00-042

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

EDUCATION: SCHOOL BOARDS; SELECTION, ETC.

Exemption from Act's open meeting requirement is not available to elected school board to discuss performance and other related matters of individual board members.

The Honorable R. Lee Ware Jr.
Member, House of Delegates
July 21, 2000

You ask whether § 2.1-344(A)(1), a portion of The Virginia Freedom of Information Act[1] (the "Act"), permits an elected school board to meet in closed meeting to discuss the performance and other related matters of individual members of the board.

The General Assembly has determined that the Act "shall be liberally construed to … afford every opportunity to citizens to witness the operations of government."[2] The Act requires that "[a]ll meetings of public bodies shall be open, except as provided in § 2.1-344."[3] Local school boards are "public bodies" under the Act.[4] Section 2.1-344(A)(1) allows public bodies to discuss certain matters in closed meetings, including discussion or consideration of "assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of specific public officers, appointees or employees of any public body."[5] "Any exemption from public access to … meetings *shall* be narrowly construed and no … meeting [shall be] closed to the public unless specifically made exempt pursuant to [the Act] or other specific provision of law."[6]

The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.[7] "[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent."[8] Analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, in addition to its express terms.[9] The purpose underlying a statute's enactment is particularly significant in construing it.[10] Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences.[11]

Section 2.1-344(A)(1) allows public bodies to discuss certain personnel matters in closed meetings.[12] This exception to the open meeting requirement allows private discussion of personnel matters involving individual employees[13] and is designed to protect the privacy of *individual employees of public bodies* in matters relating to their employment.[14] Giving § 2.1-344 its required narrow construction, the closed meeting exception is not available to an elected school board for a discussion concerning which members shall serve as the board's chairman and vice-chairman; rather, it is available only to discuss personnel considerations regarding the individuals a public body appoints or employs.[15]

The Act does not define the term "employee" or the phrase "individual employees of public bodies." Prior opinions of the Attorney General conclude that, where no applicable statutory definition of the term "employee" exists, it must be given its ordinary meaning, considering the context in which it is used.[16] A 1991 opinion notes that, at common law, the following four elements determine whether an employer/employee relationship exists: (1) the employer's selection and engagement of the employee; (2) the payment of wages to the employee; (3) the employer's retention of the power of dismissal; and (4) the employer's retention of the power of control.[17] In determining whether an employer/employee relationship exists, the crucial question of control is whether the employer has the right to control not merely the results but the progress, details, means and methods of the work.[18]

It is clear that members of an elected school board are not employees of the board or the locality. Section 22.1-57.3(A) provides that, upon voter approval at a referendum, "the members of the school board shall be elected by popular vote." Furthermore, "[t]he terms of office for the school board members shall commence on January 1 following their election in the case of a county and on July 1 following their election in the case of a city or town."[19]

Each member of an elected school board is a public officer. A 1978 opinion of the Attorney General lists criteria to be considered in determining whether a position constitutes a "public office":

> One important consideration is that, to constitute a public office, the position must be created by the Constitution or statutes. It is a position filled by election or appointment, with a designation or title, and duties concerning the public, assigned by law. A frequent characteristic of such a post is a fixed term of office.[20]

Clearly, the position on an elected school board is a public office under the above criteria: the position is created by statute—§ 22.1-57.3; it is filled by election by the qualified voters of a city, county or town; and the duties of the position concerning the public are assigned by law.[21] "[A] public office is a public agency or trust created in the interest and for the benefit of the people."[22] Because the powers exercised by public officers are held in trust for the people, such officers are considered servants of the people.[23]

I am of the opinion that members of an elected school board are public officers. Based on the above, therefore, it is my opinion that an elected school board may not meet in closed meeting to discuss the performance and other related matters of individual members of the board.

[1]Sections 2.1-340 to 2.1-346.1.

[2]Section 2.1-340.1; *see also* Op. Va. Att'y Gen.: 1984-1985 at 427, 428; 1979-1980 at 236, 237.

[3]Section 2.1-343.

[4]*See* § 2.1-341 (defining "public body" to include "school boards").

[5]Section 2.1-344(A)(1). Section 2.1-344 provides, in part:

"A. Public bodies may hold closed meetings only for the following purposes:

"1. Discussion, consideration or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of specific public officers, appointees or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter which involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board."

[6]Section 2.1-340.1 (emphasis added).

[7]*See* Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) ("shall" is word of command, used in connection with mandate); *see also* Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) ("shall" generally indicates procedures are intended to be mandatory, imperative or limited); 1999 Op. Va. Att'y Gen. 15, 15, and opinions cited at 16 n.9.

[8]Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

[9]*See* Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 222 S.E.2d 793 (1976).

[10]*See* VEPCO v. Prince William Co., 226 Va. 382, 388, 309 S.E.2d 308, 311 (1983).

[11]McFadden v. McNorton, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952); *see* 1993 Op. Va. Att'y Gen. 192, 196, and opinions cited therein.

[12]1998 Op. Va. Att'y Gen. 9, 10. This prior opinion concludes that a city council may not meet in executive session to discuss personnel matters related to city employees not under its authority. *Id.* at 9.

[13]1982-1983 Op. Va. Att'y Gen. 713, 714.

[14]1976-1977 Op. Va. Att'y Gen. 316, 316.

[15]1998 Op. Va. Att'y Gen., *supra* note 12, at 10. *See, e.g.*, Op. Va. Att'y Gen.: 1982-1983 at 714 (city council may meet in executive session to discuss employment matters related to city attorney); 1979-1980 at 378, 379 (discussions related to performance of identifiable individual employees may be subject of properly called executive meeting); 1974-1975 at 570 (town council may meet in executive session to discuss employment of town manager).

[16]*See* 1987-1988 Op. Va. Att'y Gen. 413, 414; *see also* 1991 Op. Va. Att'y Gen. 140, 142.

[17]Hadeed v. Medic-24, Ltd., 237 Va. 277, 288, 377 S.E.2d 589, 594 (1989); 1991 Op. Va. Att'y Gen., *supra*, at 143.

[18]N & W Railway v. Johnson, 207 Va. 980, 983, 154 S.E.2d 134, 136 (1967); 9B M.J. *Independent Contractors* §§ 5, 6 (1995); 1991 Op. Va. Att'y Gen., *supra* note 16, at 143.

[19]Section 22.1-57.3(C).

[20]1977-1978 Op. Va. Att'y Gen. 322, 323.

[21]*See, e.g.*, §§ 22.1-71 to 22.1-87 (codifying general powers and duties of school boards).

[22]63C Am. Jur. 2d *Public Officers and Employees* § 2, at 458 (1997).

[23]*See* 1996 Op. Va. Att'y Gen. 149, 150.