

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