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**TELECOMMUNICATION MEMORANDUM**

Date: 4/1/08

Time: \_\_\_\_\_

Please deliver the following pages to:

Name(s)	Telephone No.	Telecopier No.
<u>Steven Bin</u>		<u>(202) 318-4098</u>

Message From: R. Seabrook

Number of Pages (including cover sheet): 19

Special Instructions: Brief + attachments - Butcher v. School Bd.

I think my paralegal mailed this yesterday.

PLEASE CALL (804) 643-8401 IF THERE IS ANY DIFFICULTY IN RECEIVING THIS TRANSMISSION.

Transmitter: \_\_\_\_\_

THIS MESSAGE IS INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW, THE ATTORNEY CLIENT PRIVILEGE OR THE WORK-PRODUCT DOCTRINE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THIS ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. WE WILL REIMBURSE YOU FOR YOUR POSTAGE. THANK YOU.



School Board provided all other requested documents with its January 22, 2008 response.<sup>1</sup>

**A. There Are No Public Records Amending Sheeran's Employment Contract.**

There are no public records amending Sheeran's employment contract. Plaintiff incorrectly claims that Defendant admitted the existence of an amendment to Sheeran's employment contract. Defendant admitted the existence of a *settlement agreement* between Defendant and Sheeran, which, as is discussed below, is expressly exempt from mandatory disclosure. The settlement agreement was drafted by School Board counsel, discussed only in closed session, and remained in draft form until it was fully executed on February 6, 2008. Therefore, no agreement became effective until well after Plaintiff's requests were received.

Defendant properly and timely responded within five working days to Plaintiff's January 14, 2008 request for amendments to Sheeran's contract by advising, pursuant to VFOIA §2.2-3704 (B)(3), that no such documents existed that were responsive to the request. Defendant also properly and timely responded to Plaintiff's the remainder of Plaintiff's requests on January 14<sup>th</sup> and 22<sup>nd</sup>.

**B. Plaintiff is Not Entitled to the Settlement Agreement.**

Agreements settling employment disputes are clearly exempt from release under VFOIA §§2.2-3705.1(1) and 2.2-3705.8 (personnel record/settlement agreement exemption), 2.2-3705.1(3)<sup>2</sup> (work product exemption) and 2.2-2705.1(5) (record compiled for discussion in closed session exemption). Furthermore, the Virginia Office

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<sup>1</sup> Pursuant to the Court's request during the oral argument a Chronology of Events is attached hereto as Exhibit A.

<sup>2</sup> See 1987-88 Va. Op. Atty. Gen. 35 (decision that settlement agreements constitute work product).

of the Attorney General has opined that these documents are exempt.<sup>3</sup> The settlement agreement in this case contains a confidentiality provision which specifically references the settlement agreement VFOIA exemption.<sup>4</sup> During the hearing Plaintiff argued that the *draft* settlement agreement must be released; however, none of Plaintiff's VFOIA requests or his Complaint specifically refer to *draft* agreements. He simply never asked for drafts.<sup>5</sup>

### **C. Plaintiff's Complaint Regarding the Hawkins Letter is Moot.**

Plaintiff argued that Defendant improperly invoked a VFOIA exemption on January 22<sup>nd</sup> in order to decline release of pages one and two of the Hawkins letter. The exemption, whether or not properly invoked by Defendant, no longer applies in this case because the letter was released in its entirety on January 31, 2008 and is now a public record.<sup>6</sup> Defendant maintains that Plaintiff was never entitled to the first two pages of the Hawkins letter because the following VFOIA exemptions, which pertain to matters discussed in closed session, apply: Virginia Code §§2.2-3705.1(3) and 2.2-3705.1(5).

### **D. Private Law Firms Do Not Always Act As "Agents" Within the Meaning of VFOIA.**

Plaintiff argues that the Hawkins letter and draft settlement agreement are "public records" because the School Board attorneys act as "agents" for the public body. It is not

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<sup>3</sup> See *Id.*

<sup>4</sup> Defendant was prepared to have the Court review this document *in camera* during the hearing and will immediately submit the document under seal at the Court's request.

<sup>5</sup> See Complaint Exhibits 1 and 3. Since there was never any specific request for "draft" documents, none of Defendant's responses involve drafts or raise any exemptions which would apply to "drafts". As evidenced by Plaintiff's Trial Exhibit 7, Plaintiff was not even aware that the agreement was not executed until February 1st, after he filed his Complaint. His Complaint refers to executed agreements, not drafts. Even if Plaintiff had requested drafts, he would not be entitled to them for the same reasons he is not entitled to the executed settlement agreement and as it would create a result adverse to the letter and spirit of the law to protect a final settlement agreement, but not the parties' negotiations that resulted in a confidential agreement.

<sup>6</sup> Both Plaintiff and his counsel were aware that the School Board had agreed to release the Hawkins letter before filing this lawsuit. See, Plaintiff's Trial Exhibit 6.

necessary for the Court to decide the agency issue in this case because, even if Defendant's attorneys acted as agents of the public body, the result would be the same. Plaintiff would *not* be entitled to the draft agreements because he never requested them and both the agreement and the Hawkins letter are exempt as outlined above. In addition, whether private law firms are "agents" within the meaning of VFOIA, is a factual question to be determined by the Court on a case-by-case basis. Private law firms are not "public bodies" within the meaning of VFOIA §2.2-3701. VFOIA does not define the term "agent." Courts have found that attorneys act as agents of their clients in specific circumstances. However, there is no authority to support the proposition that private law firms always act as agents of public bodies *within the meaning of VFOIA*. Therefore, documents in the possession of a private law firm are not *always* subject to mandatory disclosure.

According to the Virginia FOIA Advisory Council, the analysis used to determine whether a private entity is acting as an agent within the meaning of VFOIA is derived from Virginia common law and depends on the level of control exercised by the public body over the private entity.<sup>7</sup> Virginia Courts and the VFOIA Advisory Council have further opined that whether an agency relationship exists depends on the level of control the principal exercises over the end result of the work product as well as the *details* and *methods* used to reach the end result.<sup>8</sup> Plaintiff offers no evidence that the School Board exercises substantial control over the methods, details and outcome of the legal services provided to the School Board by Harrell & Chambliss LLP. There is no evidence that Harrell & Chambliss acts as an agent for the purposes of VFOIA. Instead, the law firm is

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<sup>7</sup> See VFOIA Advisory Council Opinions, AO-41-01, AO-14-03 and AO-19-03 attached hereto as Exhibit B.

<sup>8</sup> See e.g., *Wells v. Whitaker et. al.* 207 Va. 616, 151 S.E.2d 422 (1966); See also VFOIA Advisory Council Opinion AO-19-03.

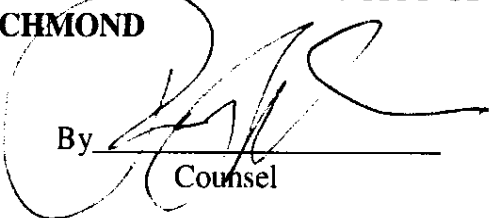
more appropriately characterized as an independent contractor providing specialized legal services to the School Board. The firm maintains substantial control and specific expertise over its own daily operations and legal work. It is not an agent whose files are subject to VFOIA.

**E. There Are No Provisions Under VFOIA That Provide Waiver of Exemptions**

Plaintiff asserts that Defendant waived its right to invoke an exemption to protect the settlement agreement from release by failing to timely admit the existence of the agreement. Complaint, ¶ 33. As outlined above, Defendant timely and properly responded to Plaintiff's January 14<sup>th</sup> and January 23<sup>rd</sup> VFOIA requests. However, even if Defendant failed to timely respond or invoke the proper exemption, VFOIA does not provide waiver of an exemption as a consequence for violation. No VFOIA provision grants the Court with authority to compel release of a document which would otherwise be protected from release under the Act.

**WHEREFORE**, having fully answered, Defendant moves this Court to deny the relief requested by Plaintiff, dismiss this case with prejudice, and award Defendant its costs for defending this action.

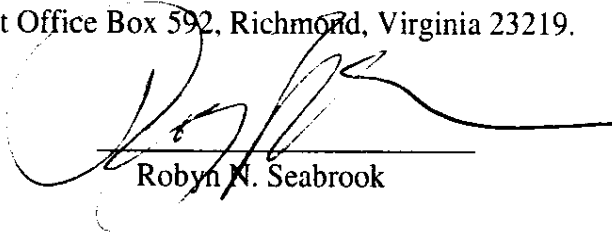
**SCHOOL BOARD OF THE CITY OF  
RICHMOND**

By   
Counsel

Bradford A. King, Esquire (VSB No. 37153)  
Robyn N. Seabrook, Esquire (VSB No.65921)  
Harrell & Chambliss LLP  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of March 2008, the foregoing Brief on behalf of Defendant School Board of the City of Richmond was mailed, first class postage pre-paid to Mr. Steven Biss, Esquire, Post Office Box 592, Richmond, Virginia 23219.



\_\_\_\_\_  
Robyn N. Seabrook



**VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**  
COMMONWEALTH OF VIRGINIA

AO-41-01

September 4, 2001

Mr. George Baker  
Chairperson, Waynesboro Tourism Steering Committee  
Waynesboro, Virginia

Ms. Iris Karl  
Member, Waynesboro Tourism Steering Committee  
Waynesboro, Virginia

*The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in a phone conversation of June 19, 2001.*

Dear Mr. Baker and Ms. Karl:

You have asked a question concerning the application of the Virginia Freedom of Information Act to a tourism program run by the Augusta County Chamber of Commerce ("the Chamber"). You indicate that the Chamber manages the tourism program for the City of Waynesboro, and that the program is funded exclusively with public money. In addition, you state that the Chamber runs the tourism information center, a duty delegated to it by the city council. When records relating to these two activities were requested from the city council, you indicate that the council responded that such records were in the possession of the Chamber, and thus the records were not provided.

Subsection A of § 2.1-342 of the Code of Virginia requires that *[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth.*<sup>1</sup> FOIA defines a public record at § 2.1-341 as *all writings and recordings ... prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.*<sup>2</sup> (Emphasis added).

In the facts that you have presented, the Chamber does not appear to be a public body under FOIA. FOIA defines a public body at § 2.1-341 to include *organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include any committee, subcommittee of the public body created to perform delegated functions of the public body or to advise the public body.*<sup>3</sup> It does not appear that the Chamber in its entirety is supported wholly or principally by public funds, nor does it appear that the city council created the Chamber solely to perform its delegated functions or to advise the public body. However, the fact that the Chamber is not a public body does not end the discussion of whether certain records that it maintains may be available to the public.

The Virginia Freedom of Information Advisory Council ("the Council") has previously addressed a similar question in finding that records collected by a private third party for a public body were subject to FOIA.<sup>4</sup> In reaching this conclusion, the Council relied on the fact that the definition of a public record indicates that physical possession of a document by a public body is not the only criterion for determining whether it is accessible by the public. The definition indicates that a record in the possession of an agent of the public body, relating to

**EXHIBIT**

tabbies

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the transaction of public business, would be subject to FOIA. In the instant case, it appears that the Chamber is performing a task delegated to it by the city council. Ordinarily, a local governing body would be involved in running local tourism activities. Here, however, the city council has delegated this task to the Chamber, and has provided funding to carry out this task. Thus, in so far as the Chamber has records relating to the tourism programs of the City, it is acting as an agent for the city council and the records are available to the public under FOIA.

In the facts that you present, you indicate that you requested these records from the city council. However, the facts indicate that the records were actually in the possession of the Chamber. FOIA states at subsection A of § 2.1-342 that *all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records.*<sup>5</sup> (Emphasis added). In the instant case, the Chamber would be the custodian of the records since they possess them in their capacity as an agent for the city council in implementing the tourism program. The instant case is distinguishable from the Council's advisory opinion mentioned above.<sup>6</sup> In that advisory opinion, the public body had a statutory duty to collect certain information, and it contracted with a private third party to collect that data. There, the public body remained the custodian of those records, even though it did not have physical custody, because of the statutory duty to maintain the information in those records. Here, there is no statutory duty for the city council to maintain a tourism program, but it has chosen to fund such a program and delegate its administration to the Chamber. There is no statutory duty for the city council to maintain records relating to tourism. In this instance, the Chamber is acting as an agent for the city council. Therefore, while not all records of the Chamber are public records subject to FOIA, those relating to the tourism program that is funded by the city council are subject to FOIA and available to the public. The Chamber, and not the city council, is the appropriate entity to ask for these records.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett  
Executive Director

<sup>1</sup>Va. Code Ann. § 2.2-3704(A) (Michie 2001) (effective Oct. 1, 2001).

<sup>2</sup>Va. Code Ann. § 2.2-3701 (Michie 2001) (effective Oct. 1, 2001).

<sup>3</sup>Va. Code Ann. § 2.2-3701 (Michie 2001) (effective Oct. 1, 2001).

<sup>4</sup>Virginia Freedom of Information Advisory Opinion 37 (2001).

<sup>5</sup>Va. Code Ann. § 2.2-3704(A) (Michie 2001) (effective October 1, 2001).

<sup>6</sup>Virginia Freedom of Information Advisory Opinion 37 (2001).



**VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**  
COMMONWEALTH OF VIRGINIA

AO-14-03

June 9 , 2003

Ms. Susan D. Scott  
Onancock Town Manager  
Onancock, Virginia

*The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your phone conversation of March 24, 2003, your e-mail of March 26, 2003, and information on the Virginia Department of Housing and Community Development's website about the Main Street Program.*

Dear Ms. Scott:

You have asked whether the Onancock Business and Civic Association ("the Association") is a public body under the Virginia Freedom of Information Act (FOIA) for purposes of its involvement with the Main Street Program ("the Program"). You indicate that the Association is a private business organization that has been in existence for several years and whose membership is comprised of local businesses and citizens.

By way of background, the Virginia Department of Housing and Community Development administers the Program to assist localities in developing public and private efforts to revitalize downtown commercial areas. The purpose of the Program is to help localities reverse economic and physical decline in traditional downtown and neighborhood business districts. The Program encourages public and private partnership at the local level and offers several levels of participation. An affiliate membership is available to communities exploring downtown revitalization or those who do not yet meet the requirements to be designated as an official Main Street community. Affiliate membership is open to a local government or to a partnership of a local government and a private sector organization. It does not appear that a private organization is eligible to join without participation from the local government.<sup>1</sup>

In the facts you present, the Association requested that the Onancock Town Council ("the Council") allow the Association to become an affiliate member of the Program. As mentioned above, a private organization like the Association is not entitled to apply without participation from the local government. Therefore, in order for the Association to join the Program, it was necessary for the Council to concur with the Association's participation. A resolution passed by the Council recognizes that the Association desires to participate, and resolves that the Association apply for affiliate membership. The resolution also indicates that the Onancock town manager would assist in submitting the application to the Program. The application requires the signature of a representative of the locality; however, based on the facts you presented, it appears as if the Association will be the active participant in the Program. The Council is involved only to the extent that the Association would not be eligible to apply to the program without partnering with the Council. You indicate that to date, the Association has not received any public funds relating to the Program. You ask if the Association is a public body for the limited purpose of membership in the Program, and whether its meetings and records must be open to the public.

Section 2.2-3701 of the Code of Virginia defines a public body as *any legislative body,*

*authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.*

(Emphasis added.) This office has previously opined that whether an entity administering a Main Street Program was a public body under FOIA turned on whether it was supported wholly or principally by public funds.<sup>2</sup> In the instant case, you indicate that the Association does not receive any public funding; instead, it has simply reached an agreement with the Council that allows it to participate in the Program. Therefore, the Association is not a public body under FOIA, even for the limited purpose of membership in the Program. If, in the future, the Association becomes wholly or principally supported by public funds, then its status as a public body may change.

You have also asked whether the records held by the Association relating to the Program would be public records under FOIA. Section 2.2-3701 defines public records to include all writings and recordings...*prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.* (Emphasis added). Even though the Association is not a public body, it is possible that it might have records subject to public inspection and copying if it is acting as the Council's agent in the Program.

FOIA does not define the term "agent." Rules of statutory construction dictate that in the absence of a statutory definition, a term is considered to have its ordinary meaning, given the context in which it is used.<sup>3</sup> The elements of a "principal-agent" relationship are well defined by the Supreme Court of Virginia. Therefore, the use of the word "agent" in the FOIA context should be given the same meaning as at common law. The Court has defined agency as "a fiduciary relationship resulting from one person's manifestation of consent to another person that the other shall act on his behalf and subject to his control, and the other person's manifestation of consent so to act."<sup>4</sup> The Court has further reasoned that control is an important factor in determining whether an agency relationship exists -- it is necessary that an agent not only be subject to the principal's control, with regard to not only the results but also to the methods and details of doing the work. In addition, the work must be done by the agent for the principal's benefit. The law does not presume that an agency relationship exists; instead, the presumption is that a person is acting for himself, and not as an agent. Whether an agency relationship exists is largely a question of fact.<sup>5</sup>

Applying this established common law principle of agency to the facts relating to the Association's participation in the Program, it does not appear that the Association is acting as the Council's agent. The resolution passed by the Council does not indicate that the Council retained any control over the Association's participation in the Program once the application was made. It does not appear that the Association's interest in joining the Program is primarily to benefit the Council or local government. The Program anticipates cooperation between public and private interests, and it can be inferred that the Association is joining to benefit the private economic development of its membership. An agency relationship cannot be presumed, and the facts here do not demonstrate that a "principal-agent" relationship exists between the Council and the Association. Therefore, any documents that the Association maintains relating to the Program are not public records. It is important to note, however, that if the Council, its officers, or employees come into possession of documents relating to the Program or the Association's participation, these documents would be public records subject to FOIA.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett  
Executive Director

<sup>1</sup> Information concerning the Main Street program can be found on the Virginia Department of Housing and Community Development's webpage at <http://www.dhcd.state.va.us/cd/crd/msp/mspindex.htm> (last accessed June 4, 2003).

<sup>2</sup> See Virginia Freedom of Information Advisory Opinion 36 (2001).

<sup>3</sup> *Commonwealth Department of Taxation v. Orange-Madison Coop. Farm Service*, 220 Va. 655, 261 S.E. 2d 532 (1980); 1991 Op. Atty. Gen. Va. 413; 1986-87 Op. Atty. Gen. Va. 174; see generally Norman J. Singer, *Statutes and Statutory Construction*, 6th ed., § 46:01.

<sup>4</sup> *State Farm Mut. Auto. Ins. Co. v. Weisman*, 247 Va. 199, 203, 441 S.E. 2d 16, 19 (Va. 1994).

<sup>5</sup> See *Drake v. Livesay*, 231 Va. 117, 341 S.E. 2d 186 (Va. 1986), *Reistroffer v. Person*, 247 Va. 45, 439 S.E. 2d 376 (Va. 1994), *State Farm Mut. Auto. Ins. Co. v. Weisman*, 247 Va. 199, 441 S.E. 2d 16 (Va. 1994), *The Texas Co. v. Zeigler*, 177 Va. 557, 14 S.E. 2d 704 (Va. 1941), *Wells v. Whittaker*, 207 Va. 616, 151 S.E. 2d 422 (Va. 1966), *Whitfield v. Whittaker Memorial Hospital*, 237 Va. 489, 169 S.E. 2d 450 (Va. 1969).



**VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**  
COMMONWEALTH OF VIRGINIA

AO-19-03

July 10, 2003

Mr. William Murphy  
Murphy's College Books  
Fairfax, Virginia

*The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence of May 12, 2003 and May 19, 2003.*

Dear Mr. Murphy:

You have asked whether Barnes & Noble Booksellers is subject to the Virginia Freedom of Information Act (FOIA), to the extent that it has contracted with George Mason University ("the University"), a public institution of higher education, to manage the University's on-campus bookstore.

You indicate that in June of 1999, Barnes & Noble entered into a contract to manage the University bookstore. The bookstore continues to be called the "George Mason University Bookstore," and is located on the campus of the University. You state that according to the terms of the contract, a minimum of \$1 million annually will be returned to the University from sales in the bookstore. You indicate that the contract also states that Barnes & Noble works for the University. You state that the University notified its instructors to send their textbook selections for each semester directly to the University bookstore.

You advise that you operate an off-campus bookstore, not affiliated with the University, that serves the University community. In order for you to know which textbooks to stock and have available for sale each semester, you access records of the instructors' textbook selections. The University instructed you to direct all requests for copies of the textbook selections to University Services. You indicate that on two different occasions you requested the selections from University Services, but did not receive all of the requested records. Specifically, four instructors whose selections you did not receive indicated to you that they had submitted their textbook selections directly to the University bookstore, as instructed. Upon notifying the University that you had not received all of the records you requested, your contact in University Services notified the manager of the University bookstore, and a nine-inch stack of records not previously received was produced. You indicate that the University's position regarding this situation is that it did not violate FOIA because the University bookstore, under the management of Barnes & Noble, did not give all of the records to the University. Furthermore, the University asserts that Barnes & Noble is an independent contractor not under the control of the University and thus not subject to FOIA. You ask if Barnes & Noble is acting as an agent for the University, and is therefore subject to FOIA.

Section 2.2-3701 of the Code of Virginia defines a public body as *any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth...and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.* Barnes &

Noble, a large, private corporation, does not fall under this definition of a public body because it is not supported wholly or principally by public funds. However, the definition of a public record includes *all writings and recordings... prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.* (Emphasis added.) In the instant case, the University is not mandated by law to operate a bookstore for its students. Nonetheless, the University has decided that this is an auxiliary service that it would like to offer, but has delegated the operation and management of the bookstore to Barnes & Noble. FOIA does not define the term "agent," so in order to determine if an entity is acting as an agent of a public body, the Virginia Freedom of Information Advisory Council has previously opined that one must examine the elements of the common law "principal-agent" relationship.<sup>1</sup>

The Supreme Court of Virginia has defined agency as "a fiduciary relationship resulting from one person's manifestation of consent to another person that the other shall act on his behalf and subject to his control, and the other person's manifestation of consent so to act."<sup>2</sup> The Court has further reasoned that control is an important factor in determining whether an agency relationship exists -- it is necessary that an agent not only be subject to the principal's control, with regard to not only the results but also to the methods and details of doing the work. In addition, the work must be done by the agent for the principal's benefit. The law does not presume that an agency relationship exists; instead, the presumption is that a person is acting for himself, and not as an agent. Whether an agency relationship exists is largely a question of fact.<sup>3</sup> If the terms of the contract and the nature of the relationship between the University and Barnes & Noble indicates that the University maintains control of decisions relating to the operation of the University bookstore, then Barnes & Noble would be acting as an agent for the University.

However, it is important to note that if Barnes & Noble is acting as an agent of the University, it is not a public body itself, and is therefore not required to respond to FOIA requests. Subsection A of § 2.2-3704 states that *all public records shall be open to inspection and copying... during the regular office hours of the custodian of such records.* The Freedom of Information Advisory Council has previously opined that a public body can be the custodian in a broader sense than just having physical possession of a record.<sup>4</sup> To the extent that a private entity creates or maintains records as an agent for a public body, the public body will remain the legal custodian of those records. The appropriate entity to ask for records is the principal public body -- in this case the University -- and not the agent, because any records generated by Barnes & Noble relating to the University bookstore are created in furtherance of its contractually obligated duties from the University.<sup>5</sup> Furthermore, in a "principal-agent" relationship, the principal is generally liable for the actions of the agent. The burden would be on the University to ensure that compliance with FOIA continues when it chooses to delegate responsibility for management of the University bookstore.

The analysis does not end even if it appears that Barnes & Noble is acting more like an independent contractor than an agent and the University maintains little or no control over the methods and details of running the University bookstore. The records at issue here -- the textbooks selected by instructors for their courses -- relate to the core public function of the University in providing an educational curriculum to students in the Commonwealth, and not just to running a bookstore. Any action of a public body to work with agents or independent contractors should avoid frustrating the purpose of FOIA. Barnes & Noble is likely not the only entity that maintains a list of the University's textbook selections. It would seem that the University administration, each academic department, or at the very least each instructor, would have records in his possession indicating the textbooks selected for a given semester. When you make a request for textbook selections, you might consider asking not only for the official textbook selection forms, but also any records maintained by the University indicating each instructor's textbook selection for the semester. To ease the burden of responding to such requests, the University might find it necessary to include a clause in its contract with Barnes & Noble requiring a copy of **all** textbook selections to be made available to the

University, or set up a system whereby instructors submit their selections both to Barnes & Noble and a central point in the University administration, such as University Services.

In conclusion, all records held by Barnes & Noble relating to the management of the University bookstore are subject to FOIA if Barnes & Noble is acting as an agent of the University. The question of agency is a question of fact, and must be determined by looking at the terms of the contract between the University and Barnes & Noble.<sup>6</sup> However, if Barnes & Noble is an agent, the University remains the legal, if not the physical, custodian of the records, and the University is the appropriate entity from whom to request the records. If Barnes & Noble is acting as an independent contractor and not an agent, records of textbook selections by instructors clearly relate to the public business of the University. The public policy of FOIA at § 2.2-3700 states that the General Assembly enacted FOIA to ensure *the people of the Commonwealth ready access to public records*. The University may not frustrate this policy of ready access to records relating to the transaction of public business by contracting with an independent contractor to operate the University bookstore and claiming that such records are out of its reach.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett  
Executive Director

<sup>1</sup> See Virginia Freedom of Information Advisory Opinion 14 (2003).

<sup>2</sup> *State Farm Mut. Auto. Ins. Co. v. Weisman*, 247 Va. 199, 203, 441 S.E. 2d 16, 19 (Va. 1994).

<sup>3</sup> See *Drake v. Livesay*, 231 Va. 117, 341 S.E. 2d 186 (Va. 1986), *Reistroffer v. Person*, 247 Va. 45, 439 S.E. 2d 376 (Va. 1994), *State Farm Mut. Auto. Ins. Co. v. Weisman*, 247 Va. 199, 441 S.E. 2d 16 (Va. 1994), *The Texas Co. v. Zeigler*, 177 Va. 557, 14 S.E. 2d 704 (Va. 1941), *Wells v. Whitaker*, 207 Va. 616, 151 S.E. 2d 422 (Va. 1966), *Whitfield v. Whittaker Memorial Hospital*, 237 Va. 489, 169 S.E. 2d 450 (Va. 1969).

<sup>4</sup> See Virginia Freedom of Information Advisory Opinion 37 (2001).

<sup>5</sup> To the extent that this opinion is inconsistent with Virginia Freedom of Information Advisory Opinion 41 (2001), that opinion is overruled.

<sup>6</sup> The Virginia Freedom of Information Advisory Council did not have a copy of the contract between the University and Barnes & Noble to review, so a definitive factual determination as to whether or not Barnes & Noble is acting as an agent or an independent contractor cannot be made.

**DEFENDANT'S EXHIBIT A**  
**CHRONOLOGY OF RELEVANT EVENTS**

1. On November 19, 2007, Defendant accepted the resignation of Thomas Sheeran ("Sheeran"), former Assistant Superintendent of Finance and Operations, effective March 31, 2008.
2. On December 20, 2007, Mr. Richard Hawkins ("Hawkins"), acting as counsel for Sheeran, submitted a letter concerning Sheeran to Bradford A. King ("King"), General Counsel for Defendant. Plaintiff's Trial Exhibit 5. (hereinafter referenced as "the Hawkins letter").
3. On December 20, 2007, King responded to Hawkins acknowledging receipt of the Hawkins' letter. Plaintiff's Trial Exhibit 8.
4. On January 14, 2008 Plaintiff submitted a Virginia Freedom of Information Act ("VFOIA") request to Defendant. Plaintiff's Complaint Exhibit 1. Plaintiff's request was for: a.) Sheeran's most recent employment contract; b.) all amendments to Sheeran's employment contract made during the preceding year; c.) all correspondence to and from Sheeran or his agent or attorney during the preceding six months; and d.) any summary of payments made to Sheeran during the preceding six months.
5. On January 22, 2008, Dr. Harold Fitrer ("Fitrer") responded, on behalf of Defendant, to Plaintiff's January 14, 2008 request. Plaintiff's Complaint Exhibit 2. Fitrer provided the following documents to Plaintiff on January 22, 2008: a.) cover letter signed by Fitrer; b.) Sheeran's most recent employment contract; c.) payroll records showing payments made to Sheeran during the preceding six months; and d.) final two of four pages of the Hawkins letter.
6. Fitrer's January 22, 2008 letter responded to Plaintiff's request for amendments to Sheeran's employment contract with a statement that "there are no such documents in the

possession of [Richmond Public Schools] which amended Mr. Sheeran's employment contract during the past year." Plaintiff's Complaint Exhibit 2, ¶ 2.

7. Fitrer responded to Plaintiff's request for correspondence to and from Sheeran, or his agent or attorney by: a.) providing pages three and four of the Hawkins letter and b.) declining to release the first two pages of the Hawkins letter. Fitrer's refusal to release the Hawkins letter in its entirety was because those pages were not released outside of closed session and that those pages remain confidential pursuant to section 2.2-3705.1 (3) of the Code of Virginia. Plaintiff's Complaint Exhibit 2, ¶ 3.

8. At 2:47 p.m. on January 23, 2008, Plaintiff emailed Fitrer regarding Fitrer's January 22, 2008 VFOIA response. Plaintiff's Complaint Exhibit 3. Plaintiff's email raised the following issues: a.) it challenged Fitrer's use of the VFOIA exemption found at Code of Virginia section 2.2-3705 and requested the first two pages of the Hawkins letter; b.) it requested to inspect and copy the "Agreement" referenced in the Hawkins letter and any correspondence accompanying the agreement; and c.) it requested to inspect and copy any agreement made during the preceding six months with Sheeran, including any agreement that keeps him paid..." or regarding Sheeran's condition or termination of employment.

9. At 9:00 p.m. on January 23, 2008, Plaintiff emailed Fitrer again regarding Fitrer's January 22, 2008 VFOIA response. Plaintiff's Complaint Exhibit 3. In this email, Plaintiff characterizes Fitrer's January 22<sup>nd</sup> response as "incomplete" with regard to contract amendments because it did not address records in the possession of Defendant's officers, agents, and employees. Plaintiff requested amendments to Sheeran's employment contract in the possession of Defendant's officers, employees and agents by

close of business on January 24, 2008 or “a complete response that there are no such records.” Plaintiff’s Complaint Exhibit 3, p. 2.

10. On January 24, 2008, Fitrer responded to both emails submitted by Plaintiff on January 23, 2008. Plaintiff’s Complaint Exhibit 4. Fitrer responded in a two page letter with no documents attached.

11. On January 24, 2008, Fitrer again declined Plaintiff’s request for the first two pages of the Hawkins letter by stating that: a.) the letter refers to matters properly discussed in closed session; b.) only a portion of the letter was released outside of closed session; c.) the letter is not a “public record” within the meaning of VFOIA; and d.) the first two pages of the letter were in the sole possession of a private law firm that does not qualify as a “public body” subject to the provisions of VFOIA. See, Plaintiff’s Exhibit 4, p. 1, ¶ 2-3.

12. In addition, Fitrer’s January 24, 2008 response declined release of the agreement referenced in the Hawkins letter. Fitrer stated that “any such agreement is exempt from release as a personnel record pursuant to FIOA sections 2.2-3705.1 (1) and 2.2-3705.8 (exempting agreements settling public employee disputes.)” See, Plaintiff’s Exhibit 4, p. 1, ¶ 4.

13. Finally, Fitrer’s January 24, 2008 response indicated that Defendant was not in possession of any document representing an agreement with Sheeran or any other person that “keeps [Sheeran] paid” or any other agreement affecting the condition or termination of Sheeran’s employment by Defendant. See, Plaintiff’s Exhibit 4, p. 2.

14. On January 27, 2008 Plaintiff contacted King, via telephone, to discuss Defendant’s responses. On the same day, counsel for Defendant spoke with both

Plaintiff and his counsel informing them that the School Board was prepared to release pages one and two of the Hawkins letter. See, Plaintiff's Trial Exhibit 6.

15. On January 28, 2008 Plaintiff filed a Verified Complaint for Injunction seeking release of an agreement between Defendant and Sheeran and the first two pages of the Hawkins' letter. Complaint, pages 7-9. Plaintiff's Complaint also requests immediate and complete responses to his VFOIA and production of "all public records that are responsive to" Plaintiff's request and attorney's fees. Complaint, page 8.

16. On January 31, 2008, counsel for the School Board released the Hawkins letter in its entirety to Plaintiff through his counsel. See, Plaintiff's Trial Exhibit 6.

17. On February 1, 2008 Defendant's counsel explained to Plaintiff's counsel that there was no executed agreement between Defendant and Sheeran. Plaintiff's Trial Exhibit 7.

18. On February 4, 2008, Defendant's counsel released a letter from King to Hawkins which acknowledged King's receipt of the Hawkins letter. Plaintiff's Trial Exhibit 8.