IN THE

Supreme Court Of Virginia

RECORD NO. 171022

SCV: Submitted on 01-31-2018 12:18:38 EST for filing on 01-31-2018

MARIAN M. BRAGG,

Appellant,

v.

BOARD OF SUPERVISORS OF RAPPAHANNOCK COUNTY, VIRGINIA, et al.,

Appellees.

OPENING BRIEF OF APPELLANT MARIAN M. BRAGG

David L. Konick
(Virginia State Bar. No 17495)
P.O. Box 57
Washington, Virginia 22747-0057
(540) 937-5067 (Telephone)
(No Facsimile Number)
dlkonick@earthlink.net

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii – iii

STATEMENT OF THE CASE AND MATERIAL TRIAL COURT PROCEEDINGS 1

ASSIGNMENTS OF ERROR 9

AUTHORITIES AND ARGUMENT 11

SUMMARY OF ARGUMENT 11

A. THE TRIAL COURT ERRED BY TREATING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS A PLEA IN BAR 13

B. THE TRIAL COURT'S REJECTION OF BRAGG'S AFFIDAVIT WAS BASED ON A NARROW CONSTRUCTION OF CODE § 2.2-3713 AND IGNORED ESTABLISHED RULES OF STATUTORY CONSTRUCTION 17

1. Rejection of Supervisor Frazier's "Acknowledgement" of the Board's FOIA Noncompliance was Erroneous 19

2. Rejection of Bragg's "Good Cause" Affidavit was Error 27

3. The Trial Court Erred by Reading Into Code § 2.2-3713(A) a Requirement That Bragg Disclose Her "Basis of Information" and Then Ignored That She Did So 29

C. THE TRIAL COURT ERRED BY REJECTING BRAGG'S AFFIDAVIT FOR FAILURE "TO SWEAR" AS REQUIRED BY CODE § 2.2-3713(A) 31

D. THE TRIAL COURT ERRED BY IGNORING CODE § 2.2-3712(A) AND BRAGG'S ALLEGATIONS THAT THE BOARD'S VOTES TO CONVENE CLOSED SESSIONS WERE NOT TAKEN DURING THE PUBLIC SESSIONS 34

E. THE TRIAL COURT ERRED BY IGNORING THE CODE § 2.2-3712(A) REQUIREMENT THAT THE BOARD PROPERLY IDENTIFY THE SUBJECT MATTER AND PURPOSE OF A CLOSED SESSION BEFORE THE VOTE 36

CONCLUSION 40

TABLE OF AUTHORITIES

PAGE(S)

CASES

Antisdel v. Ashby, 279 Va. 42, 688 S.E.2d 163 (2010)..... 18
Bidwell v. McSorley, 194 Va. 135, 72 S.E.2d 245 (1952) 28
Bloodworth v. Ellis, 221 Va. 18, 267 S.E.2d 96 (1980)..... 14
Boynton v. Kilgore, 271 Va. 220, 623 S.E.2d 922 (2006) 27
Carpenter v. Gray, 75 S.E. 300 (1912)… 32-33
Carter v. Nelms, 131 S.E.2d 401, 204 Va. 338 (Va., 1963)..... 30
Cartwright v. Commo. Transportation Comm'r, 270 Va. 58, 613 S.E.2d 449 (2005) ……. 36
Chaffins v. Atlantic Coast Pipeline, 801 S.E.2d 189 (2017)…… 18, 27
Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 722 S.E.2d 626 (2012)… 24
Deutsche Bank Nat'l Trust Co. v. Arrington, 290 Va. 109, 772 S.E.2d 571 (2015)..... 13
Dudas v. Glenwood Golf Club, Inc., 261 Va. 133, 540 S.E.2d 129 (2001)..... 14
Fenter v. Norfolk Airport Authority, 274 Va. 524, 649 S.E.2d 704 (2007) 12
FFW Enterprises v. Fairfax Co., 701 S.E.2d 795, 280 Va. 583 (2010) 29
Ford v. Benitez, 639 S.E.2d 203, 273 Va. 242 (2007) ……19, 23
Hawthorne v. VanMarter, 279 Va. 566, 692 S.E.2d 226 (2010) 14
Jones v. Conwell, 227 Va. 176, 314 S.E.2d 61 (1984)..... 18
Klaiber v. Freemasons Assocs., 266 Va. 478, 587 S.E.2d 555 (2003)..... 14
Luttrell v. Cucco, 291 Va. 308, 784 S.E.2d 707 (2016) 11
Marsh v. Richmond Newspapers, Inc., 223 Va. 245, 288 S.E.2d 415 (1982) …… passim
Nageotte v. Board of Supervisors, 223 Va. 259, 288 S.E.2d 423 (1982) …….. 34, 36
Paris v. Brown, 143 Va. 896, 129 S.E. 678 (1925)… 31-33
Robinson v. Brugiere, 72 Va. Cir. 109 (2006)..... 16
Sheets v. Ragsdale, 257 S.E.2d 858 (1979) 16
St. Joe Co. v. Norfolk Redevelopment & Housing Auth., 722 S.E.2d 622 (2012).....13
Smith v. McLaughlin, 289 Va. 241, 251, 769 S.E.2d 7 (2015)..... 14
The Daily Press v. Office of the Executive Secretary, 800 S.E.2d 822 (2017) …….11, 24

PAGE(S)

Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla.1974).....26
Tull v. Brown, 494 S.E.2d 855 (1998)… 11
Turner v. Wexler, 418 S.E.2d 886, 244 Va. 124 (1992)… 30
Va. Dep't of Corr. v. Surovell, 776 S.E.2d 579 (2015) 12
Va. Electric & Power Co. v. Bd. of Supervisors, 226 Va. 382, 309 S.E.2d 308 (1983)……27
Va. Fuel Corp. v. Lambert Coal Co., 291 Va. 89, 781 S.E.2d 162 (2016) 13
White Dog Publishing v. Culpeper Co. Bd., 634 S.E.2d 334, 272 Va. 377 (2006) … passim
WTAR Radio-TV Corp. v. City of Virginia Beach, 223 S.E.2d 895 (1976) 27

STATUTES

Virginia Code § 1-228..... 31
Virginia Code § 1-250..... 31
Virginia Freedom of Information Act Title 2.2, Chapter 37
(Virginia Code §§ 2.2-3700 *et seq.*).....*passim*
Virginia Code §2.2-3712..... passim
Virginia Code §2.2-3713.....passim
Virginia Code § 8.01-271.1 .....….19, 23
Virginia Code § 8.01-280 ..... 12, 31
Virginia Supreme Court Rule 1:4(i) 23
Virginia Supreme Court Rule 1:10 …… passim

OTHER AUTHORITIES

Black's Law Dictionary ……..……16, 29, 32
Advisory Opinion AO-06-07, Virginia Freedom of Information Advisory Council, issued June 8, 2007, http://foiacouncil.dls.virginia.gov/ops/07/AO_06_07.htm.....35
Advisory Opinion AO-08-07, Virginia Freedom of Information Advisory Council, issued July 11, 2007, http://foiacouncil.dls.virginia.gov/ops/07/AO_08_07.htm 35
Advisory Opinion AO-02-16, Virginia Freedom of Information Advisory Council, issued August 12, 2016…http://foiacouncil.dls.virginia.gov/ops/16/AO_02_16.htm…… 20, 25, 37
Advisory Opinion AO-03-17, Virginia Freedom of Information Advisory Council, issued March17, 2017, http://foiacouncil.dls.virginia.gov/ops/17/AO_03_17.htm 37

Opening Brief of Appellant

TO: **THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA**:

COMES NOW the Appellant, Marian M. Bragg, pursuant to the Certificate of Appeal issued December 18, 2017 and Rule 5:27 of the Rules of the Supreme Court of Virginia, and respectfully submits her Opening Brief.

I. *STATEMENT OF THE CASE AND MATERIAL TRIAL COURT PROCEEDINGS*.

This appeal presents the Court with the question of how a citizen who claims she was wrongfully excluded from a public body's closed meetings at which non-exempt matters were unlawfully discussed can satisfy the affidavit requirements of the Virginia Freedom of Information Act ("FOIA") when she cannot possibly swear what transpired at those closed meetings except "on information and belief." Although FOIA directs that its remedial provisions be "liberally interpreted," that closed meeting exemptions be narrowly construed, and provides that even a single violation entitles citizens to remedial relief, the Trial Court in this case held that Bragg's affidavit "on information and belief" of what happened in five closed sessions of the

Rappahannock County Board of Supervisors ("the Board") was insufficient. It erred by applying FOIA's "affidavit showing good cause" requirement restrictively – not liberally – in a way that makes it virtually impossible for any citizen to challenge a public body's improperly closed meetings. The Trial Court further erred by holding that FOIA estops public officials from later retracting or contradicting a FOIA closed meeting certification vote. Finally, the Trial Court erred by ignoring allegations of multiple failures of the Board to observe FOIA's closed meeting procedural requirements all of which were properly verified by Bragg under oath.

When the Board began its search for a new County Attorney in June 2016, it violated the Freedom of Information Act's requirement that closed meeting exemptions be narrowly construed. The Board held a series of five closed meetings to discuss "filling the position of County Attorney." In those five closed meetings the Board discussed non-exempt policy issues including whether or not the County Attorney and Zoning Administrator positions should be combined, the salary range for the position, the content of an advertisement for the position and where that advertisement should be published. None of those policy issues involved any confidential personnel

or other information concerning identifiable prospective candidates or existing employees. Bragg contends that these meetings should have been open to the public because no specific candidates had yet been identified, much less interviewed, considered or discussed, and the policy issues were not exempt topics under FOIA.

Compounding their disregard for FOIA's open meeting requirements, the Board's five motions to close the meetings identified a subject matter – "filling the position of County Attorney" – for closed meeting discussion that didn't match FOIA's open meeting exemption that is limited to "discussion, consideration, or interviews of ***prospective candidates*** for employment." At the time of the five closed meetings, the Board was still discussing the position description, salary range, the ad content and where to publish it. There were no "prospective candidates" to discuss, consider or interview when these five closed meetings occurred.

Adding insult to injury, the Board ignored FOIA's requirement that motions to go into executive session be made and voted upon in open session. At each of the five meetings, the Board first ejected all members of the press and the public from each meeting, and only after clearing the

meeting room were the motions to go into closed session made, seconded and adopted. None of the five executive session motions was voted upon in open session as FOIA requires.

After the fifth such violation, in September 2016, Bragg filed her FOIA enforcement petition (Record at 1-17) in the Trial Court against the Rappahannock County Board of Supervisors and four of its individual members, and supported it by an affidavit and verification in which Bragg, "after being duly sworn" by a Notary Public, "stated under oath" that "all of the allegations in the Petition were true and correct to the best of her knowledge and belief, except to the extent therein stated to be on information and to such extent, she believes them to be true." (Record at 15).

Also filed in support of Bragg's Petition for Enforcement was a signed, notarized "Acknowledgement" from one member of the Board – Ronald L. Frazier – confirming that the Board had discussed non-exempt matters in the five closed sessions and that the Board's certification of FOIA compliance was, in his opinion, improper. (Record at 16-17, Exhibit A, "Frazier Acknowledgement").

After responsive pleadings were filed by the Board and the individual

Respondents, on November 14, 2016, Bragg filed a Motion for Leave to Amend (Record at 177-79), attaching an Amended Petition in which her original requests for relief under the Declaratory Judgment Act and the Public Procurement Act were deleted (Record at 180-196). The core allegations concerning the five unlawfully closed sessions of the Board remained essentially unchanged and the Amended Petition was again supported by a similar affidavit and verification from Bragg (Record at 206). The Frazier Acknowledgement was incorporated by reference (Record at 193, Amended Petition at 14, ¶ 35).

The only allegations "stated to be on information" in Bragg's Amended Petition were allegations relating to the Board's discussions of non-exempt topics at five closed meetings from which Bragg alleged she had been unlawfully excluded and about which she could not possibly have first-hand knowledge. These allegations were based on the Frazier Acknowledgement.

None of Bragg's allegations about the failure of the Board's closed meeting motions to comply with applicable FOIA requirements, or about the failure of the Board to vote on the motions in open session was made "on information and belief." Included in Bragg's Amended Petition were *verbatim*

excerpts of the Board's minutes setting forth each of the closed meeting motions and links to videotapes of each of the Board five meetings showing the ejection of the public before the closure motion was made or adopted. In paragraph 32 of her Amended Petition, Bragg particularized Board actions taken or authorized after discussion in closed sessions without voting in open session in violation of FOIA. (Record at 191-92, Amended Petition at 12-13.)

At a hearing on November 28, 2016, the Trial Court granted Bragg's motion for leave to amend, giving Respondents twenty-one days from that date to file responsive pleadings. (Record at 207-209).

On December 19, 2017, the Board and the individual Respondents filed a battery of pleadings in response to Bragg's Amended Petition including a Demurrer, a Motion Craving Oyer, and a Motion for Summary Judgment. (Record at 239-276) Ignoring Virginia Supreme Court Rule 1:10 that requires objections to the adequacy of an affidavit on a pleading required to be sworn be made within seven days, Respondents raised their objections to the adequacy of Bragg's affidavit and verification for the first time in their Motion for Summary Judgment -- fourteen days too late.

Bragg filed her responses to the Demurrer and other motions on

January 9, 2017 (Record at 347-381). The Trial Court heard oral argument on the Demurrer and Motion for Summary Judgment on January 19, 2017 and issued a letter opinion on March 15, 2017 dismissing Bragg's Petition based on the inadequacy of Bragg's affidavit in support of the Amended Petition. (Record 389-394).

Instead of "liberally" construing FOIA, the Trial Court's March 15th Letter Opinion short-circuited the process and terminated the proceeding because of alleged defects in Bragg's "good cause" affidavit and rejection of the Frazier Acknowledgement incorporated by reference in her Amended Petition. In so doing, the Trial Court erred by ignoring Rule 1:10 and by narrowly construing FOIA and depriving Bragg – as well as an entire class of citizens wrongfully excluded from closed meeting of public bodies – of any meaningful possibility of ever enforcing FOIA's open meeting requirements.

The Trial Court also erred by ignoring Bragg's allegations that the Board failed to comply with FOIA procedural requirements to identify the exempt topics to be discussed in each closed session and to vote in open session to close each of the five meetings. The Trial Court erroneously treated these allegations of procedural violations as if they were based on

"information and belief," when in fact, they were based on objective proof – the Board's own written records and public video recordings – that were incorporated by reference in Bragg's Amended Complaint.

Bragg sought reconsideration of the Trial Court's March 15, 2017 letter opinion on March 20, 2017 (Record at 395-405). The Board replied on March 30, 2017 (Record at 406-419) and on April 11, 2017 the Trial Court issued a second letter opinion denying Bragg's request for reconsideration (Record at 420-21). A Final Order was entered May 30, 2017 after hearing and argument on the Board's motion for sanctions, and Bragg's cross-motion for sanctions, all which were denied. (Record at 471-474).

The Trial Court's ruling gutted FOIA's directive that "[a]ny person . . . denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges" and that "a single instance of denial of the rights and privileges conferred by this chapter" are sufficient to invoke FOIA remedies. If these erroneous rulings of the Trial Court are not reversed and the case remanded to permit Bragg to have her day in Court, it will have a chilling effect on future efforts by all citizens to protect their rights under FOIA to witness the operation of their government.

II. ASSIGNMENTS OF ERROR.

1. The Trial Court erred by treating Appellees' (Respondents') Motion for Summary Judgment and Dismissal as a Plea in Bar and not affording the allegations in the Amended Petition and all reasonable inferences therefrom a presumption of truth. (March 15th Letter Opinion at 1; Record at 389).

2. The Trial Court erroneously construed the Code § 2.2-3713(A) requirement that a FOIA enforcement petition be supported by an "affidavit showing good cause" by refusing to consider the Board member's post-meeting "Acknowledgment," by rejecting Bragg's affidavit in support of her Amended Petition and by construing Code § 2.2-3713(A) in a manner so narrow and so restrictive that it effectively deprived Bragg of her statutory rights and of any remedy for alleged violations the Freedom of Information Act's open meeting requirements expressly provided for by the General Assembly. (March 15th Letter Opinion at 2-3; Record at 390-91)

3. The Trial Court erred by granting Appellee's (Respondents') "Motion for Summary Judgment and Dismissal" and by dismissing Bragg's Amended Petition on the grounds Bragg's "good cause" affidavit did not contain the actual word "swear" even though the Affidavit contained the formulation that "upon being duly sworn, Petitioner stated, under oath." (March 15th Letter Opinion at 2-3. Record at 390-391)

4. The Trial Court erred by ignoring the policy provisions in Code §2.2-3700 in granting Respondents' "Motion for Summary Judgment and

Dismissal" and ignoring the provision of Code § 2.2-3713(D) that "a single instance of a denial" of Bragg's FOIA rights and privileges is sufficient to invoke the remedies provided by FOIA, misconstruing the requirements of Code § 2.2-3712(A) and by failing to address Bragg's allegations that members of the public had been physically excluded from the meetings and that the Board's votes to convene closed sessions were not taken during the public sessions of the Board meetings described in the Amended Petition.

5. The Trial Court erred by granting Appellees' (Respondents') "Motion for Summary Judgment and Dismissal" and ignoring or failing to address Bragg's allegations relating to the Board's alleged procedural violations of Code § 2.2-3712 with respect to its failure properly to identify the subject matter, purpose and state the specific exemption applicable to each agenda item to be discussed in the closed sessions.

Bragg preserved all of the foregoing exceptions in her March 20, 2017 Motion for Reconsideration (Record at 395-405) and also by noting them in detail at the foot of the Final Order. (Record at 472-474).

III. AUTHORITIES AND ARGUMENT

STANDARD OF REVIEW

The standard of review for all of the foregoing assignments of error is *de novo* review – all were either errors of statutory construction or erroneous conclusions of law. ***The Daily Press v. Office of the Executive Secretary***, 800 S.E.2d 822, 824 (2017); ***Luttrell v. Cucco***, 784 S.E.2d 707, 710 (2016)***.***

SUMMARY OF ARGUMENT

The Trial Court's narrow and restrictive construction of FOIA in this case contravenes a long line of cases decided by this Court that carry into effect the General Assembly's dictate that the Freedom of Information Act be liberally construed. ***Marsh v. Richmond Newspapers, Inc***., 288 S.E.2d 415, 420 (1982). In ***Marsh***, this Court observed:

> "The Act specifically mandates a liberal construction in order that public business shall be conducted so far as possible in public. Code § 2.1-340.1, as amended in 1976, requires that all exemptions under the Act be narrowly construed."

In subsequent decisions, this Court has recognized that "[o]ne of the purposes of FOIA is to ensure the people of the Commonwealth . . . free entry to meetings of public bodies wherein the business of the people is being conducted." ***Tull v. Brown****,* 494 S.E.2d 855, 857 (1998). In ***White***

Dog Publishing v. Culpeper County Board of Supervisors, 634 S.E.2d 334, 339 (2006), the Court reiterated that to achieve that purpose,

> "the General Assembly has directed that the provisions of FOIA 'be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.' Code § 2.2-3700(B). In addition, '[a]ny 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 [FOIA] or other specific provision of law.***'" (emphasis added).

See also, ***Fenter v. Norfolk Airport Authority***, 649 S.E.2d 704, 707 (2007). ***Va. Dep't of Corr. v. Surovell***, 776 S.E.2d 579 (2015) ["By its own terms, the statute puts the interpretative thumb on the scale in favor of disclosure."]

The Trial Court's dismissal of Bragg's Amended Petition challenging the Board's closed sessions because Bragg's Code § 2.2-3713(A) affidavit incorporating the allegations of the Amended Petition and sworn "on information and belief except to the extent therein stated to be on information, and to such extent she believes them to be true" was legally insufficient flies in the face of these principles, misconstrues or ignores Code § 8.01-280, and guts FOIA's enforcement provisions.

In addition, the Court erred by failing to deem the Board's objection to

the adequacy of Bragg's affidavit waived pursuant to Rule 1:10, since the Board and individual Respondents did not object to Bragg's affidavit until December 19, 2016, more than seven days after her Amended Petition was deemed filed on November 28, 2016.

Finally, the Trial Court ignored the reach of Code § 2.2-3713(D), which provides that "a single instance of a denial" of a citizen's FOIA rights and privileges is sufficient to invoke the remedies provided by FOIA. The Trial Court also ignored the requirements of Code § 2.2-3712 with respect to allegations of multiple procedural FOIA violations in Bragg's Amended Complaint all of which were supported by objective proof and none of which was stated to be "on information and belief."

A. THE TRIAL COURT ERRED BY TREATING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS A PLEA IN BAR.

This Court reviews the application of law to undisputed facts *de novo* in an appeal from a circuit court's decision to grant or deny summary judgment. ***Va. Fuel Corp. v. Lambert Coal Co***., 291 Va. 89, 781 S.E.2d 162 (2016), ***Deutsche Bank Nat'l Trust Co. v. Arrington***, 290 Va. 109, 114, 772 S.E.2d 571, 573 (2015) (quoting ***St. Joe Co. v. Norfolk***

Redevelopment & Housing Auth., 283 Va. 403, 407, 722 S.E.2d 622, 625 (2012). The purpose of a plea in bar is "to narrow the litigation by resolving an issue that will determine whether a plaintiff may proceed to trial on a particular cause of action." ***Hawthorne v. VanMarter***, 279 Va. 566, 578, 692 S.E.2d 226, 234 (2010). The trial court's decision on a plea in bar is likewise reviewed *de novo*. ***Smith v. McLaughlin****,* 769 S.E.2d 7, 12 (2015).

The Trial Court erred by ignoring not only these precedents, but also the principle of law that on a demurrer or a motion for summary judgment, all the facts pleaded by the non-moving party are accepted as true. ***Klaiber v. Freemasons Assocs****.,* 587 S.E.2d 555, 558 (2003); ***Dudas v. Glenwood Golf Club, Inc.***, 540 S.E.2d 129, 130-31 (2001); ***Bloodworth v. Ellis***, 267 S.E.2d 96, 99 (1980). Instead, the Trial Court treated the Motion for Summary Judgment as though it were a plea in bar.

Once Respondents filed their Demurrer to the Amended Complaint and their Motion for Summary Judgment (Record at 239-276) on December 19, 2016, the Trial Court was legally bound to make the required presumptions and inferences in Bragg's favor as to all the properly pleaded facts in the Amended Complaint -- especially the allegations in paragraph 35 of the

Amended Petition that incorporated by reference the Frazier Acknowledgment[1] -- unless those inferences were forced, strained, or contrary to reason. This the Trial Court failed to do.

Concomitantly and perhaps more importantly, the Board's December 19th responsive pleadings rendered the adequacy of Bragg's Code § 2.2-3713 affidavit a moot point as a matter of law. Since the Board's December 19th Demurrer and Motion for Summary Judgement had the legal effect of admitting the truth of all of the facts pleaded in the Amended Petition and all reasonable inferences drawn therefrom, whether or not the pleading was properly sworn to and verified became irrelevant. All those facts and inferences should have been accepted as true for the purpose of the Trial

---

[1] Paragraph 35 of the Appellant's Amended Petition (Record at 194) incorporated the Frazier Acknowledgement by reference and stated, *inter alia*,

> "35. Board member Ronald L. Frazier has acknowledged (*See* Exhibit A to the original Petition filed September 29, 2016) that the Board's closed session meetings on some or all of the aforementioned dates included discussion of public business matters not lawfully exempted from open meeting requirements under the Freedom of Information Act with respect to the filling of the County Attorney position, and to the extent non-exempt business was discussed at one or more closed sessions, it was an error on his part to fail to state the substance of the departure from FOIA requirements as provided in Virginia Code §2.2-3712(D)."

Court's ruling on the Board's December 19th pleadings.

That is precisely why Virginia Supreme Court Rule 1:10 requires prompt objections to an insufficient affidavit to be made via a Motion to Strike, in essence, a plea in bar.[2] But the Trial Court erred by considering objections to Bragg's affidavit filed fourteen days after the time limitation imposed by Rule 1:10 had already expired. By failing to interpose any objection in proper form on or before December 5, 2016, seven days after the Amended Complaint was filed,[3] Respondents waived all objections to the sufficiency of the Bragg affidavit. ***Sheets v. Ragsdale***, 257 S.E.2d 858, 860 (1979); ***Robinson v. Brugiere***, 72 Va. Cir. 109, 109-110 (Amherst Co., 2006).[4]

---

[2] *See*, ***Black's Law Dictionary***, "Plea in Bar * * * A plea which goes to bar the plaintiff's action; that is, to defeat it absolutely and entirely."

[3] See par. (1) of the Trial Court's December 15, 2016 Order granting Bragg's Motion for Leave to Amend, Record at 207. ["Petitioner's Amended Petition for Enforcement of the Freedom of Information Act attached to said Motion be, and ***it is hereby deemed filed as of November 28,* 2016**. . .." (emphasis added]

[4] ***Robinson*** appears to be the only reported case applying Va. S.Ct. Rule 1:10 to a FOIA enforcement action where closed sessions were challenged. While Virginia Circuit Court opinions do not have precedential value, this opinion is offered for consideration of the Court as to whether or not the rationale offered by Judge Gamble and his application of Rule 1:10 to a FOIA case challenging a closed meeting is persuasive and consistent with ***Sheets***.

B. THE TRIAL COURT'S REJECTION OF BRAGG'S AFFIDAVIT WAS BASED ON A NARROW CONSTRUCTION OF CODE § 2.2-3713 AND IGNORED ESTABLISHED RULES OF STATUTORY CONSTRUCTION.

As this Court has long recognized, in enacting Code § 2.2-3700, the General Assembly expressly directed that the FOIA is to be "liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government," that "any exemption from public access to records or meetings shall be narrowly construed," and that "[a]ny person . . . denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges." Code § 2.2-3713(D).

Amherst County Circuit Court Judge Gamble ruled:

> "The defendants argued in conjunction with their demurrer that the plaintiffs have not filed a valid cause of action because they failed to file the required supporting affidavit under Code § 2.2-3713. Rule 1:10 of the Rules of the Supreme Court of Virginia [72 Va. Cir. 110] addresses the failure of a party to file an affidavit when it is required by statute. Under this rule, this objection is waived unless it is made within seven days after the pleading is filed. ***In the instant case, there was no objection in writing filed to the complaint within the required seven days.*** This objection was first raised at the demurrer hearing on September 1, 2006. ***Accordingly, the objection is waived***." (emphasis added).

The Trial Court erred by ignoring these policy directives and by construing the statute in a way that could deny not only Bragg, but all similarly situated citizens of the Commonwealth, their rights and privileges under FOIA to witness the operation of their government, by effectively denying them any remedy if their FOIA rights are abridged or denied.

Established rules of statutory construction preclude reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd. ***Chaffins v. Atlantic Coast Pipeline****,* 293 Va. 564 801 S.E.2d 189, 191-92 (2017). On the contrary, every act of the legislature should be read so as to give reasonable effect to every word and to promote the ability of the enactment to remedy the mischief at which it is directed. ***Jones v. Conwell***, 314 S.E.2d 61, 64 (1984); *See also* ***Antisdel v. Ashby***, 688 S.E.2d 163 (2010). ["We will not read this statute in a manner that would eliminate an entire provision crafted by the General Assembly."]

Here, the Trial Court did exactly that by rejecting Bragg's "good cause" affidavit – even when based on the Frazier Acknowledgment. Its holding effectively nullifies all available Code § 2.2-3713 remedies for violation of FOIA's open meeting requirements, thereby depriving Bragg and similarly

situated citizens improperly excluded from unlawfully closed meetings of public bodies of any meaningful statutory remedy for violations of FOIA open meeting rights and privileges. The Trial Court's ruling effectively deleted from FOIA the second sentence of Code § 2.2-3713(D) – "A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein."[5]

1. Rejection of Supervisor Frazier's "Acknowledgement" of the Board's FOIA Noncompliance was Erroneous.

To initiate her FOIA enforcement action, Bragg was well aware not only of Code § 2.2-3713(A)'s requirement that a petition be supported by an affidavit "showing good cause," but also mindful of Code § 8.01-271.1 and the prohibition in ***Ford v. Benitez***, 639 S.E.2d 203 (2007) that counsel or a party may not file a pleading they do not have a basis to believe is true or that they know to be unfounded in fact. Violation of that prohibition subjects the party or counsel to sanctions.

---

[5] On April 11, 1976, the General Assembly approved the amendment to Code § 2.1-346 [the predecessor to current § 2.2-3713(C)] providing that "[a] single instance of denial of such rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein ...." Acts 1976, c. 709 *See*, fn[6] in ***Marsh****, supra*., 288 S.E.2d at 422.

Bragg (and her counsel) recognized the difficulty in satisfying the statutory requirement that her FOIA Petition be verified under oath where, as here and virtually all cases involving unlawfully closed meetings, the citizen-challenger was not present at the closed meetings and *ipso facto* is unable to state, under oath, based on his or her personal knowledge (*i.e.*, other than "on information and belief") what actually transpired in those closed sessions of the public body. Bragg and counsel were thus faced with a statutory conundrum that this Court has yet to address since FOIA was adopted, but hopefully will do so in deciding this appeal.

Acting in accordance with a Virginia FOI Advisory Council advisory opinion issued in August 2016 -- the month before Bragg's enforcement petition was filed,[6] -- Ronald L. Frazier executed an Acknowledgement

---

[6] Virginia Freedom of Information Advisory Council, Advisory Opinion AO-02-16, (August 12, 2016) http://foiacouncil.dls.virginia.gov/ops/16/AO_02_16.htm issued in response to an inquiry from former Virginia State Bar President, Kevin E. Martingayle:

> "**If the substance of the discussion strayed from what was purported to be discussed and identified in the motion to convene the closed meeting, then the certification would be improper even though the motion to certify used language that comported with the statutory requirements**.
>
> You also asked what remedial action should be taken by the board, or by

(Record at 16-17) stating that the Board had discussed non-exempt matters in the five closed sessions and that the Board's certifications of each such meeting had been, in his opinion, improper. Specifically, the Frazier Acknowledgement stated *inter alia*:

> "5. After reviewing the Draft Complaint, and the applicable provisions of the Virginia Freedom of Information Act, Virginia Code §§2.2-3700 *et seq*., I acknowledge that the Board's closed session meetings on some or all of the dates indicated in the Draft Complaint included discussion of public business matters not lawfully exempted from open meeting requirements under the Freedom of Information Act with respect to the filling of the County Attorney position, including but not limited to policy decisions related to combining the jobs of County Attorney and County Zoning Administrator, issues relating to the specifics of the content of the proposed advertisement for the combined position and where and how the proposed advertisement would be published.
>
> "6. I acknowledge that the Board violated Virginia Code §2.2-3711(B) and Virginia Code §2.2-3712(H) when it decided, resolved or voted in one or more of the foregoing closed session(s): (a) to combine the positions of County Attorney and Zoning Administrator; (b) to approve the form and content of the of advertisement for the combining the positions of County Attorney and Zoning Administrator; (c) to authorize the County Administrator to advertise the request for bids or proposals for the combined position of County Attorney and Zoning Administrator only on the Commonwealth of Virginia's electronic bulletin board of the State Department of General Services as provided by Virginia Code § 2.2-4302.1, and not to place the

---

individual members of the board, should either the motion or the certification discussed above be insufficient to meet the requirements of FOIA. * * * The statutory remedy for a FOIA violation is a petition for mandamus or injunction supported by an affidavit showing good cause as set forth in § 2.2-3713. Other than a board member or some other person bringing such a petition against the board, FOIA does not set forth any statutory remedy to cure a defective motion or certification after it has occurred. ***As a practical matter, a public body or member thereof may wish to publicly acknowledge that an error was made and a violation occurred***, and may seek to take such remedial action as seems appropriate depending on the violation . . .." (emphasis added).

request for bids in the local newspaper, and (d) to conduct interviews of prospective candidates at a special meeting to be held September 26, 2016. These actions were discussed and approved in closed session(s) but never voted on or approved by the Board in open session as required by Virginia Code §2.2-3711(B) and Virginia Code §2.2-3712(H).

"7. I acknowledge that it was imprudent and in error to vote to certify at the close of each of the aforesaid meetings that the Board's closed session meetings included only discussion of public business matters lawfully exempted from open meeting requirements under the Freedom of Information Act with respect to the filling of the County Attorney position, and to the extent non-exempt business was discussed at one or more closed session, it was an error on my part to fail to state the substance of the departure from the requirements of Virginia Code §2.2-3712(D).

8. I request that this statement be recorded in the minutes of the Board of Supervisors.

By: Ronald L. Frazier
RONALD L. FRAZIER

COMMONWEALTH OF VIRGINIA

ss:

COUNTY OF RAPPAHANNOCK

Before me, in my jurisdiction aforesaid, this day personally appeared RONALD L. FRAZIER, who signed and acknowledged his signature on the foregoing Acknowledgment.

Sharon Brown
NOTARY PUBLIC

My commission expires: 8/31/20
Notary Commission No. 7514908

SHARON ANNETTE BROWN
Notary Public
Commonwealth of Virginia
Registration No. 7514908
My Commission Expires Aug 31, 2020

The Frazier Acknowledgement was never intended to be a stand-alone basis for satisfying the "good cause" affidavit required by Code § 2.2-

3713(A). Its purpose was to satisfy the requirement that before any pleading is filed, to the best of the knowledge, information and belief of the party and her counsel, "formed after reasonable inquiry, it is well grounded in fact." Code § 8.01-271.1. ***Ford v. Benitez**, supra.*

Bragg thus incorporated everything in the Frazier Acknowledgement into her Amended Petition by specific reference (Par 34 of the original Petition, Record at 13; par. 35 of the Amended Petition, page 14, Record at 193). Virginia Supreme Court Rule 1:4(i). The Frazier Affidavit formed the basis for Bragg's allegations "on information and belief" of what transpired in the Board's closed sessions at the June, July, August and two September 2016 meetings, and are the same allegations referred to in Bragg's affidavit appended to the Amended Petition filed November 21, 2016. (Record at 205).

The Trial Court, however, rejected the Frazier Acknowledgment based upon an erroneous, narrow construction of Code § 2.2-3712(D). In so doing the Trial Court ignored the FOI Advisory Council's August 2016 Advisory Opinion, the General Assembly's command that FOIA be liberally construed, and long-standing applicable rules of statutory construction that specific

provisions should not be read in isolation, without endeavoring to harmonize them. Construing Code § 2.2-3712(D) in its Letter Opinion, the Trial Court stated:

> "There is no statutory provision that enables a member of the governing body to, at a later date, voice his or her objection. This provision, requiring prompt objection, was designed to give the governing body an opportunity to promptly consider the issues raised at the meeting in question. For those reasons, the document purporting to be an 'acknowledgment' does not furnish the good cause required by the statute." (March 15th Letter Order at 2, Record at 390)

The Trial Court ignored the rule of FOIA construction enunciated in ***Cuccinelli v. Rector & Visitors of UVA***, 722 S.E.2d 626, 629-630 (2012) that the reviewing court must,

> ". . . place its terms in context to ascertain their plain meaning . . . because 'it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal.'" [citations omitted] Thus, '"[a] statute is not to be construed by singling out a particular phrase."'"

Accord: ***The Daily Press***, *supra*. 800 S.E.2d at 824 (2017). The purpose for which a statute is enacted is of primary importance in its interpretation or construction. ***White Dog***, *supra*. 634 S.E.2d at 339 (2006).

The Trial Court's construction ignored Code § 2.2-3713(E)'s provisions that upon judicial review, the Board's certification is not entitled to any weight

at all and that the public body bears the burden of proof on all compliance issues. The Letter Opinion negated the possibility – suggested by the FOI Advisory Council in AO-02-16, *supra*. – of an "acknowledgement that an error was made and a violation occurred." It erroneously rejected the Frazier Acknowledgement without explaining why the Board member's signed, notarized statement is any less reliable or admissible than a mayor's unsigned, unacknowledged post-meeting press release like the one this Court tacitly approved as an adequate "good cause" basis for a FOIA enforcement proceeding in ***Marsh***.

The Frazier Acknowledgement (Record at 16-17) was substantially no different than Mayor Marsh's "press release" in ***Marsh****, supra.*, 288 S.E.2nd at 418, except that unlike the Mayor's press release, the Frazier Acknowledgement about what transpired at the Board's five closed meetings was formally signed and acknowledged before a Notary Public. Had this Court followed the Trial Court's erroneous reasoning when it decided ***Marsh***, that case would have been dismissed not only because the Mayor's press release contradicted his Code § 2.2-3712(D) certification vote, but also because the press release wasn't even signed, much less notarized.

The Trial Court's narrow construction of Code § 2.2-3712(D) was erroneous and would make it virtually impossible for any citizen of the Commonwealth unlawfully excluded from an improperly closed meeting to enforce their FOIA rights once a public body had certified compliance. The Trial Court established a Catch-22 that flies in the face of the reviewing Court's obligation liberally to construe FOIA: No citizen not present at an improperly closed meeting could ***ever*** satisfy the Trial Court's arbitrary "good cause" requirement under Code § 2.2-3713(A) because no citizen could possibly have first-hand knowledge (*i.e.*, not based "on information and belief") of whether or not the public body discussed non-exempt matters in a closed meeting, except in very extraordinary, limited circumstances. Under the Trial Court's construction of FOIA, only members of the public body who were present at a closed meeting could challenge it, and then, only if they voted not to certify under Code § 2.2-3712(D). This was obviously not the General Assembly's intent.

Such a rule, if not reversed and permitted to stand, denies citizens any effective remedial relief for improperly closed meetings, and any cure for "the mischief at which it is directed." *See, e.g.*, ***Town of Palm Beach v.***

Gradison, 296 So.2d 473 (Fla.1974) – cited with approval in ***WTAR Radio-TV Corp. v. City Council of City of Virginia Beach***, 223 S.E.2d 895, 897 (1976). The Trial Court's reasoning leads to an impermissibly absurd result that cannot be allowed to stand. ***Chaffins****, supra.*; ***Boynton v. Kilgore***, 271 Va. 220, 227 n.9, 623 S.E.2d 922, 926 n.9 (2006); ***Virginia Electric & Power Co. v. Board of County Supervisors,*** 309 S.E.2d 308, 311 (1983).

2. **Rejection of Bragg's "Good Cause" Affidavit was Error**.

In rejecting Bragg's affidavit and Verification (Record at 393-94), the Trial Court erroneously ignored Code § 2.2-3713(D) that only requires a FOIA enforcement petition to "allege ***with reasonable specificity*** the circumstances of the denial of the rights and privileges conferred by this chapter." Even a cursory review of the Amended Petition shows that Bragg alleged circumstances of multiple denials of FOIA rights and privileges in explicit detail with respect to each of the five closed meetings including excerpts from the Board's own closed meeting resolutions and the videotaped recordings showing the public being excluded from meetings prior to the votes on the resolutions. Paragraph 32 (pages 12-13 of the Amended Petition, Record 191-92) also detailed various actions taken or

authorized by the Board in closed session without a vote in open session that did not comply with Code § 2.2-3712(H) and not stated "on information."

The Trial Court's narrow construction of the "good cause" requirement of the statute would render FOIA's enforcement provisions inoperable in cases involving unlawfully closed meetings, virtually negating any possibility of citizens of the Commonwealth enforcing their presumptive rights under FOIA to witness the operation of government at open meetings.

The Trial Court's reliance on ***Bidwell v. McSorley***, 72 S.E.2d 245 (1952) for a definition of "good cause shown" was erroneous because that decision is completely inapplicable to the sufficiency of a Code §2.2-3713(A) affidavit. ***Bidwell*** was a child custody case – not a FOIA case – and was decided under former Code § 63-352. The mother had second thoughts about her decision to put her child up for adoption while she claimed was under the influence of narcotics. The ***Bidwell*** Court held that ". . . 'for good cause shown' means more than the simple changing of the mind by the parent who has given consent to the adoption." (72 S.E.2d 249). The ***Bidwell*** decision is simply inapposite to this case.

3. The Trial Court Erred by Reading Into Code § 2.2-3713(A) a Requirement That Bragg Disclose Her "Basis of Information" and Then Ignored That She Did So.

The Trial Court erred in holding that Bragg's "affidavit is insufficient because the amended petition, and hence her affidavit, fails to set forth the basis of petitioner's 'Information.'" (March 15th Letter Opinion at 3, par. 2, Record at 392). Nowhere in Code § 2.2-3713 or anywhere else in FOIA is there any requirement that a petitioner or affiant "set forth the basis . . . of the information" as the Trial Court erroneously required, and used as the basis for rejecting Bragg's affidavit and dismissing her case.

The Trial Court's construction of Code § 2.2-3713 violates the maxim, *expressio unius est exclusion alterius.* ***Black's Law Dictionary*** 661 (9th ed. 2009) cited with approval in ***FFW Enterprises v. Fairfax Co.,*** *280 Va. 583, 596* (2010). If the General Assembly wanted to require FOIA petitioners to do anything more than "state with ***reasonable*** specificity," *i.e.*, to also state the basis or origin of their information as the Trial Court held, it should have written that into the statute. But the legislature didn't do so.

The Trial Court misconstrued Code § 2.2-3713 based on what it thought the General Assembly ***should have*** said, rather than on what it

actually enacted. This is not permitted in statutory construction. ***Turner v. Wexler***, 244 Va. 124, 127 (1992) (emphasis added); ***Carter v. Nelms***, 131 S.E.2d 401, 406-07 (1963). Bragg's Amended Petition and Affidavit more than satisfied FOIA's "state with reasonable specificity" requirement.

Even assuming, *arguendo*, that the Trial Court's "state-the-basis of your good cause" requirement for FOIA enforcement petitions was not erroneous, the Trial Court erred by ignoring that Bragg's Amended Petition amply states the basis for Bragg's allegations of repeated FOIA violations by the Board in the five closed sessions.

In addition to the Frazier Acknowledgement, the Amended Petition sourced the Board's procedural FOIA violations to objective sources: the actual closed session motions from the Board's own records, and videos showing that the Board failed to vote on the five motions to go into closed session during the open meetings until after it excluded the public. [Paragraphs 12,16, 20, 26, and 29 (including references to the five videos in fn[3], fn[6], fn[7], fn [8], fn[9]) of the Amended Petition (pages 4, 7, 8, 10 and 12, Record at 183, 186-187, 189 and 191)].

Hence, even the Trial Court's own erroneous standard for a Code §2.2-

3713(A) "affidavit showing good cause" requirement was, in fact, actually satisfied, and the Court erred by rejecting the amended Bragg affidavit and dismissing the Amended Petition. The Trial Court's ruling begs the question: what more explicit detail could a citizen-petitioner possibly present to a Court to satisfy Code § 2.2-3713 in a case involving an allegedly unlawfully closed meeting from which she was improperly excluded than Bragg did here?

C. *THE TRIAL COURT ERRED BY REJECTING* BRAGG'S AFFIDAVIT FOR FAILURE "TO SWEAR" AS REQUIRED BY CODE §2.2-3713(A).

The Trial Court's rejection of Bragg's Code § 2.2-3713(A) Affidavit [March 15th Letter Opinion at 4, Record at 393] ignores the express provisions of Virginia Code § 8.01-280 that "when an affidavit is required in support of ***any pleading*** or as a prerequisite to the issuance thereof, ***it shall be sufficient if the affiant swear*** [sic] ***that he believes it to be true***." (emphasis added). ***Paris v. Brown***, 143 Va. 896, 129 S.E. 678 (1925).

The Trial Court erred by exalting semantics and form over substance in holding that – despite Virginia Code § 1-228, § 1-250[7] and § 8.01-280 –

[7] Code § 1-228. [Oath.] provides: "Oath" includes affirmation.
Code § § 1-250. [Swear; sworn]. "Swear" or "sworn" means "affirm" or "affirmed."

Bragg's November 17, 2016 Affidavit and Verification in support of the Amended Petition is deficient under Code § 2.2-3713(A) because it does not contain the actual word "swear."

Black's Law Dictionary defines "**swear**" as "to take an oath * * * to declare on oath the truth of a petition." [10th ed. (2014) p. 1677]. Likewise, Black's Law Dictionary defines "**verify**" as "to confirm or substantiate by oath . . . particularly used in making formal oath to accounts, petitions, pleadings, and other papers." *Id*., Revised 4th Edition at 1732. Bragg's affidavit and Verification, wherein she stated "under oath" after being "duly sworn" (Record at 206) represents substantial compliance with the statutory requirements, ***Paris***, *supra*., ***Carpenter v. Gray***, 75 S.E. 300, 301 (1912), and would impose an unreasonable restriction that would contravene the command of Code § 2.2-3700 that FOIA be "liberally construed."

In ***Paris***, *supra*. at 143 Va. at 900-901, this Court upheld a similar affidavit in support of a pleading, stating:

> ***When the requirements have been substantially met the defendant should be given an opportunity to present to the court or jury the facts upon which his plea is based***. If an affidavit in support of a pleading is sufficient when affiant swears that "he believes it to be true" (Code of 1919, section 6129). ***We can see no reason in***

> ***principle for holding, nor can we justify an interpretation which would declare an affidavit concluding "true to the best of his knowledge and belief," is not a substantial compliance with the statute***. The difference between "true to the best of his knowledge and belief," and "believes it to be true," consists in the fact that nine words are used in one case and five in the other — both phrases meaning the same. ***To deny a litigant the right of trial on the merits under such circumstances as here obtains is not in keeping with modern jurisprudence***, nor does the attempt to do so make an appeal for any refinements of reasoning on the part of this court in order to support such a position." (emphasis added)

In ***Carpenter v. Gray***, 75 S.E. at 301, *supra*., and cited with approval in ***Paris*** the affidavit approved by this Court used virtually the same formulation as Bragg's affidavit: "after being duly sworn, made oath before me" instead of "swear."[8] These terms are synonymous. The Trial Court erred by ignoring ***Paris*** and ***Carpenter*** in holding Bragg's affidavit was deficient and denying

---

[8] The affidavit filed with the plaintiff's declaration was as follows:

> "I, Edwin C. Smith, a notary public in and for the county aforesaid, in the state of Virginia, do hereby certify that J. E. Gray **this day personally appeared before me, and, after being duly sworn, made oath before me,** in my county aforesaid, that the foregoing account against W. R. Carpenter is just, true, and correct, and due to the best of the affiant's belief, and that to the best of affiant's belief the amount of his claim against the said W. R. Carpenter is $2,800, and that the said amount is justly due, with interest thereon from the 1st day of March, 1910." (emphasis added)

Bragg her right to a hearing on the merits and "an opportunity to present to the Court . . . the facts upon which [her] plea was based." ***Paris***, *supra.*

D. THE TRIAL COURT ERRED BY IGNORING CODE § 2.2-3712(A) AND BRAGG'S ALLEGATIONS THAT THE BOARD'S VOTES TO CONVENE CLOSED SESSIONS WERE NOT TAKEN DURING THE PUBLIC SESSIONS.

Code § 2.2-3712(A) specifically provides that the pubic body must first vote in open session before convening in closed session. Paragraphs 12,16, 20, 26, and 29 (including fn[3], fn[6], fn[7], fn [8], fn[9]) of the Amended Petition (pages 4, 7, 8, 10 and 12, Record at 183, 186-187, 189 and 191) contain express citations to "The Rappahannock Record" – a series of videotapes posted on www.youtube.com of each Board meeting. Each footnote contains a specific reference to the exact hour-minute-second of each videotape whereat the Board ejected the public from every one of the five meetings at issue before any voting upon any of the formal motions to go into each of the five closed sessions.

Each of the videos cited in the Amended Petition shows that contrary to FOIA requirements, the five votes to go into each of the closed sessions were not, in fact, taken in open session in direct violation of Code §2.2-3712(A). *See* ***White Dog,*** *supra*, 634 S.E.2d at 340-41; ***Nageotte v. Board***

of Supervisors, 288 S.E.2d 423, 426 (1982).[9]

Nowhere in either of its letter opinions, did the Trial Court even address any of the FOIA procedural defaults alleged in Bragg's Amended Petition, any one of which would be sufficient to invoke FOIA remedies. All of these allegations were covered by the first part of the Bragg Affidavit wherein she "stated, under oath" were "true and correct to the best of her knowledge and belief." None was stated to be "on information" or relied directly or indirectly on the Frazier Acknowledgement that the Trial Court rejected.

This Court's prior FOIA decisions make it clear that failure to follow the proper procedure when invoking an open meeting exemption – assuming *arguendo* the subject matter and purpose fall within a proper exemption – is

---

[9] *Accord*: FOI Advisory Council, Opinion AO-06-07, June 8, 2007.
http://foiacouncil.dls.virginia.gov/ops/07/AO_06_07.htm

See also, FOI Advisory Council, Opinion AO-08-07, July 11, 2007.
http://foiacouncil.dls.virginia.gov/ops/07/AO_08_07.htm

"While FOIA says nothing specific about locked doors, it is apparent in this context that a meeting held behind locked doors is **one from which the public is excluded physically and therefore is a closed meeting by definition**. If the procedure required to convene a closed meeting was not followed prior to locking the door, then the meeting was an improperly closed meeting that violated the procedural requirements of FOIA."

a fatal FOIA violation under Code §2.2-3712(A) and Code § 2.2-3713(D) that provides:

> ["*any* *failure* by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter" and "a *single* *instance* of denial of the rights and privileges conferred by this chapter *shall be sufficient to invoke the remedies* granted herein." (emphasis added).

Cartwright v. Comm'sr, 613 S.E.2d at 452 (2005), ***Marsh****, supra.*

The Trial Court erred by ignoring the "reasonably specific" allegations of procedural defects in Bragg's Amended Petition, ignoring the statute, and ignoring the precedent established by this Court.

E. ***THE TRIAL COURT ERRED BY IGNORING THE CODE § 2.2-3712(A) REQUIREMENT THAT THE BOARD PROPERLY IDENTIFY THE SUBJECT MATTER AND PURPOSE OF A CLOSED SESSION BEFORE THE VOTE.***

The Trial Court erred by ignoring the requirements of Code § 2.2-3712(A) wherein FOIA specifically provides that "[a] general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting." ***Nageotte***, *supra.* at 426.

Relying on this Court's decisions in ***Nageotte*** and ***White Dog***, the FOI

Advisory Council consistently has opined as follows regarding the Code § 2.2-3711(A) closed meeting exemption:

> "A motion to convene a closed meeting must contain all three elements (subject, purpose, and citation) in order to comply with FOIA; a motion that lacks any of these elements is insufficient under the law. We have previously observed that there is often confusion in differentiating between the subject and the purpose of a closed meeting."[10]

In paragraphs (11), (15), (19), (24), and (28) of Bragg's Amended Petition, [Amended Petition at 4-11; Record at 182-189, *see also* Record at 277-343 "Respondents' Exhibit Packet," which contains all the disputed

---

[10] ***FOI Advisory Council Advisory Opinion AO-02-16****, supra*; *Accord:* ***FOI Advisory Council Opinion AO-03-17***, issued March 17, 2017, http://foiacouncil.dls.virginia.gov/ops/17/AO_03_17.htm

> "As previously opined by this office, a motion to convene a closed meeting must contain all three elements (subject, purpose, and citation) in order to comply with FOIA; a motion that lacks any of these elements is insufficient under the law. * * * Observing that the prefatory language of subsection A of § 2.2-3711 states that "[p]ublic bodies may hold closed meetings only for the following purposes," we also opined that quoting or paraphrasing from one of the exemptions in that subsection satisfies the requirement to state the purpose of the meeting, but it does not suffice to identify the subject matter. We concluded this analysis by noting that by quoting or paraphrasing from one of the statutory exemptions, and providing a proper citation to the exemption, only two of the three required elements of the motion to convene a closed meeting are satisfied."

This Court has yet to opine on the weight, if any, to be accorded FOI Advisory Council Opinions. This case presents it an opportunity so to do.

closed session meeting motions and certifications proffered by the Board in support of its Motion Craving Oyer], Bragg specifically alleged that the Board failed to comply with these FOIA requirements. The Amended Petition contains excerpts of the actual motions to go into closed session from the Board's official records that indicate the topic of repeated closed sessions was indicated as "filling the position of County Attorney," (or "***advertising for*** and filling the position of County Attorney" in August 2016, Record at 187, ¶19 of Amended Complaint) even though neither "filling a position" or "advertising and filling the position" are permitted exempt topics – only the "discussion, consideration, or interviews of prospective candidates" is a permitted subject matter for a closed session. Code § 2.2-3711(A)(1).

Obviously, as alleged in the Amended Petition, there were no "prospective candidates" for the Board to "discuss, consider or interview" before the advertisement for the position was even published or any actual candidates for the position were identified. Other topics were lumped into the closure motions followed by a list of several FOIA exemptions without identifying which exemption applied to which agenda item [*see*, Respondents' "Exhibit Packet," Exhibit 1 (certified copies of Board

Resolutions) Record at 280-393].

At its August and September 2016 closed meetings, the Board took decisions to advertise [Exhibit 2 of Respondents' Exhibit Packet at 18, Record at 295] and to schedule interviews of certain candidates, so some decisions must have been made – but no votes on these issues were taken in any open session during or after at any of the five disputed meetings – yet another violation of Code § 2.2-3712(H) – all as specifically alleged in paragraph 32 of Bragg's Amended Petition.

Each of these defaults constituted a separate and distinct FOIA violation. Code § 2.2-3713(E). ***White Dog***, *supra*. 634 S.E.2d at 338. The Trial Court erred by ignoring Bragg's specific allegations of multiple procedural defects with respect to the Board's five motions to go into closed sessions at its June, July, August and two September 2016 meetings, and that these allegations were supported by objective proofs and not stated merely "on information and belief."

IV. CONCLUSION

For all the foregoing reasons, Bragg respectfully requests this Court to reverse the Trial Court's May 30, 2017 Final Order dismissing the Amended Petition *with prejudice*, and to remand this case to the Trial Court for further proceedings, specifically vacating the Trial Court's November 7, 2016 (Record at 168-171) Order suspending discovery, and for such other and further relief as this Court deems meet and the nature of her case requires.

Respectfully submitted,

Dated: January 25, 2018

MARIAN M. BRAGG
By counsel

/s/ David L. Konick

David L. Konick VSB № 17495
P.O. Box 57
Washington, Virginia 22747-0057
Telephone: (540) 937-5067 [dlkonick@earthlink.net]
Counsel for Appellant

CERTIFICATE OF SERVICE

In accordance with Rule 5:1(d) and Rule 5:26(e), the undersigned hereby certifies that a true and correct copy of the foregoing Brief was served electronically to the offices of each counsel of record for Respondents/Appellees this 25th day of January 2018 via electronic mail as shown below:

Arthur L. Goff, Esquire <algoff@rappahannockcountyva.gov>
County Attorney's Office Facsimile (540) 675-3698
239 Gay Street ~ P.O. Box 399
Washington, Virginia 22747-0399

Michael T. Brown, Esquire <mbrown@walkerjoneslaw.com>
Walker Jones, PC Facsimile (540) 227-5074
211-B Main Street
Washington, Virginia 22747

Jonathan P. Lienhard, Esquire <Jlienhard@walkerjoneslaw.com>
Walker Jones, PC Facsimile (540) 349-1715
31 Winchester Street
Warrenton, Virginia 20186

/s/ David L. Konick

David L. Konick VSB № 17495
P.O. Box 57 [dlkonick@earthlink.net]
Washington, Virginia 22747-0057
Telephone: (540) 937-5067
Counsel for Appellant