

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

Authority of city council to meet in executive session to discuss personnel considerations is restricted to individuals appointed or employed and supervised by council. Hopewell City Council may not meet in executive session to discuss personnel matters of other city employees with whom it does not have employer/employee relationship.

The Honorable Riley E. Ingram

Member, House of Delegates

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You ask whether § 2.1-344(A)(1) of the *Code of Virginia*, a portion of The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 (the "Act"), permits a city council to meet in executive session to discuss specific city employees other than the three officers appointed by council.

You relate that the charter for the City of Hopewell vests the city council with the authority to appoint three executive officers—the city manager, city clerk, and city attorney. You note that the council is also responsible for the city budget, which includes city personnel positions, classifications and salaries. You state that the city manager has appointive, removal and supervisory authority over city employees. Specifically, you inquire whether the Hopewell City Council may meet in executive session to discuss specific city employees other than the three officers appointed by council.

The General Assembly has determined that the Act is to be liberally construed so that citizens are afforded the opportunity to witness the operations of government.¹ The Act requires that all meetings of public bodies be public meetings, "[e]xcept as otherwise specifically provided by law."²

City councils are "public bodies" under the Act.³ Section 2.1-344(A)(1) allows public bodies to discuss certain personnel matters in executive or closed meetings, including discussion or consideration of "employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of specific public officers, appointees or employees of any public body[.]" Section 2.1-340.1 of the Act, however, requires that "[a]ny exception or exemption from applicability *shall* be narrowly construed." (Emphasis added.)

The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.⁴ The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature.⁵ Analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, in addition to its express terms.⁶ The purpose underlying a statute's enactment is particularly significant in construing it.⁷ Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences.⁸

The exception to the open meeting requirement provided by § 2.1-344(A)(1) "allows private discussion of personnel matters involving individual employees."⁹ Thus, discussions relating to the hiring, firing, performance, disciplining, or salary of "identifiable individual employees ... may be the subject of a properly called executive meeting."¹⁰ Prior opinions of the Attorney General conclude that a city council may discuss, in executive session, the selection of one of its

members to serve as mayor¹¹ or employment matters related to a city attorney.¹² Similarly, a 1975 opinion concludes that a town council may meet in executive session for the purpose of discussing employment of a person for the position of town manager.¹³ Accordingly, it is clear that a city council may discuss, in executive session, personnel considerations regarding the individuals it appoints or employs, and over whom it has full supervisory authority.

The term "employee" has not been defined by the General Assembly in the context of the Act. Further, the General Assembly has not defined the use of the phrase "individual employees of public bodies" in the Act. Prior opinions of the Attorney General, however, 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.¹⁴ 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."¹⁵ "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."¹⁶

A 1976 opinion also notes that the exception in § 2.1-344(A)(1) is "designed to protect the privacy of *individual employees of public bodies* in matters relating to their employment."¹⁷ You advise that the only employees of the city council are the city manager, city attorney and city clerk. Unlike the positions of city manager, city attorney, and city clerk, over whom the city council has full supervisory authority,¹⁸ the council does not have such authority with respect to other city employees. Consequently, the council does not control such city employees, and does not directly participate in personnel decisions relating to such other city employees. Giving the required narrow construction to the § 2.1-344(A)(1) exception,¹⁹ it is not available to the Hopewell City Council for personnel matters pertaining to these other city employees.

Consequently, it is my opinion that a city council may not meet in executive session to discuss personnel matters solely related to employees appointed, removed or supervised by the city manager.

¹ See § 2.1-340.1; see also Op. Va. Att'y Gen.: 1984-1985 at 427, 428; 1979-1980 at 236, 237.

² Section 2.1-343.

³ Section 2.1-341 (including "municipal councils" in definition of "public body").

⁴ 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 is used in imperative or mandatory sense); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein.

⁵ See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

⁶ *Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 222 S.E.2d 793 (1976).

⁷ *VEPCO v. Prince William Co.*, 226 Va. 382, 388, 309 S.E.2d 308, 311 (1983).

⁸ *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952); see Op. Va. Att'y Gen.: 1993 at 192, 196; 1991 at 5, 7; 1986-1987 at 307, 308.

⁹1982-1983 Op. Va. Att'y Gen. 713, 714.

¹⁰1979-1980 Op. Va. Att'y Gen. 378, 379.

¹¹See 1980-1981 Op. Va. Att'y Gen. 386.

¹²See 1982-1983 Op. Va. Att'y Gen. 714.

¹³See 1974-1975 Op. Va. Att'y Gen. 570.

¹⁴See Op. Va. Att'y Gen.: 1991 at 140, 142; 1987-1988 at 413, 414.

¹⁵1991 Op. Va. Att'y Gen., *supra*, at 143.

¹⁶*Id.*

¹⁷1976-1977 Op. Va. Att'y Gen. 316, 316 (emphasis added).

¹⁸*Compare* 1974-1975 Op. Va. Att'y Gen. 253, 254 (chief judge of circuit has full supervisory authority over magistrates appointed by him).

¹⁹See Op. Va. Att'y Gen.: 1987-1988 at 30, 31; 1982-1983 at 717, 718.