

Can a Councilmember Disclose Information Used in Closed Door Meetings?

by

Jasbinder Singh

An Opinion, issued by the VA Advisory Council on the Freedom of Information Act pursuant to my request for a written opinion, has shown that closed-door meetings are not sacrosanct, that councilmembers can disclose information to which they have been made privy and that "...the FOIA is not to be construed to prevent discussions of public matters between government and citizens." This article discusses three disclosure issues that arose during the Town's purchase of the Ashwell property.

BACKGROUND

Freedom Of Information Act (FOIA) allows a public body to withhold *[a]ppraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease.* It is generally accepted that an appraisal (s) should be kept confidential important prior to the negotiations; however, in the case of the purchase of Ashwell's property, the Town Council had already discussed the two appraisals, the staff had negotiated the purchase price and an "as is" contract had been prepared. The proposed contract was the subject of a forthcoming public hearing. Nothing could possibly affect the negotiations at this stage.[\[1\]](#)

The public knew nothing about the appraisals and had no basis for making comments during the public hearings. How could they possibly comment on the fairness of the purchase price? The then town attorney, Richard Kaufman, did not respond meaningfully when I asked him, " On what basis can a resident comment on the purchase price?" Mr. Kaufman asked me not to say anything about the appraisals during the public hearing. However, I wanted the public to know the facts and make informed comments regarding the purchase. At the time of this discussion with Mr. Kaufman, I was aware that the VA Freedom of Information Advisory Council (FOIA Council) had been charged with giving FOIA advisory opinions to the public at large. I decided to seek their advice. Pursuant to their verbal advice I decided to write and publish two articles, one just before the approval of the contract and other shortly thereafter, **without disclosing the appraised values.** Shortly thereafter, against the wishes of Mr. Kaufman, I decided to take the FOIA Council up on their offer to provide a written opinion.[\[2\]](#)

Click [FOIA Letter - July 2015](#) to see my communication

THE OPINION

On September 2, 2015, the FOIA Council issued its opinion. It provided detailed answers to the seven questions I had raised in my letter. The opinion

emphasized that the purpose of FOIA is to enable citizens to witness meetings of public bodies so that they know what their government is doing. **Closed meetings are exceptions to that purpose that must be given narrow construction** (*Emphasis Added*) and it continued by saying that FOIA is not to be construed to prevent discussions of public matters between government and citizens.

Take a look at the [FOIA Council opinion](#).

The following paragraphs highlight three issues discussed in the Opinion. The applicability of the Opinion to this case is given in italics.

1. No Prohibition on Speaking Publicly: "As a general rule FOIA does not prohibit you from speaking publicly or disclosing public records to which you have been made privy^[4] The General Assembly has chosen not to set out prohibitions on the disclosure of public records or limits on free speech in FOIA itself."^[4] (*Emphasis Added*)

This means FOIA does not prohibit a councilmember from speaking publicly. The fact that the General Assembly must have chosen not to set out the prohibitions means that it wanted to give legislators the freedom to have public discourse without fear of legal penalties. The question is "What information can a councilmember discuss in public?". In my first article, I chose to discuss the factors affecting appraised values. Using these factors, I showed that the purchase price was excessive, if we wanted to develop the downtown to the density approved by the town council in 2011. In the second article, I discussed the unwholesome administrative process by which the Town Council had established the range for negotiating a purchase price with Mr. Ashwell. These articles contributed greatly to public discourse even though they were written after the negotiations for the purchase price had already been completed. The articles did not violate the spirit or the letter of FOIA. On the contrary, they served the public interest by informing our residents.

Neither article disclosed the appraised values; therefore, the articles can't possibly affect the resale value of the property. A developer will probably do his own appraisals^[5]. If, in his mind, the Town paid too much, he will offer to purchase the property for a lower price. The town would lose money in that case. On the other hand, if the Town paid too little (that is, if the land is worth more than the price town paid), the developer would probably keep quiet, offer to buy it for the price the town paid and build to the highest density allowed. He will pocket the excess profits generated by the development. It would not matter what the first or the second appraisals were and what my articles said about them.

2. Protection of the Public Purse: "The General Assembly has allowed certain records and portions of meetings to be withheld or discussed outside the public view based on principles related to privacy, public safety, protection of the public purse, and similar concerns." (*Emphasis Added*)

The principle of the "protection of the public purse" deserves some discussion. The underlying assumption here is that a Town Manager, Mayor and/or the council, would always protect the public purse. That is not necessarily true in all cases. They may well be using the public purse to satisfy their personal and political interests.

Consider the case in which the first appraisal comes in much lower than the asking price; however, rather than walking away, the Manager and the Mayor decide to do whatever it takes to “make a deal”. They order another appraisal and reach an advance understanding with the appraiser that the property is worth at least a certain amount. Lo and behold, the second appraisal ends up close to or higher than the seller’s demand! Now they can make their deal with the seller. To protect themselves from a variety of allegations, they exempt both appraisals from disclosure under FOIA.

Most people would consider their actions to be “suspect”, illegal and un-protective of the public purse. In other words, most people would believe that they had violated one of the primary principles of the FOIA exemption - protection of the public purse.

Under such circumstances, it can be argued that a councilmember would be protecting the public purse more than the Manager, the Mayor and their supporters on the council, if he discloses some of the information to his constituents to initiate public discussion or to merely inform the public. His actions may even put the transaction on hold or help hold the dealmakers accountable at a future date. It appears that the General Assembly was aware of situations where the protection of the public purse and the public interest would be necessary in unusual ways and chose not to set out prohibitions on the disclosure of public records or put limits on free speech in FOIA itself.

3. Exemption From Disclosure Until Resale of the Property: According to the Opinion, FOIA provides an exemption from mandatory disclosure for *[a]ppraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease*. Therefore the time period during which the record may be withheld is not a specific term, but lasts until *the completion of such purchase, sale or lease*. In this case, it appears that the development plan includes both the initial purchase and subsequent sale of the property, and that the same appraisals are being used in both transactions. **This does not mean an appraisal used in purchasing a property may be withheld indefinitely until some vague, hypothetical sale is completed at some unknown future date. (Emphasis Added)**

If we apply the terms of the Opinion to the Ashwell property, it appears that the Town Manager and the Mayor are construing FOIA to prevent discussions of public matters between the government and its citizens as discussed below.

On September 30th, the Town completed the purchase of the Ashwell property. The next phase is the preparation and issuance of a Request for Proposal for the development. Even before a draft purchase contract was ready, the Town Manager asked and the then-Town Attorney exempted the two appraisals from disclosure under FOIA (essentially) indefinitely. The Town is not developing the town-owned parcels in accordance with any specific development plan. There is only a general plan to sell the parcels as a part of the winning proposal.

It is likely that the current phase of issuing the RFP will be followed by an extended period of (1) submission of proposals by developers, (2) initial and final proposal selection, (3) negotiations of the details of the development (4) finalizing the design and (5) negotiating the terms of the final contract. Depending on the type of financing involved, final decisions may not be made for at least another

year. Therefore, not only is the future date of the sale of the town owned-properties not known, but the buyer is also not known.

It is more likely than not that the developer, in exchange for the value of the property, will propose to, among other things:

- *Build an Art Center for the Town*
- *Underground the Utilities*
- *Build Internal Roads, and*
- *Build a Parking Garage*

Accordingly, the discussion of the terms of the sale promises to become much more complicated. It would shift from “Whether the Town paid a fair price for the Ashwell property” to “Whether the Developer’s proposed deal is fair”. The Town may lose on both ends – lose money on the Ashwell deal and lose money as a part of a development proposal; no one would be able to tell easily. Depending on the costs involved, the sale may not take place or if it does, the Town may pay a heavy price for its actions.

Regardless, by the time the sale of the town-owned parcels is finalized, the two appraisals would not be of much interest to the public. The Mayor and the Town Manager would have successfully avoided the discussion of the purchase price (for the Ashwell property) until well after the next election. And, they would have violated the spirit, if not of the letter of the FOIA. Accordingly, I believe, it is important to disclose both appraisals to the public immediately.

In summary, this Opinion, issued pursuant to my request for a written opinion, has shown that the closed-door meetings are not sacrosanct, that councilmembers can disclose information to which they had been made privy and that the FOIA is not to be construed to stifle discussions of public interest.

Notes:-

[1] The Town Attorney had also approved the Town Manager’s request to keep the appraisals confidential not only until the then current-purchase had been formally completed, but also until the purchased property was resold to an unknown developer on an unknown date in the future. This implied that the public would not know anything about the appraisals for at least another 18 months. See Part 3 of the following discussion.

[2] Mr. Kaufman wanted me to accept his word on this matter; however, I could not rely on his advice, because he had often given conflicting advice to me in the past. His advice had changed with circumstances. He told me many times that his job was to support the majority of the council, the Mayor and the town staff no matter who they were or what they wanted to do.

[3] There is only one such prohibition contained within FOIA itself, and it is not relevant to the issues presented in this opinion. Subdivision A 3 of § 2.2-3706 provides as follows: *The identity of any individual providing information about a crime or criminal activity under a promise of anonymity shall not be disclosed.*

[4] *But see n. 4, id.*

[5] In this case, the two appraisals did not take into the environmental contamination of the property and assumed a density of development that may not materialize in practice. For these reasons alone, developers must do their own appraisals.

July 13, 2015

Alan Gernhardt, Esq.
VA Advisory Council on the Freedom of Information Act
General Assembly Building, 2nd Floor
201 North 9th Street
Richmond, VA 23219

Re. The Town's Contract to Purchase Private Property

Dear Mr. Gernhardt,

The last time we talked, I had promised to write to you in a week or so and ask for a written clarification of the ability of a Councilmember to disclose information about real estate appraisals commissioned by the Town. However, I have been very busy with legislative matters and could not attend to this important matter sooner. I also wanted to cover this topic comprehensively by requesting that you cover issues raised by our Town Attorney, who incidentally has retired.

After discussing the Background of this case, I have divided my request into six parts that deal with a meeting of one kind or another. Each of these meetings raised several questions related to FOIA disclosure, but I distilled them into a total of 7 questions. I suppose, I am requesting that you answer all seven if that is possible. You may distill them further into fewer questions, if necessary.

A. BACKGROUND

In its pursuit to develop the downtown over the last 2 or 3 decades, the Town of Herndon had bought two adjacent properties – (1) Block E and (2) one half of Block D. Mr. Ashwell, a private citizen, owned the other half of Block D. In order to facilitate the development of the downtown, the Town had planned to purchase the second half of Block D at an opportune time.

In 2013, the Town ordered an appraisal of the Town-owned land (Block E and the first half of Block D) as well as that of all three properties combined, because, according to the Town Manager (TM), the Council wanted to “get an idea of the value of the properties.” In Dec. 2013, it received the appraisal (Appraisal A). The Town calculated the value of the Ashwell property by deducting the estimated appraisals of the two sets of properties.

Around June 2014, Mr. Ashwell expressed an interest selling his property to the Town. His asking price turned out to be about 67% higher than the appraised value estimated in December 2013. In order to make a deal, the Town decided to do another appraisal. The official reason for redoing the appraisal was that the first appraisal was “bad”. In November 2014, the Town received the second appraisal (Appraisal B). It turns out that the new value of the Ashwell property was about 10% higher than Mr. Ashwell's asking price or almost 84% higher than the first appraisal.

I approached you after the purchase price had already been negotiated and the Town was getting ready to hold a public hearing to approve the contract with Mr. Ashwell. My main concern was that the public had absolutely no knowledge of the appraisals and process used to negotiate the price. Based on your verbal advice, I published an article on the “fairness” of the purchase price and made a few comments during the public hearings. I wrote a second article a little later about the process used to set the negotiating range. In both cases, I managed to not disclose the appraised values.

I request that you give me a written opinion for my records. I am also making this request to facilitate a clear understanding of the applicable provisions of FOIA among politicians in Virginia.

The Town Attorney (TA), before retiring on June 30, 2015, advised me not to ask you for a written opinion, because “it will not reflect well on the Town.” It is obvious that, by sending this letter to you, I have ignored his advice. The TA has also advised the TM that the two appraisals can be kept under wraps until after the town has sold the Ashwell property to a developer (after (1) the current sale/purchase has closed, (2) the property has been rezoned and (3) the competing proposals have been evaluated.

B. DISCLOSURE ISSUES UNDER FOIA

In the following sections, I have described various meetings and written questions that I believe need to be answered to understand various provisions of FOIA. Kindly prepare your response as you see fit.

1. The First Closed-Door Meeting

The Town Manager (TM) called for a closed-door meeting of the Town Council to determine a council-approved range for negotiating with Mr. Ashwell. During the meeting the TM introduced an estimate (of the number of apartments that could be built on the Ashwell property) that had been provided independently by an architect. This estimate, as such, had nothing to do with the appraised value, but was being used to set a negotiating range. When a councilmember asked him to disclose the name of the architect, the TM refused to do so by claiming that the information had been provided on a confidential basis. Further, When the TM and the Mayor did not want to provide the appraisals to the councilmembers, I asserted my right to review the appraisals before making my decisions. After some tense discussions, the Mayor agreed to let me review the information in the TM’s office over the next two weeks. However, after several days, they decided to provide paper copies of the appraisals to all councilmembers.

Question No 1:

Does FOIA permit the TM or the Mayor or the majority of the council to withhold documents such as, the appraisals, architect’s memo, summaries of the appraisals, or calculations done by the staff, etc. from a councilmember (or restrict the manner in which they are reviewed)? See also Question No: 6.

2. Private Meeting in TM's Office

A few days before the next closed-door meeting, the TM asked me what my thoughts were about the appraisals. I said that the first appraisal was very professional and the other was “trashy”. He responded by saying that he would like to see me in his office. Five or six hours before the closed-door meeting, the TM, a member of the town staff and I met in the TM's office, discussed my evaluations of the appraisals and my position on the maximum price I would pay. I also provided them with my written evaluations of the appraisals.

Question No 2:

Are documents (appraisals, or their summaries, or the architect's memo) created for discussions with the council in a closed-door meeting, and discussed in a private meeting in the presence of Town staff, protected from disclosure under FOIA?

3. Second Closed-Door Meeting – Setting the Negotiating Price Range

What transpired during the closed-door meeting is discussed in the following article. Please notice that the article does not discuss the two appraisals even indirectly.

<http://herndonopinion.com/2015/06/07/the-untold-story-of-the-towns-purchase-of-the-ashwell-property-how-the-council-saved-millions-of-dollars/>

I published this article well after the Council had approved the contract with Mr. Ashwell, but the question is:

Question No 3:

Could I have published such an article immediately after the conclusion of the second closed-door meeting without violating FOIA?

Notice that the article mainly discusses the process the council used to establish the Town's negotiating price range. It does not mention the selected range even though one can possibly get an idea.

4. Closed-Door Meeting to Discuss and Approve the Purchase Price

At the end of this meeting, the council accepted the negotiated price. And, the Town Attorney asked for permission to prepare a contract.

Question No 4:

Can a councilmember release any information from the appraisals or other documents to the public after the Council has approved the purchase price in a closed-door meeting? If so, in what manner? Does he/she have the discretion to do so?

5. Work Session and a Public Hearing to Discuss and Approve the Contract to Purchase Ashwell's Property

The Town scheduled a TC work session to discuss the draft terms of the contract, and a public session, to approve the contract. During the work-session, the discussion was limited to the terms of the contract. After the work-session, I still had the following public interest concerns.

The purchase price was based on the density of development that was quite a bit higher than that approved in the Master plan. The two appraisals (A & B) were based on densities that were two to three times as much as the density in the Master Plan. It implied that either the Town would lose money if and when it sells the property to a developer, or would be beset with higher density. The public needed to know and understand this fact, before the public hearing.

However, unless somebody published an article or otherwise distributed appropriate data quickly, the public would have no basis to judge the reasonableness of the purchase price or of the proposed contract.

The town attorney had informed me that I was not allowed to release any information from the appraisals. He did not have any answer when I asked, "then, what is purpose of the public hearing?"

After you informed me that I had an unrestricted discretion to release any document discussed in the closed-door meetings, I published the following article a day or so before the public session.

<http://herndonopinion.com/2015/05/25/is-the-proposed-purchase-price-for-the-ashwells-property-fair/>

Notice that the article discussed the appraised values only indirectly. The focus was mainly on the assumed density of the development. The question here is:

Question No 5:

What type of information can be disclosed to the public so that it has the ability to provide enlightened comments, or, is that left up to my discretion? Would I have violated FOIA if I had released the appraisals?

Can all primary determinants of value be discussed without violating FOIA? Should an estimate of the appraised value receive greater weight than say the underlying basis for making the estimate? In this case, the number and type of condos was the primary basis for determining the appraised value.

During the public hearing, the Town Attorney opined that I would be violating FOIA if I discussed any information from the appraisals, that the Town Council was the only custodian of the information and that I had no discretion for releasing any information.

Of course, pursuant to your verbal guidance, I proceeded to make my comments. The Mayor repeatedly interrupted me by saying that I would be hurting the Town's bargaining position if I revealed any information. Disregarding her comments, I proceeded to discuss mainly the density issues. I did not mention the alternative valuations given in appraisals.

Question No 6:

Who is the custodian of the information under FOIA and under what circumstances? What if the Town does not distribute copies of the appraisals to council-members at any time? What if Town staff has reviewed the appraisals and gleaned information from them?

6. Post Contract Award Issues

After the public hearings, the Town Attorney informed me that the TM had asked that the appraisals be kept confidential until after all the properties had been sold. Presumably, the sale would take place at the end of the year or thereafter, that is, well after the Ashwell property has been rezoned, and a few years after the properties were appraised.

Question No 7:

Does FOIA permit a Town to withhold the release of appraisals (or other documents) indefinitely, or, at least until the town sells the properties, even if it takes 6 to 12 months to do so?

Notice that by that time, the first appraisal would be at least 2 years old and the second appraisal would be about 1.5 years old.

Please feel free to ask any questions and discuss this case again. I would be pleased to provide additional information, if necessary. Thank you for your cooperation and assistance.

Sincerely,

Jasbinder Singh
Councilmember
Town of Herndon



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

Senator Richard H. Stuart, Chair
Delegate James M. LeMunyon, Vice Chair

Maria J.K. Everett, Esq., Executive Director/ Senior Attorney
Alan Gernhardt, Esq., Staff Attorney
foiacouncil@dls.virginia.gov

General Assembly Building ~ North 9th Street, Second Floor ~ Richmond, Virginia 23219
804-225-3056 ~ (Toll Free) 1-866-448-4100 ~ (Fax) 804-371-0169 ~ <http://foiacouncil.dls.virginia.gov>

September 2, 2015

Jasbinder Singh
Town Council Member
Herndon, Virginia

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your electronic mail message dated July 11, 2015 and the attachment and links contained therein.

Dear Mr. Singh:

You have asked seven enumerated questions about the release of information concerning topics discussed during closed meetings of a town council. As background, you stated that you are member of the Town Council of the Town of Herndon, and that the Council held closed meetings to discuss the purchase of certain real estate. Specifically, you informed this office that the Town had previously purchased one and a half parcels of real estate in downtown Herndon - one full parcel ("Block E") and half of the adjacent parcel ("Block D"). You wrote that the Town had planned to purchase the other half of Block D from its current owner at an opportune time. In 2013, the Town ordered an appraisal of the value of the property owned by the Town (Block E and half of Block D), as well the value of both parcels if the privately-owned half of Block D was also included (Block E and all of Block D). You indicated that the Town calculated the value of the privately-owned half of Block D by subtracting the appraised value of the Town-owned parcels from the appraised value of the combined parcels. In 2014, you stated that the owner of the other part of Block D indicated an interest in selling his portion of Block D, but his asking price was about 67% higher than the appraised value computed by the Town in 2013. You stated that the Town ordered a second appraisal, stating the 2013 appraisal was "bad." The 2014 appraisal calculated the value of the privately-owned parcel as approximately 84% higher than the 2013 appraisal, approximately 10% higher than the owner's asking price. You further stated that after the purchase price had been negotiated and the Town was getting ready to hold a public hearing to approve the contract, you wrote and published two articles about this matter where you discussed the fairness of the purchase price and the process used to set the negotiating range, respectively, but did not disclose the appraised values. You wrote that

you also made comments at the public hearings. You stated your concern that the public had no knowledge of the appraisals and the process used in negotiations. Further background information will be provided along with the consideration of each of your questions below.

Before turning to your specific questions, first note the policy of the Virginia Freedom of Information Act (FOIA) stated in subsection B of § 2.2-3700, which states in relevant part as follows:

By enacting this chapter, the General Assembly ensures the people of the Commonwealth ... free entry to meetings of public bodies wherein the business of the people is being conducted. 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. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the publicAll public ... meetings shall be presumed open, unless an exemption is properly invoked.

The provisions of this chapter 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 exemption from public access to ... meetings shall be narrowly construed and no ... meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law. This chapter shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.

In regard to meetings, this policy makes abundantly clear that the purpose of FOIA is to enable citizens to witness meetings of public bodies so that they know what their government is doing. Closed meetings are exceptions to that purpose that must be given narrow construction, and FOIA is not to be construed to prevent discussions of public matters between government and citizens. This policy is implemented through the procedures and exemptions set out in §§ 2.2-3707 through 2.2-3712. Sections 2.2-3711 and 2.2-3712 set out the allowed purposes for which a meeting may be closed, and the procedure for convening and certifying a closed meeting, respectively. Specific provisions of law will be discussed as appropriate in response to each of your questions.

Your first question asked whether FOIA permits the Town Manager, the Mayor, or a majority of the Town Council to withhold from another Council member records such as appraisals, an architect's memo, and staff calculations. As background to this question, you wrote that the Town Council held a closed meeting to discuss the price range for negotiating to purchase the privately-owned portion of Block D. You stated that the Town Manager presented an estimate from an architect of the number of

apartments that could be built on the property, and that this estimate that was used to set a negotiating price range. You stated that the Town Manager declined to name the architect who had provided the estimate. Further, when you asked to review the appraisals, you stated that the Mayor agreed to let you review them in the Town Manager's office over the next two weeks, but later decided to give paper copies to all Council members.

This office recognizes that in order to carry out their duties certain government officials and employees will have access to records and meetings that other citizens do not. However, the general rule for FOIA purposes as previously stated by this office is that nothing in FOIA establishes additional, separate, or different rights for elected officials or public employees.¹ FOIA grants public records access rights to citizens of the Commonwealth and certain news media representatives in subsection A of § 2.2-3704. When a government official or employee makes a request pursuant to FOIA, he or she is acting in his or her capacity as a citizen of the Commonwealth. FOIA does not address requests made in any other capacity. Therefore your right to see an appraisal under FOIA is the same as that of any other citizen of the Commonwealth. There is an applicable exemption in this instance, subdivision 8 of § 2.2-3705.1, which allows a public body to withhold *[a]ppraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease*. Given that the record at issue was an appraisal subject to a proposed purchase, this exemption would have allowed the record to be withheld from any citizen under FOIA.

However, I note that you also wrote that you asserted your right to see the appraisals before making your decision on them as a Council member. Any other legal rights you may have as a Council member would be outside of FOIA and therefore outside the purview of this office. In general terms, it is my understanding that public bodies conduct public business as a body by motion and vote of at least a quorum of members. In this context, individual members act by proposing motions, speaking either for or against any given motion, and then voting, but the authority of local governing bodies is held by the body, not by the individual member. While it may be presumed that individual members of public bodies will be given access to appropriate background materials and information as needed to allow the members to make informed decisions, as stated above, FOIA itself does not provide for any special access rights for government officials or employees. Note also that FOIA does not set forth any rules of parliamentary procedure, although it does require that votes be made in open meetings held in accordance with FOIA.² You may wish to consult your Town Attorney or other legal counsel to ask whether any other provisions of law outside of FOIA do grant additional or different rights of access to Town Council members.

Your second question asks whether records such as appraisals, summaries of appraisals, or an architect's memorandum created for discussion with the Council in a

¹ Freedom of Information Advisory Opinion 02 (2014).

² See § 2.2-3710.

closed meeting are subject to mandatory disclosure under FOIA. Regarding the appraisals, subdivision 8 of § 2.2-3705.1 would exempt them from mandatory disclosure as described above. Additionally, subdivision 5 of the same section provides an exemption for *[r]ecords recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711. However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting.* Following this exemption, if the records at issue were *recorded in or compiled **exclusively** for use* in the closed meeting, then they would be exempt from mandatory disclosure. [Emphasis added.] However, if the records were prepared for uses other than use in closed meetings, then they would not be exempt under this provision.

Your third, fourth, and fifth inquiries will be addressed together as the answer to all of them is essentially the same. For your third question, you stated that you published an article discussing what had transpired in the closed meeting well after the Council had approved the contract to purchase the privately owned portion of Block D. You stated that the article did not discuss the two appraisals. You asked whether you could have published the article sooner without violating FOIA. Your fourth question asked whether a council member could release information from the appraisals or other documents to the public after the Council has approved the purchase price in a closed meeting, and if so, in what manner. Your fifth inquiry was presented as a series of questions regarding what information may be disclosed to the public, whether disclosure of the appraisals themselves would violate FOIA, and whether the factors used to determine the appraised values could be discussed without violating FOIA.

The answer to all of these inquiries is that as a general rule FOIA does not prohibit you from speaking publicly or disclosing public records to which you have been made privy.³ One must keep in mind that the purpose of FOIA is to provide access to government records and meetings so that the public can know what government is doing. In enacting exemptions that allow certain records to be withheld and certain topics to be discussed in closed meetings, the General Assembly has allowed certain records and portions of meetings to be withheld or discussed outside the public view based on principles related to privacy, public safety, protection of the public purse, and similar concerns. The General Assembly has chosen not to set out prohibitions on the disclosure of public records or limits on free speech in FOIA itself.⁴ There are laws, however, outside of FOIA that contain such prohibitions and limits in specific instances.⁵ I do not know of any specific laws prohibiting the release of real estate appraisals and similar

³ There is only one such prohibition contained within FOIA itself, and it is not relevant to the issues presented in this opinion. Subdivision A 3 of § 2.2-3706 provides as follows: *The identity of any individual providing information about a crime or criminal activity under a promise of anonymity shall not be disclosed.*

⁴ *But see* n. 3, *id.*

⁵ A comprehensive list is beyond the scope of this opinion, but as examples of prohibitions see §§ 19.2-389 (prohibiting the release of criminal history records except in certain circumstances) and 58.1-3 (tax secrecy).

documents. The FOIA exemptions mentioned above, subdivisions 5 and 8 of § 2.2-3705.1, are both discretionary exemptions prefaced with language common to nearly all FOIA records exemptions: *The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law.* Given this discretionary language, FOIA allows these records to be released by the custodian even though such release is not mandatory.

Your sixth question presents three alternative scenarios and asks who is the custodian of the appraisal records under FOIA in each situation: 1) who is the custodian generally, 2) what if the Town does not distribute copies to the Council members at any time, and 3) what if Town staff has reviewed the appraisals. As previously opined by this office, FOIA does not define the term *custodian*, but does use the term in referring to who receives and responds to records requests under FOIA, and who exercises discretion regarding exempt records. Observing the lack of a statutory definition and turning to common usage of the term *custodian*, this office has previously described a *custodian* as *one in charge of something*. The same opinion observed that that definition of *custodian* makes sense when considered in conjunction with the statutory definition of *public records* in § 2.2-3701, which includes records *prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business*. A later opinion also found guidance in the Virginia Public Records Act (VPRA), which provides a similar definition of the term *custodian* in § 42.1-77 to mean *the public official in charge of an office having public records*. In the context of your question, and following prior opinions, then, the term *custodian* for FOIA purposes is dependent on preparing, owning, or possessing public records.⁶ It would appear that generally, as the executive in charge of the locality that has the records, the Town Manager would be the custodian of Town records, including appraisals, and ultimately would be the official responsible to respond to requests for inspection or copying of the public records of the Town under FOIA. Specific facts that differ from the usual might change who is the custodian of a particular record. For example, if a request was made for copies of an individual Council member's constituent correspondence about a Town issue, and only the Council member has copies of that correspondence, then the Council member would be the custodian of those records.

In the second scenario you present, where the Town does not distribute copies to the Council members, the Town Manager is still the custodian of these records. In the alternative, if copies were distributed to the Council members, then those Council members would have copies in their possession, but the Town Manager is still the custodian for FOIA purposes. FOIA does not prohibit individual Council members from sharing or disclosing their copies, but doing so prior to the execution of a contract may lead to political and other problems such as adversely impacting the Town's bargaining position. Politically, it may cause an internal rift with your fellow Council members. As previously stated, public bodies conduct public business as a body by motion and vote,

⁶ AO-02-14, *supra n.* 1 (internal footnotes omitted).

and the authority of local governing bodies is held by the body, not by the individual member.

Regarding the third scenario, whether Town staff has reviewed the appraisals would not appear to have any effect on who is the custodian of them, although it might have bearing regarding the application of the exemption for records prepared exclusively for use in closed meetings. That exemption would not apply to records prepared for other uses outside of a closed meeting.

Your seventh and final question asked whether FOIA permits a Town to withhold the release of appraisals or other documents indefinitely, or, at least until the Town sells the properties, even if it takes six to 12 months to do so. As stated in reply to your first question, FOIA provides an exemption from mandatory disclosure for *[a]ppraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease*. Therefore the time period during which the record may be withheld is not a specific term, but lasts until *the completion of such purchase, sale or lease*. In this case, it appears that the development plan includes both the initial purchase and subsequent sale of the property, and that the same appraisals are being used in both transactions. If this is the case, then the appraisals may be withheld until the sale is completed. This opinion is predicated on the understanding that the sale in question will follow the purchase in sequence as part of the original development plan. However, this does not mean an appraisal used in purchasing a property may be withheld indefinitely until some vague, hypothetical sale is completed at some unknown future date.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett
Executive Director