



# VIRGINIA LEGISLATIVE ISSUE BRIEF

NUMBER 44

OCTOBER 2006

## **Closed Meeting Exemption for Contract Negotiations under the Virginia Freedom of Information Act**

*White Dog Publishing  
v.  
Culpeper County Board  
of Supervisors*

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**O**n September 15, 2006, the Supreme Court of Virginia published its unanimous decision in the case of *White Dog Publishing v. Culpeper County Board of Supervisors*, Record No. 052333, 634 S.E.2d 334 (2006). The Supreme Court found that in closing a meeting to the public, the Culpeper County Board of Supervisors (the Board) had improperly invoked the contract negotiations exemption, in violation of the Virginia Freedom of Information Act (FOIA).<sup>1</sup> This closed meeting exemption was added to FOIA in 2003 to protect a public body's bargaining position and negotiating strategy in contractual matters, in order to ensure good stewardship and the best use of public money.<sup>2</sup> The Court's decision is the first interpretation of the closed meeting exemption and sets precedent regarding the scope of the exemption and the type of contract negotiation discussions to be allowed in closed meetings. While the decision will likely impact

all public bodies in the Commonwealth, it will be especially relevant in the context of local school construction projects.

### **Background and Procedural History**

There was a great deal of public interest and concern regarding the construction of a new public high school in Culpeper County. Both the Board and the Culpeper County School Board (the School Board) held public meetings on the subject. In June 2004, the School Board entered into a contract with an architectural firm, SHW Group, regarding the plan, design, and construction of a new high school. The Board was not a party to the contract originally, but became a party by subsequent amendment to the contract. The Board then sought a second amendment directing the architect to consider other construction options besides those in the original contract. It appears that the School Board favored one option, while the Board wished to consider several other options before reaching a final decision regarding the project. During its open meeting on October 5, 2004, the Board approved the second amendment to the contract, directing the architect to consider multiple options for the project.

The Board also convened a closed meeting on October 5, 2004. Among other stated purposes, the Board's motion to convene a closed meeting cited the contract negotiations exemption for a discussion "with the County Attorney and staff [about] changes to a specific public contract where public discussion would adversely affect the bargaining and negotiating position of the County." A reporter for the The Culpeper Citizen newspaper attended the open meeting, but left when the Board closed the meeting to the public. The reporter later testified

that she left after the open session, because it was not apparent that any matters relevant to the high school were to be discussed during the closed meeting. However, during the closed portion of the meeting, the Board did meet with an architect from SHW Group, who was involved in the high school construction project. The Board later expressed a belief that it needed to speak with the architect privately, in order to have a frank and candid discussion regarding options not favored by the School Board. It was felt that the architect was more guarded in discussing other options when School Board members were present. After returning to an open meeting and certifying the closed meeting, the Board adopted a motion to have the architect examine several specific options regarding the construction of the new high school.

White Dog Publishing, Inc. (White Dog), which publishes The Culpeper Citizen, subsequently filed a petition for mandamus against the Board in general district court alleging that the Board had violated the Virginia Freedom of Information Act (FOIA) at its October 5, 2004, meeting. White Dog alleged that the motion to convene the closed meeting did not meet the procedural requirements of FOIA and that the exemption for contract negotiations did not apply to the topics discussed during the closed meeting. White Dog sought records of the closed meeting, as well as attorney's fees and costs. After an evidentiary hearing, the general district court ruled in favor of the Board on all counts, finding that the Board had not violated FOIA.

White Dog then appealed to the circuit court, where two other newspaper publishers (collectively, the publishers) were granted leave to intervene in the suit. The circuit court held that the Board's motion failed to meet the procedural requirements for a motion to convene a closed meeting under FOIA.<sup>3</sup> However, the circuit court held that the purpose of the discussion was properly exempt under the contract negotiations exemption. Recognizing that the publishers had prevailed on one count, but not wholly, the circuit court also held that special circumstances made an award of attorney's fees and costs unjust. The publishers then appealed the circuit court's decision to the

Supreme Court of Virginia, alleging that the circuit court erred in its interpretation of the closed meeting exemption, that the facts showed that the Board's discussion in the closed meeting did not fall under the allowed purpose of the exemption, and that the circuit court should have awarded attorney's fees and costs to the publishers.

## The Virginia Supreme Court's Decision

The Supreme Court found that the Board discussed "its strategy in relation to the School Board due to the policy dispute between those two public bodies about the new high school facility" in the closed meeting. The Court held that this was not an allowed purpose under the contract negotiations exemption. The exemption permits a public body to convene a closed meeting for the "[d]iscussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body." Stating that it was bound to apply FOIA's narrow construction policy,<sup>4</sup> the Court decided as follows:

The unambiguous language in Code § 2.2-3711(A)(30), viewed in its entirety, demonstrates that the purpose of the exemption is to protect a public body's bargaining position or negotiating strategy vis-à-vis a vendor during the procurement process. Under that exemption, the terms or scope of a public contract are proper subjects for discussion in a closed meeting of a public body only in the context of awarding or forming a public contract, or modifying such contract, and then only when such discussion in an open meeting would adversely affect the public body's bargaining position or negotiating strategy regarding the contract...the exemption does not allow a public body to close a meeting in order to discuss the application or enforcement of the scope or terms of a previously awarded public contract.

There were no disputed facts in the case. The Court accepted the Board's assertion that it held the closed meeting in order to discuss the scope of the contract in relation to the School Board's position, and that the Board felt that it needed a candid analysis from the architect to do so. Because such purpose "was not for forming or modifying a procurement contract" the Court found that the Board violated FOIA by closing the meeting on the basis of the contract negotiations exemption. The Court also reversed the decision of the circuit court regarding costs and attorney's fees. The circuit court had found that special circumstances made the award of such costs and fees unjust. The Court found, based upon the record and in light of its holding on the merits in favor of the publishers, that none of the circumstances described by the circuit court made such an award unjust, and therefore remanded the case to the circuit court for a determination of the award to the publishers.

In the decision, the Court has set the boundaries of the contract negotiations exemption in three ways. First, the Court clarified that the exemption may be used for discussions relating to both the formation and the modification of public contracts, but not for discussions regarding the enforcement or application of existing contracts. Second, the decision interprets the exemption such that it may be used only in the context of procurement contracts. Third, the decision indicates that the exemption only applies to discussions that might jeopardize a public body's bargaining position or negotiating strategy in relation to a vendor. Each of these three aspects of the Court's decision is discussed in greater detail below.

**A. Closed meeting discussions regarding contractual amendments are permitted under the contract negotiations exemption.**

At issue in the case was whether the contract negotiations exemption allows for the discussion of the terms and scope of a covered contract once the contract has been awarded.

In other words, could the exemption be used to discuss the amendment of an existing contract? The Board argued, based on the language of the exemption, that it covered two types of discussions: (1) discussion of the award of a public contract and (2) discussion of the terms and scope of a public contract. The discussion of contractual amendments would appear to fall under the second category as argued by the Board. However, the Court appears to have taken a somewhat different approach in interpreting the exemption. The Court held that closed meeting discussions could be held only in the context of awarding, forming, or modifying a public contract. A discussion concerning the terms and scope of a public contract may not be held outside of one of these contexts. For example, under the exemption as interpreted by the Court, a public body could not hold a closed meeting to discuss the terms and scope of a contract that has already been awarded, unless the discussion is in the context of a modification to the existing contract. The Court specifically held that discussions of the enforcement or application of a public contract that has already been awarded are not covered by the exemption. Note that the Board argued that it was in fact discussing a potential amendment to the contract, but the Court appears to have rejected this characterization of the facts of the case. The Court found that the Board was discussing its strategy in relation to a policy dispute with the School Board, rather than discussing an amendment of the terms or scope of the contract with the architect. The Court found that "the purpose of the Board's closed meeting was not for forming or modifying a procurement contract" and did not properly fall under the allowed purpose of the exemption.

**B. The contract negotiations exemption only applies in the context of procurement contracts.**

As quoted above, the Court found that the exemption's purpose "is to protect a public body's bargaining position or negotiating strategy vis-à-vis a vendor during the procurement process." In rejecting the Board's

interpretation of the exemption, the Court further stated as follows:

The Board's view of the exemption would allow any discussion about the scope or terms of an awarded contract to occur during a closed session if the discussion would adversely affect some aspect of the Board's bargaining position or negotiating strategy. The Board does not limit the exemption to discussions involving procurement. Such an expansive interpretation of Code § 2.2-3711(A)(30) would be inconsistent with the General Assembly's directive that an exemption to FOIA's requirement of open meetings be narrowly construed. (Emphasis in original.)

Thus the Court's decision limits the application of the exemption to negotiations of procurement contracts. Discussions regarding other types of contracts may not be held during closed meetings under the exemption.<sup>5</sup>

**C. The contract negotiations exemption only applies in the context of a public body's bargaining position or negotiating strategy in relation to a vendor.**

The Court explicitly agreed with the Board that its purpose in holding the closed meeting was to discuss options with the architect in order to position the Board to negotiate the scope of the contract with the School Board. The Court accepted the Board's testimony that it sought the architect's "candid analysis of the options that might be included in the scope of his contract and his assistance in convincing the School Board to agree to a scope of work." The architect was actually present during the Board's closed meeting, but in fact "no negotiations with SHW occurred during the closed session." Because the Board was discussing its strategy in relation to the School Board, the Court found that it was "not discussing changes in the terms or scope of the SHW contract vis-à-vis the vendor." The court held that this is not a purpose allowed under the exemption, because the purpose "was not for forming or modifying a procurement

contract." The Court has held under these facts that where § 2.2-3711(A)(30) refers to "the bargaining position or negotiating strategy of the public body" it specifically refers to the position or strategy relative to a vendor in a procurement transaction.

## Discussion of the Decision

The specific factual posture of the case, particularly the relationship between the parties to the contract at issue, may affect the value of the decision as precedent for other situations. School boards are political subdivisions in their own right and are empowered to negotiate contracts for things such as the construction of new school facilities that are a part of its capital improvement plan. However, the responsibility for funding such projects is vested with the governing body (in this case, the Board). There is only one source of public funds in this situation. In most cases, only the school board and the selected contractor are parties to a school construction contract. The governing body approves or disapproves the funding for the project based on a budget projection, but does not typically become a party to the contract. When a public body is not a party to the contract, it cannot invoke the contract negotiations exemption to hold a closed meeting to discuss the contract (i.e. it is not negotiating the contract, so cannot use the exemption).

The instant case is atypical because the Board did become a party to the contract between the School Board and the architect. However, keep in mind that there is still only a single source of public funds involved. The two public bodies involved share an interest in receiving the best possible deal for the least expenditure of public funds, and thus their bargaining positions and negotiating strategies were not adverse to each other. By contrast, of course, the vendor in such a situation seeks to maximize profit and so has an adverse bargaining position or negotiating strategy in relation to the public bodies. That is not to say that the School Board and the Board did not disagree, but their differences were in regard to a "policy dispute," as characterized by the

Court.<sup>6</sup> The public bodies' bargaining positions were not adverse to each other in regards to the public funds used to pay for the contract. The exemption, by its own terms, does not apply to discussions in which there is no financial adversity; political differences and discussions of policy are not covered. At the heart of the contract negotiations exemption is recognition of the importance of good stewardship of public funds. Without such an exemption, public bodies would have to discuss their bargaining positions and negotiating strategies during open meetings, which any adverse party would surely attend to gain advantage over the public body, resulting in higher costs to the citizenry. Protecting a public body's bargaining position and negotiating strategy by allowing closed meetings facilitates the ability of a public body to fulfill its obligation to be a good steward of the public money.

While the Court did not explicitly address this aspect of the facts, it is an important consideration regarding the use of the Court's decision as precedent for other situations. Consider an instance where two public bodies representing different localities, such as a neighboring county and city, with separate sources of public funds, are jointly entering a procurement contract with a third party vendor. For example, if a county and city jointly agreed to build a regional landfill to be operated by a private enterprise, the county and city may have legitimately adverse bargaining positions or negotiating strategies in relation to each other, as each seeks to obtain the best deal for its constituents. The city may negotiate to have the county pay for the majority of the goods provided or services rendered by the vendor, and vice versa. Each public body would also hold an adverse position to the third party vendor, as the vendor will seek to maximize its profits, while both public bodies will seek to minimize the amounts they pay. While such a case may be differentiated from this decision on the facts, the Court's decision stated unconditionally that the use of the exemption is limited to a public body's bargaining position vis-à-vis a vendor. It is unclear whether public bodies with financially adverse bargaining positions in relation to each other may use the closed meeting exemption for discussing those positions.

Additionally, the Court's decision limits the use of the exemption to procurement transactions, but it does not define those transactions or refer to a specific procurement law. In common usage, to *procure* means "to obtain; acquire,"<sup>7</sup> and *procurement* is defined as the "act of getting or obtaining something."<sup>8</sup> Similarly, a "procurement contract" is defined as a "contract in which a government receives goods or services."<sup>9</sup> Legally, in order to have a contract, there must be an offer, acceptance, and consideration given. The language of the exemption limits its application to discussions of the award of public contracts "involving the expenditure of public funds." Those public funds are the consideration (although not necessarily the sole consideration) given by the public body. The public body must receive something in return for its consideration for a contract to exist at all. In the context of the exemption, therefore, all contracts covered by the exemption are contracts in which the government receives goods or services, i.e. procurement contracts under the general definition. Additionally, note that the language of the exemption explicitly includes "interviews of bidders or offerors," terms typically used in procurement laws. By contrast, a more specific usage of *procurement contract* may refer to a contract formed as part of a transaction under a specific procurement statute.<sup>10</sup> However, the Court did not specify that the exemption was only to apply to contracts formed according to statutory procurement laws, and the language of the closed meeting exemption does not refer to any procurement laws, or in fact use the word *procurement* at all.

Thus it appears that the general usage of the term *procurement* is too broad to add meaning, while a narrow usage limiting the exemption to transactions under specific procurement laws is not supported by the Court's decision or the language of the statute. It is uncertain whether the Court's holding that the exemption is limited to discussions regarding procurement contracts is merely descriptive under the general usage of *procurement*, or whether it is meant as a further limitation upon the use of the exemption. The Court did state that "[t]he Board does not limit the exemption to

discussions involving procurement. Such an expansive interpretation of Code § 2.2-3711(A) (30) would be inconsistent with the General Assembly's directive that an exemption to FOIA's requirement of open meetings be narrowly construed." This statement implies that the Court was using *procurement* as a word of limitation, not merely a descriptor. It is possible that the Court only intended to differentiate between what the exemption allows and what the Board actually discussed under the facts of the case (characterized by the Court as a "policy dispute" rather than a discussion of the formation, award, or modification of a procurement contract). However, without further clarification it is not clear precisely what the limitation is or how the limitation of the exemption to procurement contracts will actually work in practice.

Finally, consider what legislative history is available to shed light on the General Assembly's intent in enacting the exemption. The interaction of FOIA and the Virginia Public Procurement Act was the subject of study by a subcommittee of the Virginia Freedom of Information Advisory Council (FOIA Council) in 2002, which ultimately led to the introduction of Senate Bill 737 as a recommendation of the FOIA Council.<sup>11</sup> Senate Bill 737 was passed by the General Assembly in 2003<sup>12</sup> and contained both a records exemption and the closed meeting exemption<sup>13</sup> that was the subject of the Court's decision in this case. This background is important in context of the Court's interpretation of the meeting exemption as being limited solely to discussions regarding procurement contracts. The language used in the records exemption is informative:

Records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body. Such records shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not

apply, and any release of records relating to such transactions shall be governed by the Virginia Public Procurement Act.

This language demonstrates that the General Assembly gave specific consideration to both procurement and other types of contracts when it passed Senate Bill 737. Similarly, there are other exemptions specific to particular procurement laws found in other sections of FOIA, demonstrating further that the General Assembly has given special consideration to the interaction of FOIA with the various procurement laws.<sup>14</sup> Looking to other closed meeting exemptions for additional context, note that discussions regarding many specific types of contracts could be held in closed meetings pursuant to other exemptions. For example, the personnel exemption<sup>15</sup> could be used to hold a closed meeting for the discussion of an employment contract, the exemption regarding the acquisition or disposition of real property<sup>16</sup> could be used to hold a closed meeting for the discussion of a real estate contract, and the exemption for consultation with legal counsel<sup>17</sup> might apply to a wide variety of contractual discussions.<sup>18</sup> Given this context in relation to other closed meeting exemptions, it appears that the contract negotiations exemption at issue is to some degree a catch-all provision that could be used for contract negotiations not covered by other exemptions. In its report, the FOIA Council subcommittee stated that "[p]articipants in the meeting noted that in addition to procurement situations, there is no clear exemption allowing for a closed meeting for contract negotiations generally."<sup>19</sup> The subcommittee studying the issue sought to create a more general exemption that would allow for closed meeting discussions concerning both procurement and other types of contracts, because no such exemption existed at the time. This background suggests that the legislative intent was to create a contract negotiations exemption of more general application. It therefore appears that the Court's interpretation of the exemption may be at odds with the original legislative intent, perhaps due to the wording of the exemption—wording that may be corrected by legislative amendment.

## Conclusion

In light of the preceding considerations, the General Assembly may wish to consider further legislation clarifying its intent regarding the exemption, particularly as to whether the exemption is intended to be limited in application solely to procurement contracts and whether the “bargaining position or negotiating strategy” must be in relation to a vendor. Until such time, the Court has set the boundaries of the contract negotiations exemption—the exemption may only be used in the context of formation or modification of procurement contracts when an open meeting would adversely affect the public body's bargaining position or negotiating strategy vis-à-vis a vendor.

## Notes

<sup>1</sup> Code of Virginia § 2.2-3711(A)(30).

<sup>2</sup> Note that the contract negotiations exemption was drafted originally as an exemption of general application, as opposed to the majority of FOIA exemptions which are both agency and conduct specific.

<sup>3</sup> Code of Virginia § 2.2-3712(A); note that this issue was not raised on appeal. The circuit court's ruling in favor of the publishers stands.

<sup>4</sup> Code of Virginia § 2.2-3700(B)(“Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law.”).

<sup>5</sup> Note that while the Court has interpreted the exemption to apply only to procurement contracts, other exemptions might apply to discussions regarding other types of contracts, depending on the specific context.

<sup>6</sup> The facts of the case underscore the political tension extant between school boards and governing bodies inherent by design.

<sup>7</sup> The American Heritage Dictionary at 988 (2nd College ed. 1982) (the word “procurement” is not separately defined therein).

<sup>8</sup> Black's Law Dictionary (8th ed. 2004) at 1244.

<sup>9</sup> *Id.* at 347.

<sup>10</sup> *See, e.g.*, the Virginia Public Procurement Act (Code §§ 2.2-4300 through 2.2-4377), the Public-Private Transportation Act of 1995 (Code §§ 56-556 through 56-575), and The Public-Private Education Facilities and Infrastructure Act of 2002 (Code §§ 56-575.1 through 56-575.17).

<sup>11</sup> Annual Report of the Virginia Freedom of Information Advisory Council, House Doc. No. 20 (2003).

<sup>12</sup> Va. Acts Ch. 274 (2003).

<sup>13</sup> Code of Virginia § 2.2-3705.1(12).

<sup>14</sup> *See* §§ 2.2-3705.6(10) and (11); § 2.2-3711(A)(29).

<sup>15</sup> Code of Virginia § 2.2-3711(A)(1).

<sup>16</sup> Code of Virginia § 2.2-3711(A)(3).

<sup>17</sup> Code of Virginia § 2.2-3711(A)(7).

<sup>18</sup> Note that these three examples are not exclusive, as there are several other closed meeting exemptions that may allow closed meetings for the purpose of discussing particular types of contracts.

<sup>19</sup> *Supra* n.9.

***Virginia Legislative Issue Brief***

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

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