



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL  
COMMONWEALTH OF VIRGINIA

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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 public ....All 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.<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> Freedom of Information Advisory Opinion 02 (2014).

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> There are laws, however, outside of FOIA that contain such prohibitions and limits in specific instances.<sup>5</sup> I do not know of any specific laws prohibiting the release of real estate appraisals and similar

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<sup>3</sup> 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.*

<sup>4</sup> *But see* n. 3, *id.*

<sup>5</sup> 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.<sup>6</sup> 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,

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<sup>6</sup> 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