DIVISION OF LEGISLATIVE SERVICES

VIRGINIA LEGISLATIVE

ISSUE BRIEF

NUMBER 37 MARCH 2004

Beck v. Shelton

The Virginia Supreme Court Examines the Parameters of a "Meeting" under FOIA

LISA WALLMEYER
STAFF ATTORNEY

MARIA J.K. EVERETT
SENIOR ATTORNEY

On March 5, 2004, the Virginia Supreme Court issued an opinion (*Beck v. Shelton*, No. 030723) concerning the Virginia Freedom of Information Act (FOIA, § 2.2-3700 et seq. of the Code of Virginia), with a holding directly relevant to all elected officials in Virginia—from members of the General Assembly to members of local school boards. *Beck* has primarily drawn interest because it is the first authoritative statement of law in Virginia as to whether use of electronic mail (e-mail) by public officials could constitute a meeting under FOIA. *Beck* also examines broader issues as to the applicability of FOIA to members-elect of a public body and the definition of a "meeting."

The Court held that FOIA does not apply to members-elect of a public body; that generally, use of e-mail by three or more members of a public body to discuss public business is not a meeting; and that the gathering of three members of a public body at a citizen-organized meeting did not violate FOIA.

Facts

Three plaintiffs filed a petition for writ of mandamus and injunction in Fredericksburg Circuit Court against five members of the Fredericksburg City Council. The petition alleged that the defendants used e-mail to discuss and decide public business and that such use of e-mail constituted an improper meeting under FOIA. Many of the e-mail exchanges took place after three of the five defendants had been elected to the city council, but prior to those members' taking their oaths of office. The trial court held that FOIA did not apply to the conduct of members-elect. The trial court also found that one e-mail exchange that took place after all of the defendants were sworn into office did constitute a meeting under FOIA, because the e-mails were used to reach a consensus on public business.

In the same suit, the plaintiffs alleged that three council members held an improper meeting by attending a gathering organized by citizens to discuss traffic and safety issues (the Charlotte Street gathering). The three members were separately invited by citizens to attend the meeting to discuss concerns about the lack of a stop sign at a particular intersection. The council members did not give notice of the gathering, nor were minutes taken, both of which are required for meetings under FOIA. The trial court held that this gathering was not a meeting and thus did not violate FOIA.

Holding

Members-elect are not subject to FOIA

Because several of the e-mails in question were exchanged before three of the defendants were sworn into office, the facts necessitated a decision as to whether FOIA applied to the members-elect

of the city council; the Court held that it did not. Section 2.2-3702 requires that *[a]ny person elected or reelected to any body not excepted from FOIA to (i) be furnished...with a copy of FOIA within two weeks following the election and (ii) read and become familiar with the provisions of FOIA*.

The Court held that this requirement did not alter the plain language of the definition of a meeting at § 2.2-3701 as an informal assemblage of three or more **members** of a public body. Although the policy set forth in subsection B of § 2.2-3700 requires liberal construction of FOIA, the Court would not read the provision requiring members-elect to be furnished with a copy of FOIA to broaden the meaning of "member" in the definition of a meeting to include members-elect. The Court opined, "We do not believe that the legislature was inviting the judiciary, under the guise of 'liberal construction,' to rewrite the provisions of FOIA as we deem proper or advisable." The Court stated that it was in the prerogative of the legislature, and not the Court, to rewrite the plain language FOIA.[1]

FOIA's application is limited to the requirement that members-elect receive a copy of the law and read and become familiar with it—ostensibly, to be aware of and digest the open government requirements of FOIA that will apply once they become sworn members of the public body. At that point, full responsibility for compliance with FOIA's procedural requirements applies.

Interestingly, but not introduced in response to this case, the 2004 Session of the General Assembly considered legislation that would apply FOIA to members-elect of any state or local public body in the Commonwealth. House Bill 389 provided that any person elected or reelected would be subject to the provisions of FOIA upon receipt of the certificate of election as provided in § 24.2-676. The bill failed in the House of Delegates.

Use of e-mail by public officials is not a meeting

The Court next turned to the question of whether use of e-mail could be a meeting under FOIA. The Court overturned the trial court's decision that use of e-mail to reach a consensus on a matter of public business was a meeting, on the grounds that the e-mails in question were similar to letters sent via U.S. Mail or facsimile.

The Court examined the definition of a meeting at § 2.2-3701, which includes *an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership*. The Court noted that e-mail can be similar to traditional forms of written correspondence, in that there may be significant delay between the time the communication is sent and received or when a response is sent. In the instant case, the shortest interval between any two e-mails was more than four hours, and the longest was over two days. The Court agreed with the trial court that the dispositive consideration in examining e-mail is how the e-mail is used.

In reviewing this standard, the Court focused on the language in the definition of a meeting that includes "an informal assemblage." "Assemblage," the Court concluded, means to bring together at the same time, and inherently entails simultaneity. The Court held that there is no "virtually simultaneous interaction" when e-mail is used as the functional equivalent of a letter communicated by

Virginia Legislative Issue Brief is an occasional publication of the Division of Legislative Services, an agency of the General Assembly of Virginia.

E.M. Miller, Jr., Director
R.J. Austin, Manager, Special Projects
K.C. Patterson, Editor

For information contact:
Special Projects
Division of Legislative Services
910 Capitol Street, 2nd Floor
Richmond, VA 23219
(804) 786-3591
http://dls.state.va.us/

U.S. Mail, courier, or facsimile transmission.[2] In further support of this conclusion, the Court noted that the Attorney General of Virginia had previously found that "transmitting messages through an electronic mail system is essentially a form of written communication."[3] While not binding, the General Assembly "is presumed to have knowledge of the Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."[4]

It is important to note that the Court did not hold that use of e-mail could never be a meeting under FOIA. Instead, the Court indicated that the dispositive determination in examining e-mail under the meeting provisions of FOIA was to look at how the e-mail was used. The trial court answered this question by reviewing the end result—that e-mail was used to reach a consensus. According to the Supreme Court, this question is more appropriately answered by reviewing whether the e-mail was used as a functional equivalent of traditional correspondence. This opinion clarifies that members of a public body need not refrain from using e-mail, but they should be cautioned against using e-mail among three or more members of the public body in a manner that is akin to using the telephone and has an element of simultaneity. The Court did not establish a time frame for when the use of e-mail may be considered simultaneous, nor did it address the use of chat rooms, instant messaging, or listservs.

Charlotte Street gathering was not a meeting

Finally, the Court upheld the decision that the Charlotte Street gathering was not a meeting under FOIA. The Court relied on the trial court's finding of fact that the gathering was scheduled by the citizens, the purpose was an informational forum concerning traffic issues, and the three council members who attended did not discuss anything as a group of three. The Court also relied on the evidence that the city council did not have any pending business concerning traffic control, nor was it likely to have such a matter come before it in the future. The Court held that the trial court "was not plainly wrong or without evidence" in finding that these facts did not indicate that a meeting took place.[5]

The Court cited two relevant FOIA provisions. First, the policy of FOIA at § 2.2-3700 *ensures the people of the Commonwealth...free entry to meetings of public bodies wherein the business of the people is being conducted*. Secondly, this same section states that FOIA *shall not be construed to discourage free discussion of government officials or employees of public matters with the citizens of the Commonwealth*. In construing these provisions together, the Court held that "the balance between these values must be considered on a case-by-case basis according [to] the facts presented."[6] In the instant case, the Court also found that the provision commonly referred to as the "bump-into" provision gives further guidance that the gathering was not a meeting. Subsection G of § 2.2-3707 allows members of a public body to gather at public forums, the purpose of which is not to transact public business or to hold discussions relating to the transaction of public business. The Court held that the Charlotte Street gathering was a citizen-organized "informational forum" that did not involve the discussion or transaction of public business.

The Court noted that whether a gathering is a meeting is a factual question to be determined on a case-by-case basis. The Court did not hold that any one of the instant facts—who initiated the meeting, what was discussed by whom, or whether the issue was pending city business—was determinative; instead, the Court based its deci-

sion on the totality of the factors. The bottom line appears to be that the Court's holding is predicated on the fact that it could not say that the trial court was plainly wrong.

Conclusion

Each of the Court's holdings has implications for members of all public bodies in the Commonwealth.

- It established conclusively that absent legislative change, FOIA does not apply to the conduct of members-elect of a public body.
- The case also examined what discussions may not be considered meetings under FOIA, regardless of whether they take place on the computer or in person. The determination as to whether a gathering or discussion falls outside FOIA's meeting provisions is fact specific, to be determined case by case.
- With e-mail, the user must consider whether the e-mail is being used akin to traditional correspondence, or whether the e-mail has an element of simultaneity and is more like a telephone call between three or more members of the public body.
- Likewise, the decision that the Charlotte Street gathering was not a meeting was fact-specific, and the Court weighed the policy of guaranteeing citizens the right to witness the operations of government with the right of free discussion between citizens and their elected officials.
- Although no bright-line rules emerged in establishing what is or is not a meeting, this ruling underscores the notion that all meetings are presumed open under FOIA. Determining whether a particular discussion falls outside the parameters of a meeting must be considered carefully, on a case-by-case basis, examining all relevant facts.

Notes

[1] *Beck* at 6.
[2] *Id*. at 7.
[3] *Id*. at 11 (citing 1999 Op. Atty. Gen. 12).
[4] *Id*. at 12 (citing *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E. 2d 603, 605-06 (1983)).
[5] *Id*. at. 14
[6] *Id*. at 14