

Greene County Board of Supervisors' Misuse of Executive Session, and Their Non-Compliance with Freedom of Information Act

Statement by Mr. McPeeks

I live on Haney Rd, one of two roads in the Golden Hills subdivision that have not been accepted into the VDOT secondary road system. While the reasons these public roads were never accepted into the secondary road system dates back to 1991, the reason they remain unmaintained is because of the inaction of this board. We are all aware of the facts and I do not feel the need to go through them all again. I would like to point out that with the help of the Surveyor, Ray & Associates, we have found the deed that dedicates the roads to public use and hope that this ends the Board's claim that these are private roads.

With all that said, that is not the reason for my comments today. I would to like to make the public aware of two issues my neighbors and I have encountered while trying to overcome the Board's reluctance to address our roads. Both of these issues pertain to Title 2.2, Chapter 37 of the Virginia Code, which is the Virginia Freedom of Information Act (FOIA).

First, is the appearance that the Board is not complying with Virginia code 2.2-3707 by discussing items during closed-door executive sessions that are not permitted. There have been many times during our discussions with members of the Board, and particularly with Chairman Martin, that it was clear meetings were occurring and decisions being made behind closed-doors. Our suspicions appear to have been confirmed by an email obtained in our August 18, 2016 FOIA request. In an email on February 23, 2016, Mr. Barkley states that he has scheduled a "brief overview of the requests for improvements to private roads received from certain homeowners in the Golden Hills subdivision for tonight's executive session." If such a briefing did in fact take place, in no way does this briefing meet the requirements of Virginia Code 2.2-3711. The code specifically states "briefings by staff members pertaining to actual or probable litigation, where such briefing in open meeting would adversely affect the negotiating or litigating posture of the public body".

First, despite the claims from Chairman Martin, there has been no probable litigation. Even if there were pending litigation, only the advice by counsel or discussions that could affect the negotiating or litigating posture of the Board are allowed in closed-session. A briefing by the County Administrator of public business is inappropriate for a closed-session.

Additionally, the Virginia Freedom of Information Advisory Council, in it's pamphlet "The Freedom of Information Act and Local Government Officials," reminds local government officials that closed meetings "require motion stating purpose, Code cite AND subject." The pamphlet italicizes the and for emphasis. The minutes from the February 23, 2016 Board of Supervisors meeting clearly show that Mr. Cox motioned to enter Executive Session, the code was

referenced and what could loosely be interpreted as a purpose but the subjects were not. The Advisory Council makes it clear that the subjects are to be identified to the public. By not providing the subjects, the Board of Supervisors gives the perception that it is trying to hide the subjects of these discussions from the public.

If the Board was to follow the intent of the law the briefing would be held in public and then the Board would enter into Executive Session, stating the purpose, citing the code, and the subject. The fact that the Board continually does not follow the code is concerning and raises alarm for the citizens of the county who elected this Board.

The second subject I want to comment on today is the fitness of Mr. Barkley as the FOIA officer for this county. Virginia Code 2.2-3704.2 states that all local public bodies shall designate a FOIA officer. Mr. Frydl informed me verbally that Mr. Barkley is the County's FOIA officer. Paragraph E of 2.2-3704.2 states that the FOIA officer shall possess specific knowledge of the provisions of Chapter 37 and be trained annually. Mr. Barkley has continually shown he does not possess the required knowledge of the Freedom of Information Act to remain the County's FOIA officer. This is evidenced by his mishandling of the FOIA request from Mr. Rob Schilling on April 30, 2015, which led to legal action against the County and now by his mishandling of Mr. David Underwood's February 16, 2016 FOIA request.

In an email on February 17, 2016 Mike Nichols, of Shenandoah Technology Systems, informs Mr. Barkley that he doesn't know how far the archive goes back and that Mr. Barkley will need to contact employees involved to have them search their own email files. Mr. Barkley's response to Mr. Nichols was to do the best he could, which is perfectly acceptable, if Mr. Barkley intends to pursue the remaining emails by other means. However, after that Mr. Barkley only reached out to the Board and Mr. Svoboda to get additional information. The FOIA request is effective January 1, 2003 and is inclusive of the entire county; why was no attempt made for other files and emails outside of those individuals? Mr. Barkley has not been here since 2003 to know that no one else had the requested information.

I would also like to point out Virginia Record Retention and Disposition Schedule No. GS-06 Series 000290:

"Agreements, Bonds, and Contracts

This series consists of agreements, contracts, and bonds relating to professional services and construction. This series may include but is not limited to: surety, bonds, correspondence, letters of credit, and public/private agreements."

It states all of these must be maintained for 5 years after completion of the project.

In his March 10, 2016 email to me Mr. Martin stated “there were extenuating circumstances with regard to the developer that may have caused the project to languish and remain incomplete.” Additionally, Mr. Svoboda and others have stated to us the project was never completed. Considering, according to County officials, the project was never completed, we are still within that period. Therefore, the records must be retained according to state code. Mr. Barkley has only been County Administrator since 2013, so why was no effort made to access the previous Administrators' email? Either the County is not following FOIA or the Public Records Act and its corresponding schedules; either of which should be addressed by this Board. The Virginia FOIA advisory council makes it very clear that email has always been considered a public record and is subject to PRA schedules and FOIA, since its inception.

With this in mind, **I ask that the Board of Supervisors immediately remove Mr. Barkley as the County’s FOIA officer.** I also think it would be appropriate for **Mr. Underwood’s and my FOIA requests to be revisited after a new FOIA officer is appointed and properly trained** in accordance with Paragraph E of 2.2-3704.2.

Landon McPeeks
Greene County, Virginia
September 13, 2016

The preceding statement – in its entirety – was to be read to the Greene County Board of Supervisors, during the Public Comment period of the September 13, 2016 Meeting of the Board of Supervisors. Unfortunately, Chairman Martin did not permit Mr. McPeeks to complete the full reading.