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## THE VIRGINIA FREEDOM OF INFORMATION ACT: INADEQUATE ENFORCEMENT

Recognizing that an informed citizenry is essential to democracy, all fifty states have enacted legislation requiring public officials to conduct public business in open meetings.<sup>1</sup> Virginia passed its open meeting law, the Virginia Freedom of Information Act,<sup>2</sup> in 1968 to ensure its citizens "ready access to the records in the cus-

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1. See ALA. CODE § 13A-14-2 (1982); ALASKA STAT. §§ 44.62.310-.312 (1980); ARIZ. REV. STAT. ANN. §§ 38-431 to -431.09 (1974 & Supp. 1983-1984); ARK. STAT. ANN. §§ 12-2801 to -2807 (1979 & Supp. 1983); CAL. GOV'T CODE §§ 11120-11131 (West 1980 & Supp. 1984); *id.* §§ 54950-54961 (West 1983); COLO. REV. STAT. § 24-6-201 to -401 (1982); CONN. GEN. STAT. ANN. §§ 1-18a, -21 to -21k (Supp. 1983-1984); DEL. CODE ANN. tit. 29, §§ 10001-10002, 10004-10005 (1983); FLA. STAT. ANN. §§ 286.0105-286.011 (West Supp. 1983); GA. CODE ANN. § 36-80-1 (1982 & Supp. 1983); HAWAII REV. STAT. §§ 92-1 to -13 (1976 & Supp. 1982); IDAHO CODE §§ 67-2340 to -2347 (1980 & Supp. 1983); ILL. ANN. STAT. ch. 102, §§ 41-46 (Smith-Hurd Supp. 1983-1984); IND. CODE ANN. §§ 5-14-1-1 to 5-14-1.5-7 (Burns 1974 & Supp. 1982); IOWA CODE ANN. §§ 28A.1-9 (West 1978 & Supp. 1983-1984); KAN. STAT. ANN. §§ 75-4317 to -4320 (1977 & Supp. 1982); KY. REV. STAT. ANN. §§ 61.805-.850 (Baldwin 1980 & Supp. 1982); LA. REV. STAT. ANN. §§ 42:4.1-.12 (West 1965 & Supp. 1984); ME. REV. STAT. ANN. tit. 1, §§ 401-409 (1979 & Supp. 1983-1984); MD. ANN. CODE art. 41, § 14 (1982 & Supp. 1983); MASS. GEN. LAWS ANN. ch. 30A, §§ 11A-11A½ (West 1979 & Supp. 1983-1984); MICH. COMP. LAWS ANN. §§ 15.261-.275 (West 1981 & Supp. 1982-1983) (provisions requiring judiciary to comply when engaged in rulemaking or administrative activities held unconstitutional in *In re* 1976 PA 267, 400 Mich. 660, 255 N.W.2d 635 (1977)); MINN. STAT. § 471.705 (1977 & Supp. 1983); MISS. CODE ANN. §§ 25-41-1 to -17 (Supp. 1983); MO. ANN. STAT. §§ 610.010-.030 (Vernon Supp. 1983); MONT. CODE ANN. §§ 2-3-201 to -221 (1982); NEB. REV. STAT. §§ 84-1408 to -1414 (1981); NEV. REV. STAT. §§ 241.010-.040 (1979); N.H. REV. STAT. ANN. §§ 91-A:1 to :8 (1977 & Supp. 1981); N.J. STAT. ANN. §§ 10:4-6 to -21 (West 1976 & Supp. 1983-1984); N.M. STAT. ANN. §§ 10-15-1 to -4 (1983); N.Y. PUB. OFF. LAW §§ 95-106 (McKinney Supp. 1982-1983); N.C. GEN. STAT. §§ 143-318.9 to .18 (1983); N.D. CENT. CODE §§ 44-04-19 to -21 (1978 & Supp. 1981); OHIO REV. CODE ANN. § 121.22 (Page 1978 & Supp. 1982); OKLA. STAT. ANN. tit. 25, §§ 301-314 (West Supp. 1982-1983); OR. REV. STAT. §§ 192.610-.990 (1981); PA. STAT. ANN. tit. 65, §§ 261-269 (Purdon Supp. 1983-1984); R.I. GEN. LAWS §§ 42-46-1 to -10 (1977 & Supp. 1983); S.C. CODE ANN. §§ 30-4-10 to -110 (Law. Co-op. Supp. 1983); S.D. COMP. LAWS ANN. §§ 1-25-1 to -5 (1980); TENN. CODE ANN. §§ 8-44-101 to -106 (1980); TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon 1970 & Supp. 1982-1983); UTAH CODE ANN. §§ 52-4-1 to -9 (1981); VT. STAT. ANN. tit. 1, §§ 311-314 (Supp. 1983); VA. CODE §§ 2.1-340 to -346.1 (1979 & Supp. 1983); WASH. REV. CODE ANN. §§ 42.30.010-.920 (1972 & Supp. 1983-1984); W. VA. CODE §§ 6-9A-1 to -7 (1979 & Supp. 1983); WIS. STAT. ANN. §§ 19.81-.98 (West Supp. 1983-1984); WYO. STAT. §§ 16-4-401 to -407 (1982).

2. VA. CODE §§ 2.1-340 to -346.1 (1979 & Supp. 1983). The Virginia statute and similar state Freedom of Information Acts frequently are called "sunshine laws."

tody of public officials and free entry to meetings of public bodies wherein the business of the people is being conducted.”<sup>3</sup> In drafting and applying the open meeting law, however, the Virginia legislature and the Virginia courts have failed to place sufficient emphasis on the enforcement provisions that ensure the Act’s vitality. This failure has been troublesome, particularly in the area of injunctions. Despite finding violations of the Act in several recent cases, the Virginia Supreme Court decided that neither injunctions nor other remedial measures were appropriate.<sup>4</sup> By failing to remedy these violations, the Virginia Supreme Court has frustrated the policy underlying the Act—the public’s right to free entry to public meetings.

This Note discusses the remedies currently provided under the Act and addresses the use of judicial discretion to fashion additional remedies for violations of the Act. The Note also proposes and evaluates methods for effectively enforcing the Act. Finally, the Note considers limitations on the exercise of judicial discretion and the efficacy of alternative remedies.

#### JUDICIAL DISCRETION IN GRANTING STATUTORY RELIEF

Historically, a court of equity has had discretion to decree the relief that it deems appropriate. A frequent criticism of the English equity courts was that the chancellor’s exercise of discretion was unpredictable, thereby fostering uncertainty in results.<sup>5</sup> Nevertheless, the tenet survives that an appeal to equity is “an appeal to the sound discretion which guides the determinations of courts of equity.”<sup>6</sup>

The judicial system generally subordinates equitable remedies to remedies at law. The system regards an injunction as a unique remedy and usually requires a plaintiff to show either that he will suffer irreparable injury unless the court enjoins the defendant, or

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3. *Id.* § 2.1-340.1.

4. See *Nageotte v. King George County*, 223 Va. 259, 288 S.E.2d 423 (1982); *Marsh v. Richmond Newspapers*, 223 Va. 245, 288 S.E.2d 415 (1982).

5. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 2.2, at 32 (1973). This uncertainty gave rise to the remark that “[e]quity is a roguish thing” measured by the length of the chancellor’s foot. *Id.* n.7 (quoting J. SELDON, *TABLE TALK* (F. Pollock ed. 1927)).

6. *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1944). See also O. FISS & D. RENDLEMAN, *INJUNCTIONS* 104 (2d ed. 1984).

that alternative legal remedies, such as monetary damages, are inadequate.<sup>7</sup> Legislatures, however, can eliminate the usual requirement that a plaintiff establish these prerequisites for injunctive relief.<sup>8</sup> Thus, by mandating the use of equitable remedies for statutory violations, legislatures may limit or even override the judiciary's freedom to exercise discretion in fashioning or denying injunctive relief.<sup>9</sup> Courts, however, have been reluctant to find a legislative intent to curtail judicial discretion to fashion suitable remedies for statutory violations.<sup>10</sup> Determining the existence and the extent of a court's discretion in granting equitable relief for statutory violations requires an examination of the statute's language to discern the legislature's intent.

A court may rely on principles of statutory construction to determine the legislature's intent. One principle of construction is that a court should give words and phrases their ordinary meanings.<sup>11</sup> A court may also consider the provision as a whole to determine whether the legislature intended to limit the court's discretion to grant equitable remedies.<sup>12</sup> Finally, a court may consider the statute's purpose in deciding whether a particular type of relief would further that purpose.<sup>13</sup>

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7. O. FISS & D. RENDLEMAN, *supra* note 6, at 58-59.

8. *See, e.g., State Bd. of Dental Examiners v. Hyde*, 114 Ariz. 544, 562 P.2d 717 (1977); *State v. O.K. Transfer Co.*, 215 Or. 8, —, 330 P.2d 510, 513 (1958) (usual prerequisites for equitable relief not necessary in special statutory proceedings).

9. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 533 (1982).

10. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles.").

11. *See Seaboard Air Line R.R. v. Commonwealth*, 204 Va. 404, 131 S.E.2d 271 (1963). If the statute's meaning is clear, no further principles of statutory construction will come into play. *See id.* at 404, 131 S.E.2d at 273. Legislative use of the words "shall" and "must" establishes mandatory provisions that a court must follow; the words "may" or "authorizes" create directive or permissive measures not binding upon a court. *See, e.g., Sheftic v. Boles*, 295 F. Supp. 1347, 1348 (N.D. W. Va. 1969); *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965). *See generally* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1973).

12. *See, e.g., Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944); *Mason & Dixon Lines v. Commonwealth*, 185 Va. 877, 886, 41 S.E.2d 16, 20 (1947). *See generally* 2A J. SUTHERLAND, *supra* note 11, § 46.05.

13. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 316 (1982) (concluding that the statutory scheme did not limit the courts' traditional equitable discretion); *Gough v. Shaner*, 197 Va. 572, 575, 90 S.E.2d 171, 174 (1955) (a court must consider the object of the statute

The Virginia Supreme Court has recognized the discretion of lower courts to decide whether equitable relief is an appropriate remedy for violations of the Virginia Freedom of Information Act.<sup>14</sup> The court has failed, however, to define the lower courts' discretionary limits and to clarify the circumstances under which the courts may exercise their discretion.<sup>15</sup> In contrast, the United States Supreme Court has defined more clearly the judiciary's discretion to fashion equitable remedies for statutory violations. In *Hecht Co. v. Bowles*,<sup>16</sup> the United States Supreme Court established guidelines for determining the boundaries of a court's discretion to grant equitable relief for the violation of a statute. In *Hecht*, the Court held that violation of the Emergency Price Control Act<sup>17</sup> did not require injunctive relief although the statute provided for such a remedy.<sup>18</sup>

In *Hecht*, an investigation revealed that, by overcharging on certain goods and by failing to maintain proper records, the Hecht Company had violated the Emergency Price Control Act and a regulation promulgated under the Act.<sup>19</sup> The Act provided that "a permanent or temporary injunction, restraining order, or other order shall be granted without bond" upon violation of the Act.<sup>20</sup> Despite the Act's use of the mandatory word "shall," the Court held that the phrase "or other order" indicated the availability of alternative remedies, giving the trial court discretion to award relief other than an injunction.<sup>21</sup> Although the government had sought an injunction, the Court reasoned that a lower court might view some other order as more appropriate.<sup>22</sup> The Court concluded that Congress would have eliminated judicial discretion expressly, if Congress had intended to do so:

We cannot but think that if Congress had intended to make

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and the purpose to be accomplished).

14. See, e.g., *Nageotte v. King George County*, 223 Va. 259, 288 S.E.2d 423 (1982); *Marsh v. Richmond Newspapers*, 223 Va. 245, 288 S.E.2d 415 (1982).

15. See *infra* notes 69-91 and accompanying text.

16. 321 U.S. 321 (1944).

17. Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (repealed 1947).

18. 321 U.S. at 331.

19. *Id.* at 324.

20. Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 23, 33 (repealed 1947).

21. 321 U.S. at 328.

22. *Id.*

such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. . . . We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied.<sup>23</sup>

The Court recognized that a lower court's discretion to fashion equitable decrees was limited, however, and warned that the judiciary must exercise its discretion "in light of the large objectives of the Act."<sup>24</sup> A court must defer to the legislature's determination of the conduct that should be prohibited, but may use its discretion to grant any order that it deems appropriate to enforce compliance with the statutory standard of conduct.<sup>25</sup>

In *Hecht*, the United States District Court for the District of Columbia had determined that an injunction was unnecessary because the Hecht Company's conduct before and after the violations indicated that the company would comply with the statute in the future.<sup>26</sup> Based on this determination, the district court dismissed the complaint.<sup>27</sup>

The Supreme Court found that the district court had discretion to deny injunctive relief under these circumstances, but remanded the case for a determination of whether the district court abused its discretion in dismissing the action.<sup>28</sup> Thus, although the trial court had discretion to choose the appropriate equitable remedy, its decision not to grant any relief may have been an abuse of discretion if the decision encouraged noncompliance with the statute.

In *Weinberger v. Romero-Barcelo*,<sup>29</sup> the United States Supreme Court reexamined the role of judicial discretion in granting injunctive relief under a statute. In *Weinberger*, the Court held that the

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23. *Id.* at 329-30.

24. *Id.* at 331.

25. See generally Plater, *supra* note 9, at 524.

26. 321 U.S. at 325-26.

27. *Id.* at 326.

28. *Id.* at 331.

29. 456 U.S. 305 (1982).

Federal Water Pollution Control Act<sup>30</sup> did not require the issuance of an injunction to prohibit the Navy's discharge of ordnance into waters off the coast of Puerto Rico.<sup>31</sup>

The Navy had used an island off the coast of Puerto Rico for weapons training, which resulted in the discharge of ordnance into the sea.<sup>32</sup> The plaintiffs sought to enjoin the naval operations because the Navy conducted the exercises without obtaining a permit.<sup>33</sup> The United States District Court for the District of Puerto Rico had found that the Navy had violated the Act by discharging ordnance into the waters without a permit from the Environmental Protection Agency (EPA).<sup>34</sup> The court ordered the Navy to apply for a permit, but refused to enjoin the training operations pending the EPA's consideration of the application.<sup>35</sup>

The Supreme Court held that the Act did not eliminate completely a court's discretion to grant injunctive relief.<sup>36</sup> The Court interpreted the Act to allow whatever relief the trial court deemed necessary to ensure compliance with the statute.<sup>37</sup> An injunction was not the only means of ensuring compliance because the Navy could overcome the Act's prohibition against the discharge of pollutants by obtaining the necessary permit from the EPA.<sup>38</sup> Neither

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30. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981).

31. 456 U.S. at 320. The Act does not mention specifically the availability of injunctive relief.

32. *Id.* at 307.

33. *Id.* at 306-07. The Federal Water Pollution Control Act requires a National Pollutant Discharge Elimination System permit for the "discharge of any pollutant." 33 U.S.C. §§ 1311(a), 1323(a). The term "pollutant" includes munitions. *Id.* § 1362(6).

34. *Barcelo v. Brown*, 478 F. Supp. 646 (D.P.R. 1979), *modified*, 643 F.2d 835 (1st Cir. 1981), *rev'd sub nom.* *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

35. 456 U.S. at 309-10.

36. *Id.* at 316. The Court observed that the Act allowed the EPA Administrator to seek relief sufficient to bring about compliance with the Act and reasoned that "Congress did not anticipate that all discharges would be immediately enjoined." *Id.* at 317-18.

37. *Id.*

38. *Id.* at 315. The Court distinguished *Weinberger* from *TVA v. Hill*, 437 U.S. 153 (1978), in which the Court found that Congress had eliminated the courts' traditional discretion. In *Hill*, the Court concluded that "one would be hard pressed to find a statutory provision whose terms were any plainer." *Id.* at 173. A refusal to enjoin the action in *Hill* would have ignored the explicit provisions of the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982), which required the protection of the habitats of endangered species. In *Hill*, the construction of a dam would have destroyed the habitat of the snail darter, a species of perch, thus frustrating the purpose of the Endangered Species Act. Commenting on *Hill*, the Supreme Court stated in *Weinberger* that "[t]he purpose and language of the stat-

the statutory scheme<sup>39</sup> nor the legislative history<sup>40</sup> of the Act indicated that Congress intended to restrict a court's discretion to fashion appropriate relief.

*Hecht* and *Weinberger* indicate that a court generally retains the discretion to decide whether injunctive or other equitable relief is the proper remedy for a statutory violation. A court retains this discretion unless the legislature removes it by expressly mandating the issuance of an injunction for statutory violations, or unless an injunction is the only relief that will ensure compliance with the statute. If a statute does not preclude a court from exercising its discretion, the court can fashion any equitable remedy that will further the statute's substantive purposes. In cases arising under the Virginia Freedom of Information Act, the Virginia Supreme Court has used its discretion freely, but has denied injunctive relief.

#### REMEDIAL PROVISIONS OF THE VIRGINIA FREEDOM OF INFORMATION ACT

Although the Virginia Freedom of Information Act was enacted in 1968, it was amended to its current form in 1976. The Act's original enforcement provision stated that "[a]ny person . . . denied the rights and privileges conferred by this chapter may . . . petition for injunction or mandamus, supported by an affidavit showing good cause. . . ."<sup>41</sup> The presence of permissive language indicated that the General Assembly did not intend that a court should issue an injunction automatically upon finding a violation of the Act.<sup>42</sup> The word "may" referred to the petitioner's right to seek an injunction, rather than the court's duty to issue an injunction if a violation occurred. The Act contained no directive language concerning a court's duty to issue an injunction. The phrase "supported by an affidavit showing good cause" also indicated that the court could exercise discretion in deciding whether an injunc-

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ute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act." 456 U.S. at 314.

39. 456 U.S. at 315-16.

40. *Id.* at 319.

41. VA. CODE § 2.1-346 (1968) (amended 1976 & 1978).

42. *See supra* note 11.



tion was appropriate. This phrase suggested that the court retained at least the discretion to determine whether an affidavit supporting a petition showed good cause.<sup>43</sup>

Another provision of the Act, pertaining to the results of executive or closed meetings, provided that

[n]o resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in an executive or closed meeting shall become effective unless such public body, following such meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation or motion.<sup>44</sup>

By using the mandatory word "shall," the General Assembly clarified its intent that courts must declare certain governmental actions void if the public body does not comply with the Act. Invalidating a prohibited action was originally the only mandatory method of effectuating the Act's primary purpose of open government. Thus, a court might exercise discretion in refusing to enjoin closed meetings, but could not exercise discretion in determining the validity of actions taken at the meetings.

Before its amendment in 1976, the Act did not clarify the circumstances in which Virginia courts should grant an injunction. As previously noted, the only phrase in the Act that indicated the General Assembly's intent regarding a court's exercise of discretion stated that a plaintiff should support his petition for an injunction with an affidavit showing good cause.<sup>45</sup> In *WTAR Radio-TV Corp. v. City Council*,<sup>46</sup> the Virginia Supreme Court relied on the good cause provision to deny injunctive relief.

In *WTAR*, the petitioner, a broadcasting corporation, alleged that the Virginia Beach City Council violated the Virginia Freedom of Information Act by holding two closed meetings to discuss topics that should have been discussed in open meetings.<sup>47</sup> On one

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43. A court also may have had discretion to determine whether an injunction was the only method of ensuring compliance with the Act. *Cf. supra* text accompanying notes 29-40.

44. VA. CODE § 2.1-344(c) (1979) (amended 1980 & 1982).

45. VA. CODE § 2.1-346 (1968) (amended 1976 & 1978). This provision apparently allowed a plaintiff to seek an injunction without establishing that the remedy at law was inadequate, a traditional prerequisite for equitable jurisdiction. *See supra* text accompanying notes 7-8.

46. 216 Va. 892, 223 S.E.2d 895 (1976).

47. *Id.* at 893-94, 223 S.E.2d at 897.

occasion, the council adopted a resolution calling for a closed meeting purportedly to discuss topics exempted from the Act's disclosure requirements.<sup>48</sup> Before the meeting, the council did not identify publicly the matters to be discussed, and the petitioners learned later that the Act did not permit private discussions of the topics actually raised at the closed meeting.<sup>49</sup> At a subsequent closed meeting, the council again addressed subjects that the Act did not exempt from the open meeting requirements.<sup>50</sup>

Seeking to stop this pattern of circumvention, the plaintiffs petitioned the court to enjoin the city council from holding any closed meeting unless the council specifically stated the meeting's purpose.<sup>51</sup> To determine whether an injunction was appropriate, the court focused on whether the plaintiffs supported their petition with an affidavit showing good cause.<sup>52</sup> The court determined that the purpose of an injunction was to deter additional violations,<sup>53</sup> and stated that the propriety of an injunction depended on the probability that the offender would commit a subsequent violation.<sup>54</sup> Although evidence of past wrongful conduct might permit the inference that the misconduct would continue, the court asserted that this inference alone did not constitute the reasonable probability of future misconduct necessary to justify an injunction.<sup>55</sup> The court held that the plaintiff's affidavit failed to show good cause because the plaintiff did not present evidence to rebut the presumption that the defendant would comply with the law in the future.<sup>56</sup> The court stated that, contrary to the plaintiff's contention, the court's holding did not render the Act unenforceable; injunctive relief would be granted upon an adequate showing of

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48. *Id.* at 893, 223 S.E.2d at 897. The Act permitted closed meetings for discussions of such matters as the administration of public employees, student discipline, acquisition of real property for public purposes, and consultation with legal counsel. VA. CODE § 2.1-344 (1973) (amended 1979, 1980, 1981 & 1982).

49. 216 Va. at 894, 223 S.E.2d at 897.

50. *Id.*

51. *Id.*

52. *Id.* at 894, 223 S.E.2d at 897-98.

53. *Id.* at 894, 223 S.E.2d at 898.

54. *Id.* at 894-95, 223 S.E.2d at 898.

55. *Id.* at 895, 223 S.E.2d at 898.

56. *Id.*

good cause.<sup>57</sup>

The court in *WTAR* did not specify the steps that a plaintiff should take to present evidence of a reasonable probability that the defendant would violate the Act in the future.<sup>58</sup> If evidence of past violations is insufficient to rebut the presumption of the defendant's future compliance with the Act, then the plaintiff's contention that the court's decision would render the Act unenforceable was justified. The court recognized this problem and closed its opinion by noting that "[w]hether the enforcement provisions of the Act should be amended, and if so, in what manner, are matters of public policy solely within the jurisdiction of the General Assembly."<sup>59</sup>

### *Legislative Reaction to WTAR*

Following the court's decision in *WTAR*, the Virginia General Assembly amended the Act's enforcement provisions.<sup>60</sup> Although no record exists of the amendment's legislative history, the timing suggests that the General Assembly amended the Act in response to the decision in *WTAR*. By amending the Act, the General Assembly apparently sought to clarify the circumstances in which a court should issue an injunction. The amendment provided that a plaintiff's petition for injunctive relief must set forth "with reasonable specificity" the circumstances surrounding the denial of the plaintiff's rights under the Act.<sup>61</sup> Thus, the legislature relaxed the criteria for injunctive relief by clarifying the "good cause" requirement which the court in *WTAR* used to deny an injunction.

More significantly, the amendment provided that "[a] single instance of denial of such rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein."<sup>62</sup> This change revealed a legislative intent different from that which the Virginia Supreme Court found in *WTAR*. In *WTAR*, the court had held that a single violation suggested, but

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57. *Id.* at 895-96, 223 S.E.2d at 898.

58. *See id.* In the court's opinion, even two past violations apparently would not have established a reasonable probability that the defendant would commit another violation.

59. *Id.* at 896, 223 S.E.2d at 898.

60. 1976 Va. Acts 709 (codified at VA. CODE § 2.1-346 (1979)).

61. VA. CODE § 2.1-346 (1979).

62. *Id.*

did not establish conclusively, that violations would recur, and that a single violation was not sufficient grounds for an injunction.<sup>63</sup> In amending the Act, however, the General Assembly stated that a single violation did constitute sufficient grounds to support an injunction.<sup>64</sup>

The amendment also provided that a petitioner could recover litigation costs and attorney's fees, presumably to encourage citizen enforcement of the Act.<sup>65</sup> The General Assembly also added a new section, entitled "Violations and Penalties," which provides that a court "shall impose" a civil fine if a defendant violates the Act "willfully and knowingly."<sup>66</sup> The amendment's mandatory language does not permit the use of judicial discretion in determining whether to impose a civil fine if the court finds a willful violation.<sup>67</sup>

The amendment of the Act sought to strengthen the enforcement measures in several significant ways. It relaxed the requirement that a plaintiff show good cause to obtain an injunction, made suits to enforce the Act less costly, and added a stronger mandatory remedial measure in the form of civil fines. These changes reflected the dissatisfaction of the General Assembly with the Virginia Supreme Court's refusal in *WTAR* to grant injunctive relief under the Act's original enforcement provision.<sup>68</sup>

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63. 216 Va. at 895, 223 S.E.2d at 898.

64. Arguably, the amended passage removed the court's equitable discretion to grant relief based on the legislature's use of the directive word "shall." Two factors, however, suggest that the General Assembly did not intend to make injunctive relief mandatory. First, the amendment did not require courts to take specific action. Second, the penalties provision stated that a court must impose a fine for a willful violation even if it does not award a writ of mandamus or injunctive relief. VA. CODE § 2.1-346.1 (1979). Thus, the General Assembly indirectly indicated its intent that a writ of mandamus or an injunction need not be granted to remedy every violation of the Act. The legislature did not specify, however, the factors that a court should consider in deciding whether to issue an injunction.

65. VA. CODE § 2.1-346 (1979). Without this provision, an enforcement action is prohibitively expensive for most private citizens because they lack the financial resources that groups such as the media possess.

66. *Id.* § 2.1-346.1 (1979).

67. *Id.* The word "shall" indicates that imposition of a civil fine is mandatory. *See id.* The amount of the fine, however, is left to the court's discretion. Arguably, the imposition of a nominal fine would be an abuse of judicial discretion.

68. Another bill recently passed by the General Assembly indicates dissatisfaction with the Virginia Supreme Court's holding in *Roanoke City School Bd. v. Times-World Corp.*, 226 Va. 176, 307 S.E.2d 256 (1983). In *Times-World*, the court found that a prearranged telephone conference call between all members of the school board did not constitute a

The Virginia Supreme Court's first opportunity to interpret the amended enforcement section came in *Marsh v. Richmond Newspapers*.<sup>69</sup> In *Marsh*, Richmond Newspapers alleged that the Richmond City Council had violated the Virginia Freedom of Information Act by improperly convening an executive session and by discussing subjects during the closed session that did not fall within the "legal matters" exemption of the Act.<sup>70</sup> Richmond Newspapers sought to enjoin the council from closing future meetings, and sought to recover costs and—if the court found that the violations were willful and knowing—civil fines against the council members.<sup>71</sup>

The trial court found that the council had committed both of the violations alleged in the petition, and granted a permanent injunction.<sup>72</sup> On appeal, however, the Virginia Supreme Court held that the council had not violated the Act, but affirmed the trial court's conclusion that the council discussed topics outside the scope of the Act's "legal matters" exemption.<sup>73</sup> The Virginia Supreme Court also held that by granting an injunction, the trial court had abused its discretion.<sup>74</sup>

In reaching its decision, the court considered the effect of the 1976 amendment. The court interpreted the amendment as "revers[ing] the presumption, which controlled our decision in *WTAR*, that a public official will obey the law."<sup>75</sup> Nevertheless, the court reasoned that several factors rendered the trial court's deci-

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meeting for purposes of the Freedom of Information Act. Thus, the school board was able to avoid the Act's requirement for open meetings. The bill, which amends the Freedom of Information Act, will take effect on July 1, 1984, and specifically precludes meetings conducted through telephone conferences or any other "means where the members are not physically assembled to discuss or transact public business." H.B. 24, Va. Gen. Assembly (1984).

69. 223 Va. 245, 288 S.E.2d 415 (1982).

70. *Id.* at 249-52, 288 S.E.2d at 416-19. The plaintiffs claimed that the council's motion to go into executive session did not state specifically the purpose of the closed meeting and thus violated the amendment to § 2.1-346 of the Act. *See* 223 Va. at 254, 288 S.E.2d at 420.

71. 223 Va. at 249, 288 S.E.2d at 417.

72. *Id.*

73. *Id.* at 255-56, 288 S.E.2d at 420-21. The council entered executive session to discuss the construction of an interstate highway and the possibility of potential litigation concerning "annexation immunity" laws. The trial court found that no potential litigation was discussed in the meeting. *Id.*

74. *Id.* at 258, 288 S.E.2d at 422.

75. *Id.* at 257-58, 288 S.E.2d at 422.

sion to issue an injunction inappropriate. First, the trial court had awarded injunctive relief because it found two violations, but the Virginia Supreme Court found only one. Second, although the trial court could have inferred from a single violation that future violations would follow, the trial court had observed that repeated violations were unlikely.<sup>76</sup> The supreme court stated that, before a court issues an injunction, the plaintiff must demonstrate that future violations are probable.<sup>77</sup> The supreme court interpreted the 1976 amendment as allowing a court to infer from a single violation that more violations would follow,<sup>78</sup> but because the trial court in *Marsh* had not made this inference, the supreme court found that no justification existed for an injunction.<sup>79</sup>

Despite the 1976 amendment, the supreme court in *Marsh* relied on the same grounds that it had in *WTAR* to determine whether an injunction was a proper remedy for a violation of the Act. In both cases, the relevant consideration was the probability of future violations. In both cases the court decided that a prior violation merely permitted—but did not require—a court to infer that violations would recur. In *Marsh*, the supreme court did not elaborate on the factors that it considered in deciding to overturn the award of injunctive relief. The court discussed the defendants' good faith,<sup>80</sup> but did not cite any evidence to support its finding that the council had acted in such a manner.

In *Nageotte v. King George County*,<sup>81</sup> a companion case to *Marsh*, the Virginia Supreme Court affirmed a trial court's decision to deny an injunction despite the defendants' violations of the Act. In *Nageotte*, two citizens alleged that motions by the Board of Supervisors of King George County to meet in executive session

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76. *Id.* at 258, 288 S.E.2d at 422. The trial judge commented that the council members "did not mean 'to do anything wrong'" and that a violation was not likely to happen again. *Id.* at 257, 288 S.E.2d at 422. The trial judge also expressed misgivings about awarding an injunction against persons who acted sincerely, though improperly. *Id.*

77. *Id.* at 258, 288 S.E.2d at 422.

78. *Id.*

79. *Id.* The trial court order also had established procedures for the council to follow in closing future meetings. The supreme court found no need to comment on the procedures, which fell within the injunction. Finally, the supreme court did not discuss the trial court's failure to award attorneys' fees, an issue that the plaintiffs had not raised on appeal. *Id.*

80. *Id.* at 257, 288 S.E.2d at 421.

81. 223 Va. 259, 288 S.E.2d 423 (1982).

were not specific and did not comply adequately with the Act's provisions.<sup>82</sup> The plaintiffs asked the trial court to enjoin future violations, award costs and attorneys' fees, impose a civil fine, and invalidate actions taken at the closed meeting.<sup>83</sup>

The trial court found that the supervisors had violated the Act, but considered the violations insufficient to entitle the plaintiffs to injunctive relief. The trial court merely cautioned the supervisors to state the purpose of an executive session with greater specificity in the future.<sup>84</sup> The Virginia Supreme Court affirmed the trial court's ruling that the defendants had violated the Act and the trial court's refusal to grant the requested relief.<sup>85</sup> The court saw "no necessity for enlarging [the trial court's] suggestion into the formal structure of an injunction."<sup>86</sup> Consistent with its decision in *Marsh*, the supreme court maintained that an injunction was an unnecessary remedy because the defendants violated the Act in good faith.<sup>87</sup> The court also noted that the violations were insubstantial.<sup>88</sup> The court, therefore, weighed the insubstantial and inadvertent nature of the violations against the evidence of multiple violations and decided that the defendant would not violate the Act in the future. Having reached this conclusion, the court reasoned that the requested relief was unnecessary.

Although the Virginia Supreme Court found one or more violations of the Act in *WTAR*, *Marsh*, and *Nageotte*, the court failed to provide any remedy. The General Assembly's attempt to

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82. *Id.* at 262-63, 288 S.E.2d at 424. Generally, the motions failed to specify the matters about which the board sought legal advice. *See id.* at 264-65, 288 S.E.2d at 425.

83. *Id.* at 263, 288 S.E.2d at 424.

84. *Id.* at 267, 288 S.E.2d at 426.

85. *Id.* at 267, 269-70, 288 S.E.2d at 427-28. The supreme court did not invalidate the actions that the board had taken at the closed meeting because the board later voted on the same proposals at an open meeting. *Id.* at 267, 288 S.E.2d at 427. Because the violations were not willful, the court also refused to impose civil fines upon the board members. *Id.* at 269, 288 S.E.2d at 428. The court did not award attorney's fees and costs, evidently because the plaintiffs had proceeded *pro se*. *Id.* at 270, 288 S.E.2d at 428.

86. *Id.* at 269, 288 S.E.2d at 428.

87. *Id.* at 269-70, 288 S.E.2d at 428. The court observed that "[t]he awarding of injunctive relief is generally discretionary" and that "a single violation of the Act is sufficient to permit the granting of relief based on the inference that future violations will occur, but such an extraordinary and drastic remedy is not to be casually or perfunctorily ordered." *Id.*

88. *Id.* The supreme court found that "[t]here were no discussions of nonexempt subjects in the executive sessions and no decisions were made in such sessions." *Id.* at 269, 288 S.E.2d at 428.

strengthen enforcement by amending the Act in 1976 had no perceptible effect upon subsequent judicial decisions.

Several explanations exist for the judicial reluctance to apply the statutory remedies. The supreme court may have disagreed with the General Assembly's determination that injunctions would ensure compliance with the Act. Another explanation for the court's reluctance to award injunctions may be that the court feared that injunctions prohibiting elected officials from holding closed meetings would interfere with the officials' legislative function.<sup>89</sup>

Another possibility is that the court may have disagreed with the Act's substantive purpose.<sup>90</sup> Open government may not result in efficient government if officials must function in full view of the public. Political decisions often involve compromises on controversial proposals. In many instances, deadlocks might be more harmful than unpopular actions. Refusing to grant relief on this basis, however, is an abuse of judicial discretion. As the United States Supreme Court indicated in *Hecht*, a court cannot substitute its judgment for the legislature's judgment concerning the conduct that should be prohibited; a court must exercise its discretion in light of the legislature's intent.<sup>91</sup>

Although the reasons for the Virginia Supreme Court's reluctance to enforce the Act are unclear, two methods exist for improving the Act's enforcement mechanisms and particularly for clarifying the use of injunctions as a method of enforcement. First, the General Assembly could amend the Act to provide alternative remedies, or to remove the judiciary's discretion in granting injunctions, or to do both. Alternatively, the General Assembly could allow courts to exercise discretion, but could offer legislative guidance by specifying the factors that a court should consider in

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89. The court may have decided that the political process provides a better remedy by allowing voters to remove public officials from office if the officials fail to hold open meetings.

90. In *Marsh*, the Virginia Supreme Court indicated that it disapproved of the Act's enforcement section which provided that a single violation of the Act is sufficient to trigger an injunction. The court observed that "in our research we have been unable to find such a provision in the statutes of any other state." 223 Va. at 257, 288 S.E.2d at 422.

91. *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). See also *Bunts Eng'g & Equip. Co. v. Palmer*, 169 Va. 206, 192 S.E.2d 789 (1937) (the judiciary's duty is to construe statutory language, not to pass upon its wisdom); *Plater*, *supra* note 9, at 532 (a court does not have discretion to allow prohibited conduct to continue).



determining whether to issue an injunction. Both of these solutions to the problem of inadequate enforcement could protect effectively the public's interest in open government.

FACTORS RELEVANT TO A DETERMINATION WHETHER TO ISSUE AN  
INJUNCTION

In *Nageotte v. King George County*<sup>92</sup> and *Marsh v. Richmond Newspapers*,<sup>93</sup> the Virginia Supreme Court refused to grant injunctive relief on the ground that an injunction was an ineffective remedy for good faith violations of the Act. In *Nageotte*, the insubstantiality of the violation also influenced the court's decision.<sup>94</sup> The court should not have relied on these factors, either alone or together, to infer that the defendants would not violate the Act in the future, and should not have refused to award injunctive relief. Instead, the court should have focused on the substantive interest at stake—the interest in open government—and considered whether the statutory remedy of an injunction would have furthered that interest.<sup>95</sup>

The substantiality of a violation does not reflect whether a violator will comply with a statute in the future. Focusing on the severity of a single violation may be an appropriate way to determine a violator's moral culpability for past misconduct, but it has little or no bearing upon whether a court should issue an injunction. In seeking an injunction, a plaintiff's primary objective is to compel officials to comply with the Act in the future, rather than to punish or compensate for past violations.<sup>96</sup> The extent to which an individual violates the Act does not indicate clearly the extent to which he will comply with it in the future.<sup>97</sup> The Virginia Supreme Court's refusal to take action after minor violations may encourage defendants to violate the Act in more substantial ways in the

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92. 223 Va. 259, 288 S.E.2d 423 (1982).

93. 223 Va. 245, 288 S.E.2d 415 (1982).

94. 223 Va. at 269-70, 288 S.E.2d at 428.

95. See O. FISS & D. RENDLEMAN, *supra* note 6, at 77.

96. See generally D. DOBBS, *supra* note 5, §§ 1.1, 2.10; O. FISS & D. RENDLEMAN, *supra* note 6, at 58-59.

97. The substantiality of a violation might reflect a violator's good faith, which might in turn correlate more closely with the probability of future compliance, but the relationship is tenuous.

future.

Good faith, like substantiality, also should not determine the propriety of an injunction.<sup>98</sup> In *Nageotte* and *Richmond Newspapers*, the supreme court defined good faith broadly and, on minimal evidence, concluded that the defendants acted in good faith.<sup>99</sup> This result diminishes the effectiveness of the Act. If a defendant's good faith leads the court to refuse an injunction in the belief that violations will not occur in the future, and if the statute does not permit the court to assess fines for unintentional violations,<sup>100</sup> then defendants will be more likely to ignore the Act. The court's refusal to take action against officials who commit honest mistakes removes any incentive for the officials to avoid careless, inadvertent violations of the Act.

One rationale for granting a remedy in the absence of an intentional violation exists in the law of strict liability. The law attaches a cost to harmful behavior, despite the defendant's lack of moral culpability, in order to deter future harm by increasing the cost of a dangerous activity.<sup>101</sup> Like the law of strict liability, the Virginia Freedom of Information Act protects an important interest, the public's right to information about governmental actions. Ordinarily, harmful conduct results in a money judgment that both compensates the victim and deters future misconduct. Because compensating the entire public is impossible, however, money judgments are an inadequate remedy for violations of the Act. Moreover, courts should not allow public officials to buy violations of the Act which would frustrate the Act's substantive purpose of ensuring public access to information.

A violation of the Act should result in an injunction, which will deter future violations and avoid the impracticalities of money awards. An injunction will give public officials an appropriate in-

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98. By its language, the Act indicates that the General Assembly did not intend that good faith be a determinative element. See VA. CODE § 2.1-346 (1979). If the legislature intended to characterize good faith as a determinative factor, it could have required that a court "shall" issue an injunction if a single *bad* faith violation has occurred.

99. See *Nageotte v. King George County*, 223 Va. 259, 288 S.E.2d 423 (1982); *Marsh v. Richmond Newspapers*, 223 Va. 245, 288 S.E.2d 418 (1982).

100. A fine may be imposed only for willful violations. VA. CODE § 2.1-346.1 (1979).

101. RESTATEMENT (SECOND) OF TORTS § 402A (1977); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 98 (4th ed. 1971).

centive to observe the Act. A public official who is unsure whether the Act allows him to close a meeting will have an incentive to study the Act, rather than proceed in ignorance and claim that he acted in good faith, because a second violation may lead to contempt proceedings. Whether a defendant violates the Act in good faith or bad faith, the same harm results to the public. The objective of enforcement, therefore, should be to prevent both good faith and bad faith violations. The courts can reduce good faith and bad faith violations by issuing injunctions any time officials do not comply with the Act. This practice also will encourage other public officials to become familiar with the Act, thus giving effect to the Act's purpose.

The court can limit in two ways the extent to which a defendant may raise a defense of good faith. The court can continue to define broadly the concept of good faith, but require a defendant to prove, in addition to good faith, other factors indicating that his compliance in the future is likely and that an injunction is unnecessary. One factor that the court might consider is whether the defendant discontinued the violation promptly and effectively.<sup>102</sup> The United States Supreme Court considered this factor in *Hecht Co. v. Bowles*,<sup>103</sup> in deciding whether an injunction would effectively prevent the Hecht Company from committing additional violations of the Emergency Price Control Act. Upon realizing its violations, the defendant in *Hecht* corrected them immediately and took precautionary measures to ensure future compliance.<sup>104</sup> Reliance on the defendant's prompt discontinuation of violations, however, is probably not an appropriate or accurate method for determining whether a defendant will comply with the Virginia Freedom of Information Act in the future. Holding a closed meeting is not an ongoing violation, like price overcharging. Thus, a court should not consider the defendant's prompt cessation of a single violation as determinative of whether future violations of the Freedom of Information Act will occur.

Another factor that the courts might consider is whether the de-

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102. See Comment, *The Statutory Injunction as an Enforcement Weapon of Federal Agencies*, 57 YALE L.J. 1023, 1028 (1948).

103. 321 U.S. 321, 324 (1944).

104. *Id.* at 325-26.

fendant's attitude and reputation lend credence to his promise of future compliance or whether the public body has engaged in a pattern of noncompliance with the Act.<sup>105</sup> Determining reputation or establishing a pattern of noncompliance, however, is difficult. Moreover, if reputation or a pattern of noncompliance were determined solely by an objective measure, such as the number of previous violations of the Act, a violator could commit multiple violations before the court found sufficient grounds for relief.<sup>106</sup> Determining a general reputation in the community in a more subjective manner would not demonstrate accurately whether violations of the Freedom of Information Act were likely to occur in the future. Because of these difficulties, requiring a defendant to show the presence of some factor in addition to good faith is not an effective means of reducing judicial reliance on the defendant's good faith to justify the decision to deny an injunction.

A second means of minimizing the scope of a good faith defense is to increase the burden of proving good faith. To avoid an injunction, a court could require defendants to demonstrate more convincingly that they acted in good faith. The court, for example, could require violators to show strong supporting evidence that their noncompliance was inadvertent. A defendant could establish good faith by presenting evidence similar to the evidence produced in *Hecht*. Before violating the Emergency Price Control Act, the Hecht Company had created a price control office in an effort to ensure that the store complied with the regulation.<sup>107</sup> The complex nature of the regulation confused employees and resulted in subsequent violations.<sup>108</sup> After correcting the mistakes, the Hecht Company increased the staff in its price control office, returned overcharges to identifiable customers and offered to contribute the remainder to charity.<sup>109</sup> This behavior convincingly indicated the defendant's good faith.

One serious drawback to increasing the burden of proving good

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105. Federal courts have given weight to the defendant's reputation in several cases. See Comment, *supra* note 102, at 1028.

106. Multiple violations, however, would indicate an absence of good faith. If this factor were present, most courts probably would not inquire into the defendant's reputation.

107. 321 U.S. at 325.

108. *Id.*

109. *Id.* at 325-26.

faith is that the court will find that more violations are in bad faith; consequently, the court will subject a larger number of violators to civil fines for willfully violating the Act. Fines may be too harsh a remedy for those violators who cannot establish a good faith defense, but who have not acted willfully. Understandably, courts may attempt to avoid imposing fines by straining to find that these defendants acted in good faith. This approach would lead to the same result that occurs under the current broad definition of good faith; courts would not grant a remedy when a violation occurs.

A final possibility is for courts to create two different sets of requirements to decide the effects of good faith. The courts could apply one standard to determine whether to impose a fine, and a more demanding standard to determine whether to issue an injunction. Using two standards, however, probably would lead to confusion and, thus, is also an unsatisfactory alternative.

Good faith, therefore, should not be a significant factor in a court's decision to issue an injunction, whether the court considers other factors or raises the requirements for proving good faith. The best solution is to remove the court's discretion by legislation and to make injunctions mandatory whenever a violation occurs.

#### AMENDMENT TO PROVIDE ALTERNATIVE REMEDIES OR REMOVAL OF A COURT'S EQUITABLE DISCRETION

An amendment to the enforcement provision of the Virginia Freedom of Information Act could achieve the Act's substantive goals. The General Assembly could amend the Act to change the manner in which courts apply the remedies currently provided. Alternatively, the General Assembly could create new remedies for violations of the Act, such as removal from public office or criminal sanctions.

#### *Injunctions*

Rather than leaving injunctive relief to a court's discretion, the General Assembly could make this remedy mandatory by changing the wording of the statute.<sup>110</sup> The General Assembly could amend

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110. See *supra* notes 9-10 and accompanying text.

the statute to require an injunction regardless of the circumstances surrounding the violation. The language would have to be specific to remove any judicial doubt concerning the legislative intent.<sup>111</sup> Thus, even if the courts were certain that defendants would comply with the Act in the future, they could not refuse to grant injunctions.

Injunctive relief has many remedial advantages that are realized fully when an injunction is mandatory. Despite the frequently stated view that injunctions are harsh and extreme measures,<sup>112</sup> an injunction is a moderate means of enforcing Freedom of Information laws because it avoids the immediate imposition of criminal sanctions or money damages for past harms. Essentially, an injunction merely directs the defendant to avoid future violations; the threat of contempt proceedings if additional violations occur gives the injunction its bite.<sup>113</sup> Injunctions also provide an opportunity for courts to clarify vague sections of the Act in a relatively painless manner. Officials who violate the Act because its meaning is uncertain are not subject to any remedy other than being enjoined from repeating the violation.<sup>114</sup>

One potential problem in seeking injunctive relief in Freedom of Information Act suits is that courts are reluctant to issue an injunction in the absence of past violations. The defendant, therefore, can commit with impunity at least one violation of the Act before the interest of the public receives protection.<sup>115</sup> To ameliorate this problem, the General Assembly could amend the current enforcement provision to allow a party to seek an injunction whenever he reasonably anticipates that a defendant will violate the Act.<sup>116</sup> The existing statute does not require a violation to occur in

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111. See *supra* notes 9-11 and accompanying text.

112. See, e.g., *Nageotte v. King George County*, 223 Va. 259, 288 S.E.2d 423 (1982); *Marsh v. Richmond Newspapers*, 223 Va. 245, 288 S.E.2d 415 (1982).

113. See *Kalil, Florida Sunshine Law*, 49 FLA. B.J. 72, 78 (1975). See generally O. FISS & D. RENDLEMAN, *supra* note 6, at 58-59.

114. See *infra* text accompanying notes 123-24.

115. See *Kalil, supra* note 113, at 78; Note, *Open Meeting Statutes: The Press Fights for the "Right to Know"*, 75 HARV. L. REV. 1199, 1215 (1962). Of course, the court must impose a civil fine if the defendant's initial violation is willful. See *supra* note 67 and accompanying text.

116. Even without an amendment, the Virginia Supreme Court could interpret the existing statute to allow a court to grant injunctions when no previous violation has occurred.

order for a court to award an injunction; it requires only that a party show good cause to support the petition for an injunction.<sup>117</sup> The Virginia Supreme Court, however, has interpreted this good cause requirement as including proof of at least one previous violation.<sup>118</sup> By specifically providing that a court must grant an injunction whenever a party persuades the court that a violation is likely to occur, the General Assembly could reduce the number of violations of the Act that the public must endure before a court takes action.

One criticism of good cause provisions is that proof of an imminent violation of the statute is difficult in the absence of an earlier violation.<sup>119</sup> If public officials give advance notice of closed meetings, however, a court should consider the likelihood of a violation of the Act. The public should not have to endure the consequences of a violation, which include seeking an injunction against further violations and requesting that the court invalidate any nonexempt actions taken at the closed meeting.<sup>120</sup>

If the availability of an injunction is discretionary and a court is allowed to predict future compliance, the public's interest in open meetings will not be protected adequately.<sup>121</sup> The Virginia Supreme Court has asserted that an injunction is an extreme remedy,<sup>122</sup> but the court's refusal to remedy violations does not serve

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A Florida court interpreting Florida's sunshine law stated that a court may issue an injunction if a violation is imminent, even in the absence of a past violation. *Times Publishing Co. v. Williams*, 222 So. 2d 470, 476 (Fla. 1969).

117. VA. CODE § 2.1-346 (1979).

118. See *Nageotte v. King George County*, 223 Va. 259, 288 S.E.2d 423 (1982); *Marsh v. Richmond Newspapers*, 223 Va. 245, 288 S.E.2d 415 (1982); *WTAR Radio-TV v. City Council*, 216 Va. 892, 223 S.E.2d 895 (1976).

119. See Note, *Texas Open Meetings Act Has Potentially Broad Coverage but Suffers from Inadequate Enforcement Provisions*, 49 TEX. L. REV. 764, 774 (1971); Comment, *Open Meetings in Virginia: Fortifying the Virginia Freedom of Information Act*, 8 U. RICH. L. REV. 261, 269 (1974).

120. The Virginia statute provides that no final action taken in violation of the Act will become effective unless a vote is taken on the action in an open meeting. VA. CODE § 2.1-344 (1979 & Supp. 1983). Thus, a public body can frustrate the Act despite this provision by improperly holding a closed discussion and then validating the action by taking a vote in an open meeting with no open discussion. See *infra* text accompanying note 139.

121. See *supra* text accompanying notes 93-109.

122. See *Nageotte v. King George County*, 223 Va. 259, 288 S.E.2d 423 (1982); *Marsh v. Richmond Newspapers*, 223 Va. 245, 288 S.E.2d 415 (1982); *WTAR Radio-TV v. City Council*, 216 Va. 892, 223 S.E.2d 895 (1976).

the public policies underlying the Act. To be effective, an enforcement method must give defendants an incentive to stop violating the substantive interests involved, and thus must pose some negative consequences. The advantage of an injunction is that its negative effect, contempt proceedings for subsequent violations, occurs only upon the second violation rather than the first violation.<sup>123</sup> Thus, even if a court issues an injunction after a single violation, the only necessary negative effect of the injunction is the political embarrassment that a public official will suffer for violating the Act. The offender does not face a fine, jail term, or removal from office. For those who deliberately frustrate the public's right to open government, political embarrassment is not an excessive or unjust punishment. Moreover, to reduce the chance that an injunction may adversely affect officials acting in good faith, the General Assembly could amend the Act to allow officials who are uncertain about the legality of an action to seek a declaratory judgment to determine whether the action is lawful under the statute.<sup>124</sup>

### *Civil Fine*

In addition to permitting injunctions, the Virginia statute currently provides for a fine of not less than \$25 nor more than \$500 for willful and knowing violations.<sup>125</sup> Because a fine will not always place a financial burden upon an official who knowingly violates the Act, its effectiveness as a deterrent is questionable. But if a monetary loss alone is not meaningful to an official, the adverse publicity and political damage resulting from the levy of a fine against him for a willful violation may serve as a strong deterrent.<sup>126</sup>

By permitting fines for knowing violations only, the statute protects innocent violators from personal liability and abates potential damage to political careers.<sup>127</sup> The General Assembly could incor-

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123. See Kalil, *supra* note 113, at 78; Note, *supra* note 115, at 1215.

124. Iowa currently permits officials to seek declaratory judgments under its sunshine law. See IOWA CODE ANN. § 28A.6 (West Supp. 1983-1984).

125. VA. CODE § 2.1-346.1 (1979).

126. See Note, *supra* note 115, at 1215; Comment, *Open Meetings Laws: An Analysis and a Proposal*, 45 Miss. L.J. 1151, 1182 (1974).

127. See VA. CODE § 2.1-346.1 (1979) ("if it finds a violation was willfully and knowingly made, [a court] shall impose a civil [fine]").



porate additional protection into the Act by providing that an official will not be fined if he protests the action that is later found to violate the Act and records his objection in the minutes of the meeting at which the violation occurs.<sup>128</sup> This measure would prevent the Act from discouraging public service out of a fear of personal financial liability for misreading an ambiguous section of the statute or when insufficient time exists to seek a declaratory judgment. Moreover, the measure would protect officials who participate in a closed meeting after unsuccessfully attempting to open the meeting to the public.

A civil fine performs an important function in the enforcement scheme. Unlike invalidation, a fine affects individual officials rather than the official action.<sup>129</sup> Unlike an injunction, a fine punishes offenders who deliberately violate the Act by denying public access to meetings. A fine is not as harsh as criminal sanctions or removal from office, however, and is thus an appropriate measure to take against first-time willful offenders.

### *Invalidation*

In addition to providing injunctive relief and civil fines, the Virginia Freedom of Information Act states that no resolution, regulation, or rule that is passed in a closed meeting will become effective unless the public body reconvenes in an open meeting to vote on the measure.<sup>130</sup> This provision is similar to other sunshine laws that declare any action taken in violation of the statute to be void or voidable.<sup>131</sup> These provisions prevent public officials from benefiting from unlawful conduct and protect the public from the results of decisions in which they took no part.<sup>132</sup> Invalidation is both a deterrent and a corrective measure, therefore, and despite

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128. See Note, *New Jersey's Open Public Meetings Act: Has Five Years Brought "Sunshine" Over the Garden State?*, 12 RUTGERS L.J. 561, 575-76 (1981). For an example of such a provision, see N.J. STAT. ANN. § 10:4-17 (West 1976 & Supp. 1983-1984).

129. See Note, *The Iowa Open Meetings Act: A Lesson in Legislative Ineffectiveness*, 62 IOWA L. REV. 1108, 1137 (1977).

130. VA. CODE § 2.1-344(9)(c) (1979 & Supp. 1983).

131. See, e.g., ALASKA STAT. § 44.62.310 (1980); ARIZ. REV. STAT. ANN. § 38-431.05 (Supp. 1983-1984); ARK. STAT. ANN. § 12-2805 (1979); HAWAII REV. STAT. § 92-11 (1976).

132. See Note, *The Minnesota Open Meeting Law After Twenty Years—A Second Look*, 5 WM. MITCHELL L. REV. 375, 416 (1979).

the complications that can result from invalidating official actions, its effectiveness justifies its use as a means of enforcing the Act.

One frequent objection is that invalidation can affect contracts and other actions taken in reliance on an official decision.<sup>133</sup> Two measures can reduce the detrimental effects of invalidation. First, the statute could provide exceptions to the invalidation provision to protect matters that require stability and consistency, such as actions involving the public debt.<sup>134</sup> The General Assembly also could set a time limit on the period following a violation during which an invalidation action may be brought.<sup>135</sup> The period should be relatively brief in order to minimize the delay before officials can act on the decision, but the period must be long enough to allow a reasonable time for a party to file suit.<sup>136</sup>

Whether good faith violations of the Act should be invalidated is unclear.<sup>137</sup> Those who believe that inadvertent violations should not be invalid focus only on the deterrent value of invalidation. Invalidation serves another important goal, however, that no other method of enforcement can accomplish. Invalidation forces officials to cure a decision made in violation of the Act. The substantive purpose of the Act is to provide public access to official meetings and, whether the violation was knowing or inadvertent, any action that frustrates this purpose should be void.

Even if invalidation disrupts public business, invalidating only bad faith violations will not reduce the disruption significantly. A third party relying on a decision made at a closed meeting will not know whether the public officials inadvertently violated the Act or knowingly refused to follow it. Thus, invalidating only bad faith

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133. See Note, *supra* note 115, at 1214; Note, *supra* note 119, at 776; Note, *supra* note 132, at 417; Comment, *supra* note 119, at 270.

134. See, e.g., IND. CODE ANN. § 5-14-1.5-7(b) (Burns Supp. 1982); TENN. CODE ANN. § 8-44-105 (1980).

135. See Kalil, *supra* note 113, at 78; Note, *supra* note 129, at 1137; Note, *supra* note 119, at 776; Comment, *Invalidation as a Remedy for Open Meeting Law Violations*, 55 OR. L. REV. 519, 531 (1976).

136. Several state statutes contain limitations periods. See, e.g., GA. CODE ANN. § 50-14-1 (1982 & Supp. 1983); HAWAII REV. STAT. § 92-11 (1976); N.J. STAT. ANN. § 10:4-15 (West 1976 & Supp. 1983-1984). These periods may be as short as twenty-one days. See, e.g., MASS. GEN. LAWS ANN. ch. 39, § 23B (West Supp. 1983-1984).

137. See Note, *Pennsylvania's "Sunshine Law": Problems of Construction and Enforcement*, 124 U. PA. L. REV. 536, 554 (1975).

violations will not reduce instability because of uncertainty over the nature of a violation of the Act. If third parties have no way of predicting which decisions are invalid, they will hesitate to rely on any official action taken at a closed meeting.

The Virginia invalidation provision suffers from a problem that weakens similar state statutes. Only final actions are invalid; deliberations held in violation of the Act are not.<sup>138</sup> These provisions often lead to informal votes in which the public body deliberates privately and then brings the matter before the public for an immediate vote without further discussion.<sup>139</sup> This procedure deprives the public of knowledge about the reasons for the decision and frustrates the Act's purpose. Invalidating these deliberations is probably impractical,<sup>140</sup> but the General Assembly could provide that no action can be taken at a public meeting following closed deliberations conducted in violation of the Act unless the matter is reopened for full public discussion.

### *Criminal Sanctions*

Another common enforcement procedure not contained in the Virginia statute is the imposition of criminal sanctions.<sup>141</sup> The severity of this punitive means of enforcement accounts for its infrequent use. Even its unquestionable value as a deterrent does not offset the harshness of punishing persons whose only misconduct is holding a closed meeting. The object of the Freedom of Information Act is to make public officials responsive to the public, not to create criminal liability.<sup>142</sup> Moreover, the procedural requirements of criminal prosecutions, such as the reasonable doubt standard of proof, make criminal proceedings more cumbersome than civil actions.

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138. The General Assembly amended the Act in 1980 to require that an action discussed in closed session must "have its substance reasonably identified in the open meeting" before a vote on the action. VA. CODE § 2.1-344 (Supp. 1982). This provision, however, does not require public deliberation or discussion before the final vote.

139. See Note, *supra* note 129, at 1137; Comment, *supra* note 126, at 1181.

140. See Note, *supra* note 129, at 1137; Note, *supra* note 119, at 775; Comment, *supra* note 119, at 270.

141. Other states have provided criminal sanctions in their sunshine laws. See, e.g., ARK. STAT. ANN. § 12-2807 (1979); CONN. GEN. STAT. ANN. § 1-21k (Supp. 1983-1984); HAWAII REV. STAT. § 92-13 (1976).

142. See Comment, *supra* note 126, at 1178.

Imposing criminal penalties for any violation of the Act is a particularly inappropriate way to deal with officials who inadvertently violate the Act.<sup>143</sup> Public officials should not suffer criminal punishment for violations resulting from an honest misreading of confusing portions of the statute. Moreover, an official who cannot raise a good faith defense to a criminal action will have to decide on short notice whether to withdraw from the meeting and forego the opportunity to vote or to remain at the meeting and risk criminal sanctions.<sup>144</sup>

Criminal penalties might defeat the purpose of the statute altogether. Prosecutors might hesitate to bring criminal charges against their political allies,<sup>145</sup> but might prosecute their political opponents zealously. Thus the danger of potential abuse is significant. Due to the risk of prosecution, officials also might hesitate to test ambiguous sections of the statute. Finally, the potential for criminal sanctions may discourage qualified people from seeking public office.<sup>146</sup>

These numerous disadvantages have led several states to reject criminal provisions as a method of enforcing freedom of information statutes.<sup>147</sup> One alternative that avoids many of the problems of criminal sanctions, but carries the same strong deterrent effect, is removal from office.

### *Removal From Office*

Removal from office is gaining increased recognition and acceptance as an enforcement mechanism.<sup>148</sup> This sanction is a strong deterrent because, like criminal penalties, it operates directly against the violator rather than the official action.<sup>149</sup> Several characteris-

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143. See Kalil, *supra* note 113, at 77-78.

144. See Note, *supra* note 128, at 575-76.

145. See Kalil, *supra* note 113, at 78; Comment, *supra* note 126, at 1138; Comment, *supra* note 119, at 269.

146. See Note, *supra* note 119, at 774.

147. See, e.g., IND. CODE ANN. § 5-14-1.5-7 (Burns Supp. 1982); LA. REV. STAT. ANN. § 42:9 (West Supp. 1984).

148. Four states currently provide for removal from office in their open meeting statutes. See HAWAII REV. STAT. § 92-13 (1976); IOWA CODE ANN. § 28A.6(3)(d) (West Supp. 1983-1984); MINN. STAT. § 471.705(2) (1977 & Supp. 1983); OHIO REV. CODE ANN. § 121.22(H) (Page 1978 & Supp. 1982).

149. See Wickham, *Tennessee's Sunshine Law: A Need for Limited Shade and Clearer*

tics make removal from office more attractive than the imposition of criminal penalties. Removal from office is less likely to raise constitutional concerns<sup>150</sup> and avoids such criminal procedure requirements as proof beyond a reasonable doubt and unanimous jury verdicts.<sup>151</sup> Removal also does not stigmatize violators as criminals, and may be an even more effective deterrent than criminal sanctions.<sup>152</sup>

Critics of removal provisions assert that the public can remove willful violators through the normal electoral process.<sup>153</sup> The public, however, cannot completely protect its interest in open government through elections.<sup>154</sup> A removal from office provision prevents violations by nonelected officials and by elected officials who are not at the end of a term of office.<sup>155</sup> Another criticism of removal provisions is that they may lead to the removal of a good faith offender.<sup>156</sup> Limiting this sanction to situations involving repeated violations would eliminate this unpalatable result.<sup>157</sup> The sanction could be imposed, for example, only after two or more violations occur.<sup>158</sup> General agreement exists that a single violation could result from negligent rather than intentional action, but the commis-

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*Focus*, 42 TENN. L. REV. 557, 569 (1975).

150. The United States Supreme Court has defined the process required for removing government employees. See *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972). In these cases, the Court recognized a property interest in governmental employment that could not be infringed without cause. Presumably, violation of a sunshine law constitutes sufficient cause to satisfy the due process concerns. See Little & Tompkins, *Open Government Laws: An Insider's View*, 53 N.C.L. REV. 451, 481-82 & n.11 (1975).

151. Because removal from office is a remedy based on equitable principles, a court may employ equity procedures. See Little & Tompkins, *supra* note 150.

152. See Wickham, *supra* note 149, at 569-70; Note, *supra* note 132, at 412-13. Arguably, a public official would prefer to pay a fine, or perhaps even serve a jail sentence, than leave office under court order. See Little & Tompkins, *supra* note 150, at 481.

153. See, e.g., Kalil, *supra* note 113, at 78.

154. *Id.*

155. See Wickham, *supra* note 149, at 569; Note, *supra* note 129, at 1138; Comment, *supra* note 126, at 1183.

156. See Comment, *Entering the Door Opened: An Evolution of Rights of Public Access to Governmental Deliberations in Louisiana and a Plea for Realistic Remedies*, 41 LA. L. REV. 192, 217 (1980).

157. See Kalil, *supra* note 113, at 78; Wickham, *supra* note 149, at 569.

158. See Wickham, *supra* note 149, at 569; Note, *supra* note 129, at 1138; Note, *supra* note 132, at 412-13; Comment, *supra* note 126, at 1182-83.

sion of several violations seldom results from inadvertence.<sup>159</sup> In addition, the statute could grant the violator the right to a jury trial.<sup>160</sup> A final criticism of removal is that it provides no enforcement for the first and second offenses.<sup>161</sup> Combining the removal provision with the imposition of civil fines for first and second time offenders would eliminate this problem.

Of the four states that currently have freedom of information statutes providing for removal from office, two do not require repeated violations but leave removal to the discretion of the judge or jury.<sup>162</sup> The statutes in the other two states make removal mandatory upon the third violation.<sup>163</sup> Determining whether an official violated the Act inadvertently or intentionally may not be easy. Allowing removal on the basis of a single violation, therefore, reduces the protection afforded good faith violators who should not be subject to this harsh sanction. A multiple violation requirement would protect public officials who act in good faith. Additionally, the statute could provide that each violation must be established in separate legal proceedings. This requirement would ensure that the defendant received proper notice that further violations might lead to his removal from office.

#### RECOMMENDATIONS

The Virginia Freedom of Information Act has been inadequately and ineffectively enforced. The lack of meaningful remedies, and the exercise of excessive judicial discretion in applying them, account for this result. Several solutions to this problem exist. The General Assembly should amend the Act to provide for mandatory injunctive relief. Absent a prior violation, an injunction should be granted whenever a party shows good reason for expecting that an official will violate the Act. The Act also should provide that a public official will be removed from office if a court finds willful violations on at least two separate occasions. This provision also

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159. See Note, *supra* note 132, at 413; Comment, *supra* note 126, at 1183.

160. See Wickham, *supra* note 149, at 569.

161. See Note, *supra* note 129, at 1138; Comment, *supra* note 156, at 217.

162. See HAWAII REV. STAT. § 92-13 (1976); OHIO REV. CODE ANN. § 121.22(H) (Page 1978 & Supp. 1982).

163. See IOWA CODE ANN. § 28A.6(3)(d) (West Supp. 1983-1984); MINN. STAT. § 471.705(2) (1977 & Supp. 1983).

should guarantee the violator the right to a jury trial.

In addition to more precise remedies, the General Assembly should provide certain safeguards for public officials. These should include a provision allowing public officials to seek declaratory judgments concerning the legality of contemplated actions. If a public official unsuccessfully objects to the closing of a meeting and enters that objection in the record, his participation in the meeting should constitute only a good faith violation.

The General Assembly should require that any nonexempt matters discussed at a closed meeting be reopened for public debate before final action. Any actions, including those taken in good faith, should be ineffective if taken in violation of the Act. A brief statute of limitations period should apply to suits filed to invalidate an action taken at a closed meeting.<sup>164</sup> Finally, the General Assembly should provide an exception to invalidation for actions that concern the public debt, and for similar matters requiring stability.

Adopting these provisions will force public officials to give the Act serious attention. The remedies will deter potential violators and caution others to familiarize themselves with all aspects of the Freedom of Information Act. Although some of the remedies are potentially onerous, adequate safeguards will prevent unfair results. With thorough and effective remedial provisions, the Virginia Freedom of Information Act can secure the public's right to information about governmental actions.

ELEANOR BARRY KNOTH

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164. This relatively brief limitation period should apply only to invalidation actions, and should not apply to judicial proceedings against violators of the Act.