judge's retirement. *Id.*

95. Except that the former may be confidential as the General Assembly may provide, but the latter must be open to the public. *Id.* The General Assembly has made the record of Commission proceedings confidential unless or until it is forwarded to the Supreme Court of Virginia in conjunction with a formal complaint by the Commission. VA. CODE ANN. § 17.1-913 (Cum. Supp. 2008).

96. See VA. CODE ANN. §17.1-911 (Repl. Vol. 2003 & Cum. Supp. 2008).

97. *Judicial Inquiry & Review Comm'n v. Shull*, 274 Va. 657, 662, 651 S.E.2d 648, 651

same hearing, *ex parte*, the judge telephoned the emergency room where the woman claimed to have been treated.⁹⁸ He then refused to extend the protective order while she found a lawyer.⁹⁹ In a separate case, the judge offered to settle holiday visitation by tossing a coin.¹⁰⁰

To contest his suspension, the judge obtained a hearing before the Commission,¹⁰¹ at which he produced witnesses, arguing that the Commission bore the burdens of proof and persuasion on the statutory standard for continuing his suspension (i.e., that justice would be served), and sought to confront and cross-examine his accusers.¹⁰² At that point, the Commission had not laid a formal charge, but it refused to present its complaining witnesses.¹⁰³ At the conclusion of the hearing, the Commission continued his suspension.¹⁰⁴

A month later, the Commission issued three formal charges that described violations of judicial canons 1, 2, and 3.¹⁰⁵ In response, the judge denied ordering the woman to drop her pants, maintaining that she had volunteered, but admitted both the *ex parte* phone call and the coin tosses.¹⁰⁶ After a formal hearing at which the judge appeared and offered testimony from witnesses of his own, the Commission found the charges well-founded and filed a formal complaint with the Supreme Court of Virginia.¹⁰⁷

Before the supreme court, the judge renewed his due process claims.¹⁰⁸ After an independent review of the Commission's record, the court found clear and convincing evidence of misconduct and conduct prejudicial to the proper administration of justice,¹⁰⁹ and removed the judge from office.¹¹⁰

(2007).

98. *Id.* at 663, 651 S.E.2d at 651.

99. *Id.* at 662, 651 S.E.2d at 651.

100. *Id.* at 663, 651 S.E.2d at 652.

101. *See* VA. CODE ANN. § 17.1-911(B) (Repl. Vol. 2003 & Cum. Supp. 2008).

102. *Shull*, 274 Va. at 661-62, 651 S.E.2d at 651.

103. *See id.* at 662 & n.2, 651 S.E.2d at 651 & n.2.

104. *Id.* at 663, 651 S.E.2d at 651.

105. *Id.* at 668-69, 651 S.E.2d at 654-55.

106. *Id.* at 672, 651 S.E.2d at 657.

107. *Id.* at 661, 651 S.E.2d at 650.

108. *Id.* at 671, 651 S.E.2d at 656. He also argued that the Commission violated due process by assigning him the burden of proving that continuing his suspension was unwarranted, and challenged the complaint on its merits, without success. *Id.*

109. *See* VA. CONST. art. VI, § 10.

With respect to Shull's due process claims, the court unanimously held that because its only jurisdiction in the matter was original (pursuant to Virginia Code section 17.1-906), it was without authority to consider such objections.¹¹¹ If the judge was otherwise without a forum for real claims of constitutional dimension, such a curt conclusion might deserve more attention. According to the court, it is obliged in such cases to look for "clear and convincing" evidence in support of the Commission's charges.¹¹² At least where the weight of evidence turns on the credibility of a source, it should not be regarded as convincing if an opponent was refused any opportunity to confront and cross-examine the witness supplying it. But the judge's claims here are not real, and even if they were, a circuit court offers them an adequate forum.

We hardly need reminding that a constitutional right to due process limits the discretion of a state agency when it would dismiss an employee from a position that employee holds by tenure,¹¹³ and that this right entitles the employee to a hearing with procedural safeguards adequate to ensure the employee is heard in a meaningful way.¹¹⁴ But the judge in this case was

110. *Shull*, 274 Va. at 677, 651 S.E.2d at 660.

111. *Id.* at 671-72, 651 S.E.2d at 656-57; *see also* VA. CODE ANN. § 17.1-906 (Repl. Vol. 2003 & Cum. Supp. 2008).

112. *Shull*, 274 Va. at 670, 651 S.E.2d at 656 (citing *Judicial Inquiry & Review Comm'n v. Peatross*, 269 Va. 428, 444, 611 S.E.2d 392, 400 (2005)).

113. 16D C.J.S. *Constitutional Law* § 1900 (2005); 4C MICHIE'S JURISPRUDENCE *Constitutional Law* § 134 (Repl. Vol. 2006 & Supp. 2007).

114. 16D C.J.S. § 1897 (2005). Notwithstanding the black-letter nature of much of C.J.S., it errs when it avers that in a disciplinary hearing of which removal may be the outcome, a public employee is entitled by due process to cross-examine adverse witnesses. Twenty co-authors apparently succumbed to the fallacy of the negative pregnant. In three of the four cases on which they rely, courts said only that hearings in which public employees were allowed cross-examination satisfied due process. These cases therefore did not present the question of whether a hearing in which cross-examination was refused satisfied due process nevertheless. *But see* *McNeill v. Butz*, 480 F.2d 314, 325 (4th Cir. 1973). That the due process clause does not generally make cross-examination an essential procedure in a termination hearing should have been clear since *Mathews v. Eldredge*, 424 U.S. 319 (1976). After *Mathews*, it depends on the nature of the disputed fact as well as a balancing between the party's interest at risk in the hearing and, among other things, any risk of witness intimidation. In *Withrow v. Larkin*, 421 U.S. 35 (1975), a physician argued that his state license had been revoked after a hearing that denied him due process. Justice White wrote for a unanimous Court approvingly, albeit in obiter dicta, of a process substantially similar to that employed in this case. *Id.* at 55 n.20. *See generally* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 7.4.2 (3d ed. 2006); RICHARD J. PIERCE, JR., 2 *ADMINISTRATIVE LAW TREATISE* § 9.3 (4th ed. 2002); RONALD D. ROTUNDA & JOHN E. NOWAK, 3 *TREATISE ON CONSTITUTIONAL LAW* § 17.94-5 (3d ed. 1999).

complaining of a hearing from which followed the decision to continue his suspension *with* pay.¹¹⁵ Suspension with pay does not usually hazard any interest of constitutional dimension.¹¹⁶ For the judge to establish a due process right to cross-examination in his suspension hearing, he would have to persuade something more.¹¹⁷ A judge's right to judge, that is, to hear and decide cases, should not be added to the collection of rights treated by courts as forms of liberty or property for which due process is guaranteed. While it is often said that there no longer exists the distinction between rights and privileges that once limited judicial enforcement of the due process guarantees,¹¹⁸ the situation of judges facing discipline ought to persuade that such reports, like some of the demise of Mark Twain, are exaggerated.¹¹⁹

That the Supreme Court of Virginia had no jurisdiction in a proceeding pursuant to Virginia Code section 17.1-911 to consider claims of due process violations by the Commission does not mean that the Commission need not answer in any court for disregarding due process. In another case in which removal may be

115. *Shull*, 274 Va. at 663, 651 S.E.2d at 651.

116. See *In re Davis*, 189 S.W.3d 444, 446 (Ark. 2004); see also *Fields v. Durham*, 909 F.2d 94, 98 (4th Cir. 1990) (quoting *Royster v. Bd. of Trustees*, 774 F.2d 618, 621 (4th Cir. 1985)); *Scruggs v. Keen*, 900 F. Supp. 821, 825 (W.D. Va. 1995). In *In re Jaffe*, the court held that a judge's suspension without pay did not violate due process for want of any hearing beforehand. 814 A.2d 308, 316 (Pa. Ct. Jud. Discipline 2003).

117. In due course, the Commission in this case afforded the judge a hearing on the charges themselves. *Shull*, 274 Va. at 662, 651 S.E.2d at 651. Curiously, when a judge is accused of disability, the statute guarantees that judge the right to call witnesses in the hearing conducted by the Commission, but the statute does not explicitly afford the same guarantee to a judge accused of misconduct. VA. CODE ANN. § 17.1-912 (Repl. Vol. 2003). Rules of the Commission governing its hearings on charges (versus suspensions) refer to them as "formal hearing[s,]" speak of witnesses, and allow for subpoenas, but they do not explicitly promise a judge the opportunity for cross-examination. See 15 VA. ADMIN. CODE § 10-10-10 (Cum. Supp. 2008), available at <http://www.courts.state.va.us/jirc/rules.html>. In this case, it appears from the record that the judge did not demand cross-examination during the formal hearing; indeed, he seems to have conceded the facts for which the testimony of witnesses would have been relevant. See *Shull*, 274 Va. at 664-68, 651 S.E.2d at 652-54. Moreover, from the record one can conclude that the summary of the Commission's case with which the judge was earlier supplied left him sufficiently informed to call the Commission's informants as his own witnesses in the formal hearing. See *Richardson v. Perales*, 402 U.S. 389, 404-05 (1971) (holding that a party who did not subpoena cannot then complain that a summary of the evidence constituted hearsay and denied that party the opportunity to cross-examine the physician who prepared it).

118. See, e.g., *CHEMERINSKY*, *supra* note 114, at 558-59; *PIERCE*, *supra* note 114, at § 9.3; *ROTUNDA & NOWAK*, *supra* note 114, at § 17.2(a).

119. "The reports of my death are greatly exaggerated." Cable from Mark Twain [Samuel Langhorne Clemens] to the Associated Press (1897), in *BARTLETT*, *supra* note 4, at 625.

at risk, should the Commission refuse a judge the right to confront a Commission informant in its formal hearing, and the evidence be such that its weight could vary according to what occurred during cross-examination, a plausible due process claim might well be made out. But in what court? Some court can surely hear the judge's complaints about constitutional wrongs by the Commission. Although the General Assembly is not obliged to provide for judicial review of procedural decisions by the Commission, nevertheless it has, in the APA, where it has promised that "[a]ny . . . party aggrieved by and claiming unlawfulness of a case decision . . . shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents."¹²⁰

But the APA does not explicitly include the Commission; nor, for that matter, does the APA explicitly exclude it.¹²¹ Of course, in the APA, "[a]gency" means any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases."¹²² So what might put the matter in doubt is firstly whether the Commission decides cases. On the one hand, its decision is final when it determines that a complaint of judicial misconduct or disability is not well-founded; that decision effectively puts an end to the matter.¹²³ On the other hand, its decision that a complaint is well-

120. VA. CODE ANN. § 2.2-4026 (Repl. Vol. 2008).

Actions may be instituted in any court of competent jurisdiction . . . , and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. . . by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases.

Id. In a case like this, venue lies in the City of Richmond, where the Commission maintains its principal office, or as the parties may otherwise agree. *Id.* § 2.2-4003 (Repl. Vol. 2008).

121. The APA does exempt "[a]gency action relating . . . to the selection, tenure, dismissal, direction or control of any officer or employee of an agency of the Commonwealth." *Id.* § 2.2-4002(B)(7) (Repl. Vol. 2008). This seems to fall short of action by the Commission relating to the tenure or dismissal of a judge. After all, the APA regards courts as organizations different from agencies. See *supra* text accompanying note 75. Thus, the APA does not exclude the Commission from the class of agencies it governs; nor does the APA exempt determinations that complaints of misconduct (or disability) are well-founded. It is true that the APA exempts from Article V any "case in which the agency is acting as an agent for a court, or . . . encompasses matters subject by law to a trial de novo in any court," VA. CODE ANN. § 2.2-4025 (Repl. Vol. 2008), but in light of the constitution and the statute, it can hardly be argued that the Commission acts for a court when it goes about its business.

122. *Id.* § 2.2-4001 (Repl. Vol. 2008).

123. *Cf.* VA. CONST. art. VI, § 10 (stating that the Commission must investigate and

founded does not end the case, but simply affords the Commission an opportunity to make a complaint to the Supreme Court of Virginia if the Commission chooses.¹²⁴ That the Commission finally disposes of some complaints ought to be enough to qualify the Commission as a decider in APA terms. Moreover, the Commission's decision to suspend pending its investigation should itself be seen as deciding.

Now, do those decisions resolve cases of the sort qualifying the deciding body for status as an agency in APA terms? In the APA, "case" means:

[A]ny . . . proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.¹²⁵

Assuming the Commission decides, does it decide cases? It certainly conducts investigations to which specific judges are parties by name. Complaints within its purview may refer to violations of law, but they may otherwise refer to "conduct prejudicial to the proper administration of justice."¹²⁶ Are the judicial canons law? Are they regulations? According to the APA, "'regulation' means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws."¹²⁷

The APA appears to regard courts as something other than agencies:

"Agency action" means either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by any agency *or* court.¹²⁸

find the charges to be well-founded to continue a judicial inquiry proceeding).

124. *Id.*

125. VA. CODE ANN. § 2.2-4001 (Repl. Vol. 2008).

126. VA. CONST. art. VI, § 10.

127. VA. CODE ANN. § 2.2-4001 (Repl. Vol. 2008).

128. *Id.* (emphasis added)

If courts are not agencies, then at least some investigations by the Commission are not “cases.” However, investigations of unlawful conduct are cases, and that should be enough to make the Commission an agency within the meaning of the APA. Thus, for purposes of the APA, the Commission is an agency that decides cases, so those decisions are reviewable by a circuit court.

In *Judicial Inquiry & Review Commission v. Shull*, the Supreme Court of Virginia took a complaint by the Commission and refused to hear from the judge that the Commission had denied him due process.¹²⁹ The court might have viewed his claims as relevant to the weight of the Commission’s evidence, but did not.¹³⁰ Because the judge could not show injury to a constitutionally cognizable interest, his claims of constitutional error were specious,¹³¹ so this is not the case that proves the Commission need not answer for procedurally shortchanging a disciplined judge. A judge removed or suspended without pay after action by the Commission contrary to due process may be heard in a circuit court on that complaint and therefore, if not immediately in the supreme court, then eventually.

IV. LEGISLATIVE CHANGES TO VIRGINIA’S FREEDOM OF INFORMATION ACT

Virginia’s Freedom of Information Act (“FOIA”), enacted by the General Assembly in 1968, begins from the general principle that all public records should be open to citizen inspection and all meetings of public bodies should be open to the public.¹³² FOIA is

129. *Shull*, 274 Va. at 671, 651 S.E.2d at 656.

130. *Id.*

131. *Id.*

132. VA. CODE ANN. §2.2-3700(B) (Repl. Vol. 2008) (“The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.”); see VA. MUN. LEAGUE, VA. FREEDOM OF INFO. ACT & THE VA. CONFLICT OF INTEREST ACT 3 (2007), available at <http://www.vml.org/CLAY/SeriesPDF/06-07FOIACOIARpt1.pdf> [hereinafter VA. MUN. LEAGUE] (“The guiding principle of FOIA is openness.”); see also Karen E. Jones, Comment, *The Effect of the Homeland Security Act on Online Privacy and the Freedom of Information Act*, 72 U. CIN. L. REV. 787, 788 (2003) (“[T]he government cannot veil all of its activities in secrecy or gather information for itself and subsequently shield it from the public. A government that is derived from the people must also be accountable to its people As James Madison so eloquently stated, ‘A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be

the embodiment of the understanding between citizens and government that “an open government is the preferred government.”¹³³ Emphasizing the commonwealth’s “commitment to open government principles,”¹³⁴ in each year since FOIA’s passage the legislature has reexamined numerous provisions and revised the statute to address constantly changing public concerns.¹³⁵ The General Assembly had active sessions in both 2007 and 2008; in 2007, the legislature passed nineteen bills amending the Act,¹³⁶ and in 2008, twenty-one bills amending the Act.¹³⁷ This legislative activity resulted in ten new records exemptions and four closed-meeting exemptions, as well as several additional amendments to existing provisions of FOIA.¹³⁸

A. FOIA in the Information Age

Measures permitting citizens access to government records and information were enacted at a time when government records existed only in paper form.¹³⁹ During the 1950s and 1960s, when such statutes were first enacted, the primary methods of communication were easily categorized as meetings or non-meetings, and states envisioned that this classification would create little controversy.¹⁴⁰ Today, however, most records exist in “paperless”

their own governors must arm themselves with the power which knowledge gives.”) (citing Letter from James Madison to W.T. Berry (Aug. 4, 1822)).

133. Maria J.K. Everett, Op.-Ed., *Striking Public-Private Balance Is a Challenge*, RICH. TIMES-DISPATCH, Mar. 16, 2008, at E1.

134. VA. FREEDOM OF INFO. ADVISORY COUNCIL, REPORT OF THE VA. FREEDOM OF INFO. ADVISORY COUNCIL TO THE GOVERNOR & THE GENERAL ASSEMBLY OF VA. 7 (2007), available at <http://dls.state.va.us/groups/foiacouncil/2007ar.pdf> [hereinafter 2007 REPORT].

135. VA. MUN. LEAGUE, *supra* note 132, at 3.

136. 2007 REPORT, *supra* note 134, at 7.

137. See VA. FREEDOM OF INFO. ADVISORY COUNCIL, 2008 FOIA LEGISLATIVE UPDATE 1 (2008), available at <http://dls.state.va.us/groups/foiacouncil/2008updt.pdf> [hereinafter 2008 REPORT].

138. See *id.*; 2007 REPORT, *supra* note 134, at 8.

139. ACCESS TO GOVERNMENT IN THE COMPUTER AGE: AN EXAMINATION OF STATE PUBLIC RECORDS LAWS 2 (Martha Harrell Chumbler, ed., Am. Bar Ass’n 2007) [hereinafter ACCESS TO GOVERNMENT]; cf. Lauren Bemis, Comment, *Balancing a Citizen’s Right to Know with the Privacy of an Innocent Family: The Expansion of the Scope of Exemption 7(C) of The Freedom of Information Act Under National Archives & Records Administration v. Favish*, 25 J. NAT’L ASSOC. ADMIN. L. JUDGES 507, 542 (2005) (explaining that the federal FOIA statute was enacted at a time when Congress could not anticipate how rapidly information would be disseminated via television, satellite radio, the Internet, or cell phones, and therefore, Congress could not adequately safeguard individuals’ privacy).

140. John F. O’Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to E-mail Correspondence*, 12 GEO. MASON L. REV. 719, 728–

form, and the government “depend[s] heavily upon information technology” to conduct its business.¹⁴¹

This “information technology” has significantly impacted state open meeting statutes. New computer technologies such as e-mail, instant messaging, text messaging, electronic discussion boards, and video conferencing have blurred the distinctions between “meeting” and “non-meeting.”¹⁴² The advent of these new technologies has left Virginia, like its sister states, at a crossroads: the legislature must somehow incorporate computer technologies into open meeting laws that were written well before the technologies were created.¹⁴³

The rush of technological innovations prompted varied responses by states.¹⁴⁴ States define “meetings” in three ways generally: some use qualifying terms to indicate that not all communications amongst public officials constitute a meeting; other states maintain over-inclusive definitions of meetings that encompass all informal communications amongst public officials; and others do not define the term at all.¹⁴⁵ Only twenty-three states specifically address electronic meetings in their FOIA statutes.¹⁴⁶

29 (2004).

141. ACCESS TO GOV'T, *supra* note 139, at 2.

142. See Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FL. ST. L. REV. 245, 260 (2008) (examining the impact of e-mail, text messaging, and other technology on Florida's sunshine law).

143. See *id.* at 259.

144. See O'Connor & Baratz, *supra* note 140, at 725.

145. *Id.* at 725–28.

146. Chance & Locke, *supra* note 142, at 260 & n.137. The states that address electronic meetings in their FOIA statutes are Alabama, Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Iowa, Kansas, Missouri, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia. See ALA. CODE § 36-25A-1 (LexisNexis Cum. Supp. 2007); ALASKA STAT. § 44.62.310(a) (2006); ARIZ. REV. STAT. ANN. § 38-431(4) (Cum. Supp. 2007); CAL. GOV'T CODE § 54952.2(b) (West Cum. Supp. 2008); COLO. REV. STAT. § 24-6-402(2)(1)(b)(d)(III) (2006); CONN. GEN. STAT. ANN. § 1-200(2) (West 2007); HAW. REV. STAT. § 92-3.5 (Cum. Supp. 2006); IOWA CODE ANN. § 21.8 (West Cum. Supp. 2008); KAN. STAT. ANN. § 75-4314317a (1997 & Cum. Supp. 2007); MO. ANN. STAT. § 610.010(5) (West 2006); MONT. CODE ANN. § 2-3-202 (2007); NEB. REV. STAT. § 84-1411 (Supp. 2007); N.J. STAT. ANN. § 10:4-8(b) (West 2002 & Cum. Supp. 2008); N.D. CENT. CODE § 44-04-20 (Repl. Vol. 2007); OKLA. STAT. ANN. tit. 25, § 306 (West 2008); OR. REV. STAT. § 192.670 (2008); R.I. GEN. LAWS § 42-46-5(b) (2007); S.C. CODE ANN. § 30-4-20(d) (2007); TENN. CODE ANN. § 8-44-108 (Supp. 2007); TEX. GOV'T CODE ANN. § 551.127 (Vernon 2004 & Cum. Supp. 2008); UTAH CODE ANN. § 52-4-207 (Repl. Vol. 2007); VA. CODE ANN. § 2.2-3708 (Repl. Vol.

Although Virginia's FOIA statute in its original form did not anticipate the birth of, and therefore supply guidance for, the digital age of government work accomplished by e-mail and data stored on computers,¹⁴⁷ because of the government's increasing reliance on information technology, Virginia's legislature has continued to adapt and revise FOIA accordingly. In fact, Virginia now statutorily addresses electronic meetings.¹⁴⁸ The General Assembly amended FOIA to add a definition of "electronic communications," which encompass "any audio or combined audio and visual communication method."¹⁴⁹ This definition evidences the legislature's recognition that communication amongst members of a public body often occurs through telephone, video, or e-mail, and that in some instances, such communication may constitute a meeting.¹⁵⁰

In only some circumstances, however, does such electronic communication constitute a meeting. Virginia falls into the category of states that define "meetings"; its definition uses qualifying terms to indicate that not all electronic communications necessarily constitute a meeting.¹⁵¹ In 2004, the Supreme Court of Virginia became the first state supreme court to address whether e-mail correspondence by members of a public body may constitute a closed meeting forbidden by FOIA.¹⁵² In *Beck v. Shelton*, the court found that e-mail communication amongst members of a public body does not constitute an electronic meeting subject to FOIA.¹⁵³

Virginia Code section 2.2-3708 generally forbids public bodies from conducting any meetings at which public business is discussed and the members are not physically assembled.¹⁵⁴ This

2008); W. VA. CODE ANN. § 6-9A-2(4) (LexisNexis Repl. Vol. 2006).

147. See ACCESS TO GOVERNMENT, *supra* note 139, at 2; cf. Bemis, *supra* note 139, at 542 (discussing a similar scenario with the national FOIA).

148. See VA. CODE ANN. § 2.2-3708 (Repl. Vol. 2008).

149. *Id.* § 2.2-3701 (Repl. Vol. 2008).

150. This manner of communication may sometimes, but does not always, constitute a meeting. Compare *Roanoke City Sch. Bd. v. Times-World Corp.*, 226 Va. 185, 307 S.E.2d 256, 258-59 (Va. 1983) (finding that telephone conferences were not subject to FOIA) with *Beck v. Shelton*, 267 Va. 482; 593 S.E.2d 195 (Va. 2004) (finding that e-mail correspondence did not constitute a meeting subject to FOIA).

151. O'Connor & Baratz, *supra* note 140, at 725-26.

152. VA. CODE ANN. § 2.2-3701 (Repl. Vol. 2008); see O'Connor & Baratz, *supra* note 140, at 721.

153. See *Beck v. Shelton*, 267 Va. 482, 494, 593 S.E.2d 195, 201 (2004).

154. VA. CODE ANN. § 2.2-3708(A) (Repl. Vol. 2008).

statutory provision is borne of the notion that “the citizenry must be well informed in order to effectively self-govern.”¹⁵⁵ The 2007 revisions, however, amend section 2.2-3708 to allow for meetings by electronic communication when the Governor has declared a state of emergency, or if the meeting is necessary to take emergency action.¹⁵⁶ This amendment thus relaxes the strict prohibition on meetings without a physically assembled quorum.¹⁵⁷ The amendments do not significantly alter the general requirement of physical assembly, however, because to do so would run counter to the General Assembly’s intent that unless an exemption applies, “every meeting shall be open to the public.”¹⁵⁸

The 2007 and 2008 revisions also relax the notice requirement for these types of meetings, permitting public bodies to give only three-day notice of an electronic communication meeting, rather than the seven days previously required by statute.¹⁵⁹ This amendment may reflect a degree of practicality. It simply is not feasible “for any and all interested members of the public to ‘attend’ an e-mail communication”¹⁶⁰ or a telephone conference call. Despite this practical concern, the government nevertheless owes the public the right to participate in meetings of public bodies in which public business is discussed. Three-day notice of a meeting to be held by electronic communication “is hardly convenient notice conducive to public participation.”¹⁶¹

Although there was some relaxation of the requirements surrounding electronic communication meetings, the amendments to FOIA’s general notice provisions continue to increase agencies’ accountability through compliance with information technology standards. The 2007 amendments explicitly require the government to post notice of meetings and meeting minutes on the

155. Chance & Locke, *supra* note 142, at 245–46.

156. VA. CODE ANN. § 2.2-3708(B) (Repl. Vol. 2008). If an authorized state public body chooses to hold a meeting via electronic communication, it must also conduct at least one meeting annually where all members are physically present and none participates by means of electronic communication. *Id.*

157. See VA. FREEDOM OF INFO. ADVISORY COUNCIL, 2007 FOIA LEGISLATIVE UPDATE 3 (2007), available at <http://dls.state.va.us/groups/foiacouncil/2007updt.pdf> [hereinafter 2007 UPDATE].

158. VA. CODE ANN. § 2.2-3700(B) (Repl. Vol. 2008).

159. *Id.* § 2.2-3708(C) (Repl. Vol. 2008); see 2007 UPDATE, *supra* note 157, at 6.

160. O’Connor & Baratz, *supra* note 140, at 753.

161. Charles Bonner, John Paul Jones, & Henry M. Kohnlein, *Annual Survey of Virginia Law: Administrative Procedure*, 33 U. RICH. L. REV. 727, 737 (1999).

Commonwealth Calendar website.¹⁶² Posting notice of meetings to the Internet is certain to provide access to information and notice of scheduled meetings to many more Virginia citizens than would merely posting the printed meeting calendars in a public place. Now, anyone with Internet access may visit one website for the date, time, and location of any meeting of any public body. In offering the calendars of all public bodies in online format, the legislature is effectuating its stated goal to “afford every opportunity to citizens to witness the operations of government.”¹⁶³

B. *Requests for Public Records*

FOIA dictates that access to government records “shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.”¹⁶⁴ The updated FOIA reflects only a minor change in the class of people eligible to request public records. The 2007 revisions did not expand this class of persons granted access to the records of public bodies. Instead, the only revision regarding the identity of eligible requesters clarifies that FOIA rights are denied to persons civilly committed pursuant to Virginia’s Sexually Violent Predators Act.¹⁶⁵

The General Assembly could have done more to clarify eligible requesters. The statute says nothing of the rights of nonresidents. Perhaps the statute simply reflects the fact that “[i]t is generally easy for an out of state person or media representative to find a Virginia individual to make the request.”¹⁶⁶ Public agencies would gain nothing by prohibiting requests from foreigners because Virginia does not condition a FOIA request on a showing that the requester has some “civic-minded” purpose.¹⁶⁷ Therefore, a Virginia resident may make a FOIA request on behalf of a non-resident. Or, perhaps the statute does not speak to the rights of foreign requesters out of concerns about the Due Process Clause

162. VA. CODE ANN. §§ 3707(C), 3707.1 (Repl. Vol. 2008).

163. *Id.* § 2.2-3700(B) (Repl. Vol. 2008).

164. *Id.* § 2.2-3704(A) (Repl. Vol. 2008).

165. *See id.* § 2.2-3703(C) (Repl. Vol. 2008).

166. VA. MUN. LEAGUE, *supra* note 132, at 9.

167. *See Associated Tax Serv., Inc. v. Fitzpatrick*, 236 Va. 181, 187, 372 S.E.2d. 625, 629 (1988).

of the Fourteenth Amendment.¹⁶⁸ Regardless, nothing in the statute forbids a public body from denying a request based on residency; therefore, it appears that public bodies have the discretion to grant or deny requests from non-Virginia residents as they see fit.

The revisions also leave unchanged a provision in the statute that permits custodians of records to request—at their discretion—the legal name and address of the requester.¹⁶⁹ Should a custodian seek this information, a requester may refuse it: nothing in the statute requires the requester to acquiesce.¹⁷⁰ Further, nothing in the statute offers custodians any recourse should the requester fail to provide a legal name and address. If the custodian *may* request identification, *may* the custodian also refuse the FOIA request should the requester fail to provide a legal name and address?¹⁷¹

Perhaps the decision not to set more standards in this area results from the post-September 11th realization that the same statutes providing Virginia's citizens access to government information afford terrorists identical access.¹⁷² The manner in which a requester uses public records acquired through FOIA requests is not governed by FOIA, though; “[t]here are other laws for that.”¹⁷³ Worry over the intent behind a request cannot be used to revoke public access to those records;¹⁷⁴ nor should the government be permitted to chill requests by screening a requester's legal name and address.¹⁷⁵

Significant changes occurred with respect to responses to information requests. The recent amendments to Virginia Code sec-

168. Bonner et al., *supra* note 161, at 730–31; see U.S. CONST. amend. XIV, § 1.

169. See VA. CODE ANN. § 2.2-3704(A) (Repl. Vol. 2008).

170. See VA. MUN. LEAGUE, *supra* note 132, at 9.

171. See *id.*

172. See *id.* at 7 (discussing a revision to Virginia Code section 2.2-3711(A)(20) allowing a closed meeting to discuss both planning for terrorist activity and responding to terrorist activity); see also Keith Anderson, Note, *Is There Still a “Sound Legal Basis?”: The Freedom of Information Act in the Post-9/11 World*, 64 OHIO ST. L.J. 1605, 1649 (2003) (arguing that although terrorist organizations may not obtain all of their information through the federal FOIA, the executive branch of the federal government is justified in limiting information that might be used for destructive purposes by terrorist groups).

173. Everett, *supra* note 133.

174. See *id.*

175. Cf. Taylor v. Worrell Enters., Inc., 242 Va. 219, 222, 409 S.E.2d 136, 138 (1991) (stating that compelled release of the Governor of Virginia's telephone logs could have a chilling effect on the Governor's use of the telephone for commonwealth business).

tion 2.2-3704 clarify that all responses must be in writing.¹⁷⁶ Not only must the response from the public body be in writing, but it must be in one of the four statutorily provided forms.¹⁷⁷ In *Fenter v. Norfolk Airport Authority*, the Supreme Court of Virginia determined that the Norfolk Airport Authority (the “Airport Authority”) violated FOIA when it failed to adequately respond to John Fenter’s requests for information about the authority of the Airport Authority to randomly search vehicles entering the airport.¹⁷⁸ The Airport Authority responded by letter to all of Fenter’s written requests for information; however, the Authority’s replies indicated only that it had contacted a second agency for advice or had referred the matter to its legal counsel.¹⁷⁹ The court found those responses did not meet the requirements of the Virginia Code.¹⁸⁰ Thus, in each response to a FOIA request, an agency must clearly respond through one of the four statutorily created responses.¹⁸¹

The four responses permitted by statute were amended by the General Assembly in 2007: the revisions eliminate the possibility that an agency might respond to a request merely by notifying the requestor that the records will be provided.¹⁸² Now, when a public body receives a FOIA request but cannot find the requested records, and the agency knows that another public body maintains those records, it must provide that agency’s contact information to the requester.¹⁸³ Today, the Airport Authority’s response to Fenter indicating it had contacted another agency would still be inadequate—it ought to have informed him how to contact the agency the Authority believed was in possession of the sought-after information. Requiring a requested agency to identify the custodial agency precludes a public body from frustrating a requester by merely replying that it cannot find the records or that it does not have them.

176. VA. CODE ANN. § 2.2-3704(B)(1–4) (Repl. Vol. 2008).

177. *See id.*

178. *See Fenter v. Norfolk Airport Auth.*, 274 Va. 524, 528–32, 649 S.E.2d 704, 706–09 (2007).

179. *Id.* at 531, 649 S.E.2d at 708.

180. *Id.*

181. *See id.*; *see also* VA. CODE ANN. § 2.2-3704(B) (Repl. Vol. 2008).

182. *See* VA. CODE ANN. § 2.2-3704(B) (Repl. Vol. 2008).

183. *See id.* VA. CODE ANN. § 2.2-3704(B)(3) (Repl. Vol. 2008).

C. *Closed Meetings*

In 2007, the General Assembly added four closed meeting exemptions, most of which correspond to records exemptions. There is now an exemption for meetings relating to records exempted from the Virginia Retirement System or local retirement systems.¹⁸⁴ The 2008 amendments added exemptions for (1) meetings relating to the Virginia Military Advisory Council, the Virginia National Defense Industrial Authority, or a local or regional military affairs organization appointed by a local governing body;¹⁸⁵ (2) discussion or consideration by the Virginia Board of Education of records related to the denial, suspension, or revocation of teacher licenses;¹⁸⁶ and (3) discussion or consideration of confidential or proprietary records provided by a private business to certain state, local, or regional industrial or economic development authorities or organizations for business, trade, or tourism development.¹⁸⁷

D. *Enforcement*

FOIA enforcement remains mostly unchanged. Virginia Code section 3713 was amended to clarify that enforcement of violations of FOIA by public bodies is to be adjudicated in the general district court or circuit court of the residence of the aggrieved party, or, in the alternative, in the City of Richmond.¹⁸⁸

E. *Records Exemptions*

The General Assembly enacted FOIA “to ensure public access to governmental records and meetings, to avoid an ‘atmosphere of secrecy’ in the conduct of government affairs, and to encourage resolution of disputes in these areas through agreement rather

184. Act of Mar. 21, 2007, ch. 739, 2007 Va. Acts 1119 (codified as amended at VA. CODE ANN. § 2.2-3711(A)(20) (Repl. Vol. 2008)).

185. Act of Mar. 27, 2008, ch. 721, 2008 Va. Acts __ (codified as amended at VA. CODE ANN. § 2.2-3711(A)(42) (Repl. Vol. 2008)).

186. Act of Mar. 27, 2008, ch. 668, 2008 Va. Acts __ (codified as amended at VA. CODE ANN. § 2.2-3711(A)(41) (Repl. Vol. 2008)).

187. Act of Mar. 12, 2008, ch. 626, 2008 Va. Acts __ (codified at VA. CODE ANN. § 2.2-3711(A)(40) (Repl. Vol. 2008)).

188. VA. CODE ANN. § 3713 (Repl. Vol. 2008).

than litigation.”¹⁸⁹ A government of the people, by the people, and for the people must be accountable to its people.¹⁹⁰ But this policy is not absolute.¹⁹¹ The General Assembly’s creation of a number of exceptions to FOIA evinces the legislative intent that this policy of sunshine in government “does not override the need for confidentiality in every circumstance”; moreover, often the Commonwealth’s best interests may require that some records not be disclosed.¹⁹²

To proponents of open government, however, “FOIA in Virginia is not perfect; there will always be more exceptions to what is considered public information that [sic] what is not.”¹⁹³ After all, “FOIA was enacted as a disclosure statute, not as a non-disclosure statute.”¹⁹⁴ The 2007 and 2008 amendments will do nothing to ease the concerns of those worried that the statute classifies more information than not as FOIA-exempt; the revisions increase the number of exceptions available to public bodies. The 2007 revisions included these new exceptions: the identities of executioners from FOIA requests;¹⁹⁵ certain information contained in rabies vaccination certificates is exempt through a revision to section 3705.7;¹⁹⁶ and some records held by the Virginia Retirement System.¹⁹⁷

In the 2008 session, the General Assembly passed nine bills creating seven new records exemptions.¹⁹⁸ Now exempt from FOIA are certain records of the Virginia Military Advisory Coun-

189. *Taylor v. Worrell Enters., Inc.*, 242 Va. 219, 224, 409 S.E.2d 136, 139 (1991); see Jones, *supra* note 132, at 788 (“[T]he government cannot veil all of its activities in secrecy or gather information for itself and subsequently shield it from the public.”).

190. Jones, *supra* note 132, at 788.

191. See *Taylor*, 242 Va. at 224, 409 S.E.2d at 139.

192. *Id.*; see also Anderson, *supra* note 172, at 1608 (stating that the need for open government must be balanced with the need for the government to be able to withhold information it deems essential to the protection of the public).

193. Editorial, *Not Much Sunshine*, THE DAILY NEWS LEADER (Staunton, Va.), July 21, 2007, at 7A.

194. Bemis, *supra* note 139, at 543.

195. Act of Mar. 21, 2007, ch. 737, 2007 Va. Acts 1116 (codified as amended at VA. CODE ANN. § 2.2-3705.7(26) (Repl. Vol. 2008); VA. CODE ANN. § 53.1-233 (Cum. Supp. 2008)).

196. This provision was removed during the 2008 session. See Act of Feb. 22, 2008, ch. 16, 2008 Va. Acts __ (codified as amended at VA. CODE ANN. § 2.2-3705.7 (Repl. Vol. 2008)).

197. Act of Mar. 21, 2007, ch. 739, 2007 Va. Acts 1119 (codified as amended at VA. CODE ANN. § 2.2-3705.7(25) (Repl. Vol. 2008)); see 2000 Op. Va. Att’y Gen. 215.

198. See 2008 REPORT, *supra* note 137, at 1.

cil, the Virginia National Defense Industrial Authority, or a local or regional military affairs organization;¹⁹⁹ certain confidential documents provided by an insurance carrier to the Virginia Health Commissioner;²⁰⁰ “[i]nvestigator notes, and other correspondence and information . . . with respect to an active investigation conducted by or for the [Virginia] Board of Education related to the denial, suspension, or revocation of teacher licenses;”²⁰¹ “[r]ecords maintained by the Department of the Treasury or participants in the Local Government Investment Pool, to the extent that such records relate to information required to be provided by such participants to the Department to establish accounts;”²⁰² records “supplied by a private or nongovernmental entity to the Inspector General of the Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Inspector General’s Office;”²⁰³ and certain records of the Office of the Attorney General acting pursuant to its enforcement authority under the Master Settlement Agreement regarding certain tobacco product manufacturers, to the extent that those records contain information submitted by a private business entity or principal thereof to the Office of the Attorney General.²⁰⁴

The most controversial of these bills exempts the donor records of institutions of higher education.²⁰⁵ This bill, requested by the University of Virginia (“UVA”), protects the anonymity of donors who do not want their personal information publicized.²⁰⁶ Supporters and critics alike agree that UVA should have the right to withhold donors’ social security numbers, financial information,

199. VA. CODE ANN. § 2.2-3705.2(12) (Repl. Vol. 2008).

200. *Id.* § 2.2-3705.6(21) (Repl. Vol. 2008).

201. *Id.* § 2.2-3705.3(13) (Repl. Vol. 2008).

202. *Id.* § 2.2-3705.7(27) (Repl. Vol. 2008).

203. *Id.* § 2.2-3705.6(22) (Repl. Vol. 2008).

204. *See id.* § 2.2-3705.3(14) (Repl. Vol. 2008).

205. *See Act of Mar. 27, 2008, ch. 665, 2008 Va. Acts* __ (codified as amended at VA. CODE ANN. § 2.2-3705.4(7) (Repl. Vol. 2008)); *see also* Tyler Whitley, *New Law Allows Anonymity for Donors to Some Schools*, RICH. TIMES-DISPATCH, Mar. 21, 2008, at B3; Brian McNeill, *U.Va Seeks To Withhold Donor Data*, RICH. TIMES-DISPATCH, Jan. 15, 2008, at B1; Editorial, *Sunshine*, RICH. TIMES-DISPATCH, Jan. 17, 2008, at A12.

206. Editorial, *supra* note 205. The bill would exempt from FOIA a significant portion of UVA’s fundraising database; the university would be required only to provide a donor’s name, the size and date of a contribution, and for what purpose the donation was designated. McNeill, *supra* note 205.

marital status, and other personal data.²⁰⁷ But critics argue that university donations, and the donors themselves, “have political and policy implications,”²⁰⁸ and therefore the names of donors ought to be subject to FOIA.²⁰⁹ As a public institution, UVA is subject to FOIA; thus its finances and funders “must be transparent to ensure accountability.”²¹⁰ Closure of a university’s records may indicate to other institutions that they, too, may close their records when closure benefits their needs.²¹¹ This subverts the policy of open government.

Similarly controversial is the proposed exemption for concealed weapon permit holders. The Virginia Freedom of Information Advisory Council appointed two subcommittees to examine the most controversial issues discussed in the 2008 legislative session: electronic meetings and access to personal information.²¹² The proposed exemption for concealed weapon permit holders was sent to the privacy advisory committee appointed by the Virginia Freedom of Information Advisory Council for further study and promises heated debate in the 2009 legislative session. As one observer noted, “[w]ith the exception of abortion, perhaps no other issue in current American debate invokes more emotionally charged rhetoric and diametric opposition than the proper place of firearms in the modern-day United States.”²¹³

In previous years, the privacy of an individual’s name and address, or other identifying personal information, was “in a sense protected by the barriers of time and inconvenience involved in collecting this information from public records.”²¹⁴ Not so today: In March of 2007, the *Roanoke Times* published a list of all Virginians with a permit to carry a concealed handgun.²¹⁵ The list,

207. *Id.*

208. Editorial, *supra* note 205.

209. See McNeill, *supra* note 205 (quoting Jennifer Perkins, executive director of the Virginia Coalition for Open Government, who says, “but what if a reporter is doing a story about a public official who hasn’t paid taxes in a dozen years but is giving half a million dollars to U.Va? We’d want to know about that.”).

210. *Id.*

211. *Id.*

212. See Virginia Freedom of Information Advisory Council, 2008 Subcommittees, http://dls.state.va.us/groups/foiacouncil/subcom_mtgs/2008/subcom08.htm (last visited Oct. 16, 2008).

213. Ryan S. Andrus, Note, *The Concealed Handgun Debate and the Need for State-to-State Concealed Handgun Permit Reciprocity*, 42 ARIZ. L. REV. 129, 129 (2000).

214. Everett, *supra* note 133.

215. See Christian Trejbal, *Shedding Light on Concealed Handguns*, ROANOKE TIMES,

maintained by the state police as an investigative tool,²¹⁶ was sent to a *Roanoke Times* reporter in response to a FOIA request. Its subsequent publication sparked public outcry.²¹⁷ Safety concerns persuaded the removal of the database from the newspaper's website.²¹⁸ But is the proper answer to public objection or safety concerns to restrict public access to those records causing concern?

The General Assembly has yet to resolve the issue. Perhaps guidance may be had from other states that have already made such a decision. Connecticut, Delaware, Missouri, Utah, and Washington, for example, exempt from FOIA all records identifying individuals permitted to carry a concealed weapon.²¹⁹ Alaska, Arizona, Arkansas, Hawaii, New Mexico, Oklahoma, and West Virginia prohibit disclosure of the identity of individuals who have a permit to carry a concealed weapon to anyone other than law enforcement or criminal justice agencies.²²⁰ South Carolina, however, makes such records available to anyone who requests them.²²¹

Still other states strive to maintain some sort of balance between total exclusion from FOIA and complete public access. For example, in South Dakota, applications for permits to carry concealed weapons must be maintained, and, as such, are public

Mar. 11, 2007, at 10.

216. See 2007 Op. Va. Att'y Gen. 07-027.

217. See Rex Bowman, *Va. Gun Database Off-Limits*, RICH. TIMES-DISPATCH, Apr. 7, 2007, at B1 ("[Attorney General Bob] McDonnell issued the [advisory] opinion at the request of Del. David A. Nutter, R-Montgomery, who said he was inundated with calls last month from constituents who were angry that the *Roanoke Times* obtained the database from state police and published it online.").

218. See Op. Att'y Gen., *supra* note 216 (noting concerns for public safety); *The Roanoke Times Removes Database of Handgun Permit Holders*, ROANOKE TIMES, Mar. 11, 2007.

219. See CONN. GEN. STAT. ANN. § 29-28(d) (West Cum. Supp. 2008); DEL. CODE ANN. tit. 29, § 10002(g)(11) (Repl. Vol. 2003 & Cum. Supp. 2006); MO. ANN. STAT. § 571.101(9) (West Cum. Supp. 2008); UTAH CODE ANN. §§ 53-5-708(1), 63G-2-305(10) (Supp. 2008); WASH. REV. CODE ANN. §§ 9.41.070(4), 42.56.240(4) (West Cum. Supp. 2008).

220. See ALASKA STAT. § 18.65.770 (2006); ARIZ. REV. STAT. ANN. § 13-3112(J) (Cum. Supp. 2007); ARK. CODE ANN. § 5-73-307(a) (Supp. 2007); HAW. REV. STAT. § 92F-13(4) (Repl. Vol. 1993 & Cum. Supp. 2006); N.M. STAT. § 29-19-6(b) (Cum. Supp. 2008); OKLA. STAT. tit. 21, § 1290.13 (2002); W. VA. CODE ANN. § 61-7-4(m) (LexisNexis Supp. 2008); see also Hawaii Office of Info. Practices Op. Ltr. No. 95-18 (July 28, 1995) (stating that the names of individuals licensed to carry concealed firearms in Hawaii are not a matter of public record).

221. See S.C. CODE ANN. § 23-31-215(I) (Cum. Supp. 2007) (stating that the list of concealed weapon permit-holders must be released upon request).

records; however, the information on the applications is confidential.²²² Maine also exempts applications for concealed weapons permits from FOIA.²²³ In Ohio, the sheriff is required to maintain such records, which the statute designates as confidential and not public.²²⁴ Yet, if a journalist makes a request for such records, the sheriff is required to disclose the identifying information of the person seeking the concealed weapon permit.²²⁵

Also bound to attract notable debate in 2009 will be the status of disciplinary information posted to the Virginia State Bar (the "Bar") website. The Bar posts charges of attorney misconduct that have received a finding of probable cause of a violation of legal ethics.²²⁶ The Supreme Court of Virginia has asked the Bar to refrain from posting disciplinary information about a lawyer until the time for filing any appeal has expired.²²⁷ This poses concern for the Bar, however, because the failure to publicize that information to the public could mean that an attorney may be under suspension while appealing the decision and the public would have no way of accessing this information.²²⁸ This promises to bring interesting debate between the Bar and the supreme court in regards to the accessibility of information concerning disciplinary proceedings.

222. S.D. CODIFIED LAWS § 23-7-8.10 (2006).

223. See ME. REV. STAT. ANN. tit. 25, § 2006 (2007).

224. OHIO REV. CODE ANN. § 2923.129(B)(1) (LexisNexis Supp. 2008).

225. *Id.* § 2923.129(B)(2) (LexisNexis Supp. 2008).

226. Alan Cooper, *Court: Delay Web Discipline Postings*, VA. LAW. WKLY., Apr. 21, 2008, at 1.

227. *Id.*

228. *Id.*