

99-061

**ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.**

**Reconsideration and affirmance of 1998 opinion concluding that Act does not permit Hopewell City Council to hold closed meeting to discuss personnel matters related solely to employees of city manager. Examination of elements that determine existence of employer/employee relationship. Hopewell City Council does not possess required element of control over city employees. Comparison of 1998 opinion with 1979 opinion dealing with employment relationships of local school boards. Employer/employee relationship that exists between local school boards and public school system employees is distinguishable from relationship between Hopewell City Council and city employees. Exemption from Act's open meeting requirement is reserved to city manager, and not council, for discussion of personnel matters related solely to city employees.**

Mr. Steven L. Micas  
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May 18, 2000

You request that I reconsider an opinion to the Honorable Riley E. Ingram, Member, House of Delegates, dated December 16, 1998<sup>1</sup> ("1998 opinion"), concluding that The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the *Code of Virginia* (the "Act"), does not permit the Hopewell City Council to hold a closed meeting to discuss personnel matters related solely to employees appointed, removed, or supervised by the city manager. The 1998 opinion notes that the exception to the open meeting requirement in § 2.1-344(A)(1), which allows public bodies to discuss certain personnel matters in closed meetings, clearly permits a city council to discuss in a closed meeting personnel considerations regarding individuals appointed or employed by council and over whom the council has supervisory authority.<sup>2</sup> The 1998 opinion also notes, however, that the statutory exception is not available to a city council for personnel matters pertaining to city employees it does not appoint or employ, and over whom it does not have supervisory authority, such as employees supervised by the city manager.<sup>3</sup>

In the 1998 opinion, the charter for the City of Hopewell authorized the city council to appoint only the city manager, city clerk, and city attorney.<sup>4</sup> The city manager, however, had appointive, removal and supervisory authority over other city employees.<sup>5</sup> The specific inquiry in the 1998 opinion was whether the Hopewell City Council may meet in executive session to discuss specific city employees other than the three officers appointed by council.<sup>6</sup> In this factual context, it was noted that § 2.1-344(A)(1) allows public bodies to hold closed meetings *only* for the purposes of "[d]iscussion, ... assignment, ... promotion, performance, demotion, salaries, disciplining or resignation of specific public ... employees of any public body."<sup>7</sup>

The 1998 opinion cites two prior opinions, which conclude that a city council may discuss in a closed meeting personnel matters related to the council's selection of one of its members as mayor<sup>8</sup> or related to the city attorney whom it appoints.<sup>9</sup> With regard to other employees of the city, however, the term "employee" is not defined in the Act. It is, therefore, necessary to rely on a 1991 opinion which considers the following four elements to 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.<sup>10</sup> The 1991 opinion concludes that the crucial question in determining the existence of such a relationship is whether the employer has the right to control not merely results but the progress, details, means and methods of the work.<sup>11</sup> "The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."<sup>12</sup> Based on an assessment of these four elements, the 1998 opinion concludes that the Hopewell City Council does not have the required element of control over the city employees in question and thus may not discuss personnel matters relating to them in a closed meeting.<sup>13</sup>

In your analysis,<sup>14</sup> you argue that the phrase "employees of any public body" is synonymous with the phrase "employees of any locality." Thus, you conclude that employees of the City of Hopewell are also employees of the city council. You argue that the interpretation of the term "employees" in the 1998 opinion is too restrictive. Additionally, you argue that a 1979 opinion conflicts with the 1998 opinion because it concludes that a school board may not meet in a closed meeting to discuss the general priority of administrative positions in the school system's central administrative office, but such board could meet in a closed meeting to discuss personnel matters relating to specific employees of the central office.<sup>15</sup> Finally, you contend that the 1998 opinion is inconsistent with the intent of § 2.1-344(A)(1) in that the conclusion fosters open, rather than closed, discussion of city employee personnel issues.

It is clear that the General Assembly has defined neither the term "employee" nor the phrase "individual employees of public bodies" in the context of the Act.<sup>16</sup> When the General Assembly intends words in a statute to have a specific meaning, it clearly and unambiguously expresses its intention.<sup>17</sup> Therefore, the determination of whether the employees of the City of Hopewell are employees of the city council is subject to the particular facts and circumstances of the individual case. The analysis of the 1998 opinion focuses on the common and ordinary meaning associated with the term "employee." Use of such term by the General Assembly envisions a relationship between an employer and employee in which the employer exercises a degree of control over the employee.

Based on the facts presented in the 1998 opinion, I remain of the view that the Hopewell City Council does not possess the requisite control over the city employees. I also am unable to agree with your argument that the 1979 opinion, dealing with employment relationships of local school boards, conflicts with the 1998 opinion. A 1985 opinion notes that "[t]he powers to hire, dismiss and set the terms of employment of employees in

the public school system are vested in the [local] school board."<sup>18</sup> Specifically, § 22.1-293(A) provides that local school boards "may employ principals and assistant principals"; § 22.1-295(A) provides that public school teachers "shall be employed ... by the school board"; and § 22.1-296 provides that "[e]ach school board shall provide for the payment of teachers, principals, assistant principals and other employees." I am not aware of any similar statutory provision that vests the Hopewell City Council with similar management responsibility and control over city employees.<sup>19</sup>

Furthermore, § 2.1-340.1 of the Act mandates that "[a]ny exception or exemption from [the Act's] applicability shall be narrowly construed." Thus, taking into consideration that the exemption provided pursuant to § 2.1-344(A)(1) for the discussion of personnel matters related to "employees of any public body" must be narrowly construed, I am constrained to interpret such exemption in a restrictive manner. To define the term "employees" as you suggest such that all employees of a city are automatically regarded as employees of the city council contravenes the expressed mandate of the General Assembly. Accordingly, I am required to construe the term "employees" in a restricted manner when such term is used in the Act. Consequently, it is my opinion that the phrase "employees of any public body" is not synonymous with the phrase "employees of any locality."

The 1979 opinion, which you suggest contradicts the 1998 opinion, addresses the issue of whether a local school board may meet in a closed meeting to discuss a report prepared by the superintendent regarding the order of priority among administrative positions in the school board's central administrative office.<sup>20</sup> The 1979 opinion notes that the report did not involve the performance of school board employees, but rather, evaluated the importance of the employees' positions.<sup>21</sup> Thus, the 1979 opinion concludes that such report was not within the scope of the Act's exception for discussion of personnel matters in a closed meeting.<sup>22</sup>

You also conclude that the 1979 opinion indicates that it would be permissible to discuss in a closed meeting personnel matters related to specific employees of the central office who are not school board appointees. You rely on the 1979 opinion as analagous to the situation presented in the 1998 opinion, and maintain that the 1979 opinion stands for the proposition that a city council may discuss in a closed meeting the personnel matters of specific city employees as well as appointees of the council. I concur with your conclusion that the 1979 opinion furthers the result of permitting a school board to discuss in a closed meeting the personnel matters of specific school board employees as well as appointees of the school board. As discussed above, however, local school boards are statutorily vested with the requisite management and control powers over public school system employees that evidence an employer/employee relationship.<sup>23</sup> Conversely, the Hopewell City Council considered in the 1998 opinion was not so vested; thus, the facts and corresponding conclusion of the 1979 opinion are clearly distinguishable from the 1998 opinion.

Finally, you argue that the conclusion of the 1998 opinion is inconsistent with the confidentiality purpose of the § 2.1-344(A) exception in that it leads to the discussion of personnel matters of city employees in open session of a city council meeting.

Your proposition assumes that, because the 1998 opinion concludes that discussion of personnel matters related to city employees who are appointed, removed, or supervised by the city manager does not fall within the Act's exception to open meetings, such discussion must necessarily take place in an open meeting of city council. As noted in the 1998 opinion, the § 2.1-344(A)(1) exception is "designed to protect the privacy of *individual employees of public bodies* in matters relating to their employment."<sup>24</sup> Accordingly, discussions related to the employee's personnel matters are reserved to the employer and employee. Because it is my opinion that the employees of the City of Hopewell in the 1998 opinion are employees, as that term is commonly defined, of the city manager and not the city council, discussion of personnel matters solely related to them are reserved unto such employees and the city manager.

For these reasons, the conclusion of the 1998 opinion is affirmed.

<sup>1</sup>1998 Op. Va. Att'y Gen. 9.

<sup>2</sup>*Id.* at 10.

<sup>3</sup>*Id.* at 11.

<sup>4</sup>*Id.* at 10.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at 9-10.

<sup>7</sup>*See id.* at 10.

<sup>8</sup>*See* 1980-1981 Op. Va. Att'y Gen. 386.

<sup>9</sup>*See* 1982-1983 Op. Va. Att'y Gen. 714.

<sup>10</sup>1991 Op. Va. Att'y Gen. 140, 143 (citing *A. C. L. R. Co. v. Tredway's Admx.*, 120 Va. 735, 744-45, 93 S.E. 560, 562 (1917)).

<sup>11</sup>*Id.* (citing *N & W Railway v. Johnson*, 207 Va. 980, 983, 154 S.E.2d 134, 136 (1967)); *see also* 9B M.J. *Independent Contractors* §§ 5, 6 (1995).

<sup>12</sup>*Deal v. Commonwealth*, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983); *see also* Op. Va. Att'y Gen.: 1995 at 225, 227; 1985-1986 at 21, 22.

<sup>13</sup>1998 Op. Va. Att'y Gen., *supra* note 1, at 11.

<sup>14</sup>Any request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Section 2.1-118.

<sup>15</sup>1979-1980 Op. Va. Att'y Gen. 378.

<sup>16</sup>1998 Op. Va. Att'y Gen., *supra* note 1, at 10.

<sup>17</sup>*See* Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985); Adkins v. Com., 27 Va. App. 166, 169, 497 S.E.2d 896, 897 (1998); Birdsong Peanut Co. v. Cowling, 8 Va. App. 274, 277, 381 S.E.2d 24, 26 (1989).

<sup>18</sup>1985-1986 Op. Va. Att'y Gen. 159, 159 (citing, e.g., § 22.1-293).

<sup>19</sup>*Compare* § 15.2-1131 (providing that city council may establish personnel system for city administrative officials and employees in city with population exceeding 200,000 upon receipt of recommendation submitted *by city manager*); 1989 Op. Va. Att'y Gen. 43, 44, 45 (noting as valid, procedure to resolve employee complaints through which employees of local department of social services must address such complaints first to their immediate supervisor; if unsatisfied, then to department's director, and lastly, to local board of supervisors at meeting of full board).

<sup>20</sup>*See* 1979-1980 Op. Va. Att'y Gen., *supra* note 15, at 378.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* at 378-79.

<sup>23</sup>*See* 1985-1986 Op. Va. Att'y Gen., *supra* note 18, at 159.

<sup>24</sup>1998 Op. Va. Att'y Gen., *supra* note 1, at 11 (quoting 1976-1977 Op Va. Att'y Gen. 316, 316).