VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

COMMONWEALTH OF VIRGINIA

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March 19, 2025

Joshua Stanfield
Yorktown, Virginia
Request received via email

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 email of January 1, 2024.

Dear Mr. Stanfield:

You have asked whether it is permissible to request declaratory relief under the Virginia Declaratory Judgment Act (§ 8.01-184 et seq. of the Code of Virginia) (the Declaratory Judgment Act) as it pertains to disputes concerning the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) (FOIA). Specifically, you have requested that the Virginia Freedom of Information Advisory Council (FOIA Council) address the following questions:

> (1) Does § 2.2-3713 of the Code of Virginia (or any other section/case law) preclude actions solely for declaratory relief concerning FOIA disputes?
>
> (2) Does § 2.2-3713 of the Code of Virginia (or any other section/case law) preclude actions for declaratory relief in conjunction with mandamus/injunctive relief concerning FOIA disputes?

Factual Background

As background information, you stated in your email to this office that you would like to know generally if it is permissible to request declaratory relief under the Declaratory Judgment Act as it pertains to disputes concerning FOIA.

FOIA's Statutory Remedies

For those instances where an individual believes that his FOIA rights have been violated, the statutory remedy provided in § 2.2-3713 of the Code of Virginia is for the individual to file a petition for mandamus or injunction in either general district or circuit court. Subsection A of § 2.2-3713 of the Code of Virginia, in relative part, provides as follows:

> Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or

> injunction, supported by an affidavit showing good cause. Such petition may be brought in the name of the person notwithstanding that a request for public records was made by the person's attorney in his representative capacity.

Subsection B of § 2.2-3713 of the Code of Virginia also provides that:

> In any action brought before a general district court, a corporate petitioner may appear through its officer, director or managing agent without the assistance of counsel, notwithstanding any provision of law or Rule of Supreme Court of Virginia to the contrary.

FOIA provides for an expedited hearing on the disputed matter to be scheduled. Subsection C of § 2.2-3713 of the Code of Virginia states that:

> Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing. However, if the petition or the affidavit supporting the petition for mandamus or injunction alleges violations of the open meetings requirements of this chapter, the three-day notice to the party against whom the petition is brought shall not be required. The hearing on any petition made outside of the regular terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

FOIA also unambiguously provides the amount and manner of civil penalties a court may impose for violations of FOIA.[1]

Case Law

There is existing case precedent in which previous FOIA disputes were resolved with Orders for Declaratory Judgment as well as examples of courts determining that relief sought under the Declaratory Judgment Act was an unavailable remedy in FOIA matters. The following such cases are presented for consideration in chronological order.

In *Town of Saltville v. Surber*, Surber and Saltville Publishing Company submitted FOIA requests to the Town of Saltville for certain communications to or from a former member of the Saltville Town Council.[2] An employee of the Town of Saltville who was also a party to some of the communications at issue in the proceeding "objected to the Town [of Saltville] releasing the communications in question on the grounds that they were personal and unrelated to the transaction of public business."[3] The Town of Saltville submitted the disputed documents under seal for review.[4] The Town of Saltville filed a Motion for Declaratory Judgment, pursuant to §§ 8.01-184, *et seq.* of the Code of Virginia, requesting the Circuit Court of Smyth County "to determine the applicability of

[1] *See* Va. Code Ann. § 2.2-3714.
[2] *Town of Saltville v. Surber*, 83 Va. Cir. 161, 162 (Cir. Ct. 2011).
[3] *Id.* at 162.
[4] *See id.* at 162.

[FOIA] to the disputed documents and to determine whether same should be the disclosed or withheld, in whole or in part."[5]

The Circuit Court of Smyth County determined that the Town of Saltville acted properly in seeking guidance from the court in determining its legal obligation under FOIA and by bringing its Motion for Declaratory Judgment as "the Town [of Saltville] was caught on the horns of a dilemma considering the facts as stated in its Complaint."[6] The Circuit Court of Smyth County also agreed "that a [FOIA] request and response under Virginia Code §§ 2.2-3700, *et seq.* is purely statutory" and determined "that the issues presented in the Motion for Declaratory Judgment were ripe for decision."[7] After carefully reviewing the sealed exhibits, the Circuit Court of Smyth County ultimately directed disclosure of certain documents that dealt with the transaction of town business, redacted portions of other documents, and determined that some were personal and not subject to disclosure under FOIA.[8]

Transparent GMU v. George Mason University is an example of a trial court determining that relief sought under the Declaratory Judgment Act was an unavailable remedy in a FOIA dispute.[9] In this opinion, the Circuit Court of Fairfax County adjudicated on a demurrer filing by the University which raised "the defense of Sovereign Immunity against Petitioner's claim seeking declaratory judgment."[10] The Circuit Court of Fairfax County stated that "Sovereign Immunity prevents lawsuits against the Commonwealth; it is in effect unless expressly waived by the legislature."[11] Additionally, the Circuit Court of Fairfax County acknowledged that "[w]hen the legislature abrogates sovereign immunity by statute, that waiver is to be read narrowly, and can only apply to the limited circumstances under which the Commonwealth has allowed itself to be subjected to suit."[12] The University and Petitioner offered competing interpretations of how a Sovereign Immunity waiver is to be limited with the Circuit Court of Fairfax County ultimately reasoning that "the distinction is immaterial to the question of whether declaratory relief is available in a [FOIA] suit."[13]

Alternatively, the Circuit Court of Fairfax County decided to consider when addressing the two dismissed claims for relief "what remedies the legislature has provided for in the event that a citizen's [FOIA] rights, however broadly (or narrowly) construed, are violated."[14] The Circuit Court of Fairfax County stated that "[t]he statute is clear on that front" because "[FOIA] provides for two remedies in the event that the rights guaranteed

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[5] *Id.* at 162.
[6] *Id.* at 161.
[7] *Id.* at 161-62.
[8] *See id.* at 163-64.
[9] *Transparent GMU v. George Mason Univ.*, 97 Va. Cir. 212 (Cir. Ct. 2017); (*note*: There are several published legal opinions regarding adjudication of various legal issues in the matter of *Transparent GMU v. George Mason University* concerning whether the GMU Foundation was a private, separate corporation or an entity of the University; however, this opinion is the only one applicable to the Virginia Declaratory Judgment Act and FOIA issue.).
[10] *Id.* at 216.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 217.
[14] *Id.*

under the statute are violated."[15] FOIA specifically provides that "aggrieved [sic] citizens 'may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction.'"[16] Subsequently, the Circuit Court of Fairfax County held that "[t]his limited waiver provides the only two forms of relief available under the statute."[17]

In comparison, the Circuit Court of Fairfax County stated that the "Virginia Declaratory Judgment Act allows for the circuit courts to adjudicate 'cases of actual controversy' prior to an actual injury occurring."[18] The Circuit Court of Fairfax County acknowledged that "[a]lthough the Declaratory Judgment Act is a valuable tool in resolving legal disputes before an actually [sic] injury occurs, the Declaratory Judgment Act does not broaden the Sovereign Immunity waiver specifically provided for under [FOIA]."[19] The Circuit Court of Fairfax County determined that requests for declaratory relief "will not be entertained by the Court because they seek a form of relief not permitted by the legislature, to which the University is immune."[20] The Circuit Court of Fairfax County reasoned that "[i]f the [GMU] Foundation were a public body of the Commonwealth . . . then the [GMU] Foundation would also be cloaked in Sovereign Immunity" for reasons previously provided.[21] Thus, the Circuit Court of Fairfax County concluded that if "the [GMU] Foundation was not a public body, declaratory relief would still be inappropriate, because the controversy has already ripened and injury has already been inflicted."[22]

The Circuit Court of Fairfax County stated that "[t]he Virginia Declaratory Judgment Act authorizes courts to render declaratory judgments where there are present facts ripe for adjudication before they mature into an actual injury."[23] The Circuit Court of Fairfax County further contended that "[i]f the injury has already occurred or rights have already been invaded, however, then a declaratory judgment is not an appropriate form of relief."[24] The Circuit Court of Fairfax County opined "[d]eclaratory judgment 'will not as a rule be exercised where some other mode of proceeding is provided.'"[25] Ultimately, the Circuit Court of Fairfax County held that "the University is entitled to Sovereign Immunity against Petitioner's claims" because "Sovereign Immunity can only be waived voluntarily, and when it is, the waiver is to be read narrowly and the Commonwealth is only subjected to suit in the limited areas it has allowed for."[26] Even though FOIA presents such a waiver, the Circuit Court of Fairfax County determined that "[FOIA] only allows suit for mandamus and injunctive relief, and not declaratory judgments."[27] Finally, because "the rights and cause of action in this suit accrued prior to the Original Petition

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[15] *Id*.
[16] *Id.*; *see* Va. Code Ann. § 2.2-3713(A).
[17] *Id.* at 217.
[18] *Id.* at 217 (citing *Reisen v. Aetna Life & Casualty Co.*, 225 Va. 327, 331, 302 S.E.2d 529 (1983)); *see* Va. Code § 8.01-184.
[19] *Id.* at 217.
[20] *Id*.
[21] *Id*.
[22] *Id.* at 217-18.
[23] *Id.* at 218 (citing *Reisen*, 225 Va. at 331).
[24] *Id.* at 218.
[25] *Id.* at 218 (quoting *Miller v. Jenkins*, 54 Va. App. 282, 289, 678 S.E.2d 268 (2009)) (citing *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421, 177 S.E.2d 519 (1970)).
[26] *Id.* at 224.
[27] *Id*.

being filed," the Circuit Court of Fairfax County ruled that "a declaratory judgment is also an inappropriate [sic] action" against the GMU Foundation.[28]

Thus, the Circuit Court of Fairfax County's reasoning in this matter was twofold. First, GMU is subject to FOIA as a public body, and therefore, the only available remedy against GMU is the petition for mandamus or injunction because the General Assembly for the Commonwealth has allowed for it to be. Secondly, because the GMU Foundation is not a public body subject to FOIA, the petition for mandamus or injunction is not available against it. However, a declaratory judgment would generally be available for relief except procedurally it was not ripe for decision in this case.

Another instance of a court determining that relief sought under the Declaratory Judgment Act was an unavailable remedy in a FOIA dispute may be found in the matter of *Hurst v. City of Norfolk*.[29] Hurst filed a "Petition for Declaratory, Mandamus, and Injunctive Relief" against the City of Norfolk for violating the five-working-day response requirement in subsection B of § 2.2-3704 of the Code of Virginia to both of his FOIA requests.[30] The Circuit Court of the City of Norfolk found that the City of Norfolk was late in responding to both of Hurst's FOIA requests. The Circuit Court of the City of Norfolk noted that the style of the Petition indicated that Hurst sought declaratory, mandamus, and injunctive relief, but "[t]he Petition–including the prayer for relief–does not request injunctive relief, however."[31] Because Hurst conceded that he did not specifically describe in his Petition what form of injunctive relief he was requesting, the Circuit Court of the City of Norfolk determined that "there is no cognizable claim for injunctive relief."[32] Likewise, the Circuit Court of the City of Norfolk deemed "there is no apparent request for mandamus relief in the Petition, nor is there any need for such relief as all requested documents have been received to Hurst's satisfaction."[33] At trial, Hurst orally amended the relief sought after acknowledging that all of the documents he requested were produced to his satisfaction.[34] As a result, Hurst abandoned his claims for mandamus and injunctive relief and sought "only a declaration that the City [of Norfolk] violated FOIA in handling his requests and reimbursement of his costs related to this case, which total approximately $100."[35]

In rebuttal at trial, "the City [of Norfolk] moved to strike Hurst's evidence, arguing that declaratory relief is not an available remedy under FOIA."[36] The Circuit Court of the City of Norfolk agreed because "the statutorily conferred rights and privileges under FOIA have specific associated statutorily conferred identifiable causes of action for which the Court can provide relief–specifically, mandamus or injunction."[37] Ultimately, the Circuit

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[28] *Id*.
[29] *Hurst v. City of Norfolk*, 97 Va. Cir. 158 (Cir. Ct. 2017).
[30] *Id*.
[31] *Id.* at 173.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id.* at 173; *see* Va. Code Ann. § 2.2-3713(A) ("Any person . . . denied the rights and privileges conferred by [the FOIA statute] may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction supported by an affidavit showing good cause.").

Court of the City of Norfolk decided that it lacked the authority to award declaratory relief and therefore was "compelled to grant the [City of Norfolk's] motion to strike that claim."[38] The Circuit Court of the City of Norfolk stated that "[t]he purpose of FOIA is to ensure citizens have ready access to public records held by public bodies, and the statutory remedial scheme supports this goal."[39] The Circuit Court of the City of Norfolk further reasoned that "[t]he intent of the available remedies [as provided by § 2.2-3713 of the Code of Virginia] is to require the public body to produce the records, with reimbursement of the requester's costs and imposition of civil fines available to disincentivize non-compliance."[40] The Circuit Court of the City of Norfolk determined that "a declaratory judgment simply is not within the statutory remedial framework [of FOIA]."[41] Even though the Circuit Court of the City of Norfolk found that the City of Norfolk did not comply with the FOIA timeliness requirements, it concluded "that there are no FOIA violations for which relief is available under the statute."[42] Finally, the Circuit Court of the City of Norfolk resolved that "because Hurst did not substantially prevail on his claim and the City [of Norfolk] did not act in bad faith, Hurst is not entitled to recover his costs associated with this action."[43]

In another matter, *Berry v. Bd. of Supervisors*, the Supreme Court of Virginia, as part of its analysis of a FOIA dispute between three resident taxpayers of Fairfax County (the Residents) and the Board of Supervisors of Fairfax County (the Board) over adoption of an updated zoning ordinance (Z-Mod) via an electronic meeting, examined the applicability of the Declaratory Judgment Act in such matters.[44] The Residents requested a declaration from the circuit court "that any such action or approval by the [Board] concerning Z-Mod is not permitted by Virginia law during the pandemic emergency and, hence, is *void ab initio* and of no continuing force or effect."[45] "The circuit court denied the requested relief, finding that the Residents' claims were moot, that a portion of the Residents' declaratory judgment action also was unripe, and that the Board had the authority to adopt Z-Mod in an electronic meeting."[46] Therefore, the Residents appealed the matter to the Supreme Court of Virginia for de novo review.[47]

In its analysis, the Supreme Court of Virginia acknowledged that the Declaratory Judgment Act "represents a departure from the common law requirement that a litigant suffer actual damage before filing suit."[48] The Declaratory Judgment Act also affords "relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor."[49] The Supreme Court of

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[38] *Id.* at 173.
[39] *Id.* at 173; *see* Va. Code Ann. § 2.2-3700(B).
[40] *Id.* at 174.
[41] *Id.*
[42] *Id.* at 175.
[43] *Id.*
[44] *Berry v. Bd. of Supervisors*, 302 Va. 114, 124, 884 S.E.2d 515 (2023).
[45] *Id.*
[46] *Id.*
[47] *See id.* at 127.
[48] *Id.* at 128; see *Miller v. Highland Cnty.*, 274 Va. 355, 370, 650 S.E.2d 532 (2007).
[49] *Id.*; *see* Va. Code Ann. § 8.01-191.

Virginia noticed that the Declaratory Judgment Act "do[es] not create or change any substantive rights, or bring into being or modify any relationships, or alter the character of controversies, which are the subject of judicial power."[50] Yet, the Declaratory Judgment Act offers "a speedy determination of actual controversies between citizens, and [operates] to prune, as far as is consonant with right and justice, the dead wood attached to the common law rule of 'injury before action[.]'"[51] "In doing away with the requirement that a litigant suffer actual damage before filing suit, the [Declaratory Judgment] Act does not permit a litigant to bring an action that is moot or in which the claims are so speculative that the action is not ripe for adjudication."[52]

The Supreme Court of Virginia examined the determination of mootness relative to the Residents' request for declaratory judgment. The Supreme Court recognized that an action for declaratory judgment is moot "when 'the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'"[53] In addition, "[a]n action that involves a live controversy at its inception may become moot during the course of litigation" because "changing events during litigation may make it impossible for a court to award a litigant the relief requested."[54] The Supreme Court of Virginia stated that "[a] case is moot if the relief requested by a litigant can no longer be granted."[55] Notwithstanding how changes in events developed, "a determination that a claim is moot because it is no longer possible to grant the requested relief 'deprives [a court] of [its] power to act; there is nothing for [it] to remedy, even if [it] were disposed to do so.'"[56]

The Supreme Court of Virginia noted that the circuit court had "correctly found that a portion of the Residents' claimed relief had been mooted by events" because "[a]t the time of the circuit court's final order, the Board had already met, voted on, and adopted Z-Mod in an electronic meeting."[57] Therefore, "it was impossible for the circuit court to enter an injunction preventing the Board from doing so" as "the portions of the Residents' claims that sought to prevent such occurrences from happening were now moot."[58] The Supreme Court of Virginia determined that even though "some of the Residents' requested relief had been mooted by events" this "did not render moot the Residents' suit in total" because "the gravamen of the complaint–that the Board lacked the authority to adopt a revised zoning ordinance in an electronic meeting–remained a live question, and the Residents had requested relief–a declaration that the Board lacked such authority and that Z-Mod was *void ab initio*–that the circuit court could still award."[59] Thus, the Supreme Court resolved that "although the claims seeking to enjoin the consideration and

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[50] *Id.* (citing *Lafferty v. School Bd. of Fairfax Cnty*., 293 Va. 354, 360-61, 798 S.E.2d 164 (2017) (quoting *Williams v. Southern Bank of Norfolk*, 203 Va. 657, 662, 125 S.E.2d. 803,807 (1962)).
[51] *Id.* (citing *Morgan v. Board of Supervisors of Hanover Cnty*., 302 Va. 46, 69, 883 S.E.2d 131 (2023) (quoting *Chick v. MacBain*, 157 Va. 60, 66, 160 S.E.2d 214 (1931)).
[52] *Id.* at 129 (citing *City of Fairfax v. Shanklin*, 205 Va. 227, 229-30, 135 S.E.2d 773 (1964)).
[53] *Godlove v. Rothstein*, 300 Va. 437, 439, 867 S.E.2d 771 (2002) (quoting *Board of Supervisors v. Ratcliff*, 298 Va. 622, 622, 842 S.E.2d 377 (2020)).
[54] *Berry* at 129.
[55] *Id.; see, e.g., Hankins v. Town of Virginia Beach*, 182 Va. 642, 644, 29 S.E.2d 831 (1944); *Hollowell v. Virginia Marine Res. Comm'n*, 56 Va. App. 70, 77-78, 691 S.E.2d 500 (2010).
[56] *Id.* at 130 (quoting *Spencer v. Kemna*, 523 U.S. 1, 18, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)).
[57] *Id.* at 130.
[58] *Id.; see, e.g., Spencer*, 523 U.S. at 18; *Hankins*, 182 Va. at 644; *Hollowell*, 56 Va. App. at 77-78.
[59] *Id.* at 130.

adoption of Z-Mod were moot, the underlying claim as to the Board's authority was very much alive."[60]

While acknowledging that "a declaratory judgment action may not be used to assert claims that have fully matured," the Supreme Court of Virginia stated that "the circuit court's ruling that the Residents' declaratory judgment action was mooted by the adoption of Z-Mod was error because the Residents' action was not exclusively a *pre-adoption* challenge to Z-Mod."[61] Instead, the Supreme Court of Virginia concluded that it was "because of the alternative relief requested in the event that the Board adopted Z-Mod, it was also a *pre-enforcement* challenge to Z-Mod, seeking to prohibit the Board from enforcing the provisions of Z-Mod or expending taxpayer funds to implement it" and therefore "not all of the Residents' claims had fully matured."[62]

The Supreme Court of Virginia declared that "[i]t is well-established that a declaratory judgment action is a proper vehicle for a pre-enforcement challenge to the manner in which an ordinance has been adopted."[63] In further support of this point, the Supreme Court of Virginia wrote that "[t]he procedure is so well-established that, in its brief in this Court, the Board concedes that, regarding 'a governing body's decision to adopt or amend a zoning ordinance[,]' a declaratory judgment action 'is the proper vehicle for challenging that decision.'"[64] Thus, the Supreme Court of Virginia found that "the circuit court erred in concluding that the Board's adoption of Z-Mod mooted the Residents' declaratory judgment action."[65]

The Supreme Court of Virginia also examined the applicability of ripeness in the circuit court's decision to deny the Residents' declaratory judgment action by stating that:

> Whereas mootness addresses a once viable claim that has lost its viability, the concept of ripeness applies to claims that, while potentially viable at some point in the future, have yet to mature into a justiciable controversy—that is, an actual controversy between the parties that is not based solely on speculation or purely hypothetical scenarios that may (or may not) occur at some undefined point in the future. Even under the less stringent injury pleading requirements of the Declaratory Judgment Act, "[t]he controversy must be one . . . where specific

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[60] *Id.*
[61] *Id.* at 130-31; *see, e.g., Pure Presbyterian Church of Washington v. Grace of God Presbyterian Church*, 296 Va. 42, 55, 817 S.E.2d 547 (2018).
[62] *Id.* at 131.
[63] *Id.* at 131; *see, e.g., Gas Mart Corp. v. Board of Supervisors*, 269 Va. 334, 611 S.E.2d 340 (2005); *Glazebrook v. Board of Supervisors*, 266 Va. 550, 557, 587 S.E.2d 589 (2003); *Town of Jonesville v. Powell Valley Vill. Ltd. P'ship*, 254 Va. 70, 74, 487 S.E.2d 207 (1997); *Board of Supervisors v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).
[64] *Id.* at 131; The Supreme Court noted in footnote #5 that: "In making this concession, the Board argues that a declaratory judgment action is the appropriate vehicle only 'after' the ordinance has been adopted. We address this argument below."
[65] *Id.* at 131.

> adverse claims, based upon present rather than future or speculative facts, are ripe for judicial adjustment."[66]

The Supreme Court of Virginia reasoned that in this matter "the Residents' complaint was based on much more than mere speculation or purely hypothetical scenarios" because "[i]n required public notices, the Board made it known that it was planning to consider and adopt Z-Mod in an electronic meeting, and it did in fact do so."[67] Moreover, "[t]he Residents' complaint that the Board lacked the authority to do so rested on the situation as it existed and did not depend on future events unfolding in a particular way."[68] Therefore, the Supreme Court of Virginia contended that "the complaint was ripe because it presented the circuit court with 'specific adverse claims, based upon present rather than future or speculative facts[.]'"[69]

The Supreme Court of Virginia disagreed with the circuit court's conclusion that "the Residents' declaratory judgment action needed to be dismissed because it was a 'premature' appeal of the zoning ordinance" based on a provision in subsection F of § 15.2-2285 of the Code of Virginia that required "the Residents to refrain from initiating such a claim until after the Board had adopted Z-Mod."[70] The Supreme Court of Virginia determined that the circuit court was incorrect in its interpretation of the phrase "within thirty days of the decision" in subsection F of § 15.2-2285 Code of Virginia to mean "within thirty days *after*" the decision.[71] The Supreme Court of Virginia remarked that "[n]otably absent from the statute is the word 'after,' and, like this Court, circuit courts are required to interpret statutes based upon 'what the statute says and not by what [the court] think[s] it should have said.'"[72] The Supreme Court of Virginia contended that "courts may not 'add[] language to or delet[e] language from a statute' in the guise of interpreting that statute."[73] The Supreme Court of Virginia further emphasized that "[a]bsent the circuit court effectively adding 'after' to the statute, the Residents' complaint, which was filed eighteen days before the adoption of Z-Mod, literally was filed within thirty days of the Board's decision to adopt Z-Mod as required by the statute."[74]

The Supreme Court of Virginia maintained that "[a] conclusion that [subsection F of § 15.2-2285 of the Code of Virginia] did not require the Residents' complaint to be

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[66] *Id.* at 131-32 (citing *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty. Bd. of Supervisors*, 285 Va. 87, 98, 737 S.E.2d 1 (2013)) (quoting *Shanklin*, 205 Va. at 229).
[67] *Id.* at 132.
[68] *Id.*
[69] *Id.* (citing *Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. 87, 98) (quoting *Shanklin*, 205 Va. at 229)).
[70] *Id.* at 132.
[71] *Id.*; *see* Va. Code Ann. § 15.2-2285(F) which provides, in part, that: "Every action contesting a decision of the local governing body adopting or failing to adopt a proposed zoning ordinance or amendment thereto or granting or failing to grant a special exception shall be filed within thirty days of the decision with the circuit court having jurisdiction of the land affected by the decision."
[72] *Id.* at 133 (citing *Commonwealth v. Amerson*, 281 Va. 414, 421, 706 S.E.2d 879 (2011) (quoting *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 468-69, 698 S.E.2d 900 (2010)).
[73] *Id.* (quoting *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 706, 733 S.E.2d 250 (2012)) (citing *BBF, Inc. v. Alstom Power, Inc*., 274 Va. 326, 331, 645 S.E.2d 467 (2007)).
[74] *Id.*; noting footnote #7: "We note that, on at least one prior occasion, we have concluded that language requiring that a pleading be filed within a specific time 'after' a specified event allowed for the pleading to

dismissed is not only consistent with the literal meaning of the statutory text, it also is consistent with the purpose of the statute" because "[p]reviously, we have recognized that the 30-day period in [subsection F of § 15.2-2285 of the Code of Virginia] and its predecessors is neither a statute of limitations nor a statute of repose."[75] Moreover, the Supreme Court of Virginia wrote "[i]n governing challenges to zoning decisions, the statute and resulting procedures exist to 'assure[] that the legislative body's decision will be reviewed in a fair, orderly, and prompt manner.'"[76]

The Supreme Court of Virginia criticized the circuit court's ruling that would require "the Residents to dismiss the existing action only to file an identical challenge (minus the previously disposed of requests for injunctive relief) the day after Z-Mod's adoption."[77] The Supreme Court of Virginia resisted a result that "does nothing to increase or assure the fairness, orderliness, or promptness of the Residents' challenge to Z-Mod" and "only would have resulted in both delay and disorderliness, thus producing an absurd result."[78] The Supreme Court of Virginia rejected the circuit court's conclusion that the Residents' action for declaratory judgment was premature pursuant to an interpretation of subsection F of § 15.2-2285 of the Code of Virginia that was "not compelled by its text and is at odds with its purpose."[79]

After reviewing FOIA requirements, the Supreme Court of Virginia initially concluded that "unless some other provision of law supplanted [FOIA's] requirements, the meetings at which Z-Mod was considered and ultimately adopted could not be conducted by electronic means."[80] In further analysis of other laws, the Supreme Court of Virginia examined § 15.2-1413 of the Code of Virginia, the Continuity Ordinance adopted by the Board in 2020, and the General Assembly's enacting budget language in 2020 that allowed for certain meetings to be held by electronic means during states of emergency declared by the Governor.[81] In due course, the Supreme Court of Virginia determined that "neither § 15.2-1413 [of the Code of Virginia], nor the Continuity Ordinance, nor the budget language authorized the Board to consider and adopt Z-Mod in meetings

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be deemed timely filed if filed before the specified event." *See, e.g., Lackey v. Lackey*, 222 Va. 49, 50, 278 S.E.2d 811 (1981).

[75] *Id.* at 133 (citing *Friends of Clark Mountain Found., Inc. v. Board of Supervisors*, 242 Va. 16, 19-20, 406 S.E.2d 19, 7 Va. Law Rep. 2773 (1991)).

[76] *Id.* (quoting *Riverview Farm Assocs. Va. Gen. P'ship v. Board of Supervisors*, 259 Va. 419, 426, 528 S.E.2d 99 (2000)) (citing *Friends of Clark Mountain Found* 242 Va. at 21-22, 406 S.E.2d at 22).

[77] *Id.* at 133.

[78] *Id.* at 133-34.

[79] *Id.* at 134.

[80] *Id.* at 135; *see* 2020 Acts ch. 1283 § 4-0.01(g) (Reg. Sess.); 2020 Acts (Spec. Sess. I) ch. 56 § 4-0.01(g) ("budget language").

[81] Va. Code Ann. § 15.2-1413, as it existed at the relevant time, provided that: "Notwithstanding any contrary provision of law, general or special, any locality may, by ordinance, provide a method to assure continuity in its government, in the event of an enemy attack or other disaster. Such ordinance shall be limited in its effect to a period not exceeding six months after any such attack or disaster and shall provide for a method for the resumption of normal governmental authority by the end of the six-month period."; *see id.* at 136; footnote #11: "In 2021, the General Assembly amended Code § 15.2-1413 to extend the period of time a continuity ordinance could remain in effect from six months to twelve months. *See* 2021 Acts ch. 295 (Spec. Sess. I). The amendment became effective July 1, 2021, and thus, has no application to the Board's consideration and adoption of Z-Mod in March 2021."

conducted 'by electronic communication means without a quorum of the public body or any member of the governing board physically assembled at one location[.]'"[82] Ultimately concluding that "the circuit court had erred in dismissing the Residents' complaint" and "that the Board adopted Z-Mod in a manner that violated the open meeting provisions of [FOIA]," the Supreme Court of Virginia, in accordance with previous rulings, reversed the judgment of the circuit court, entered final judgment for the Residents, and declared Z-Mod void *ab initio*.[83]

In contrast to the court's opinion in *Hurst* referenced previously, the Circuit Court of the City of Norfolk in the matter of *Transportation District Comm'n of Hampton Roads v. Raja* granted declaratory judgment relief in a FOIA dispute.[84] The Transportation District Commission of Hampton Roads, or Hampton Roads Transit (HRT), had filed "an action under the Declaratory Judgment Act, Va. Code §§ 8.01-184 [through] 8.01-191, seeking a ruling respecting its obligations under [FOIA]" regarding Raja's FOIA request for "copies of any cell phone text messages" between five HRT employees.[85]

The Circuit Court of the City of Norfolk recognized that HRT had adopted a written policy "prohibiting its employees from using private personal cell phones to conduct HRT business" and had "issued company cell phones to the five employees named in [Raja's FOIA request]."[86] The Circuit Court of the City of Norfolk noted that in HRT's response to the FOIA request it had searched "the five HRT–leased–cellular phones issued to the Five HRT employees and provided all cell phone text messages between them."[87] Raja "confirmed that he was not 'limiting [his] request to just work phones but rather to any phones from which [he is] entitled to make a [FOIA] request.'"[88] HRT contended "that it did not consider that FOIA requires it to search the private personal cellular phones of the Five Employees or that it has the legal authority to compel any employee to turn over his private device so that HRT can search it."[89]

In its analysis, the Circuit Court of the City of Norfolk referenced multiple FOIA Council's Advisory Opinions cited by Raja regarding emails, but not text messages, that instructed "public bodies that they should establish protocols to ensure that public records do not end up in private email accounts."[90] The Circuit Court acknowledged that "HRT has enacted the equivalent of what the [FOIA] Council described as 'ideal' by issuing

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[82] *Id.* at 146; *see* 2020 Acts ch. 1283 § 4-0.01(g) (Reg. Sess.); 2020 Acts ch. 56 § 4-0.01(g) (Spec. Sess. I) ("budget language").
[83] *Id.* at 147-48; *see, e.g.*, *Glazebrook*, 266 Va. at 557 (holding that certain "zoning ordinances passed pursuant to [defective] notices . . . are void *ab initio*"); *Powell Valley Vill. Ltd. P'ship*, 254 Va. at 74 (recognizing that a "[f]ailure to abide by the statutory prescriptions for the adoption of an ordinance renders the ordinance void *ab initio*"); *City Council of City of Alexandria v. Potomac Greens Assocs. P'ship*, 245 Va. 371, 378, 429 S.E.2d 225, 9 Va. Law Rep. 1185 (1993) (stating that, because the city "failed to give the requisite notices . . . , the TMP Ordinance is void *ab initio*").
[84] *See Transp. Dist. Comm'n of Hampton Rds. v. Raja*, No.: CL24-2180, 2024 Va. Cir. LEXIS 173 (Cir. Ct. Nov. 4, 2024).
[85] *Id*. at 1.
[86] *Id*. at 1-2.
[87] *Id*. at 2.
[88] *Id.*
[89] *Id.*
[90] *Id*. at 3-4; *see* Freedom of Information Advisory Opinion 03 (2012).

government phones and requiring its employees to use them and not personal devices for the conduct of public business."[91] The Circuit Court of the City of Norfolk characterized the FOIA Council's Advisory Opinions cited by Raja as arising "out of requests where the parties knew or understood that public business had been conducted by officials on private email accounts" and, therefore, "the public body should have reasonably expected that a review of those accounts could yield responsive documents."[92] However, in this instance, the Circuit Court of the City of Norfolk distinguished that Raja "has not proffered information that additional public records in fact are located on the Five Employees' personal devices or that HRT has reason to know or suspect that to be the case."[93]

The Circuit Court of the City of Norfolk stated that "HRT has demonstrated that the agency prohibits employees from using private cell phones to transact HRT business, and this supports a presumption that its employees have properly performed that official duty."[94] The Circuit Court of the City of Norfolk noted that "[j]ust as 'there is a presumption that public officials will obey the law,' so too is the Court willing to recognize a presumption that public agency's employees will follow the agency's [FOIA] procedures."[95] The Circuit Court of the City of Norfolk also acknowledged that "[t]he presumption may be rebutted, but [Raja] has pleaded no facts indicating that it would be in this case."[96] In spite of Raja's request, the Circuit Court of the City of Norfolk determined that it "is unable to locate any such duty in FOIA" for HRT "to search employees' devices for text messages even with no reason to believe that they will be found there."[97] Furthermore, "[w]ithout clear legislative guidance that the General Assembly wishes to impose this requirement, or some controlling case authority, the Court is unwilling to create this duty."[98] The Circuit Court finding "that FOIA imposes no duty on HRT to compel its employees to make their personal cell phones available to be searched for any responsive records" and "that HRT's Petition for Declaratory Judgment states a justiciable controversy between the parties that is not disallowed by FOIA and that is mature and ripe for consideration" granted declaratory relief to HRT.[99]

Analysis

In general, FOIA provides how a petition for mandamus or injunction is served, filed, and adjudicated by the court in such matters.[100] Section 8.01-644 of the Code of Virginia states that:

> Except as provided in § 2.2-3713, application for a writ of mandamus or a writ of prohibition shall be on petition verified by oath, after the party against whom the

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[91] *Id.* at 4-5.
[92] *Id.* at 5.
[93] *Id.*
[94] *Id.* at 7.
[95] *Id.* at 7 (quoting *Hinderliter v. Humphries*, 224 Va. 439, 448, 297 S.E.2d 684 (1982)).
[96] *Id.* at 7.
[97] *Id.* at 8.
[98] *Id.*
[99] *Id.* at 11.
[100] *See* Va. Code Ann. §§ 2.2-3713 and 2.2-3714.

> writ is prayed has been served with a copy of the petition and notice of the intended application a reasonable time before such application is made.

Subsection C of § 2.2-3713 of the Code of Virginia provides:

> Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing. However, if the petition or the affidavit supporting the petition for mandamus or injunction alleges violations of the open meetings requirements of this chapter, the three-day notice to the party against whom the petition is brought shall not be required. The hearing on any petition made outside of the regular terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

Therefore, despite the exclusion of § 8.01-644 of the Code of Virginia to a FOIA petition, the other lawful provisions under the Declaratory Judgment Act may be available for district and circuit courts to utilize in the adjudication of a FOIA matter. Thus, despite the contradictory positions taken by some circuit courts on this issue, the more recent decisions and the ruling of the Supreme Court of Virginia in *Berry* indicate that the use of a declaratory judgment action in a FOIA petition appears to be permissible unless otherwise determined invalid. In particular, § 8.01-184 of the Code of Virginia states that:

> In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

In summary, a declaratory judgment action in a FOIA matter would be permissible if deemed by a court to be appropriate under the circumstances. There is case law where a circuit court utilized a declaratory judgment to resolve a FOIA dispute. There is also case law from a circuit court that determined that a declaratory judgment action was inappropriate in resolving a FOIA matter. In *Berry*, the Supreme Court of Virginia determined that the circuit court had failed to review Residents' request for a declaratory judgment properly under Virginia law and held that a zoning ordinance was invalid because it had not been adopted at a meeting held in accordance with FOIA or otherwise authorized by law. However, the Supreme Court of Virginia did not specifically consider whether declaratory judgment actions were allowed as a means to resolve FOIA disputes. The decision of the Supreme Court of Virginia in *Berry* read together with the pertinent decisions of the circuit courts described above appear to indicate that a declaratory judgment action in a FOIA matter is available under appropriate factual circumstances.

Questions and Conclusion

(1) Does § 2.2-3713 of the Code of Virginia (or any other section/case law) preclude actions solely for declaratory relief concerning FOIA disputes?

There appears to be no provision in FOIA that this office is aware of that would seem to preclude the utilization of a declaratory judgment action in the adjudication of a FOIA dispute. While the case law from Virginia courts as previously examined appears to present differing results, the final conclusion appears to be that declaratory judgment is available under appropriate circumstances, but otherwise the petition for mandamus or injunction would be the sole remedy available under FOIA.

(2) Does § 2.2-3713 of the Code of Virginia (or any other section/case law) preclude actions for declaratory relief in conjunction with mandamus/injunctive relief concerning FOIA disputes?

Given the Supreme Court of Virginia's analysis in *Berry* described above, it would appear that it would depend on whether the circumstances that would be appropriate for declaratory judgment would also be appropriate for a petition for mandamus or injunction. In particular, the Supreme Court of Virginia in *Berry* observed that "a declaratory judgment action may not be used to assert claims that have fully matured," which is often the case in FOIA petitions dealing with alleged violations that have already happened. However, there might be some circumstances where both are appropriate, for example, perhaps when a person seeks an injunction against future actions under FOIA and the same circumstances are also ripe for decision under the Declaratory Judgment Act. Whether any given set of circumstances is appropriate for decision under FOIA's statutory petition procedures, the Declaratory Judgment Act, or both, would be a decision for the court hearing the matter.

Thank you for contacting this office. We hope that this opinion is of assistance.

Sincerely,

Joseph Underwood
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