

OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

WEST VIRGINIA

**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

OPEN GOVERNMENT GUIDE

OPEN RECORDS AND MEETINGS LAWS IN

WEST VIRGINIA

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Previously Titled
Tapping Officials' Secrets

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Contents

Introductory Note	iv	V. PROCEDURE FOR OBTAINING RECORDS	23
User’s Guide	v	A. How to start.	23
FOREWORD	1	B. How long to wait.	23
Open Records	4	C. Administrative appeal.	24
I. STATUTE -- BASIC APPLICATION.	4	D. Court action.	24
A. Who can request records?	4	E. Appealing initial court decisions.	26
B. Whose records are and are not subject to the act?	4	F. Addressing government suits against disclosure.	26
C. What records are and are not subject to the act?	6	Open Meetings	27
D. Fee provisions or practices.	7	I. STATUTE -- BASIC APPLICATION.	27
E. Who enforces the act?	8	A. Who may attend?	27
F. Are there sanctions for noncompliance?	8	B. What governments are subject to the law?	27
II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS	8	C. What bodies are covered by the law?	27
A. Exemptions in the open records statute.	8	D. What constitutes a meeting subject to the law.	28
B. Other statutory exclusions.	16	E. Categories of meetings subject to the law.	29
C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.	16	F. Recording/broadcast of meetings.	31
D. Are segregable portions of records containing exempt material available?	16	G. Are there sanctions for noncompliance?	32
E. Homeland Security Measures.	17	II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS	32
III. STATE LAW ON ELECTRONIC RECORDS	17	A. Exemptions in the open meetings statute.	32
A. Can the requester choose a format for receiving records?	17	B. Any other statutory requirements for closed or open meetings. 33	
B. Can the requester obtain a customized search of computer databases to fit particular needs?	17	C. Court mandated opening, closing.	33
C. Does the existence of information in electronic format affect its openness?	17	III. MEETING CATEGORIES -- OPEN OR CLOSED.	34
D. How is e-mail treated?	17	A. Adjudications by administrative bodies.	34
E. How are text messages and instant messages treated?	18	B. Budget sessions.	34
F. How are social media postings and messages treated?	18	C. Business and industry relations.	34
G. How are online discussion board posts treated?	18	D. Federal programs.	34
H. Computer software.	18	E. Financial data of public bodies.	34
I. How are fees for electronic records assessed?	18	F. Financial data, trade secrets or proprietary data of private corporations and individuals.	34
J. Money-making schemes.	18	G. Gifts, trusts and honorary degrees.	34
K. On-line dissemination.	18	H. Grand jury testimony by public employees.	34
IV. RECORD CATEGORIES -- OPEN OR CLOSED.	18	I. Licensing examinations.	35
A. Autopsy reports.	18	J. Litigation; pending litigation or other attorney-client privileges.	35
B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)	19	K. Negotiations and collective bargaining of public employees.	35
C. Bank records.	19	L. Parole board meetings, or meetings involving parole board decisions.	35
D. Budgets.	19	M. Patients; discussions on individual patients.	35
E. Business records, financial data, trade secrets.	19	N. Personnel matters.	35
F. Contracts, proposals and bids.	19	O. Real estate negotiations.	35
G. Collective bargaining records.	20	P. Security, national and/or state, of buildings, personnel or other.	35
H. Coroners reports.	20	Q. Students; discussions on individual students.	35
I. Economic development records.	20	IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS	35
J. Election records.	20	A. When to challenge.	35
K. Gun permits.	20	B. How to start.	36
L. Hospital reports.	20	C. Court review of administrative decision.	37
M. Personnel records.	21	D. Appealing initial court decisions.	38
N. Police records.	21	V. ASSERTING A RIGHT TO COMMENT.	38
O. Prison, parole and probation reports.	22	A. Is there a right to participate in public meetings?	38
P. Public utility records.	22	B. Must a commenter give notice of intentions to comment?	38
Q. Real estate appraisals, negotiations.	22	C. Can a public body limit comment?	38
R. School and university records.	22	D. How can a participant assert rights to comment?	38
S. Vital statistics.	22	E. Are there sanctions for unapproved comment?	38
		Statute.	39

Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

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FOREWORD

There have been several important court decisions interpreting West Virginia's Freedom of Information Act (FOIA) since the Fifth Edition of this guide was published in 2006 and three exemptions to the Act added by amendment. The Open Governmental Proceedings Act (called "the Sunshine Law" in West Virginia, but referred to herein as the Open Meetings Act) has not been amended since 1999.

The West Virginia Freedom of Information Act begins with an emphatic declaration that the people of the state demand an open government:

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people and not the master of them, it is the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.

W. Va. Code § 29B-1-1. The state's Open Meetings Act contained a similar unequivocal declaration in favor of broad public access to governmental proceedings until it was amended in 1999. W. Va. Code § 6-9A-1.

In 1992, the West Virginia Legislature amended § 29B-1-3 of the FOIA to require records existing "in magnetic, electronic or computer form" be made available on magnetic or electronic or magnetic media, and a new section, § 29B-1-7, that provides for payment of attorney fees and court costs to successful litigants who have been denied access to public records. The following year the Legislature amended the Open Meetings Act to include standing committees of the Legislature in the definition of "governing body" and added provisions in § 6-9A-6 to provide for attorney fees and fines for intentional violations. Attempts to revise the state's FOIA and Open Meetings Acts during the 1996 and 1997 legislative session, however, proved too controversial. However, in 1997, a paragraph was inserted into a bill amending an economic development section of the Code (W. Va. Code § 5B-2-1). That amendment essentially barred public access to documents made or received by a "public body, whose primary responsibility is economic development, for the purpose of furnishing assistance to a new or existing business" and effectively concealed from public scrutiny

the bulk of records pertaining to state economic development activities.

The West Virginia Legislature responded to the September 11, 2001 terrorist attacks by amending FOIA seeking to block terrorist access to certain sensitive state government information. The amendments added to W.Va. Code § 29B-1-4 eight new exemptions from public disclosure; those exemptions bar access to information that would have a detrimental effect on public safety or public health. These amendments have the effect not only of blocking terrorists' ability to obtain sensitive information through FOIA, but have the potential to limit public access as well.

With a few exceptions the West Virginia Supreme Court of Appeals has shown a willingness to liberally interpret the state FOIA and open meetings statutes. The court frequently has held the disclosure provisions of FOIA are to be liberally construed and the exemptions are to be strictly construed. *Shepherdstown Observer v. Inc. v. Maghan*, 226 W.Va. 353, 700 S.E.2d 805 (2010). *Daily Gazette v. W. Va. Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996); *Ogden Newspapers v. City of Charleston*, 192 W. Va. 648, 453 S.E.2d 631 (1994). *But see, State v. Brotherton*, 214 W. Va. 434, 589 S.E.2d 812 (2003), where the court held that FOIA could not be used by state prison inmates to obtain court records for the purpose of filing *habeas corpus* petitions and *Associated Press v. Canterbury*, 224 W.Va. 708, 688 S.E.2d 317 (2009), in which the court held that only the content and not the context of emails sent by a public body through a government operated internet server could be considered in determining whether such communications were public records under the Act.

Similarly, in case interpreting the Open Meetings Act, the Court held that the Act should be read expansively since a "narrow reading would frustrate the legislative intent and negate the purpose of the statute." *McComas v. Board of Education of Fayette County*, 197 W. Va. 188, 475 S.E.2d 280, 289 (1996). This was clear, in part, from the constitutional underpinnings of the Act:

[The] declaration, and the Act generally, implement grand and fundamental provisions in our State Constitution. Those provisions, adopted from Virginia's Declaration of Rights, proclaim the theory of our form of government and embrace Article II, § 2 (powers of government in citizens) and Article III, § 2 (magistrates servants of people) and § 3 (rights reserved to people). Together they dramatically call for a political system in which the people are the sovereigns and those in government are their servants. Naturally, servants should be loath to exclude their sovereigns from any substantive deliberations. As is obvious from the declaration of policy in W. Va. Code § 6-9A-1, that is precisely the sentiment inspired by the Sunshine Act.

Id.

The Supreme Court of West Virginia also has shown a willingness to identify additional sources for public access to official information. When faced with practical problems not specifically addressed by the FOIA or the Open Meetings Act, (e.g., when the disclosure of personal information would be "unreasonable") the Supreme Court has fashioned "innovative measures" to provide public access while protecting other legitimate interests. *Child Protection Group v. Clime*, 177 W. Va. 29, 350 S.E.2d 541, 545 (1986). The court also directed the lower courts of the state to do likewise and to remember, "the fullest responsible disclosure, not confidentiality, is the dominant objective" of these statutes. *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799, 810 (1985).

In several decisions, however, the Supreme Court has shown a slight willingness to narrow the breadth of prior rulings. *State v. Brotherton*, 214 W. Va. 434, 589 S.E.2d 812 (2003) (FOIA not available to state prison inmates seeking to obtain court records for the purpose of filing *habeas corpus* petitions); *Affiliated Construction Trades Foundation v. Regional Jail And Correctional Authority*, 200 W. Va. 621, 490 S.E.2d 708 (1997) (Where public body has unexercised right to

obtain copy of writing relating to the conduct of the public's business which was prepared and retained by private party, that fact alone does not mean the writing is "public record" under FOIA.) *Associated Press v. Canterbury*, 224 W.Va. 708, 688 S.E.2d 317 (2009) (court held that only the content and not the context of emails sent by a public body through a government operated internet server could be considered in determining whether such communications were public records under the Act).

Prior to passage of the Acts, the state Supreme Court identified the mechanisms by which the public could obtain access to information regarding the operation of government. These mechanisms remain available in addition to and independent of the FOIA and Open Meetings statutes. The first of these additional sources is the common law right of access to public records. This traditional common law right is more restrictive than the FOIA in one respect, since it requires both that the requester have a legally cognizable "interest" in the records and that the information be sought for a "useful and legitimate purpose." *State v. Harrison*, 130 W. Va. 246, 254, 43 S.E.2d 214, 218 (1947). However, where the information pertains to the functions of government, the interest of any citizen in "being fully informed on the activities and conduct of its government and the elected officers thereof" generally is sufficient to fulfill these requirements. *Charleston Mail Association v. Kelly*, 149 W. Va. 766, 770, 143 S.E.2d 136, 139 (1965).

In West Virginia, the common law right retains considerable importance since it not only gives citizens a right to inspect public records, but also imposes a duty on government officials to create and maintain written records reflecting activities of government:

There is no obligation under the State FOIA to create any particular record, but only to provide access to a public record already created and which is 'retained' by the public body in question . . . [T]he common law in this state does require a public official to create and maintain such documents involving the public official in an official capacity. The State FOIA and the common law principles are not, therefore, coextensive but are interrelated.

Daily Gazette v. Withrow, 177 W. Va. 110, 350 S.E.2d 738, 746 n.9 (1986). The *Withrow* ruling is an important one, since the lack of an existing record is a frequent barrier to obtaining information under the federal FOIA and those of other states. However, the potential scope of *Withrow's* holding has been limited somewhat by *Affiliated Construction Trades Foundation v. Regional Jail And Correctional Authority*, 200 W. Va. 621, 490 S.E.2d 708 (1997). *Affiliated Construction Trades Foundation* held that a state public body may not have to request a copy of a writing relating to the conduct of the public's business which was prepared and is retained by a private party. The fact that the public body has an unexercised right to obtain such a writing does not, alone, mean the writing is "public record" subject to disclosure under FOIA.

The Supreme Court also has recognized particular statutory provisions might provide a broader right of access to certain types of information than the FOIA. In *Richardson v. Town of Kimball*, 176 W. Va. 24, 340 S.E.2d 582 (1986), for example, the court ruled a statute which mandates most court records be open to the public creates an absolute right of access to those records. In *Maclay v Jones*, 208 W. Va. 569, 542 S.E.2d 83 (2000), the court held that public records exempt from disclosure under FOIA may be have to be produced in response to civil discovery requests in litigation.

In some of its most important access rulings, the Supreme Court of Appeals has held the West Virginia Constitution's mandate that "the courts of this state shall be open" creates a "fundamental constitutional right of access" to civil and criminal judicial proceedings, as well as to the records and proceedings of quasi-judicial agencies. The court has relied on this provision to require broad public access to disciplinary proceedings against attorneys and physicians, and to require licensing agencies to create a written public record justifying their action whenever they dismiss a complaint against an attorney or physician without a hearing. *Daily Gazette v. W. Va. State Bar*, 176 W. Va. 550, 326 S.E.2d 705, 706 (1984); *Daily Gazette v. W. Va. Board of Medicine*, 177 W. Va.

316, 352 S.E.2d 66 (1986); *Thompson v. W. Va. Board of Osteopathy*, 191 W. Va. 15, 442 S.E.2d 712 (1994). These rulings apply to all agencies exercising quasi-judicial powers and provide a much broader access right to these proceedings than would be available under the Freedom of Information or Open Meetings Acts.

Finally, the court's access decisions have recognized the essential role played by the press in transmitting information concerning governmental action to the citizens of the state:

Once the right in the public to attend the trial is acknowledged, the same right must be accorded members of the press. The press not only constitutes a part of the general public, but it is well established that it operates in a special capacity as an agent or surrogate for the general public in its gathering and dissemination of information. This special status rests on a realistic recognition that it is impossible for any meaningful number of the general public to abandon their daily pursuits to attend trials, and a further acknowledgement that the press has valuable expertise in ferreting out information difficult for the general public to obtain.

State ex rel. Herald Mail Co. v. Hamilton, 165 W. Va. 103, 267 S.E.2d 544 (1980).

So long as the general judicial attitude toward openness reflected in these cases continues, the Freedom of Information Act and Open Meetings Act will be important to reporters and the public generally in attempts to obtain information regarding the functions of government.

Open Meetings Act.

Enacted in 1975, the Open Meetings Act provides:

The Legislature hereby finds and declares that public agencies with in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for all proceedings of public agencies to be conducted openly with only a few clearly defined exceptions. The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government created by them.

W. Va. Code § 6-9A-1. With this statement of legislative purpose, the West Virginia Legislature in 1975 enacted the Open Governmental Meetings Act, W. Va. Code § 6-9A- *et seq.*, sometimes referred to here as the Open Meetings Act. The statute is sometimes called the Sunshine Law or Government in the Sunshine Act. As indicated in the statement of purpose, the Act seeks to provide broad public right to be present at the meetings of government agencies.

In 1999 the West Virginia Legislature amended this declaration adding the following language:

The Legislature finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decisionmaking.

This amendment is problematic; it most likely was intended to emphasize that some discussions between decisionmakers in an informal setting and discussions with legal counsel are not required to be held

in an open meeting. Other substantive 1999 amendments to the Act appear to implement this intent. See W.Va.Code § § 6-9A-2(4)(D) & 6-9A-11. The amended declaration of legislative policy may be interpreted as inviting courts to use a balancing test in interpreting the statute. No cases have been decided in which this amended policy is mentioned. The amendment could be construed to narrow public rights of access to meetings. Whether courts will so construe this provision remains to be seen.

The court in *Appalachian Power Co. v. Public Service Commission*, 162 W. Va. 839, 253 S.E.2d 377 (1979), emphasized the law's legislative purpose:

The foregoing statement is without doubt laudable, and we agree wholeheartedly with the intent expressed therein. However, it is unfortunate that the actual words of the Act fail to properly implement this lofty policy. Curiously it is as if the Act and the statement of policy were written by two different kinds of individuals without communication or knowledge of each other's intent or actions.

Id. at 385 n.6. Indeed, as *Appalachian Power* indicates, there were some limitations in the language of the Open Meetings Act that rendered it less expansive than the Legislature may have intended. A 1996 decision of the West Virginia Supreme Court of Appeals interpreted the Open Meetings Act in a way that appeared to significantly broaden public's access to governmental meetings. *McComas v. Fayette County Board Of Education*, 197 W. Va. 188, 475 S.E.2d 280 (1996). Subsequently, the Legislature amended the Act narrowing the breadth of *McComas* insofar as it addresses whether discussions between public officials during informal social, educational, training, ceremonial and similar settings fall within the purview of the law. See W.Va.Code § 6-9A-2 (4) (D). The impact of the interaction of the *McComas* decision and the 1999 amendments has not yet been addressed by the Court. Prior to enactment of the Open Meetings Act, the public had no comprehensive right of access to governmental meetings. Specific statutes provided varying degrees of access to meetings of different governmental bodies. See, e.g., *Casto v. Board of Education*, 38 W. Va. 707, 18 S.E. 923 (1894) (public meeting required for appointment of teachers so "the patrons of the school may know what is transpiring, and give the trustees invaluable information touching the morality, capacity, and fitness of the teacher"); *State ex rel. Withrow v. Surface*, 110 W. Va. 237, 157 S.E. 402 (1931) (invalidating act of county court in special session because adequate public notice of meeting was not given).

Other than the statement of purpose, there is no legislative history available recording what initially prompted the Legislature to enact the Open Meetings Act in 1975. The statute has been amended four times — in 1978, 1987, 1993 and 1999 — since its passage. The first two amendments were directed toward the most glaring deficiency in the original statute: the lack of a requirement that the public body give advance notice of its meetings. When it was first enacted, the Open Meetings Act contained no notice requirement whatsoever. In 1978, the statute was amended to require that "[e]ach governing body shall promulgate rules by which the time and place of all regularly scheduled meetings and the time, place and purpose of all special meetings are made available, in advance, to the public and news media, except in the event of an emergency requiring immediate official action." W. Va. Code § 6-9A-3. In 1987, the section was again amended to require notice of state executive agency meetings be published in the state register at least five days prior to the meeting date. (All other public bodies could still determine their own notice procedure by regulation.)

Although the Secretary of State has no enforcement powers under the Open Meetings Act, under some administrations the office has strongly supported the enforcement of the Open Meetings Act, especially its' meeting notice requirements. =

The Secretary of State publishes information relating to notice of meetings subject the law in the state register and in the case of regula-

tions, also in the Code of State Regulations. The Register is a weekly publication that is available by subscription. The Code of State Regulations represents the codification of all final state agency rules and regulations. State agency open meeting regulations must be published in the Code of State Regulations. This information may be accessed via the Secretary's website (<http://www.sos.wv.gov/administrative-law/register/Pages/openmeetings.aspx>) that

provides information on all rules promulgated by West Virginia State agencies and incorporated into the Code of State Regulations as well as rules proposed for public comment. Final and proposed rules may be located through the Secretary's homepage found at: www.wv-sos.com/main.htm.

State agency notices of meetings, as well as proposed and final regulations, must be filed with the Secretary of State's office Notices of meetings in time for notices to appear in the State Register five days prior to a scheduled meeting. Compliance with this mandate is monitored by a daily newspaper (*The Charleston Gazette*) that lists agencies that have failed to comply. (<http://blogs.wvgazette.com/watchdog/>). A list of current, future or historical meetings may be found at <http://apps.sos.wv.gov/meeting-notices/default.aspx>

That site also contains a general discussion of when prior public notice must be given as required by the Open Meetings Law: www.wvsos.com/adlaw/register/aboutmeetingnotices.htm. A telephone inquiry to the Secretary of State's office (304/558-6000) should reveal whether a particular agency has adopted Open Meetings regulations or has given notice of any pending meeting. Written questions relating to the Open Meetings law may be directed to the Secretary of State through the internet (<http://www.sos.wv.gov/Pages/contact-adlaw.aspx>) At times the state register will note a particular agency's non-compliance with the Open Meetings Act. The Secretary of State's Administrative Law office maintains a permanent record of the meeting notices that fail to comply with the requirements of the statute.

In the 1990s, the Office of the Attorney General of West Virginia (304/558-2021) also emerged as a leading supporter of the public's right of access to governmental information. The Attorney General has invited inquiries from all state boards and commissions concerning the state's FOIA and for advice or assistance regarding compliance with these acts or in responding to FOIA requests. Moreover, the 1999 amendments to the Open Meetings Act impose specific duties upon the Attorney General to assist state and municipal government bodies and officials in achieving compliance with that statute. W.Va.Code § 6-9A-12. The Web site of the Office of the Attorney General provides access to an excellent summary of the requirements of the Open Meetings Act: <http://www.wvago.gov/pdf/OpenMeetingsHandbook2006.pdf>

The 1999 amendments to the Open Meeting Law § 6-9A-11 requires the West Virginia Ethics Commission to rule on requests for advisory opinions regarding interpretations of that statute. Any person subject to the provisions of the Act may request an opinion concerning his or her own conduct. This includes an elected or appointed public official or a public employee of State, county or local government. An individual may inquire as to whether she or he is subject to the Ethics Act. The Commission will not respond to requests for written advice on the propriety of someone else's conduct. The identity of the requester will not be disclosed in the Commission's written opinion.

Information relating to such advisory opinions is available online at: <http://www.ethics.wv.gov/advisoryopinion/Pages/default.aspx>. Any governing body or member thereof subject to the law may seek advice and information from the executive director of the West Virginia ethics commission or request in writing an advisory opinion from the West Virginia Ethics Commission Committee on Open Governmental Meetings as to whether an action or proposed action violates the law. Requests for a formal advisory opinion must be submitted to the West Virginia Ethics Commission in writing at 210 Brooks St., Charleston, WV 25301, Phone (304) 558-0664, WV Toll Free 1-866-

558-0664, Fax (304) 558-2169. The letter should contain a complete statement of the facts, including your name, your official position, a brief description of the powers of your agency, commission or office and the nature of the issue. The members of the Commission will review your letter, but their deliberations and written response will not disclose your name or the identity of your specific public entity.

General information concerning the Open Meetings Act is available on the Ethics Commission website: <http://www.ethics.wv.gov/openmeetings/Pages/default.aspx>

The executive director of the Ethics Commission may render oral advice and information upon request. The committee is required to respond in writing and in an expeditious manner to a request for an advisory opinion. The opinion is binding on the requesting parties. The Ethics Commission's advisory opinions are available at: <http://www.ethics.wv.gov/advisoryopinion/Pages/OpenMeetingsOpinions.aspx>. The same section provides that when an advisory opinion is requested and the requester acts in good faith reliance on the opinion, he/she has an absolute defense to any civil suit or criminal prosecution for any action taken in good faith reliance — unless the committee was willfully and intentionally misinformed as to the facts by the requester. Section 6-9A-11 does not appear to provide for members of the public to request such an advisory opinion.

(c) The committee and commission may take appropriate action to protect from disclosure information which is properly shielded by an exception provided for in section four [§ 6-9A-4] of this article. (1999, c. 208.)

This edition of the West Virginia Open Government Guide expands upon and amends earlier initial editions the work of authored by attorneys Rudy diTrapano, D.L. Hamilton, and Rebecca Baitty; their excellent work is acknowledged with appreciation.

Open Records

I. STATUTE -- BASIC APPLICATION

The Freedom of Information Act's declaration of policy, which is quoted in the Foreword, is the only indication of the legislative intent underlying the statute. There is no recorded legislative history relating to either the statute's original enactment in 1977 or its subsequent amendments. However, the state Supreme Court of Appeals has quoted the FOIA policy declaration repeatedly in its opinions. *Daily Gazette v. W. Va. Development Office, supra*; *Ogden Newspapers v. City of Charleston*, 192 W. Va. 648, 453 S.E.2d 631 (1994). West Virginia's Supreme Court has mandated "the fullest possible disclosure" of information concerning government. *Hechler v. Casey*, 333 S.E.2d at 808.

A. Who can request records?

Any person or entity may obtain access to records through the Freedom of Information Act. The statute provides that "[e]very person has a right to inspect or copy any public record" and specifies the term "[P]erson" includes any natural person, corporation, partnership, firm or association." W. Va. Code § 29B-1-2.

In general, the requester's purpose does not affect his right to receive records under the Freedom of Information Act, and the statute places no restrictions on the subsequent use of information obtained. However, if the request is for "information of a personal nature such as that kept in a personal, medical or similar file," the requester must have a "legitimate interest" in order to obtain the information. *Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988). In such cases, the purpose of the request is one factor in the balancing test used by the courts to determine whether access should be allowed. A court may impose restrictions on the subsequent use of any personal information that is released. *Child Protection Group v. Cline*, 350 S.E.2d at 543. This issue is discussed later in this outline, under the section on the Freedom of Information Act's exemptions.

1. Status of requestor.

Any person or entity may obtain access to records.

2. Purpose of request.

It is not necessary for a requester to indicate the purpose for a request. It may, however, be advisable in some circumstances to so indicate if that purpose is one that the public body receiving the request is likely to endorse.

3. Use of records.

It is not necessary for a requester to indicate the use intended for the documents requested. It may, however, be advisable in some circumstances to indicate the underlying purpose if it is one that the public body receiving the request is likely to endorse or at least toward which the agency will have no negative reaction.

B. Whose records are and are not subject to the act?

The Freedom of Information Act applies to every branch of government, and no agency is entirely exempt from its provisions. The Act applies to every "public body," and that term is defined broadly:

'Public body' means every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other body which is created by state or local authority or which is primarily funded by the state or local authority.

W. Va. Code § 29B-1-2(3).

1. Executive branch.

Since every individual state officer constitutes a “public body” under the Freedom of Information Act (*cf. Daily Gazette v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1986)), the records of the executives themselves (governor, mayor, other chief executive) are subject to the act so long as they “contain information relating to the public’s business.” The FOIA makes no other distinctions based upon the functions of a public agency.

a. Records of the executives themselves.

Where a document involves “personal” conduct in addition to “official” conduct of the public body, it is possible that the “invasion of privacy” exemption set forth in *W.Va. Code* § 29B-1-4(2) may apply. If that exemption were held to apply, the court would use a balancing test to determine whether and in what circumstances such information may be disclosed. See, *Daily Gazette v. Withrow*, 177 W. Va. 110, 166; 350 S.E.2d 738, 744 (1986), *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (W.Va.1986); *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799, 809-12 (1985).

2. Legislative bodies.

Records of legislative bodies are subject to the FOIA to the same extent as records of any other public body. In *Common Cause of West Virginia v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991), the state Supreme Court invalidated the process by which the Legislature’s Conferees Committee on the Budget traditionally prepared an informal but influential budget “digest” setting forth its view of the specific purposes for which general appropriations should be used. The court ruled the contents of the digest must be determined by the Conferees Committee in a public meeting, and the Committee must create and maintain for public inspection “memoranda of the negotiations, compromises and agreements or audio recordings of committee or subcommittee meetings where votes were taken or discussions had that substantiate the material which is organized and memorialized in the Budget Digest.” *Id.*, Syllabus pt. 5.

3. Courts.

Court records are open to public inspection under the Freedom of Information Act. *Associated Press v. Canterbury*, 224 W.Va. 708, 688 S.E.2d 317 (2009). Access to court records is also guaranteed by the open courts provision of the state constitution (W. Va. Constitution, Article III, § 17) (*see Daily Gazette v. W. Va. State Bar*, 326 S.E.2d 705, Syllabus pt. 4) and by *W. Va. Code* § 51-4-2 (1981), which the Supreme Court applied in *Richardson v. Town of Kimball*, *supra*.

There are several specific statutes, however, which make certain categories of court records confidential, including certain court records relating to divorce (W. Va. Code § 48-2-27) and adoption (W. Va. Code § 48-4-10), and juvenile records (W. Va. Code §§ 49-5-17, 49-7-1; these sections were amended in 1997 to broaden the disclosure of juvenile records), tax information (11-10-5d), and economic development assistance (W. Va. Code § 5B-2-1). However, even though certain court information is made confidential by statute, *State ex rel. Daily Mail Pub. Co. v. Smith*, 161 W. Va. 684, 248 S.E.2d 269 (1978), *aff’d*, 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979), held that reporters cannot be punished for publishing lawfully obtained, truthful information of public interest.

4. Nongovernmental bodies.

a. Bodies receiving public funds or benefits.

The Freedom of Information Act applies to “any other body . . . which is primarily funded by [a] state or local authority.” In *4-H Road Community Association v. W. Va. University Foundation*, 182 W. Va. 434, 388 S.E.2d 308 (1989), the Supreme Court ruled that receipt by the WVU Foundation of private contributions intended to support the state university, and the Foundation’s use of state property for a nominal fee under an arrangement primarily benefiting the University

rather than the Foundation, were not sufficient to make the Foundation a body “primarily funded” by governmental authority. While there has been significant criticism of that decision by the media and members of the bar, there has been no change in the statute or the law interpreting it. Such bodies remain outside the purview of the FOIA act. *Cf., Queen v. W. Va. University Hospitals*, 179 W. Va. 95, 365 S.E.2d 375 (1987).

b. Bodies whose members include governmental officials.

The FOIA does not specifically apply to nongovernmental bodies whose members include governmental officials, unless the body “is created by state or local authority or . . . is primarily funded by the state or local authority.” *W. Va. Code* § 29B-1-2(3).

In *Queen v. W. Va. University Hospitals*, 179 W. Va. 95, 365 S.E.2d 375 (1987), the state Supreme Court ruled the FOIA applies to the WVU Hospitals corporation (WVUH) because, even though it was a “private” corporation “established under the general corporate provisions of West Virginia law,” the corporation was created to take over and operate the university’s medical center, and the corporation’s exclusive function was made possible by an enabling statute which “laid out very specific requirements that the corporation had to meet. . . . Unlike the normal corporate entity, the statute was the *sine qua non* leading to the incorporation of WVUH and that body was, therefore, created by state authority.” *Id.* at 386-87. The primary factors leading to the court’s decision were that the new corporation “has statutorily specified purposes and directors, primarily public officers, who have fiduciary duties to the people of the state.” *Id.* at 379. The court accordingly held, because of the provisions in the statute creating WVUH “mandating openness and accountability in the management of the corporation and because of the statutory requirement that we liberally construe the disclosure provisions of the West Virginia Freedom of Information Act,” the corporation is covered by the FOIA and its records are subject to disclosure. *Id.* at 377.

In contrast, the court has held that the WVU Foundation is not a public body. *4-H Road Community Association v. W. Va. University Foundation*, 182 W. Va. 434, 388 S.E.2d 308 (1989). In ruling that the hospital corporation, but not the foundation, was “created by state authority,” the court delineated the important differences in the nature of the two corporations:

Although WVUH was incorporated under the general corporate provisions of state law, it was incorporated as such only after the legislature mandated its creation. Under the statute, the former Board of Regents was authorized to transfer the public hospital’s assets to the proposed corporate entity that had “statutorily specified purposes and directors [appointed by the Governor and subject to Senate confirmation], primarily public officers [nine of the eighteen directors served by virtue of their positions with the Board of Regents or the University Hospital], who have fiduciary duties to the people of the State of West Virginia [prohibition of mortgaging, public conflict of interest statements and public audits, as mandated in the enabling legislation].” The statute further provided that the hospital employees of the former Board of Regents were to remain employed by the corporation without becoming employees of the corporation.

...

In the case before the Court today, the Foundation was formed by private citizens pursuant to the general corporate laws of the state. No legislative mandate for such an entity predates its incorporation. It is not located on state property; does not utilize state employees; and selection of its Board of Directors, and their duties, are governed by the corporation’s by-laws. While the president of the University serves on the Board of Directors of the Foundation, the president serves by virtue of the Foundation’s by-laws, rather than legislative mandate, and serves in an ex officio capacity.

4-H Road Community Association v. W. Va. University Foundation, 388 S.E.2d at 311 (citations omitted).

5. Multi-state or regional bodies.

Multistate or regional bodies, such as planning authorities, usually will be “created by state or local authority or . . . primarily funded by the state or local authority” and thus will be subject to the FOIA. Alternatively, the statute’s provision of coverage for any “board, department, commission, council or agency” of any state or local governmental unit should include these bodies.

6. Advisory boards and commissions, quasi-governmental entities.

Advisory boards and commissions, quasi-governmental entities are also likely to be held to constitute a “board, department, commission, council or agency” of a governmental unit, or to be created or primarily funded by such a body. In any of these circumstances, the Freedom of Information Act will cover the organization’s records. But see, *Mayo v. W.Va. Secondary Schools Activities Commission*, 223 W.Va. 88, 672 S.E.2d. 224 (2008) (applying five part test and holding Commission not a state agency because only one of five part test satisfied).

C. What records are and are not subject to the act?

1. What kind of records are covered?

The Freedom of Information Act applies to “any writing containing information relating to the conduct of the public’s business, prepared, owned and retained by a public body.” W. Va. Code § 29B-1-2(4). As the state Supreme Court has noted, this provision “constitutes a liberal definition of a ‘public record’ in that it applies to any record which contains information relating to the conduct of the public’s business, without the additional requirement that the record is kept ‘as required by law’ or ‘pursuant to law,’ as provided by the more restrictive freedom of information statutes in some of the other states.” *Daily Gazette v. Withrow*, 350 S.E.2d at 742-43 (citations omitted).

Earlier editions of this *Guide* observed that the requirement that the writing contain “information relating to the conduct of the public’s business” is one of the easiest to understand and apply. As the state Supreme Court held in *Withrow, supra*, this broad definition includes documents that contain a mixture of “official” and “personal” information regarding a public officer or body:

[If the] document contains information ‘relating to the conduct of the public’s business,’ [it] is . . . a ‘public record’ under the State FOIA. . . . That the . . . document involves ‘personal,’ as well as ‘official,’ conduct of the public body does not vitiate the ‘public’ nature of the document. The term ‘public record’ should not be manipulated to expand the exemptions to the State FOIA; instead, the burden of proof is upon the public body to show that one (or more) of the express exemptions applies to certain material in the document.

Daily Gazette v. Withrow, 350 S.E.2d at 744. *Associated Press v. Canterbury*, 224 W.Va. 708, 688 S.E.2d 317 (2009), however, took a much more narrow, crabbed view of the statutory term “related to the conduct of the public’s business.” In *Canterbury*, a member of the state judiciary sent more than a dozen emails (over a government internet server) to an officer of a corporation that had an appeal of an adverse fifty million dollar jury award pending before the jurist’s court.

The Court held that the definition of a “writing” contained in FOIA includes e-mail communications. However, it also held that “a personal e-mail communication by a public official or public employee, which does not relate to the conduct of public’s business, is not a “public record” under FOIA. While that holding is unsurprising, the Court chose to narrowly construe the statutory language “relating to the conduct of the public’s business.”

The Court’s opinion advised trial courts to restrict their review of whether a record was “public” to an analysis of *the content* of the e-mail

and not extend to a context-driven analysis because of public interest in the record. Thus, the court held that an email sent by a member of the judiciary via a court email system to an officer of a private corporate litigant (that had a fifty million dollar adverse jury award appeal pending before the court) was not a “public record” subject to the FOIA. The decision has been criticized by commentators, see e.g., *Taking Out The Context: A Critical Analysis Of Associated Press v. Canterbury*, 113 W.Va.Law Rev. 259 (2010):

In *Associated Press v. Canterbury*, the court improperly relied on case law from outside of West Virginia, contradicted its own precedent, abrogated a clear legislative mandate, and ignored the policy underlying the West Virginia Freedom of Information Act. In doing so, it arrived at a holding that was contrary to the clear and emphatically stated purpose of the Act: to open the workings of government to the public by allowing persons to access public records held by government agencies so that the electorate may be informed and retain control.

Id. at 285. Both the majority and a dissenting opinion in *Canterbury* indicated that the state’s legislature should consider amending the statute if it desired a broader interpretation of “public record.” In the 2011 session of the West Virginia legislature, the House of Delegates passed an amendment that would have nullified *Canterbury*’s narrow definition of “public record.” The proposed amendment would have required both the context of an email and the email’s content be considered in determining whether it is a public record under FOIA. The West Virginia Senate, however, failed to take up the bill in committee. Future legislative action may be forthcoming in response to the *Canterbury* decision.

The Court has also broadly defined what is “owned and retained by a public body”: “[L]ack of possession of an existing writing by a public body at the time of a request under the State’s Freedom of Information Act is not by itself determinative of the question whether the writing is a ‘public record’ under W. Va. Code § 29B-1-2(4). . . . The writing is ‘retained’ if it is subject to the control of the public body.” *Daily Gazette v. Withrow*, 350 S.E.2d at 744.

As *Withrow* noted, a public body can be compelled to produce records under the Freedom of Information Act if those records are in the hands of its attorney, bank, or other agent. However, in a subsequent decision, the Supreme Court held that “[w]here a public body has a legal right to obtain a copy of a writing relating to the conduct of the public’s business, which was prepared and retained by a private party, but the public body does not exercise that right, the fact that the public body has the right to obtain a copy of the document does not, standing alone, mean that the writing is a “public record” as defined by the Freedom of Information Act.” *Affiliated Construction Trades Foundation v. Regional Jail and Correctional Facility Authority*, 200 W.Va. 621, 622, 490 S.E.2d 708, 709 (1997).

The FOIA requirement that a writing must have been “prepared, owned and retained by a public body” is somewhat ambiguous. However, in a recent decision, the Supreme Court has clarified the meaning of the phrase, interpreting the word “and” used in the phrase “prepared, owned and retained by a public body” to be read as “or.” In *Shepherdstown Observer v. Magban*, 226 W.Va. 353, 700 S.E.2d 805 (2010) a public body argued that a zoning petition prepared by private citizens, but in the possession of a County Clerk, did not qualify as a public record because it was not “prepared . . . by a public body.” The Court held that “under the West Virginia Freedom of Information Act (FOIA) . . . a ‘public record’ includes any writing in the possession of a public body that relates to the conduct of the public’s business which is not specifically exempt from disclosure by *W.Va. Code*, 29B-1-4, even though the writing was not prepared by, on behalf of, or at the request of, the public body.”

In *Daily Gazette v. W. Va. Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996), a “public record” was held to include written communications between a public body and private persons or entities. The court recognized a very narrow exception to the disclosure re-

quirement where such communications “consist of advice, opinions or recommendations to the public body from outside consultants or experts obtained during the public body’s deliberative, decision-making process.” *Id.*, Syllabus pt. 4. It is clear that documents kept by a public body and containing information relating to the conduct of the public’s business are not exempt from disclosure simply because they were initially “prepared” by some other person or entity.

2. What physical form of records are covered?

The Freedom of Information Act applies to any conceivable physical form of “documentary materials”:

‘Writing’ includes any books, papers, maps, photographs, card, tapes, electronic mail, recordings or other documentary materials regardless of physical form or characteristics.

W. Va. Code § 29B-1-2(5). See *Veltri v. Charleston Urban Renewal Auth.*, 178 W. Va. 669, 363 S.E.2d 746 (1987) (ordering public body to make a tape recording of its open meeting available for public listening and copying under the FOIA). A 1992 amendment to the FOIA added that “[i]f the records requested exist in magnetic, electronic or computer form, the custodian of the records shall make such copies available on magnetic or electronic media, if so requested.” § 29B-1-3(3).

3. Are certain records available for inspection but not copying?

Under the literal terms of the FOIA, any “public record” subject to inspection also may be copied. However, the statute recognizes a narrow exception that permits public agencies to deny all access to certain records that could be damaged by handling. W. Va. Code § 29B-1-4(6). It seems certain that if particular documents could be inspected, but not copied, without the threat of damage, the courts would permit this approach as the least restrictive alternative.

Furthermore, the West Virginia Supreme Court of Appeals has recommended that “innovative measures” be used when FOIA requests are made for “personal” information concerning individuals. For example, to limit damage that might be caused by the disclosure of highly private personal information, the court has ordered that parents could read, but not copy, psychiatric records of a school bus driver. *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986).

D. Fee provisions or practices.

1. Levels or limitations on fees.

The Freedom of Information Act permits each public body to “establish fees reasonably calculated to reimburse it for its actual cost in making reproductions of such records.” W. Va. Code § 29B-1-3(5). The Supreme Court of Appeals has indicated that a public body “may . . . provide for reasonable limitations as to the hours and methods of viewing and cost of copying, but in no circumstances may these limitations be used so as to prevent a person from access to the records.” *Richardson v. Town of Kimball*, 340 S.E.2d at 583 n.2.

While charges for research and search time may be imposed under the federal FOIA, it is important to understand that unlike West Virginia public bodies, federal agencies are expressly allowed to impose charges for document search, duplication, and review, when records are requested for commercial use; fees are required to be limited to “reasonable standard charges” for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media. Charges for other types of FOIA requests are limited to “reasonable standard charges for document search and duplication.” 5 U.S.C. §552 (a) (4) (A) (ii) (I – III) and §552 (a) (4) (A) (iii) – (viii). Because the language of the federal and West Virginia FOI Acts are not at all comparable, the fact that some federal agencies may charge research, search or other fees beyond the actual cost of reproduction is not relevant to the interpretation of the West Virginia law.

Considering the broad public policy favoring disclosure of government information as a means of furthering core democratic principles, “the actual cost of reproduction” should be liberally construed. Such a construction would limit the per page cost to that which is comparable to commercial copying charges.

2. Particular fee specifications or provisions.

The FOIA contains no provisions for separate charges for searches, duplication, computer access or printouts, microfiche, or non-print audio or audio-visual records. Since the statute only authorizes charges for the cost of “reproduction,” additional “search” charges generally should be prohibited except when expressly authorized by another statute. An exception to the general rule is found in W. Va. Code § 59-1-10 that provides a schedule of fees in excess to the actual cost of reproduction to be charged by county clerks for copies of various documents required by statute to be maintained by such officers. The Attorney General has advised county clerks that this fee schedule is mandatory. Op. Att’y Gen., September 8, 1986. Although the Attorney General’s opinion does not mention the Freedom of Information Act, some county clerks now charge these higher fees, rather than the “actual cost in making reproductions,” for documents provided under the FOIA.

a. Search.

In 2010 reports surfaced of West Virginia state and local government public bodies charging one dollar or more per page for copying records sought by FOIA requesters as well as billing for research and search time. There have been no judicial decisions directly addressing the issue of the scope of public bodies’ authority to impose copying, research and search fees. The starting point for analyzing this issue is the language of the FOIA itself. Section 29B-1-3 (5) states in relevant part:

(5) The public body may establish fees *reasonably calculated to reimburse it for its actual cost in making reproductions* of records.

Both the WVFOIA itself, as well as decisions of the West Virginia Supreme Court of Appeals, provide guidance for interpretation of Section 29B-1-3 (5).

As discussed above, Section 29B-1-1, *supra*, declares an extraordinarily broad policy of public access to the records of government entities, including the mandate that “it is . . . the public policy of the state of West Virginia that all persons are, *unless otherwise expressly provided by law*, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. . . . To that end, *the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.* (Emphasis added).

Decisions of the West Virginia Supreme Court also provide guidance for interpretation of the meaning of 29B-1-3 (5). The Court has frequently reiterated the following well established principles regarding interpretation of the FOIA:

“The disclosure provisions of this State’s Freedom of Information Act, W. Va. Code, 29B-1-1 *et seq.*, as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed.” W. Va. Code, 29B-1-1 [1977]. Syllabus Point 4, *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).

“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syllabus Point 5, *State v. General Daniel Morgan Post No. 548*, *V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syllabus Point 5, *State v. General Daniel Morgan Post No. 548*, *V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

In re Charleston Gazette FOIA Request, 222 W.Va. 771, 671 S.E.2d 776 (W.Va. 2008).

Liberal construction of Section 29B-1-3 (5) effectuates the Legislatures' goal to allow "all persons . . . the full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." W.Va. Code § 29B-1-3 commands that "[e]very person has a right to inspect or copy any public record of a public body in this state, except as otherwise expressly provided by [law]." (emphasis added).

The unambiguous statutory language of Section 29B-1-3 (5) allows West Virginia public bodies to impose on FOIA requesters fees *only* for the purpose of reimbursing *actual cost in making reproductions* of records. There is no other express or implied authority granted to such bodies to charge search/research fees when responding to a FOIA request.

Moreover, the statutory term "reimburse" must be interpreted in light of its generally accepted meaning. The Random House Unabridged Dictionary, (2006), defines "reimburse" as "to make repayment for expense or loss incurred." It is part and parcel of agency employees' responsibilities under the FOIA to disclose information upon citizens' requests. Thus, when employees of public bodies perform a search or research in responding to a FOIA request, it is not reasonable to interpret such efforts as incurring agency expense or loss for which the FOIA requires reimbursement.

Further, the imposition of fees and costs on FOIA requesters over and above the "actual cost in making reproductions of records" would create an obstacle to the achievement of the explicit legislative intent.

Public bodies have no explicit authority to impose fees for anything but reimbursement of actual copying costs. To imply authority to impose research and/or search costs would be contrary to the liberal interpretation and broad public disclosure goals of the FOIA.

b. Duplication.

Utilizing the principles of statutory interpretation and the case law set forth above, the most cogent view of the language of Section 29B-1-3 (5) is that it clearly and unambiguously states that "[t]he public body may establish fees reasonably calculated to *reimburse it for its actual cost in making reproductions* of records."(emphasis added). This language permits of only one reasonable interpretation. A public body may charge fees to reimburse *only* its *actual costs in copying* records.

3. Provisions for fee waivers.

The FOIA does not contain any specific provisions for fee waivers when disclosure would be in the public interest. However, the statute merely authorizes, and does not require, public bodies to charge for copies. Therefore, agencies clearly have discretion to waive copying charges when this would serve the public interest. It is suggested that journalists seeking public information under the West Virginia FOIA routinely include a request for a waiver of reproduction costs on the ground that the information will be used to further the substantial public interest in informing citizens concerning the activities of their government.

4. Requirements or prohibitions regarding advance payment.

The Freedom of Information Act neither requires nor specifically prohibits the advance payment of fees.

5. Have agencies imposed prohibitive fees to discourage requesters?

The use of prohibitive fees is an obvious, and favorite, tactic used by public agencies wishing to discourage requests. On one occasion, for example, West Virginia University initially demanded payment of over eight hundred dollars in search fees and 'overhead costs' for producing a document a few pages long. The fee was subsequently waived after objections were raised. The obvious, and frequently successful,

tactic of requesters who have been charged a clearly unreasonable fee has sometimes been simply to refuse to pay the bill or, if advance payment was required, to demand and sue for a refund. Few agencies would be interested in defending such a seemingly losing cause, particularly if the requester makes known her intention to seek an award of attorneys' fees from the agency.

E. Who enforces the act?

Citizen lawsuits are recognized as the mechanism by which the West Virginia Freedom of Information Act is enforced. W. Va. Code, § 29B-1-5(1) provides that "[a]ny person denied the right to inspect the public record of a public body may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept."

Furthermore, W. Va. Code, § 29B-1-5(2) provides that "[I]n any suit filed under subsection one of this section, the court has jurisdiction to enjoin the custodian or public body from withholding records and to order the production of any records improperly withheld from the person seeking disclosure. The court shall determine the matter *de novo* and the burden is on the public body to sustain its action. The court, on its own motion, may view the documents in controversy in camera before reaching a decision. Any custodian of any public records of the public body found to be in noncompliance with the order of the court to produce the documents or disclose the information sought may be punished as being in contempt of court."

The West Virginia Open Governmental Proceedings Act is also enforceable through civil lawsuits filed by citizens. See, W.Va. Code §§ 6-9A-3 ("[u]pon petition of any adversely affected party") and 6-9A-6 ("any citizen").

1. Attorney General's role.

The West Virginia Freedom of Information Act does not explicitly mention the Attorney General's role in enforcement of the Act. The West Virginia Open Governmental Proceedings Act provides that "It is the duty of the attorney general to compile the statutory and case law pertaining to this article and to prepare appropriate summaries and interpretations for the purpose of informing all public officials subject to this article of the requirements of this article." W. Va. Code, § 6-9A-12. See, <http://www.wvago.gov/pdf/OpenMeetingsHandbook2006.pdf> . State agencies and other governmental entities may request the Attorney General to render an official opinion regard issues relating to either the West Virginia FOIA or the Open Governmental Proceedings Act. W. Va. Code, § 5-3-1.

2. Availability of an ombudsman.

Neither the West Virginia Freedom of Information Act nor the West Virginia Open Governmental Proceedings Act explicitly provides for an ombudsman.

3. Commission or agency enforcement.

Neither the West Virginia Freedom of Information Act nor the West Virginia Open Governmental Proceedings Act provides for commission or agency enforcement.

F. Are there sanctions for noncompliance?

The FOIA was amended in 2001 to make "any custodian of any public records who willfully violates the provision of [FOIA] may be charged with a misdemeanor and upon conviction the custodian may be fined not less than two hundred dollars nor more than one thousand dollars or be imprisoned for more than twenty days, or both. W. Va. Code § 29B-1-6.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open records statute.

"Three cardinal rules must be remembered in any FOIA case regardless of which exemption is claimed to be applicable. First, the

disclosure provisions are to be liberally construed. Second, the exemptions are to be strictly construed. Finally, the party claiming exemption from the general disclosure requirement . . . has the burden of showing the express applicability of such exemption to the material requested.” *Daily Gazette v. W. Va. Development Office, supra*, Syllabus pts. 1 and 2 (citations omitted). As noted, *supra*, in 2003 the state Legislature amended W. Va. Code § 29B-1-4 adding eight new exemptions relating to limiting terrorists access to sensitive information; in 2009 three additional exemptions were added by amendment to FOIA. See, *W. Va. Code* § 29B-1-4 (9) - (91).

1. Character of exemptions.

a. General or specific?

There is no general exemption in the West Virginia statute, and there is no authority for an agency or court to deny access to records based upon its own notion of what “the public interest” requires. The only public records to which citizens may be denied access under the Freedom of Information Act are those containing the sixteen categories of information made “specifically exempt from disclosure” under Section 4 of the statute.

b. Mandatory or discretionary?

The Freedom of Information Act simply provides that nineteen specified “categories of information are specifically exempt from disclosure under the provisions of [the FOIA].” *W. Va. Code* § 29B-1-4. If the issue of agency discretion to release documents that fall within one of the nineteen FOIA exemptions were directly presented to the court, it is likely that it would follow the lead of the federal courts whose interpretation of the federal FOIA has held the exemptions to be discretionary rather than mandatory.

It is important to keep in mind that the Freedom of Information Act is not the only source of access to documents. “The State FOIA and the common law principles are not . . . coextensive but are inter-related.” *Daily Gazette v. Withrow*, 350 S.E.2d at 746 n.9. Even if a particular record falls within one of the FOIA exemptions, it still might be disclosable under the common law or a more specific statute providing for public access to such records.

c. Patterned after federal Freedom of Information Act?

The West Virginia Freedom of Information Act is similar to the federal statute in many respects, and the West Virginia Supreme Court recognized “the close relationship between the federal and West Virginia FOIA . . . in particular the value of federal precedents in construing our state FOIA’s parallel provisions.” *Daily Gazette v. W. Va. Development Office, supra*. It should be noted, however, that the eleven new exemptions added to *W. Va. Code*, § 29B-1-4 since 2003 are not patterned after those contained in the federal FOIA, 5 U.S.C. § 552 (b) (1) - (9).

The West Virginia court has identified notable differences between the state and federal acts, regarding the exemption for law enforcement records, *Hechler v. Casey, supra*, and the exemption for personal information, *Child Protection Group v. Cline, supra*. The *Cline* court cautioned that, although the state and federal exemptions for personal information are similar:

The statutes differ in an important regard. Under the United States Code, private information should be disclosed unless its disclosure would ‘constitute a clearly unwarranted invasion of personal privacy.’ The West Virginia Code, on the other hand, exempts disclosure if the ‘public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance.’ While the burden of proof is always on the agency resisting disclosure, the burden is different in the two codes. The Federal Code unambiguously favors disclosure of personal information with the resisting party having to show clear evidence of

an unwarranted invasion of personal privacy. The West Virginia Code, with some ambiguity, favors nondisclosure of personal information unless public interest clearly requires disclosure. The simplest explanation of these differences is as follows: If the scales weigh heavily in favor of disclosure, both codes require disclosure; if the scales weigh heavily in favor of nondisclosure, both codes require nondisclosure; but, if the scales weigh even or near even, the Federal Code favors disclosure while the West Virginia Code favors nondisclosure.

Child Protection Group v. Cline, 350 S.E.2d at 545 (citations and footnotes omitted).

The *Hechler* court also emphasized a significant difference between the state and federal exemptions for law enforcement information: “It is clear that exemption 7 to the Federal FOIA ‘includes the enforcement of both civil and criminal federal laws.’ It is not so clear whether *W. Va. Code*, § 29B-1-4(4) includes regulatory agencies’ proceedings only to invoke civil sanctions, such as suspension or revocation of a license issued by the agency, and not to enforce penal laws.” *Hechler, supra*, at 813. The *Hechler* court also noted a more fundamental difference:

The law enforcement exemption to the State FOIA . . . appears at first blush to be a somewhat broader exemption than exemption 7 to the Federal FOIA, amended in 1974 to limit exemption there under to six types of situations in which disclosure is likely to cause specified types of injury. We do not, however, believe that *W. Va. Code*, § 29B-1-4(4) creates a blanket law enforcement exemption, as did the pre-1974 Federal FOIA, because our statute, unlike the pre-1974 Federal FOIA, does not exempt entire “files” labeled “law enforcement” and does not expressly limit disclosure to “authorized private parties,” as did the pre-1974 Federal FOIA.

Hechler v. Casey, supra, at 809 n.7.

2. Discussion of each exemption.

The West Virginia Freedom of Information Act specifically exempts nineteen categories of information from disclosure. Each of these exceptions, and Supreme Court decisions interpreting them, are discussed in the following sections.

a. Trade secrets

The first FOIA exemption is for:

Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan pattern [sic], process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors.

W. Va. Code § 29B-1-4(1). The scope of this exemption has never been interpreted by the West Virginia Supreme Court of Appeals, although in *Queen v. WVU Hospitals*, 365 S.E.2d at 382, the court summarily rejected the “conclusory” argument of WVU Hospitals that certain of its contracts should be exempt from disclosure under this provision “and that it should be allowed to maintain ‘business confidentiality.’ As we have already noted, FOIA exemptions are to be strictly construed.” *Id.*

The trade secrets exemption was revisited briefly by the court in *AT&T Communications of W. Va. v. Public Service Commission of W. Va.*, 188 W. Va. 250, 423 S.E.2d 859 (1992). In that case, public utilities sought a protective order from the Public Service Commission covering all information contained in an annual report utilities were required to file with the PSC. The court ruled the utilities were en-

titled to confidential treatment of the information only if they first established, by clear and convincing evidence, they were likely to be harmed by disclosure of “a trade secret, expansively defined” under the Freedom of Information Act. The court emphasized, “[a]s an administrative agency, the PSC has a responsibility to disclose as much information to the public as it can.” *Id.* at 862.

Confidentiality provisions for trade secrets, similar but not identical to the FOIA exemption, are contained in several more specific statutes. These include W. Va. Code § 5D-1-21 (Public Energy Authority records relating to secret processes or secret methods of manufacture or production); W. Va. Code § 16-20-11a (Air Pollution Control Commission records containing “methods or processes entitled to protection as trade secrets”); and W. Va. Code §§ 31-19-19, 20-5C-21 (records of the Community Infrastructure Authority or the Water Development Authority under DNR “relating to secret processes or secret methods of manufacture or production”).

A new exemption was amended into an economic development section of the West Virginia Code in 1997. As a direct result of the opinion in *Daily Gazette v. W. Va. Development Office, supra*, the following was added to W. Va. Code § 5B-2-1:

Any documentary material, data or other writing made or received by the West Virginia development office or other public body, whose primary responsibility is economic development, for the purpose of furnishing assistance to a new or existing business shall be exempt from the provisions of [the Freedom of Information Act].

A proviso to the new law requires disclosure of “any agreement entered into or signed by the development office or public body which obligates public funds . . . as of the date the agreement is entered into, signed or otherwise made public.” W. Va. Code § 5B-2-1.

b. Personal information

The second exemption, which may be the most difficult to apply, exempts:

Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance: Provided, That nothing in this article shall be construed as precluding an individual from inspecting or copying his own personal, medical or similar file.

W. Va. Code § 29B-1-4(2).

One commentator has observed, “The language of the exemption suggests that it is available only to individuals and not “artificial persons” such as corporations.” *Neely, supra*, § 7.09 at 552. The plain language of the statute supports this narrow interpretation of “information of a personal nature” and is consistent with the Supreme Court’s frequent admonition that such exemptions be strictly construed.

The exemption for personal information is the only one that requires a balancing of competing interests. Understandably, it has produced the most complex test for determining whether particular information should be disclosed.

The Supreme Court of Appeals has examined this exemption in five cases, *Hechler v. Casey, supra*, *Child Protection Group v. Cline, supra*, *Manns v. City of Charleston Police Dept.*, 209 W.Va. 620, 550 S.E.2d 598 (2001), *Smith v. Bradley*, 223 W.Va. 286, 673 S.E.2d 500 (2007) and *In re Charleston Gazette FOIA Request*, 222 W.Va. 771, 671 S.E.2d 776 (W.Va. 2008).

The *Hechler* court concluded the exemption “does not apply to a list of names and addresses of security guards furnished to the Secretary of State pursuant to his licensing and regulation of the guards’ employer, since such information is not personal in nature but public facts, and since the risk of harm from disclosure is speculative.” 333 S.E.2d at

802.

In *Cline, supra*, the court analyzed the competing interests underlying the exemption and devised a five part test for deciding whether access to personal information should be allowed:

1. Whether disclosure would result in a substantial invasion of privacy; a court must determine the seriousness of the invasion.
2. The extent or value of the public interest and the purpose or object of the individuals seeking disclosure.
3. Whether the information is available from other sources.
4. Whether the information was given with an expectation of confidentiality.
5. Whether it is possible to mould relief so as to limit the invasion of individual privacy.

Cline contains a detailed discussion of how this test should be applied. It is worth reprinting here at length:

First, the court must determine whether disclosure would result in an invasion of privacy and, if so, how serious. This is a two-part test. The first part is whether there is a substantial invasion of privacy. Private information is something that affects or belongs to private individuals as distinct from the public generally. The invasion into the private information must be substantial. Information of a non-intimate or public nature may be disclosed.

If there is a substantial invasion of privacy involved, the court must measure the seriousness of the invasion. . . . [W]eighing the extent of the invasion of privacy, courts must look at the extent to which the release of the information would cause an ordinary man in the time and place of the private individual involved, embarrassment or harm. . . .

Second, the court looks for the extent or value of the public interest, purpose or object of the individuals seeking disclosure. Again, two tests are involved. The first is the value of the public interest. The interest may be pecuniary, or the public may have an interest because their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity. [The public interest that has received the greatest protection is the interest in honest and efficient government.]

The second test also concerns the purpose for which the information is sought. If the information is sought to provide for something that would be useful to the public, then the courts will weigh this favorably. To the contrary, where a misuse of information may result, the courts are wary of ordering disclosure.

Third, the court asks whether the information is available from other sources. If the information sought is available in publicly obtainable books and records, then the court should simply allow the plaintiff access to information that he would eventually get anyway. If the information sought is available in a format that would be less intrusive to individual privacy, the courts should protect the privacy interests and force the plaintiff to use the less intrusive format. Finally, if there is absolutely no other place or method to gather the information than from the particular Freedom of Information Act request before the court, this is a factor in favor of disclosure.

Fourth, the court examines whether the information was given with an expectation of confidentiality. . . . An agreement or expectation of confidentiality, while a factor, will not override the Freedom of Information Act.

Finally, a court must ask whether it is possible to mould relief to limit the invasion of individual privacy. To release or not to release is not an “all or nothing” decision under the Freedom of Information Act where personal material is concerned. The courts have consistently taken steps such as the deletion of certain per-

sonal data from the documents to be released so as to protect the privacy interests of individuals involved. . . . Trial courts should be encouraged to take innovative measures to limit the invasion of individual privacy whenever disclosure is required.

Child Protection Group v. Cline, 350 S.E.2d at 544-45. See also, *In re Charleston Gazette FOIA Request*, 222 W.Va. 771, 671 S.E.2d 776,

The *Cline* case presented the court with a particularly difficult situation. A group of parents had sought to review and copy the medical records of a school bus driver, whose bizarre conduct while driving their children had led to his suspension and compelled psychiatric treatment. Upon his reinstatement, the school board sent a letter to the parents which assured them of the driver's competency but which also included "short, ambiguous quotes from his psychiatrists." The parents demanded access to the full psychiatric record. The court's resolution of this difficult conflict represents an innovative — and highly pragmatic — example of attempting to accommodate all competing interests to the maximum extent possible:

There is no question that disclosure would cause an invasion of privacy. An individual's medical records are classically a private interest. Further, it is difficult to imagine an item more potentially embarrassing than individual psychiatric reports. . . . These reports were surrendered to the school board under a justifiable expectation of confidentiality. . . . Certainly only a most compelling interest could justify the release of the records under the Freedom of Information Act.

Nevertheless, we believe that the parents of the children assigned to Mr. Roberts' bus have such a compelling interest in his mental condition. Mr. Roberts' statements and actions in front of the children raise serious concerns about his ability to safely pilot his school bus. . . . [T]he parents need more. . . . The parents deserve to see all of the evidence on Mr. Roberts' condition. . . . [I]t is the safety of the children which we find to be a factor of overriding importance, tipping the scales clearly and convincingly toward disclosure. . . .

In order to dilute what is a massive invasion of Mr. Roberts' privacy, we take the somewhat unprecedented step of ordering a less than full disclosure of the records, limiting their viewing only to those who have a "need to know." The public at large has no need to know about Mr. Roberts' medical condition. Mr. Roberts does not make decisions in his job which will affect anyone other than those riding his bus. He is not a high elected official, but a humble public servant. No public interest would be served by a general release of Mr. Roberts' records. Therefore, we hold that the public at large does not meet the test set out in § 29B-1-4(2) and the public at large should not be allowed to view Mr. Roberts' medical reports.

In order to best fit the equities of this unusual case, we therefore fashion the following remedy. (1) All relevant information in Mr. Roberts' personnel and medical files shall be open to inspection by any parent whose child is assigned to Mr. Roberts' bus. The records shall be kept in a convenient place and open to inspection during normal business hours. The parents, however, shall not be allowed to photocopy any records. (2) In the event the parents collectively or any one of them wish to investigate the possibility of legal action in this regard, their attorney shall be allowed one complete photocopy of Mr. Roberts' records. . . . (3) No general public dissemination of this information should be allowed without the permission of Mr. Roberts and the Board of Education of Gilmer County.

Child Protection Group v. Cline, 350 S.E.2d at 545-46.

In *Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988), the court applied the test it had developed in *Child Protection Group v. Cline*, ruling that an attorney representing injured workers was not entitled to inspect Workmen's Compensation Fund records containing the names, addresses, employer information, and information regard-

ing type of injuries sustained by Workmen's Compensation recipients.

The *Robinson* court ruled that if the individual seeking access "fails to present, by clear and convincing evidence, legitimate reason sufficient to overcome Freedom of Information Act exemption from disclosure for information of a personal nature and where adequate source of information is already available, records will not be released." *Id.*, Syl-labus pt. 3.

In *Manns v. City of Charleston Police Dept.*, 209 W.Va. 620, 550 S.E.2d 598 (2001), a person arrested (Manns) by city police officers sued the city and its' police chief under the FOIA, seeking to compel disclosure of records regarding outcome of police department's internal investigations of every officer against whom civil or criminal complaint had been filed regarding their behavior while in course of employment or otherwise. Manns asserted that a police officer used excessive force in carrying out her arrest. The City initiated an internal investigation and also asked the Federal Bureau of Investigation to conduct its own, independent investigation. Both investigations exonerated the officer. The City produced about half of the records requested but objected to supplying the remaining documents and information.

The Court explained at the outset of the *Manns* opinion that FOIA provisions which address the confidentiality of records and their availability to the general public are aimed at protecting interests distinct from those at issue when records are requested in conjunction with a civil rights action, *Manns v. City of Charleston Police Dept.*, 209 W.Va. 620, 550 S.E.2d 598, citing *Maclay v. Jones*, 208 W.Va. 569, 574, 542 S.E.2d 83, 88 (2000) (civil rights lawsuit plaintiffs could obtain some records in civil discovery relative to an internal affairs investigation of complaints filed against a state trooper as well as the trooper's personnel file).

The Manns Court first determined that the records requested in this case contained "information of a personal nature such as that kept in a personal, medical or similar file" as set forth in the FOIA, W.Va. Code § 29B-1-4(2). Then, applying the five factor balancing test of *Cline v. Child Protection Group*, the Manns Court found that the public interest did not require the disclosure of the requested information.

The Court opined that:

Clearly, disclosure of the information would result in a substantial invasion of privacy. As noted above, the request in this case would require the disclosure of all claims of misconduct no matter how egregious, unfounded, or potentially embarrassing. In addition, the information was obviously given with an expectation of confidentiality as the appellants' policy and procedural manuals require all investigative reports to be "treated with the strictest of confidence." Furthermore, the expectation of confidentiality is crucial to continued reports of possible misconduct. This Court is certainly mindful that "the lawfulness of police operations is a matter of great concern to the state's citizenry." However, our concern in *Maclay* that "compelled disclosure of police investigatory materials might result in 'fishing expeditions' and thereby encourage frivolous litigation" leads us to conclude that the public interest does not require the disclosure of the requested information.

(Citations omitted). In *dicta*, Manns observed that it believed some of the records requested also fell with the law enforcement exemption of FOIA, W.Va.Code § 29B-1-4(4) (exempting "records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement." Further, the Court noted that FOIA's "internal memoranda" exemption might shield some police records from disclosure. W.Va.Code § 29B-1-4(8) would exempt certain "internal memoranda" from disclosure. Because the Court resolved the appeal by holding the requested documents were exempt under the personal records exemption, it did not to decide whether the exemptions mentioned in *dicta* would bar disclosure of the documents requested by Manns.

In *Smith v. Bradley*, 223 W.Va. 286, 673 S.E.2d 500 (2007), the Court held that student, peer, and chair reviews and job performance evaluations of a non-tenured university faculty member could be withheld under the “records of a personal nature” exemption of FOIA, W.Va.Code § 29B-1-4(2). The trial court had found that the professor’s job performance evaluations containing personal information kept in a personal or similar file, and that disclosure of these evaluations in an un-redacted form would result in an invasion of privacy for the faculty members, while disclosure in a redacted form would not be an invasion of privacy. *Id.*, at 223 W.Va. at 290-291, 673 S.E.2d at 504-505.

The Court upheld the trial court, concluding that the release of the evaluations in an un-redacted form would clearly constitute a substantial invasion of individual privacy of the individuals who completed the evaluations. In applying the *Cline* balancing test, the Court found the public interest weighed heavily in favor of non-disclosure. The evaluators “had a reasonable expectation that their responses were confidential.” *Id.* at 223 W.Va. at 292, 673 S.E.2d at 506. Confidential evaluations “help to foster the higher education system’s need for an effective faculty evaluation system” and “public disclosure of evaluations will necessarily lead to a less effective evaluation system.” *Id.* “It is possible that a vindictive supervisor could use the public nature of the performance evaluations to personally attack employees whom he or she dislikes” and “sincere evaluators will necessarily be less likely to be critical of their colleagues if un-redacted evaluations are easily available to be viewed by the public and by co-workers.” *Id.* The Court also expressed the concern that “some evaluators may not provide in-depth or truthful evaluations of their colleagues fearing that they could personally be the subject of retribution or libel lawsuits for any information found in evaluations, even if truthful, that portray colleagues in a negative manner.” *Id.*

In re Charleston Gazette FOIA Request, 222 W.Va. 771, 671 S.E.2d 776 (W.Va. 2008).

A FOIA request was made a newspaper seeking the activity logs and payroll time sheets of police officers who were accused of double dipping. The City denied the request relying on *In Manms v. City of Charleston Police Dept.*, supra.

The West Virginia Court had not previously addressed whether payroll records of public employees must be disclosed under FOIA, although most other states that considered the issue had construed their open records laws as requiring disclosure of such records. Many jurisdictions had also reached the same conclusion under their FOIAs regarding payroll records, attendance, employment, vacation, or sick leave records for the reason that such records do not include information of a personal nature to which an expectation of confidentiality attaches.

In re Charleston Gazette FOIA Request concluded that the release of the time records did not constitute a substantial invasion of individual privacy because there was no evidence that any police officers had a reasonable expectation that their time records would remain confidential. Also, there was no evidence the City considered the time records to be an important part of its’ employment records. The Court found that the newspaper sought the information “for a valuable public interest and that the information would not otherwise be available from other sources.” The time sheets were held to be public records not exempt from disclosure. 222 W.Va. 771, at 788, 671 S.E.2d 776, 783 (2008).

In dicta, the Court further “acknowledge[d] that public documents relating to such matters as names of public employees, their designation, an employee number, payroll records, time sheets, salary amounts, attendance records, numerical data dealing with a public employee’s vacation or sick leave records, retirement service credit, and statutorily withheld federal, state and city taxes, are clearly public records and subject to disclosure.” *Id.* The dicta also observed that, “without delineating the precise scope of the right to privacy afforded by West Virginia’s FOIA, we can state with confidence that disclo-

sure of such records would not ‘constitute an unreasonable invasion of privacy.’”*Id.* The Court continued:

They simply are not the kind of private facts that the Legislature intended to exempt from mandatory disclosure. Likewise, these ministerial and plainly public documents could not be considered, “[r]ecords of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement” as prescribed by W.Va.Code § 29B-1-4(a)(4).

Furthermore, even if some of the aforementioned records were being used as a part of an internal criminal investigation, they would still be subject to disclosure under our FOIA. *See* Syllabus Point 11 of *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985) (holding that investigatory records portion of FOIA does not include “information generated pursuant to routine administration or oversight, but is limited to information compiled as part of an inquiry into specific suspected violations of the law”).

The City points out that six of the twenty-eight time sheets are under seal in other court proceedings. However, this Court has indicated that an agreement as to confidentiality between a public body and the supplier of information may not override the Freedom of Information Act. *See Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985).

In re Charleston Gazette FOIA Request, 222 W.Va. at 788-789, 671 S.E.2d at 783-784 (2008).

The Court ordered that the newspaper be allowed to inspect and copy the City’s payroll records.

c. Examination data

The third FOIA exemption applies to:

Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination.

W. Va. Code § 29B-1-4(3). The West Virginia Supreme Court of Appeals has never interpreted this exemption.

d. Law enforcement records

One FOIA provision which has generated litigation, and likely will continue to do so, is the law enforcement exemption, which covers:

Records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement.

W. Va. Code § 29B-1-4(4). The West Virginia Supreme Court of Appeals in 1993 held that, for the purpose of the state statute prohibiting the concealment or destruction of a public record, a criminal history summary is a public record. *State v. Nelson*, 189 W. Va. 778, 787, 434 S.E.2d 697, 706 (1993). In its later decision, *Ogden Newspapers v. City of Charleston*, 192 W. Va. 648, 453 S.E.2d 631 (1994), the court found police incident reports to be public records under FOIA because “the public has an interest in receiving information about criminal activity within the community.” *Id.* at 634. However, the court went on to hold that the report requested by the newspaper in that case “was prepared following an inquiry into a specific violation of the law, *i.e.*, a fight between two juveniles involving a gun” and therefore was a law enforcement record within the meaning of Exemption 4. This did not, however, automatically exclude the report from disclosure under FOIA “if society’s interest in seeing the document outweighs the government’s interest in keeping the document confidential.” *Id.* at 635-36. The court held there was a right to public access to the extent the disclosure of the information would not compromise an on-going law enforcement investigation.

The report in *Ogden*, however, involved the names of juveniles, and the court went on to hold that the right to any such report was only to a redacted copy that omitted any information that could reasonably lead to the discovery of the juveniles' identities. Such redacted information included the exact time and location, the names of witnesses, and the identity of the complainant. *Id.* at 638.

In *Ogden*, the Supreme Court of Appeals followed its decision in *Hechler v. Casey*, *supra*, the first case in West Virginia interpreting the law enforcement exemption. At issue in *Hechler* was a list of names and addresses of security guards furnished to the Secretary of State pursuant to his licensing and regulation of the guards' employer. There the court observed that "[t]he primary purpose of the law enforcement exemption . . . is to prevent premature disclosure of investigatory materials which might be used in a law enforcement action" and concluded the FOIA did not "create a blanket law enforcement exemption." *Hechler v. Casey*, 333 S.E.2d at 812. The court recognized two important limitations on the scope of the law enforcement exemption, stating the exemption did not apply to information generated pursuant to routine administration or oversight or to ordinary manuals or procedures unless they included confidential details of law enforcement programs. *Id.* at 802, Syllabus pts. 11, 12. In addition, the court in *Hechler* suggested the law enforcement exemption applied to records of 'law-enforcement agencies' that was defined to mean only those agencies enforcing criminal laws. It did not apply to proceedings of regulatory agencies to invoke civil sanctions, such as hearings to suspend or revoke a license, nor did it apply to the list sought in that case. *Id.* at 813.

Prior to *Hechler*, the West Virginia Supreme Court of Appeals briefly examined the law enforcement exemption in *Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50 (1984), in which the owner of a tavern destroyed by arson sought "information in the prosecutor's files, including a police report related to the fire, and confessions by Deputies," in an attempt to establish that the former sheriff had participated in the arson. *Id.* at 51. While the court acknowledged that whether the exemption applied was a balancing test, i.e., whether the exemption protected an interest that weighed more greatly than the public's right to know (*Id.* at 52), the court declined to decide the issue because the petitioner had bypassed the review procedures provided by the Freedom of Information Act and therefore failed to develop a factual record.

Also of note is a 1986 Attorney General's opinion that suggests public records may temporarily lose their open status if they are turned over to a prosecuting attorney for use in a criminal investigation. Although these records become exempt from disclosure during the course of the investigation, "should all the prosecuting authorities involved decide not to prosecute . . . the information would then revert back to its original status . . . and would no longer be exempt under the Act." *Report of the Attorney General*, W. Va. April 18, 1986, 112, 113-15.

e. Information exempted by other statutes

The fifth FOIA exemption, for "[i]nformation specifically exempted from disclosure by statute," W. Va. Code § 29B-1-4(5), may encompass a variety of information kept confidential by statute, such as court records pertaining to divorce, W. Va. Code § 48-2-27, adoption, W. Va. Code § 48-4-10, and juvenile proceedings, W. Va. Code § 49-5-17; other juvenile records (W. Va. Code § 49-7-1); tax records (11-10-5d); and economic development assistance (W. Va. Code § 5B-2-1). Although W. Va. Code § 29B-1-4(5) states that the information must be "specifically exempted from disclosure" by statute, and the state Supreme Court has held "the party claiming exemption . . . has the burden of showing the express applicability of such exemption to the material requested" (*Daily Gazette v. W. Va. Development Office*, *supra*, Syllabus pt. 2), records have been withheld based on statutory language that the records are "confidential" even where the other statute did not expressly refer to exemption 5 under the state FOIA.

For instance, the state Supreme Court has given an expansive interpretation to the state Tax Code's confidentiality provisions, W. Va.

Code § 11-10-5d, and has refused to permit disclosure of tax-related information even though the Tax Code did not specifically prohibit such disclosure. The first case, *Daily Gazette v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989), involved a newspaper's request for information concerning the state Tax Department's compromise of its claim against the CSX Corporation shortly after the company's challenge to the validity of the tax had been rejected by a federal appeals court. Over a strong dissent by two justices — who argued the relevant statutes did not make such settlement information confidential, particularly where the challenged tax had been the subject of litigation — the court relied on its perception that, in general, the Legislature favored confidential treatment of tax information: "While we cannot state in all honesty that the statute is perfectly clear on the issue of confidentiality, we believe the intent was toward caution in disclosure." 380 S.E.2d at 213 n.11.

In a related case, *State ex rel. Caryl v. MacQueen*, 182 W. Va. 50, 385 S.E.2d 646 (1989), the court ruled the state Attorney General, who is required by law to review any proposed tax settlements and to give a written recommendation concerning their advisability, also is prohibited from disclosing any information regarding the settlements.

In *Town of Burnsville v. Cline*, 188 W. Va. 510, 425 S.E.2d 186 (1992), the court inexplicably imposed restrictions on the use of information which it had found to be disclosable under the Freedom of Information Act. The *Burnsville* case originated with the town's suit against two local businesses, in an attempt to collect business and occupation taxes they allegedly owed. The businesses contended that the town's B & O tax was being selectively enforced against them, while other businesses paid no tax but were not prosecuted. The trial court ordered that the businesses should be given access to the B & O tax returns filed with the town, since these records were necessary to prove their claim. The Supreme Court struck what it termed a compromise, holding that the tax returns themselves were confidential, due to a specific statutory provision, but "it would not violate the confidentiality requirements of [the tax statute] to permit a review of the roll of B & O taxpayers, since every person or company involved in a business or occupation is assumed to pay B & O taxes, and the list would contain only the names of the taxpayers, not the actual contents of the tax returns." *Id.* at 188.

The court's finding that disclosure of a list of taxpayers "would not violate the confidentiality requirements" of any statute should have resulted in the unconditional disclosure of the list pursuant to the FOIA. However, without any further discussion, the court ruled that "[a]s an extra measure of protection, the list should be treated as any confidential material and not leave [the circuit judge's] chambers." This result is probably best explained by the court's particular sensitivity to the privacy issues involved in disclosure of tax information, which is discussed later in this outline.

In *Paige v. Canady*, 197 W. Va. 154, 475 S.E.2d 154 (1996), the plaintiffs sought to use a FOIA request to obtain documents pertaining to the application of state tax laws from 1978, and the Tax Commissioner acknowledged that W. Va. Code § 11-10-5s(b)(1), as amended, "created a mandatory duty to release [administrative decisions or summaries thereof] after having omitted any identifying characteristics or facts about the taxpayer" but that the limited exception to the general principal of confidentiality of taxpayer information found in W. Va. Code § 11-10-5s(b)(1) (requiring the names of addresses of taxpayers receiving tax credits under specified sections of the tax code be published in the state register, along with the category of the credit received) was no basis for releasing the general taxpayer correspondence requested. After the denial of their FOIA request, the plaintiffs filed a petition for an injunction and a declaratory judgment and deposed a number of Tax Department employees, including the agency General Counsel. The case was brought by the Commissioner against the Circuit Judge; the judge had ordered that the Commissioner also be deposed. The state Supreme Court did not allow the deposition of the Tax Commissioner unless, after further proceedings, findings of fact, and conclusions of law, the circuit court determined the deposition was necessary. However, the discovery allowed by the circuit court and

the redacted documents which were disclosed, made inroads into the near blanket exception to the Freedom of Information Act the state Supreme Court has accorded tax information.

f. Historical materials

The sixth exemption, which has never been interpreted by the state Supreme Court, applies to:

Records, archives, documents or manuscripts describing the location of undeveloped historic, prehistoric, archaeological, paleontological and battlefield sites or constituting gifts to any public body upon which the donor has attached restrictions on usage or the handling of which could irreparably damage such record, archive, document or manuscript.

W. Va. Code § 29B-1-4(6).

The last part of this exemption, for materials that could be irreparably damaged by handling, “offers some temptation for abuse. Whenever the public exercises its rights to inspect or copy a public record there may be some risk of damage. . . . The records, archives, documents and manuscripts exempted under § 29B-1-4(6) should be limited to only that small subclass of public records which have unique, intrinsic and irreplaceable value.” *Neely, supra*, § 7.13 at 556-58.

g. Financial institutions

This exemption provides broad protection for information concerning banks and other financial institutions, extending confidential status to:

Information contained in or related to examination, operating or condition reports prepared by, or on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions, except those reports which are by law required to be published in newspapers.

W. Va. Code § 29B-1-4(7). This FOIA exemption, which has never been interpreted by the state Supreme Court, essentially duplicates several more specific confidentiality provisions of the state Banking Code. W. Va. Code § 31A-1-2 includes “banks, building and loan associations, industrial banks, industrial loan companies, small loan companies, credit unions and all other similar institutions, whether persons, firms or corporations which are by law under the jurisdiction and supervision of the commissioner of banking” in the definition of “financial institutions.”

It should be emphasized that this language does not create a “blanket exemption” which bars disclosure of any information relating to financial institutions. The narrowness of this exemption is evident if one carefully parses the statutory language. So understood, the exemption clearly pertains only to information “contained in or related to examination, operating or condition reports prepared by, or on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.”

h. Internal memoranda

The final FOIA exemption applies to “[i]nternal memoranda or letters received or prepared by any public body.” W. Va. Code § 29B-1-4(8). It may be the exemption most frequently claimed by public agencies. Courts sometimes refer to the exemption as the “deliberative process exemption.” This exemption has been addressed in only one West Virginia case, *Daily Gazette v. W. Va. Development Office, supra*. Along with other evidentiary privileges such as the attorney-client and attorney work product privileges, the West Virginia court noted that under the federal FOIA’s similar exemption 5, the public is not entitled to disclosure of documents that a private party could not discover in litigation with the agency. *Id.*

In *Charleston Gazette v. W. Va. Development Office*, the newspaper sought information from the state agency about a proposed pulp and paper mill. The office released some and withheld other documents on exemption 8 grounds. Upon the *Gazette’s* filing of a complaint, the circuit court appointed a special master to review the withheld docu-

ments *in camera* to determine whether they were exempt and ordered the Development Office to prepare a *Vaughn* index containing a general description and date of each withheld document including the names of the author and recipient if any. *Id.*

Upon review of the index and the affidavit submitted by the Development Office explaining the claimed exemptions, the special master recommended disclosure of some of the withheld documents in their entirety, disclosure of some of the documents after redaction of specific information deemed exempt from disclosure under exemption 8, and nondisclosure of some of the withheld documents. *Charleston Gazette v. W. Va. Development Office, at Id.*

After the Development Office applied to the Supreme Court for a stay of the circuit court’s disclosure order, the Supreme Court directed the circuit court “to make findings on the issue of balancing the benefit of the information to the public as opposed to protecting the government’s interest in keeping the documents . . . confidential.” However, the lack of specific evidence and mere conclusory statements offered by the Development Office regarding alleged harm to the agency did not outweigh the benefit of making the documents deemed non-exempt available to the public. *Id.*, n. 9.

Subsequently, the newspaper appealed that portion of the circuit court’s order that held that certain communications between the office and officials of the pulp and paper mill fell within the exemption 8 of the FOIA. The issue engendered a discussion in the court’s opinion about the primary purpose of the deliberative process privilege. While acknowledging the importance of encouraging the free exchange of ideas and information within government agencies during the processes of deliberation and policymaking, the court found that materials that could not reveal the deliberative process or which explained a decision after it was made or were factual in nature were not exempt. *Id.* What was determinative was whether the documents related to the agency’s deliberative, predecisional process, and it did not matter whether the documents were intra-agency or inter-agency or involved outside consultants and experts. *Id.*

The case was remanded to determine whether the documents fell within exemption 8. The court held they would not be held exempt unless they consisted entirely of advice, opinions or recommendations reflecting the public body’s deliberative, decision-making process. *Id.* If only portions of a document were exempt, those portions should be redacted and the document disclosed. *Id.* Upon remand, at a hearing in January of 1997, the circuit court barred disclosure of certain tax documents under W. Va. Code § 11-10-5d and ordered disclosure of other documents, with tax information on some of the documents redacted. *Daily Gazette v. W. Va. Development Office*, Civil Action No. 95-C-1983, Circuit Court of Kanawha County, Order entered March 13, 1997.

While this case was still pending, the 1997 Legislature, reportedly at the request of the Governor, added a paragraph to an otherwise innocuous economic development bill that essentially undercuts the broad disclosure policy set forth in the opinion. As stated *supra*, the new law exempts *all* “documentary material, data or other writing” made or received by the West Virginia Development Office (or other public body whose primary responsibility is economic development) for the purpose of “furnishing assistance to a new or existing business.” In addition to the office named as the defendant in the pending case, other public agencies may claim that information in their files should be deemed exempt under this provision. The exemption language is very broad and may be used by agencies that are arguably included to conceal much information simply by asserting that the information requested constitutes “assistance” to a business. It is important to observe, however, that the liberal disclosure policy outlined by the court in *Daily Gazette v. W. Va. Development Office* regarding exemption 8 is unaffected if the requested information relates to anything other than “assistance” to a business.

Even prior to the *West Virginia Development Office*, the exemption did not automatically insulate a public body’s preliminary decision-

making process from public view. In a case involving the legislative budget conferees, the Supreme Court ruled the conference committee must have and maintain as public records “memoranda of the negotiations, compromises and agreements” which led to the formation of the Budget Digest if these were not accomplished in recorded public meetings. *Common Cause v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991). However, the case was decided under the Open Meetings Act, and the court did not specifically mention the Freedom of Information Act or its exemptions.

Eight years after *Charleston Gazette v. W. Va. Development Office* was decided, the court in *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004), also gave additional specific guidance to state agencies who withhold information under claim of any of the nineteen statutory exemptions contained in W. Va. Code § 29B-1-4. The court affirmed *Charleston Gazette*’s requirement that a *Vaughn* index must be produced if an agency withholds information under W. Va. Code § 29B-1-4(8). In addition it held that an index must also be provided if any of the other fifteen statutory exemptions contained in W. Va. Code § 29B-1-4 serve as the basis for withholding information. The court specifically delineated the process a public body must use in complying with its duty to provide a *Vaughn* index in the context of FOIA litigation.

A *Vaughn* index, the court held, must provide a relatively detailed justification as to why each document is exempt, specifically identifying the reason(s) why the exemption is relevant and correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies. The *Farley* court further held that the index need not be so detailed that it compromises the exemption claimed. Moreover, the public body claiming an exemption must submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt. 215 W. Va. at 416, 599 S.E.2d at 839. Finally, consistent with its prior holding in *Charleston Gazette v. W. Va. Development Office*, *supra*, the *Farley* court held that a public body must redact or otherwise segregate from documents exempt information and disclose nonexempt material.

i. Terrorism prevention records

The ninth FOIA exemption is for:

Records assembled, prepared or maintained to prevent, mitigate or respond to terrorist acts or the threat of terrorist acts, the public disclosure of which threaten the public safety or the public health.

W. Va. Code § 29B-1-4(9).

j. Vulnerability assessments, plans, data, databases and inventories to respond to terrorist attacks and law enforcement communications codes and deployment plans.

The tenth FOIA exemption is for:

Those portions of records containing specific or unique vulnerability assessments or specific or unique response plans, data, databases, and inventories of goods or materials collected or assembled to respond to terrorist acts; and communication codes or deployment plans of law enforcement or emergency response personnel.

W. Va. Code § 29B-1-4 (10).

k. Interagency intelligence information and investigation records relating to terrorist acts or threats.

The eleventh FOIA exemption is for:

Specific intelligence information and specific investigative records dealing with terrorist acts or the threat of a terrorist act shared by and between federal and international law-enforcement agencies, state and local law enforcement and other agencies within the department of military affairs and public safety.

W. Va. Code § 29B-1-4(11).

l. Classified federal security records not subject to disclosure under federal law and national security briefings whose purpose is to state and local government with terrorism preparedness.

The twelfth FOIA exemption is for:

National security records classified under federal executive order and not subject to public disclosure under federal law that are shared by federal agencies, and other records related to national security briefings to assist state and local government with domestic preparedness for acts of terrorism.

W. Va. Code § 29B-1-4 (12).

m. Computing, telecommunications and network security records, passwords, security codes or programs relating to anti-terrorism planning.

The thirteenth exemption is for:

Computing, telecommunications and network security records, passwords, security codes or programs used to respond to or plan against acts of terrorism which may be the subject of a terrorist act.

W. Va. Code § 29B-1-4 (13).

n. Security or disaster recovery plans, risk assessments, and tests.

The fourteenth exemption is for:

Security or disaster recovery plans, risk assessments, tests, or the results of those tests.

W. Va. Code § 29B-1-4 (14).

o. Architectural or infrastructure designs, maps or other records that show the location or layout of the facilities where communications infrastructure is used in anti-terrorism plans and responses.

The fifteenth exemption is for:

Architectural or infrastructure designs, maps or other records that show the location or layout of the facilities where computing, telecommunications or network infrastructure used to plan against or respond to terrorism are located or planned to be located.

W. Va. Code § 29B-1-4 (15).

p. Facility security system codes.

The sixteenth exemption is for:

Codes for facility security systems; or codes for secure applications for such facilities referred to in subdivision (15), subsection (a) of this section.

W. Va. Code § 29B-1-4 (16).

q. Engineering plans and descriptions of existing public utility plants and equipment

The seventeenth exemption is for:

Specific engineering plans and descriptions of existing public utility plants and equipment.

W. Va. Code § 29B-1-4 (17).

r. Customer proprietary network information of other telecommunications carriers, equipment manufacturers and individual customers

The eighteenth exemption is for:

Customer proprietary network information of other telecommunications carriers, equipment manufacturers and individual customers, consistent with 47 U. S. C. §222.

s. Records of the Division of Corrections and the Regional Jail Authority relating to design of corrections and jail facilities

The nineteenth exemption is for:

the policy directives and operational procedures of personnel relating to the safe and secure management of inmates, that if released, could be utilized by an inmate to escape a corrections or jails facility, or to cause injury to another inmate or to facility personnel.

None of the eight exemptions added to the FOIA in 2003 have been the subject to judicial interpretation. The possibility exists that some state agencies may utilize one or more of these newly added exemptions in an effort to withhold information which should be disclosed. One should be aware that the purpose of these exemptions (W. Va. Code § 29B-1-4 (9-16)) is to protect the public from realistic terrorist threats and interpretations. Subsection (b) of W. Va. Code § 29B-1-4 provides that [a]s used in subdivisions (9) through (16) the term “terrorist act” means an act that is likely to result in serious bodily injury or damage to property or the environment and is intended to:

- (1) Intimidate or coerce the civilian population;
- (2) Influence the policy of a branch or level of government by intimidation or coercion;
- (3) Affect the conduct of a branch or level of government by intimidation or coercion; or
- (4) Retaliate against a branch or level of government for a policy or conduct of the government.

Subsection (c), of W. Va. Code § 29B-1-4 further provides that [n]othing in the provisions of subdivisions (9) through (16) . . . should be construed to make subject to the provisions of this chapter any evidence of an immediate threat to public health or safety unrelated to a terrorist act or the threat thereof which comes to the attention of a public entity in the course of conducting a vulnerability assessment response or similar activity.

B. Other statutory exclusions.

As stated, statutory provisions preserve the confidentiality of certain court records such as divorce (W. Va. Code § 48-2-27), adoption (W. Va. Code § 48-4-10), and certain juvenile proceedings (W. Va. Code § 49-5-17); tax information (W. Va. Code § 11-10-5d); etc. However, for any other state statute to nullify the public’s right of access to public records, the statute must “specifically” exempt the particular information from disclosure, W. Va. Code § 29B-1-4(5), and “the party claiming exemption . . . has the burden of showing the express applicability of such exemption to the material requested.” *Daily Gazette v. W. Va. Development Office*, *supra*, Syllabus pt. 2).

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

The Supreme Court of Appeals has stated repeatedly that the specific exemptions contained in section four of the Freedom of Information Act are the only exemptions from disclosure under the Act. However, while the court has never specifically decided any claim for confidentiality based upon any privileges against disclosure which existed at common law, the court has recognized privileges in the context of FOIA litigation in three cases.

First, in *Withrow*, *supra*, the court raised, but did not decide, the question of whether the common law privilege for an attorney’s work product might apply to an FOIA request:

We need not address any question of whether an attorney’s work product is exempt from the disclosure under the State FOIA; it is clear that such an exemption would apply, if at all, only to a writing reflecting the mental impressions, conclusions, opinions or theories of an attorney prepared in anticipation of litigation or in preparation for trial, and would not apply to a writing, such as

a release or another litigation settlement document, prepared by an attorney to conclude litigation.

Withrow, 350 S.E.2d at 744 n.5 (emphasis added).

Second in *State ex rel. Caryl v. MacQueen*, 182 W. Va. 50, 385 S.E.2d 646 (1989), the court held the state Attorney General has an attorney-client relationship with the state Tax Commissioner when the Attorney General engages in his statutorily required review of the Commissioner’s proposed settlements of tax liabilities, and cannot disclose information concerning the settlements without the Tax Commissioner’s consent. Although the case originated with a Freedom of Information Act request made to the Attorney General as a public official and custodian of certain records relating to tax settlements, the court’s lengthy discussion of the attorney-client privilege never mentions the Freedom of Information Act, nor does it discuss whether the attorney-client privilege constitutes an exemption under the statute.

The main holding of the case is that the Attorney General, as well as the Tax Commission, is bound by the confidentiality provisions of the state tax code, which the court held to constitute a specific statutory exemption from disclosure. The court’s discussion of the attorney-client privilege, while not necessary to the decision, apparently was inserted because of the court’s disapproval of “the Attorney General’s cavalier attitude regarding the dissemination of information to which he became privy in the course of his position as Attorney General.” *Id.* at 647. However, the opinion cannot be read as a clear statement the Freedom of Information Act contains an implied exception for records that would be covered by the attorney-client privilege.

Finally, in *Daily Gazette v. W. Va. Development Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996), the Supreme Court of Appeals of West Virginia explicitly discussed claims for confidentiality based upon privileges against disclosure which existed at common law. As noted above, the case involved application of the deliberative process privilege of exemption 8 of the FOIA. Interpreting FOIA exemption 8 in a manner consistent with federal court interpretation of exemption 5 of the federal Act, the West Virginia Court suggested that exemption 8, like its federal counterpart, preserves to government agencies “such recognized evidentiary privileges as the attorney-client privilege, the attorney-work-product privilege, and the executive ‘deliberative process’ privilege”:

Exemption 5 of the federal FOIA exempts from public disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]” 5 U.S.C. ‘552(b)(5) (1994). In adopting Exemption 5, it was Congress’ intention that the public “not be entitled to government documents which a private party could not discover in litigation with the agency.” *Schell v. U.S. Dept. of Health & Human Services*, 843 F.2d 933, 939 (6th Cir.1988) (citations omitted). The federal FOIA’s open government policies notwithstanding, Exemption 5 preserves to government agencies “such recognized evidentiary privileges as the attorney-client privilege, the attorney work-product privilege, and the executive ‘deliberative process’ privilege.” *Schell*, 843 F.2d at 939 (citing *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 5 (6th cir.1980)). See *Arthur Andersen & Co. v. I.R.S.*, 679 F.2d 254, 257 (D.C.Cir.1982). (footnotes omitted). 198 W.Va. at 571, 482 S.E.2d at 188.

D. Are segregable portions of records containing exempt material available?

Where a document contains a segregable combination of exempt and nonexempt material, the nonexempt portion should be disclosed. An example of this approach is found in *Child Protection Group v. Cline*, where the court held that information falling within the personal privacy exemption could be redacted and the document disclosed:

To release or not to release is not an “all or nothing” decision under the Freedom of Information Act where personal material is concerned. The courts have consistently taken steps such as the deletion of certain personal data from the documents to be released so as to protect the privacy interests of individuals

involved. Trial courts should be encouraged to take innovative measures to limit the invasion of individual privacy whenever disclosure is required.

Child Protection Group v. Cline, 350 S.E.2d at 545 (citations omitted). The court has also held that, “To the extent that segregable, factual data may be extracted, that information should be disclosed.” *Daily Gazette v. W. Va. Development Office*, *supra*, citing *inter alia* *Ogden Newspapers*, *supra*.

Consistent with its prior holdings, the court in *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004) held that a public body must redact or otherwise segregate from documents exempt information and disclose nonexempt material: “[A] public body has a duty to redact or segregate exempt from non-exempt information contained within the public record(s) responsive to the FOIA request and to disclose the nonexempt information unless such segregation or redaction would impose an unreasonably high burden or expense.” *Farley* cautions that “a public body cannot simply state in a conclusory or cursory manner that redaction would be unreasonably burdensome or costly.” *Id.* 215 W. Va. at 423, 599 S.E.2d 846. When a public body withholds information for such reasons it “must provide the requesting party a written response that is sufficiently detailed to justify refusal to honor the FOIA request on these grounds.”

E. Homeland Security Measures.

In 2003 the West Virginia Legislature amended FOIA by adding eight new exemptions related to homeland security and anti-terrorism planning. See, W. Va. Code § 29B-1-4(9) - (16). No judicial decisions have been reported which have involved any of the new exemptions. See *supra*, II A (2).

W. Va. Code § 29B-1-4 was further amended to add subsections W. Va. Code § 29B-1-4 (b) and (c) which provide that the term “terrorist act” as used in the new exemptions to the section “means an act that is likely to result in serious bodily injury or damage to property or the environment and is intended to: (1) intimidate or coerce the civilian population; (2) influence the policy of a branch or level of government by intimidation or coercion; (3) affect the conduct of a branch or level of government by intimidation or coercion; or (4) Retaliate against a branch or level of government for a policy or conduct of the government. W. Va. Code § 29B-1-4 (b).

Subsection (c), W. Va. Code § 29B-1-4 (c) indicates that nothing in the eight new exemptions (subdivisions (9) through (16)) of subsection (a) “should be construed to make subject to the provisions of this chapter any evidence of an immediate threat to public health or safety unrelated to a terrorist act or the threat thereof which comes to the attention of a public entity in the course of conducting a vulnerability assessment response or similar activity.” The precise meaning of this provision has not been the subject of judicial interpretation.

III. STATE LAW ON ELECTRONIC RECORDS

A. Can the requester choose a format for receiving records?

W. Va. Code § 29B-1-3(3) requires that copies of records that “exist in magnetic, electronic or computer form” be made “available on magnetic or electronic media, if so requested.” There are no state Supreme Court cases where the application or interpretation of this requirement has been an issue. Agencies reportedly vary in their willingness to comply with this section. For instance, computerized census information to date has only been made available in hard copy. There are no state Supreme Court cases addressing the 1992 addition of the language acknowledging electronic records. It is common today for agencies to obtain records in electronic formats. In the first decade of the twenty first century it became common for public bodies to post considerable information on internet websites where it can be downloaded by citizens without making FOIA requests. It is also common for FOIA requesters to ask for and obtain information provided in

magnetic, electronic, or similar electronic formats. It is reported that some public bodies charge considerably more than the actual cost of a computer DVD or CD, thus raising the issue of violation of Section 29B-1-3 (5) that limits charges imposed on FOIA requests to the “actual cost of reproduction. Other policies, procedures and practices may be instituted by public bodies as a result of the significant changes in information-gathering and because of the widespread use of computers, smart phones, other electronic communication devices and the internet.

B. Can the requester obtain a customized search of computer databases to fit particular needs?

There are no state Supreme Court cases addressing whether someone can obtain a customized search, and agencies willingness to do so reportedly varies. For instance, the staff of one agency that oversees the computerized census information may perform customized searches, but will only make the information available in hard copy. To be consistent with the broad disclosure mandate of the FOIA, public bodies should provide FOIA requesters with records that exist in magnetic, electronic or computer formats, and requesters should be entitled to have an agency search its databases to extract requested information. It is impossible to distinguish between an agency search through file cabinets for paper records and a computer search for records – except that computer searches are likely to take less time and copying electronic format records to a disc would in most cases be less costly than duplication of paper records using a copy machine.

C. Does the existence of information in electronic format affect its openness?

To date, there has been no distinction between information in electronic format and more traditional format and state agencies routinely provide information to FOIA requesters in electronic format.

D. How is e-mail treated?

In *Canterbury*, the Court held that “[a] trial court’s determination of whether personal e-mail communication by a public official or employee is a public record, subject to disclosure under the [FOIA] . . . is restricted to an analysis of the content of the e-mail and does not extend to a context-driven analysis because of public interest in the record.”

1. Does e-mail constitute a record?

Email has been held to be a “writing” that must be disclosed upon a FOIA request if it is related to the conduct of the public’s business and is prepared, owned and retained by a public body, W.Va. Code § 29B-1-2 (4). See, *Associated Press v. Canterbury*, 688 S.E.2d 317 (W.Va. 2009) (“definition of a “writing” contained in FOIA includes an e-mail communication”).

2. Public matter on government e-mail or government hardware

Public matter on public e-mail systems falls within FOIA’s disclosure mandate if it fits the statutory definition of “public record” found in W.Va. Code § 29B-1-2 (4).

3. Private matter on government e-mail or government hardware

Personal e-mail sent and received using public computers and telephone lines fall within the definition of “public record” if they “relate to the conduct of the public’s business . . .” W.Va. Code § 29B-1-2 (4). *Associated Press v. Canterbury*, *supra*, Syl.Pt. 3. In determining whether an e-mail “relates to the conduct of the public’s business, only the content and not the context of the e-mail may be considered. *Id.*

4. Public matter on private e-mail

There have been no court decisions indicating how public records contained in private e-mail archives should be treated. It is possible,

however, that the West Virginia Court may require disclosure upon a finding that private e-mail was used as a ruse to conduct public business while avoiding FOIA disclosure requirements.

5. Private matter on private e-mail

There have been no court decisions indicating how private records contained in private e-mail archives should be treated. However, based upon the West Virginia Court's holding in *Associated Press v. Canterbury*, *supra*, it is likely that records of discussion of private matters on private e-mail will fall outside the law's disclosure requirements because they fail to fall within the definition of West Virginia FOIA's definition of "public record."

E. How are text messages and instant messages treated?

1. Do text messages and/or instant messages constitute a record?

There have been no court decisions indicating whether text messages and/or instant messages constitute a "public record" under West Virginia FOIA. However, depending on the specific circumstances, the holding of *Associated Press v. Canterbury*, *supra*, is likely to be instructive insofar as the Court in *Associated Press*. In that case, the Court recognized that e-mail communications fall within the scope of "writings" covered by the West Virginia FOIA. Text and instant messages are likely to be viewed in the same light.

2. Public matter message on government hardware.

There have been no court decisions indicating whether text messages and/or instant messages constitute a "public record" under West Virginia FOIA. However, Public matter messages on government hardware are likely to be held to be "writings" under state law requiring disclosure if such messages "relate to the conduct of the public's business." *Associated Press v. Canterbury*, *supra*.

3. Private matter message on government hardware.

There are no cases dealing with private matters discussed in text or instant messages on government hardware. Such communications would probably qualify as a "writing" under FOIA, but would likely be held to fall outside FOIA disclosure requirements unless the messages "relate to the conduct of the public's business" as interpreted by the Court in *Associated Press v. Canterbury*, *supra*.

4. Public matter message on private hardware.

There are no cases dealing with private matters discussed in text or instant messages on government hardware. It is possible, however, that the West Virginia Court may require disclosure upon a finding that private matter text or instant messages have been used as a ruse to conduct public business while avoiding FOIA disclosure requirements.

5. Private matter message on private hardware.

There have been no court decisions indicating how private matter messages on private hardware should be treated. However, based upon the West Virginia Court's holding in *Associated Press v. Canterbury*, *supra*, it is likely that records of discussion of private matters on private e-mail will fall outside the law's disclosure requirements because they fail to fall within the definition of West Virginia FOIA's definition of "public record."

F. How are social media postings and messages treated?

There have been no court decisions or agency guidance indicating how social media postings and messages are to be treated for purposes of FOIA analysis.

G. How are online discussion board posts treated?

There have been no court decisions or agency guidance indicating how online discussion board posts social media postings and messages are to be treated for purposes of FOIA analysis.

H. Computer software

There have been no court decisions or agency guidance indicating how online discussion board posts social media postings and messages are to be treated for purposes of FOIA analysis.

1. Is software public?

There have been no court decisions or agency guidance indicating how software is to be treated for purposes of FOIA analysis.

2. Is software and/or file metadata public?

There have been no court decisions or agency guidance indicating how file metadata is to be treated for purposes of FOIA analysis.

I. How are fees for electronic records assessed?

Fees for electronic record request should be consistent with the fees that may be charged for reproducing records in a paper format. Thus, the limit on fees charged by public bodies should be the "actual cost of reproduction" of records in an electronic format. If the record is transmitted to the requester on a computer readable DVD or CD the charge should be no more than the cost of that medium to the government body.

J. Money-making schemes.

1. Revenues.

Significant information relating to West Virginia State Government is available without charge through the State's general website found at <http://www.wv.gov/Pages/default.aspx>, Additional state information and public records are available via the Office of the Secretary of State of West Virginia: <http://www.sos.wv.gov/Pages/default.aspx>. Fee are charged by the Secretary of State for some searches and for some requested documents. All proposed and final State rules and regulations are accessible and may be downloaded free of charge: <http://www.sos.wv.gov/administrative-law/Pages/Rules.aspx>. Information relating to bills and legislative enactments is available free from the State Legislature's website: <http://www.legis.state.wv.us/>.

2. Geographic Information Systems.

For more than a decade several West Virginia agencies have been involved in developing a geographic information system to use in the appraisal and assessment of reserve coal property. It is not clear whether such information might fall within one of the state tax code's exemptions of tax-related data. Otherwise, to the extent that geographical information system data does not fall within a specific FOIA exemption contained in another statute, it should be disclosed.

K. On-line dissemination.

When requested records are transferred to FOIA requesters by e-mail or are downloaded by requesters from a government website, no fees should be assessed as the government body would have incurred no "actual cost of reproduction."

IV. RECORD CATEGORIES -- OPEN OR CLOSED

As noted in the last section, the only exemptions available under the Freedom of Information Act are the nineteen categories of information specifically exempted in the statute. This section addresses the availability of certain specific types of records for which requests are frequently made.

A. Autopsy reports.

Autopsy reports and records of the state medical examiner probably could fall within the "personal information" exemption of the FOIA, and thus be subject to the *Cline* balancing test. Based upon other decisions, it is possible that the Supreme Court of Appeals might recognize some degree of privacy protection even for records of deceased persons. See *Jeffery v. McHugh*, 166 W. Va. 379, 273 S.E.2d 837 (1980) (upholding the confidentiality of juvenile court records, specifically

exempt from disclosure under W. Va. Code § 49-7-1, even though the juvenile involved had died). However, the fact that autopsy reports would not directly affect the privacy rights of any living person undoubtedly would be important in the *Cline* balancing process.

Note that there is a specific statute mandating disclosure of autopsy reports made by the state medical examiner to persons to whom the cause of death is “a material issue.” W. Va. Code § 61-12-10 requires that “[a] full record and report of the findings developed by the autopsy shall be filed with the office of medical examinations,” and requires that office to keep “full, complete, and properly indexed records of all deaths investigated, containing all relevant information concerning the death, and the autopsy report if such be made. . . . Copies of such records or information shall be furnished, upon request, to any party [in court proceedings] to whom the cause of death is a material issue.” Moreover, “any prosecuting attorney or law-enforcement officer may secure copies of these records or information necessary for the performance of his or her official duties.” While W. Va. Code, § 61-12-10 suggests limited availability of autopsy records it does not explicitly exempt such records from public scrutiny. It is likely that courts would view autopsy and related records as subject to FOIA disclosure, but would analyze each FOIA request to determine the extent to which disclosure might be limited by *W.Va. Code* § 29B-1-4(2) (“Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy . . .”). As noted above, where such information is of such a personal nature, disclosure depends on a balancing test that weighs privacy and public interests. *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541(1986).

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

1. Rules for active investigations.

Other than cases construing FOIA exemptions, there have been no specific court decisions or statutory references to application of FOIA to active administrative law enforcement investigations. Worker safety and health inspections, or accident investigations arguably may be viewed as falling within the FOIA exemption for records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement *W.Va. Code* 29B-1-4 (a) (4)

The primary purpose of the law enforcement exemption, *W.Va. Code*, 29B-1-4(4), is to prevent premature disclosure of investigatory materials which might be used in law enforcement action. *Hechler v. Casey*, 333 S.E.2d 799, 175 W.Va. 434 (1985).

The fact that the document falls within law enforcement records exception to Freedom of Information Act (FOIA) disclosure requirement does not automatically exclude it from disclosure under FOIA; once a document is determined to be law enforcement record, it may still be disclosed if society’s interest in disclosure of the document outweighs government’s interest in keeping the document confidential. *Ogden Newspapers, Inc. v. City of Williamstown*, 453 S.E.2d 631, 192 W.Va. 648 (1994).

2. Rules for closed investigations.

Other than cases construing FOIA exemptions, there have been no specific court decisions or statutory references to application of FOIA to closed administrative law enforcement investigations.

It is unlikely that closed administrative enforcement records such as worker safety and health inspections, or accident investigations reports would fall under FOIA’s law enforcement exemption. An exception might be recognized for information of a personal nature contained in closed files. Disclosure of such personal information could be seen as constituting an unwarranted invasion of privacy under § 29B-

1-4(2). To determine whether such information of a personal nature closed administrative files may be disclosed to the public, application of the five factor analysis of *Cline v. Child Protection Group*, would be required.

In *Manns v. City of Charleston Police Department*, 550 S.E.2d 598 (W.Va. 2001), the West Virginia Supreme Court of Appeals observed that records of administrative investigations of police misconduct had been found by other courts to be “similar” to “personal files” as set forth in *W.Va. Code* § 29B-1-4(2) (“Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy . . .”). Agreeing with this approach, the West Virginia Court held that disclosure of records of complaints about, and investigations into, police officer misconduct depends upon the application of a five factor balancing test that must weigh privacy and public interests. *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541(1986).

C. Bank records.

Most bank records — and particularly “[i]nformation contained in or related to examination, operating or condition reports prepared by, or on behalf of, or for the use of any” banking regulatory agency — are exempt from disclosure under Exemption 7 of the FOIA, as well as the specific statutes discussed above.

D. Budgets.

Generally, final versions of budgets of West Virginia governmental entities should be disclosed upon receipt of a FOIA request. It is possible that government bodies may claim that proposed budgets fall within exemption 8 of the FOIA, §29B-1-4(a)(8). That exemption relates to internal predecisional information. See *Daily Gazette v. W. Va. Development Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996).

E. Business records, financial data, trade secrets.

Trade secrets are the first FOIA exemption, but there is no provision under the FOIA or other statutes for confidentiality of business records or financial data. In *Queen v. WVU Hospitals, supra*, the Supreme Court refused to create a general exemption for “business confidentiality.” In *Keegan v. Bailey*, 191 W. Va. 145, 443 S.E.2d 826 (1994), the state Supreme Court ruled that the state’s uncashed checks were subject to disclosure under the Freedom of Information Act, even though the records of *abandoned* property are specifically exempt under W. Va. Code § 36-8-12a (1983). (Under W. Va. Code § 36-8-8b(a), property is not abandoned until it has remained unclaimed for *seven* years, and the records requested related to checks issued within the past *six* years.)

F. Contracts, proposals and bids.

Public contracts are subject to disclosure under the Freedom of Information Act and, in *4-H Road Community Association v. WVU Foundation, supra*, the Supreme Court observed that leases between West Virginia University and other parties were public documents subject to disclosure by the University under the FOIA. The competitive bidding procedure prescribed by statute for most state contracts provides that, after the award of the contract or order, copies of each bid submitted shall be maintained as public records by the director of the Department of Finance and Administration and by the state auditor, and “shall be open to public inspection in the office of the director and state auditor and shall not be destroyed by either of them without the written consent of the legislative auditor.” W. Va. Code § 5A-3-14.

There is no express exemption, in the FOIA or in W. Va. Code § 5A-3-14, for bids or proposals on public contracts prior to the award of the contract. However, the provisions of the latter statute probably would be sufficient to keep such documents confidential until the contract is awarded. The FOIA’s trade secret exemption could be construed to grant temporary confidentiality to competitive bids of other entities not subject to § 5A-3-14.

G. Collective bargaining records.

There is no exemption for collective bargain records. However, collective bargaining by public employees is unlawful in West Virginia.

H. Coroners reports.

Coroners reports would most likely be treated the same as autopsy reports (see IV. A. *supra*), i.e., they may fall within the “personal information” exemption of the FOIA and thus be subject to the *Cline* balancing test, with some degree of privacy protection for the records of deceased persons. See *Jeffery v. McHugh*, 166 W. Va. 379, 273 S.E.2d 837 (1980) (upholding the confidentiality of juvenile court records, which were specifically exempt from disclosure under W. Va. Code § 49-7-1, even though the juvenile involved had died).

I. Economic development records.

W. Va. Code § 5B-2-1 exempts from the West Virginia FOIA “any documentary material, data or other writing made or received by any public body whose primary responsibility is economic development for the purpose of furnishing assistance to a new or existing business. This exemption specifically applies to the West Virginia economic development office and other similar public bodies with such responsibilities. The exemption includes a proviso requiring release of “any agreement entered into or signed by the development office or public body which obligates public funds shall be subject to inspection and copying pursuant to the provisions of said article as of the date the agreement is entered into, signed or otherwise made public.” This exemption for economic development records was enacted to limit the liberal construction afforded FOIA by the state Supreme Court in *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 198 W.Va. 563, 575, 482 S.E.2d 180, 192 (1996) (“*Gazette I*”).

J. Election records.

Election records are subject to disclosure under the Freedom of Information Act. Additionally, several statutes specifically mandate particular records to be maintained as public records open to inspection. See *W. Va. Code* § 3-1-7 (clerk of county commission must keep a bound book recording all proceedings creating or changing precincts, or establishing or changing voting places or precincts); *W. Va. Code* § 3-6-9 (county commission must keep a complete record of all vote canvassing proceedings). There is one very narrow caveat to the general rule that election information must be disclosed to FOIA requesters. In *State ex rel. Daily Gazette Co. v. Bailey*, 152 W.Va. 521, 164 S.E.2d 414 (1968) the West Virginia Supreme Court addressed whether certificates of nomination to place a candidate for President and Vice-President of the United States on the ballot were not public records required to be disclosed under pre-FOIA state open records statutes. *Bailey* concluded that “[c]ertificates of nomination signed and filed pursuant to [state law] do not constitute public records.” *Bailey*, Syl. Pt. 1. This conclusion was based on the Court’s determination that certificates of nomination were the functional equivalent of the candidate nominating processes used by the major political parties and thus entitled to the same protection from public disclosure as the “secret ballot.”

The legislature has declared that candidates may be nominated for political office in a manner other than by conventions or primary elections. This declaration has been made in the following words: “(a) Groups of citizens having no party organization may *nominate* candidates for public office otherwise than by conventions or primary elections[.]” *Bailey*, 152 W.Va. at 524, 164 S.E.2d at 416.

A major deciding factor in *Bailey* was the Legislature’s mandate that “[n]o person signing such certificate shall vote at any primary election to be held to nominate candidates for office to be voted for at the election to be held next after date of signing such certificate[.]” See, *Shepherdstown Observer, Inc. v. Maghan*, 226 W.Va. 353, 700 S.E.2d 805 (W.Va. 2010) (distinguishing *Bailey*). “In all aspects, a person signing a nominating certificate was casting a primary ballot for his or her candidate and had thus voted. It was for this reason that we held in Syl-

labus Point 2 of *Bailey* that: “[a] qualified voter who signs a certificate . . . effectively casts his vote for the nomination of the candidate named therein and his vote, except where necessarily revealed, is entitled to the same secrecy as one cast in a primary election.” *Shepherdstown Observer, Inc. v. Maghan*, 700 S.E.2d at 812-813.

In *Shepherdstown Observer*, a county clerk asserted that a petition seeking a referendum election on a zoning ordinance was exempt from disclosure under the pre-FOIA decision in *State ex rel. Daily Gazette Co. v. Bailey*.

The *Shepherdstown Observer* Court rejected the trial court’s conclusion that no valid purpose existed for making the signatures appearing on a referendum petition public and that a referendum petition should be treated, under *Bailey*, as a ballot cast and therefore “entitled to the same secrecy as one cast in [an] election,” 700 S.E.2d at 813.

The Court found the circuit court had erred in holding that signatures on a referendum petition were the functional equivalent of a secret ballot, that disclosing the names of signatories on a referendum petition could have an unconstitutional chilling effect on the ability of citizens to petition the government in violation of the First Amendment to the *United States Constitution* and Article III, §§ 7 and 16 of the *Constitution of West Virginia*. *Id.* Finding that disclosure of a referendum petition under the FOIA “serves a vital function in protecting the integrity of the electoral process and in promoting transparency and accountability in the “conduct of the public’s business” the Court saw “nothing in our state law or state *Constitution* that would bar disclosure of the referendum petition at issue pursuant to a FOIA request.” *Shepherdstown Observer*, 700 S.E.2d at 814-815.

1. Voter registration records.

While there are no cases construing FOIA in the context of voter registration records, such records have been routinely made available to the public upon request.

2. Voting results.

While there are no cases construing FOIA in the context of voting results, such records have been routinely made available to the public upon request.

K. Gun permits.

West Virginia requires those who desire to carry concealed weapons to obtain a license. *W. Va. Code* § 61-7-4. The license application must be made to the county sheriff. If the license is granted after an investigation, the County Sheriff is required to forward to the Superintendent of the West Virginia State Police a certified copy of the approved application. The Superintendent of the West Virginia State Police is required to maintain a register of all persons who have been issued concealed weapons licenses. *W. Va. Code* § 61-7-4.

There is no provision in West Virginia law exempting information regarding concealed weapons license applicants and/or licensees from the states’ FOIA law. It appears, therefore, that such records are open for public inspection. There is no caselaw addressing the issue.

L. Hospital reports.

“An individual’s medical records are classically a private interest,” *Child Protection Group v. Cline*, 350 S.E.2d at 545, and Exemption 2 of the FOIA specifically protects “[i]nformation of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance.” The balancing test required by this exemption is discussed at length above. (*W. Va. Code* § 16-29-1 gives individuals the right of access to their own medical records.)

An even broader exemption from disclosure is provided by *W. Va. Code* § 27-3-1 for records reflecting psychiatric treatment or evaluation of any individual:

Communications and information obtained in the course of treatment or evaluation of any client or patient shall be deemed to be ‘confidential information’ and shall include the fact that a person is or has been a client or patient, information transmitted by a patient or client or family thereof for purposes relating to diagnosis or treatment, information transmitted by persons participating in the accomplishment of the objectives of diagnosis or treatment, all diagnoses or opinions formed regarding a client’s or patient’s physical, mental or emotional condition; any advice, instructions or prescriptions issued in the course of diagnosis or treatment, and any record or characterization of the matters hereinbefore described. It does not include information which does not identify a client or patient, information from which a person acquainted with a client or patient would not recognize such client or patient, and encoded information from which there is no possible means to identify a client or patient.”

This statute provides for disclosure of confidential information in three circumstances: (1) in specified judicial proceedings, where an involuntary examination has been made pursuant to those proceedings, or where the court determines the information is sufficiently relevant to the proceeding to outweigh the importance of maintaining confidentiality; (2) to professionals involved in treatment of the patient, for treatment or internal review purposes; or (3) “to protect against a clear and substantial danger of imminent injury by a patient or client to himself or another.”

The Supreme Court of Appeals interpreted this statute in *State v. Simmons*, 173 W. Va. 590, 309 S.E.2d 89 (1983), but gave no indication of whether its provisions would constitute a blanket exemption for psychiatric records in the custody of a public body. Although the court in *Cline*, *supra*, did not mention this statutory provision, the court’s treatment of such records suggests they would be subject to disclosure under the FOIA if the interests favoring access in a particular case outweighed the individual’s right to privacy.

Records concerning the institution, rather than individuals, normally will be subject to disclosure. *Queen v. WVU Hospitals*, *supra*. W. Va. Code § 16-5C-16 requires the state director of health to “make available for public inspection and at a nominal cost provide copies of all inspections and other reports of [nursing homes and personal care homes] filed with or issued by the director,” without disclosing “confidential medical, social, personal or financial records of any patient.” The Freedom of Information Act should provide similar access to inspection records of hospitals and other regulated facilities.

Information regarding state hospitals may be obtained from the individual facilities, or from the state director of health, to whom the superintendent of each facility is required to furnish “such information as he may have concerning admissions, discharges, deaths and other matters. From this and other information available to the director of health, he shall keep such records as are necessary to enable him to have current information concerning the extent of mental illness in the state. The names of individuals shall not be accessible to anyone except by permission of the director of health or by order of a judge of a court of record.” W. Va. Code § 27-2-5.

Specific statutes control access to one additional category of hospital records. State law regulates peer review organizations, in which medical professionals evaluate the performance of their colleagues. Whenever a hospital’s peer review committee finds a physician has performed incompetently, it is required to furnish its findings to the state Board of Medicine. W. Va. Code § 30-3C-3 makes such peer review records strictly confidential unless the person whose activities were reviewed consents to disclosure. In *Daily Gazette v. W. Va. Board of Medicine*, *supra*, the state Supreme Court upheld the validity of this provision generally, but ruled that peer review records must be made available for public inspection if they are used by the Board of Medicine as a basis for initiating disciplinary proceedings against a physician. Then, in *Thompson v. W. Va. Board of Osteopathy*, *supra*, the court held that, even where the Board of Osteopathy Medicine did not find

probable cause to pursue disciplinary action, the public had a right of access to the document setting forth the charges, and the findings of facts and conclusions of law supporting the dismissal of those charges.

M. Personnel records.

Personnel records, including information contained in an individual’s application and disciplinary records, generally would be subject to the balancing test required for disclosure of personal information under FOIA Exemption 2, discussed in the previous section. Facts — such as an individual’s name and residential address — which “are not ‘personal’ or ‘private’ facts but are public in nature in that they constitute information normally shared with strangers and are ascertainable by reference to publicly obtainable books and records” are disclosable even without the balancing test required for more intimate information. See generally, *In re Charleston Gazette FOIA Request*, 222 W. Va. 771, 671 S.E.2d 776 (2008) (recognizing, in *dicta*, that such records should be available to the public upon FOIA request.)

Syllabus pt. 8, *Hechler v. Casey*, *supra*. Public bodies have disclosed information regarding public employees’ salaries routinely.

A few types of personnel records are made specifically subject to, or exempt from, disclosure by other statutes. W. Va. Code § 29-6-16 provides that records of the state civil service commission, “except such records as the rules may properly require to be held confidential for reasons of public policy, shall be public records and shall be open to public inspection.” W. Va. Code § 18-29-3, which regulates grievance proceedings for education employees, and W. Va. Code § 29-6A-3, which regulates grievance proceedings for public employees, mandate that “[a]ll grievance forms and reports shall be kept in a file separate from the personnel file of the employee and shall not become a part of such personnel file, but shall remain confidential except by mutual agreement of the parties.”

W. Va. Code § 8-14-10 requires the Policemen’s Civil Service Commission to “[k]eep minutes of its own proceedings, and records of its examinations and other official actions. All recommendations of applicants for office, received by the said commission or by any officer having authority to make appointments to office, shall be kept and preserved for a period of ten years, and all such records, recommendations of former employees excepted, and all written causes of removal, filed with it, shall, subject to reasonable regulation, be open to public inspection.”

Records identifying specific individuals by name are not *per se* exempt from disclosure unless the record falls within one of the exemptions of FOIA or are otherwise rendered specifically exempt from disclosure pursuant to the provisions of another statute.

Expense reports of government employees or contractors do not fall within any FOIA exemption and should be disclosed upon request.

N. Police records.

The scope of the FOIA exemption for records of law enforcement agencies is discussed in the preceding section. In general, the exemption applies only to (1) “information compiled as part of an inquiry into specific suspected violations of the law” and (2) internal records which reveal “confidential investigative techniques and procedures.” *Hechler*, *supra* at 802, Syllabus pts. 11, 12. Items such as mug shots, police blotters and 911 tapes normally would not meet these prerequisites for confidentiality, and thus should be subject to disclosure.

Records which are “generated pursuant to ‘routine administration, surveillance or oversight’” are not exempt, and “[t]he fact that information . . . may form a *basis* for further investigation . . . or may alert the administrator to a possible violation of law . . . does not make that [information] an investigatory record created *pursuant to* an investigation.” *Id.* at 813 (citation omitted) (emphasis in original).

Similarly, although the protection of confidential police techniques and procedures was identified in *Hechler* as one of the primary reasons for the law enforcement exemption, this protection does not extend

to “ordinary manuals or procedures unless they include confidential details of law enforcement programs.” *Id.* at 813.

Again, various statutes contain more specific provisions governing access to certain types of law enforcement records. Accident reports which are filed by law enforcement officers with the state Department of Motor Vehicles are available for public inspection at DMV, W. Va. Code § 17A-2-14; 51 Op. Att’y Gen. 556 (1965), and also should be available under the FOIA from the officers directly.

Active investigatory records are exempt from disclosure, W. Va. Code § 29B-1-4(4). However, since the primary purpose of the exemption is “to prevent *premature* disclosure of investigatory materials which might be used in a law enforcement action,” *Hechler, supra* at 812 (citation omitted)(emphasis added), the exemption should no longer apply once the “detection and investigation” has concluded. See *Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50, 52 (1984) (“We have no evidence of what interests are intended to be protected by nondisclosure in this particular case, especially after the investigation has ceased and no charges have been filed. We have been admonished to make decisions in favor of disclosure.”); Op. Att’y Gen., April 18, 1986, at 112 (information revealed in Legal Services Corporation audit is exempt from disclosure while in custody of prosecutors investigating possible criminal violations, but reverts to public status once investigation is concluded). Arrest records and compilations of criminal histories maintained by the Criminal Investigation Bureau of the state police are exempt from disclosure under the provisions of W. Va. Code § 15-2-24, which denies public access to “fingerprints, photographs, records or other information” maintained by the CIB.

There is no specific provision in the FOIA regarding access to such information as confessions, or the identities of victims and informants. The general test whether the information was “compiled as part of an inquiry into specific suspected violations of the law” or reveals “confidential investigative techniques and procedures” — will determine whether such records are open to public inspection. This test does not apply to information concerning alleged crimes reported to security or other officials at colleges and universities. See also Section IV.N., *infra*.

West Virginia State Code §15-12 entitled the Sex Offender Registration Act authorizes the electronic release of information regarding certain sex offenders required to register under West Virginia Law. A database registry of sex offenders is available via the West Virginia State Police website: <http://www.wvstatepolice.com/sexoff/web-searchform.cfm>

Emergency medical services records of state or local government funded emergency services providers should be available to FOIA requesters subject to claims of exemption pursuant to exemption 2 of the FOIA, §29B-1-4(a)(2) relating to “information of a personal nature such as that kept in a personal, medical or similar file.” To the extent that such records reflect medical treatment or the medical condition of a person who has received emergency medical services, it is likely that courts would hold such information exempt under exemption 2. However, the fact of provision of emergency services to an individual as well as the time and circumstances arguably should be disclosed if requested under the FOIA.

O. Prison, parole and probation reports.

The FOIA has no specific exemption for prison, parole and probation reports. Therefore, unless the particular materials sought fall with the exemptions discussed above for personal information or law enforcement records, they would be available for public inspection.

The disclosure of presentence reports prepared by a court’s probation office is discretionary with the court, under Rule 32 of the W. Va. Rules of Criminal Procedure. The Supreme Court has ruled that even the defendant has no absolute right to full disclosure of his presentence report. *State v. Godfrey*, 170 W. Va. 25, 289 S.E.2d 660 (1981). Probation revocation proceedings are conducted in open court, and public access is guaranteed as for any court proceeding.

P. Public utility records.

Public utility records in the possession of any public body such as the Public Service Commission would be subject to disclosure unless the particular information sought is one of the sixteen exempt categories discussed in the previous section.

As discussed above, the Supreme Court has ruled that information contained in the annual reports submitted by public utilities to the Public Service Commission are public, unless the utility establishes by clear and convincing evidence that the information constitutes a trade secret, or comes within one of the other exemptions. *AT&T Communications v. Public Service Commission, supra*.

Q. Real estate appraisals, negotiations.

The only specific state FOIA exemption for real estate appraisals or negotiation material is the provision of FOIA Exemption 6 that protects the “location of undeveloped historic, prehistoric, archaeological, paleontological and battlefield sites.” W. Va. Code § 29b-1-4(6).

In *Veltri v. Charleston Urban Renewal Authority, supra*, the Kanawha County Circuit Court ordered the Authority to release all appraisals it had obtained on a parcel of real estate it had purchased.

R. School and university records.

There is no specific exemption for school or university records. However, individual students’ and personnel records generally would be subject to the balancing test applicable to personal information. Information concerning the institution, including trustee records, should be available for public inspection. A specific statute requires colleges and universities in the state to provide information to the public regarding alleged crimes occurring on campus and reported to the school’s security or other officials. W. Va. Code § 18B-4-5a.

It should be noted, however, that many student records of state colleges and universities are exempt from disclosure pursuant to federal law. The Family Educational Rights and Privacy Act (“FERPA”) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. FERPA gives parents certain rights with respect to their children’s education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Information relating to FERPA is available at the United States Department of Education website: <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>

S. Vital statistics.

Birth and death certificates are governed by W. Va. Code § 16-5-26, which provides that it is:

unlawful for any person to permit inspection of confidential information or to disclose confidential information contained in vital statistics records, to copy or issue a copy of all or any such confidential information, except as authorized by law or by order of a court having jurisdiction with respect thereto or by rule and regulation duly adopted under the provisions of this article. . . . Information in vital statistics records indicating that a birth occurred out of wedlock shall not be disclosed except as provided by rule and regulation duly adopted or upon order of a court having jurisdiction with respect thereto. Appeals from decisions of the custodians of permanent local records refusing to disclose confidential information, or to permit inspection of or copying of confidential information under the authority of this section and rules and regulations issued hereunder shall be made to the state registrar of vital statistics, whose decisions shall be binding upon the local custodians of permanent local records.

Documentation of marriages and divorces do not fall within any exemption and should be disclosed upon request.

No West Virginia statutory law or mentions or limits the disclosure of records relating to infectious disease and health epidemics.

However, exemption 2 of FOIA, §29B-1-4(a)(2) relating to “information of a personal nature such as that kept in a personal, medical or similar file” could be asserted by government bodies in an effort to withhold information relating to infectious disease and health epidemics. Exemption 2 would apply only to medical records naming specific individuals. Arguably such records should be disclosed after redaction of information identifying individuals suffering from an epidemic-related disease. If an infectious disease or health epidemic was caused by terrorist activity, records relating to such an event may be claimed exempt under exemptions 11 through 16, §29B-1-4(a)(11)-(16) and/or §29B-1-4(c). Those exemptions have not been the subject of any public discussion or court action since their enactment in response to the September 11, 2001 terrorist attacks on the World Trade Center in New York City and the Pentagon in Virginia.

V. PROCEDURE FOR OBTAINING RECORDS

This section addresses the most frequently asked question under the Freedom of Information Act: “How do I file an FOIA request?”

A. How to start.

1. Who receives a request?

The Freedom of Information Act requires that requests for access to records be made to the person in charge of the government body:

A request to inspect or copy any public record of a public body shall be made directly to the custodian of such public record.

‘Custodian’ means the elected or appointed official charged with administering a public body.

W. Va. Code §§ 29B-1-2(1), 29B-1-3(2).

2. Does the law cover oral requests?

The FOIA requires a denial of a request for access to records to be in writing, but the request itself may be either oral or written. However, as Professor Neely notes, written requests often have practical advantages:

For evidentiary purposes a written request would prove useful in subsequent judicial review proceedings, if an oral request is denied or if refusal is anticipated at the outset. Additionally, a written request will establish precisely what is being requested for purposes of deliberation within the public body.

The more plausible scenario is that an initial oral request will be made to a clerk having routine responsibility for the keeping of certain records, although technically all requests are to be made to the “custodian.” Consequently, it seems sensible that debatable requests be made in writing, in the first instance, and directed to the custodian. This is essential when the location of the records is unknown, or their very existence is uncertain.”

Neely, supra, § 7.05 at 544-45 (1982). Thus, written request should be the rule and oral request avoided unless time constraints make reduction of the request to writing infeasible.

a. Arrangements to inspect & copy.

Each “custodian” of records subject to disclosure under the Freedom of Information Act is required to “furnish proper and reasonable opportunities for inspection and examination of the records in his office and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them.” W. Va. Code § 29B-1-3(3).

The statute does permit public bodies to “make reasonable rules and regulations necessary for the protection of the records and to prevent interference with the regular discharge of his duties,” *id.*, “but in no circumstances may these limitations be used so as to prevent a person from access to the records.” *Richardson v. Town of Kimball*, 340 S.E.2d at 583 n.2. A telephone call to the Secretary of State’s Administrative Law office (304/558-6000) should reveal whether a particular agency has adopted regulations governing inspection procedures.

Although the FOIA has no requirement that advance arrangements be made for inspection or copying of records, an agency could require this by regulation. Moreover, if locating the records will be at all time consuming, advance arrangements obviously would be desirable.

b. If an oral request is denied:

If an oral request is denied, the agency should be asked to provide the denial in writing, as required by the Freedom of Information Act. If this request is refused, or if the denial does not specifically and correctly describe what records were requested, a written record of what was requested should be made together with the reasons given for the denial. If a clerk, or someone other than the actual “custodian” of the records made the denial, a formal written request should be directed to the custodian.

3. Contents of a written request.

a. Description of the records.

Any FOIA request must describe the information sought “with reasonable specificity.” W. Va. Code § 29B-1-3(4). Written requests should also specify that the request is being made both under the Freedom of Information Act and under the common law right of access. If another statute provides for broader access to the requested materials, that statute also should be mentioned.

The Supreme Court has not defined the term “reasonable specificity.” But in *Richardson v. Kimball, supra*, it ruled that a town’s denial of an FOIA request for inspection of “all traffic records” for a three-year period — based on the contention that the request was not “reasonably specific” — was so unjustified that the town was found to have acted in bad faith, justifying an award of attorneys’ fees even prior to the 1992 amendment which permitted such fees.

b. Need to address fee issues.

The statute does say that furnishing copies is one permissible response. It also indicates that the public body may establish fees to reimburse it for the actual cost of reproduction. Does this mean that a public body may respond with copies and a bill for reproduction costs? This should be allowed only if copies are requested and the fees understood. If there is any doubt, the public body should offer the option of the second response, and make known the time and place at which the person may inspect and copy the records. Most persons probably will prefer this latter course.

Neely, supra, § 7.06 at 546 (1982). The requester should specifically request to review disclosed documents if that is his/her preference. Copying may be requested of some or all disclosed documents, after they have been reviewed. Certainly, if a request specifically asks for copies, it should recite the requesters understanding of the fee which will be charged.

c. Plea for quick response.

The Freedom of Information Act requires a response to all requests within five working days, and the request should ask that this time limit be met. If there is a particularly urgent need for the records, this should be explained and an expedited response requested.

d. Can the request be for future records?

The statute neither prohibits nor specifically authorizes a request for future records. So long as they can be identified with “reasonable specificity,” an FOIA request for future records should be valid. Keep in mind, also, that you may have a common law right to require the public body to create records and then make them available for public inspection or copying. *See Daily Gazette v. Withrow, supra*.

B. How long to wait.

1. Statutory, regulatory or court-set time limits for agency response.

W. Va. Code § 29B-1-3(4), mandates that each “custodian, upon demand for records made under this statute, shall as soon as practicable

but within a maximum of five days not including Saturdays, Sundays or legal holidays:

- (a) Furnish copies of the requested information;
- (b) Advise the person making the request of the time and place at which he may inspect and copy the materials; or
- (c) Deny the request stating in writing the reasons for such denial.”

2. Informal telephone inquiry as to status.

Unless the agency has clearly indicated its intention to refuse the request, however, an informal telephone inquiry regarding the status of the request is advisable if the response is not received within the time limit. If the initial request was oral, or was made to someone other than the official “custodian” of the records, a written inquiry directed to the custodian — including a reminder that you will seek reimbursement for attorneys’ fees if the agency’s failure to respond necessitates legal action — would be preferable.

3. Is delay recognized as a denial for appeal purposes?

The FOIA does not specify the consequences of a public body’s failure to respond within the five-day limit. The courts routinely have treated such lack of response, for appeal purposes, as a denial of the request.

4. Any other recourse to encourage a response.

Typical approaches to encourage a response would include seeking the assistance of the press or an influential person whether within or without the public body. Another, and often more promising, method of informally encouraging a response is through the agency’s legal advisor. The state Attorney General’s office represents most state agencies; counties and political subdivisions usually obtain legal advice from the county prosecuting attorney or city attorney. If a public body’s refusal seems to be clearly wrong under the statute, and it is not based upon the attorney’s advice, it may be worthwhile to ask the agency to consult with its lawyer. In some cases you may be able to contact the lawyer directly and seek his intervention on your behalf. In many cases, the agency’s lawyer will be the Attorney General’s office that in many cases has advised an agency (and a court reviewing the agency’s action) that it considered the agency’s refusal unjustified.

C. Administrative appeal.

Unlike the federal FOIA, West Virginia’s Freedom of Information Act has no provisions for administrative appeals. Since the request for records must be made to the agency’s chief executive — “the elected or appointed official charged with administering a public body,” W. Va. Code § 29B-1-3(2) — there usually is no practical avenue for informal administrative appeals.

Some agencies, such as professional licensing boards, may have an administrator who is not actually a decision maker. In these cases, a denial by the “custodian” may not reflect agency policy, and an informal appeal to the governing board could be pursued. Also, in the case of refusals by local agencies that are under the indirect supervision of a state agency, an informal appeal to the state agency may be worthwhile. (W. Va. Code § 16-5-26 provides for such an administrative appeal in one instance: denials of access to local vital statistics records are appealable to the state health department.)

Since there is no formalized procedure for such appeals, ordinarily you must depend on the administrator’s cooperation to present the request to the governing body and to obtain a prompt decision. If you decide to pursue this approach, provide a clear description of the records or portions of records to which you were denied access and of the reasons given for such denial (or of the relevant facts if you are raising another issue such as excessive fees or delays). State why you consider the administrator’s decision wrong: if possible, quote the specific portion of the statute or case that makes the error clear. Remember, if the issue isn’t clear, it is unlikely that the administrator’s

decision will be overruled except by a court. It might be advisable to indicate that if a failure to disclose the requested information is successfully challenged in court, the agency may be required to pay the attorney fees of the requester.

There is no time limit established either for taking the informal appeal, or for receiving a decision. An appeal letter should specify the time limit within which you desire a response and should state that a failure to respond within this period will be considered a denial. Be reasonable in setting this time limit: since there are no established procedures for such appeals, an expeditious decision is unlikely. If your appeal is directed to a part-time governing board, a greater delay in receiving a response must be expected. If you need the requested materials promptly, the only truly effective avenue of appeal is to a circuit court.

D. Court action.

1. Who may sue?

Just as “any person” may request access to records under the Freedom of Information Act, “any person denied the right to inspect the public record of a public body” may sue to enforce that right. W. Va. Code § 29B-1-5(1).

2. Priority.

The FOIA confers priority on cases involving the denial of access to public records: “Except as to causes the court considers of greater importance, proceedings arising under [the FOIA] shall be assigned for hearing and trial at the earliest practicable date.” W. Va. Code § 29B-1-5(3). Such a “priority” however, is left to the discretion of the trial court, which may consider other matters to be of greater importance.

3. Pro se.

There is no requirement that an attorney file a FOIA suit. In fact, two of the court decisions ordering public bodies to provide access to records were the result of suits filed by individuals *pro se*, representing themselves. *Veltri v. Charleston Urban Renewal Authority, supra*; *Hark v. Charleston Urban Renewal Authority, supra*. However, seeking relief in court without the aid of an attorney is problematic and should be the subject of careful consideration of the temperament of the court toward the press and the identity and expertise of possible opposing counsel. Successful *pro se* FOIA litigants are entitled to an award of court costs, but because they have not been represented by an attorney they are not eligible for an award of attorney fees. *Smith v. Bradley, 223 W.Va. 286, at 293, 673 S.E.2d 500, at 507 (2007)*.

In all Freedom of Information Act cases, the “burden is on the public body to sustain its action,” W. Va. Code § 29B-1-5, and in a simple case one may be able to rely solely upon the agency’s inability to justify its denial. As a general rule, the more complicated or important the issue or the less time you have available to learn the basics of judicial procedures, the more you need an attorney.

Remember that, if an attorney is retained to obtain records and a court finds that the information requested was withheld wrongfully under the statute, the requester is entitled to have the agency pay attorney fees. Some attorneys may agree to represent a requester with the understanding that the requester will pay costs and that the attorney will be compensated for his or her work only if suit causes withheld documents to be disclosed, thus triggering a judicial award of attorney fees. This was the arrangement between the newspaper and its attorneys in *Daily Gazette Co. Inc. v. W. Va. Development Office, 206 W.Va. 51, 521 S.E.2d 543 (1999)*.

If your issue is an important one, other news organizations might be willing to join your case and share expenses. In the suit which opened the Board of Medicine’s records and proceedings to the public, for example, the two Charleston newspapers — normally competitors — joined forces as plaintiffs to pursue an issue of great concern to both of them.

4. Issues the court will address:

The FOIA confers on the court “jurisdiction to enjoin the custodian or public body from withholding records and to order the production of any records improperly withheld from the person seeking disclosure.” W. Va. Code § 29B-1-5(2). The statute also authorizes the court to enter a declaratory judgment that establishes patterns for future access. During the course of the litigation the court will determine whether there has been a denial of access to records, whether any claim of exemption is valid, and the scope and application of an exemption if relevant to the requested information. The court may choose to review withheld *documents in camera* (without counsel or parties present) or require the appointment of a special master to accomplish this task. See e.g., *Daily Gazette Co. Inc. v. W. Va. Development Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996). Other provisions of the Freedom of Information Act, such as the limitations on fees charged for copying, time limits for responding to requests, and a determination of whether the petitioner is entitled to an award of attorneys’ fees, may also be addressed.

5. Pleading format.

The complaint need only contain a “short and plain” statement of your claim. If it seeks injunctive relief, it must be verified. Describe the contents of the request, and state when and to whom the request was made. Recount the reasons (if any) given for its denial. Invoke the FOIA, as well as the state constitution and common law, if applicable, as the legal basis for your claim. If either your request or the denial is in writing, attach a copy to the complaint. The most important thing is to clearly identify the information to which you were denied access.

6. Time limit for filing suit.

There is no time limit under the FOIA for filing suit. As a practical matter, however, a new request to the agency would be advisable if there has been a long delay, at least if there is reason to believe that any circumstances prompting the initial denial might have changed. When an agency fails to respond to a request for information within the five “working days” time period allocated by the FOIA, in accord with the federal FOIA, such inaction will likely be treated by West Virginia courts as a judicially reviewable denial of disclosure. Requesters should be cautious about immediately rushing to court, however, without developing a more extensive written record. It is advisable to send at least one follow-up letter to the non-responding public body emphasizing that it has failed to meet the statutory deadline for a response and warning that should the body fail to respond promptly the requester may seek a court order, thus exposing the public body to an award of attorneys fees and costs. One caveat to this suggestion applies when there is an urgent need to review such documents in an expeditious fashion; when time of disclosure is of the essence, one may be justified in going directly to court without further contacts. Such action should, however, be the rare exception and not the rule.

One statute, W. Va. Code § 16-20-11a, establishes a 30-day time limit for filing a notice of appeal with the Air Pollution Control Commission in the event that body withholds records. Although it is unclear whether this time limit would apply to a request made under the FOIA, prudence would dictate filing the notice within the 30-day limit, if possible.

7. What court.

Suits seeking access to records under the Freedom of Information Act ordinarily must be brought “in the circuit court in the county where the public record is kept.” W. Va. Code § 29B-1-3(4).

8. Judicial remedies available.

The Freedom of Information Act specifically authorizes declaratory and injunctive relief. These same remedies are available if the records are sought under a common law right of access or the constitutional open courts mandate, and the complaint should invoke all applicable bases for relief.

In extraordinary situations, where the statutory FOIA procedures are for some reason inadequate, or where the claim to access is based upon the constitution or common law, it is possible to bypass the circuit courts and instead seek a writ of mandamus directly from the Supreme Court of Appeals. Mandamus, which is used to command a public official to perform his legal duty, was the primary method of enforcing access rights at common law. Today, its only particular advantage is the immediate access it provides to the Supreme Court of Appeals.

In most cases, however, the circuit court proceeding will be a prerequisite to review by the Supreme Court of Appeals. In *Sattler v. Holliday*, *supra*, the Supreme Court rejected a petition for a writ of mandamus seeking access to a prosecutor’s records, because the circuit court proceedings provided by the FOIA had been bypassed without any compelling reason.

9. Litigation expenses.

In the most significant amendment to the Freedom of Information Act since its enactment, the 1992 legislature provided that “[a]ny person who is denied access to public records requested pursuant to this article and who successfully brings a suit filed pursuant to [the FOIA] shall be entitled to recover his or her attorney fees and court costs from the public body that denied him or her access to the records.” W. Va. Code § 29B-1-7. The Supreme Court of Appeals of West Virginia recently interpreted the attorney fee provision of the FOIA, W. Va. Code § 29B-1-7, which provides that “[a]ny person who is denied access to public records required pursuant to this article and who successfully brings a suit filed pursuant to [the FOIA] to recover his or her attorney fees and court costs from the public body that denied him or her access to the records.”

There has been only one case in which the West Virginia Supreme Court has addressed the issue of entitlement to a statutory attorneys fees award under the FOIA; that decision however, provides comprehensive guidance on the subject. In *Daily Gazette Co. Inc. v. W. Va. Development Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999), a newspaper corporation filed a FOIA suit against the West Virginia Development Office seeking disclosure of public records. On remand from the Supreme Court of Appeals, 198 W.Va. 563, 482 S.E.2d 180, the circuit court entered an order awarding attorney fees to the newspaper, and the Development Office appealed.

The court held in syllabus point 6 of *Daily Gazette* that “[t]he plain language of W. Va. Code § 29B-1-7 (1992) (Repl.Vol.1998) requires an award of attorney fees to a person who has made a request for public records under the West Virginia Freedom of Information Act, W. Va.Code § 29B-1-1, et seq., whose request for such records has been denied by the public body controlling such records, and who has ‘successfully br[ought] a suit’ for the disclosure of the requested records pursuant to W. Va. Code § 29B-1-5 (1977) (Repl.Vol.1998).”

The court further held in syllabus point 7 of *Daily Gazette* that:

[f]or a person to have brought a suit for the disclosure of public records under the West Virginia Freedom of Information Act (FOIA), as permitted by W. Va. Code § 29B-1-5 (1977) (Repl. Vol.1998), so as to entitle him/her to an award of attorney fees for ‘successfully’ bringing such suit pursuant to W. Va. Code § 29B-1-7 (1992) (Repl.Vol.1998), he/she need not have prevailed on every argument he/she advanced during the FOIA proceedings or have received the full and complete disclosure of every public record he/she wished to inspect or examine. An award of attorney fees is proper even when some of the requested records are ordered to be disclosed while others are found to be exempt from disclosure or are released in redacted form. In the final analysis, a successful FOIA action, such as would warrant an award of attorney fees as authorized by W. Va. Code § 29B-1-7, is one which has contributed to the defendant’s disclosure, whether voluntary or by order of court, of the public records originally denied the plaintiff.

Id. The court also held that: (1) corporation was a “person” entitled to award of attorney fees under the FOIA, even though it did not succeed in every one of its requests for disclosure; (2) circuit court acted within its discretion in awarding full amount of attorney fees requested by corporation, even though corporation did not obtain the full measure of relief sought or prevail upon every contention it raised; and (3) rules established for award of attorney fees in mandamus proceedings do not apply to FOIA actions.

Even if the plaintiff’s success is due to the agency’s capitulation prior to a ruling by the court, or to a settlement after suit is filed, he is entitled to an award of attorney fees, unless the settlement agreement specifically precludes such a claim. *Jordan v. National Grange Mutual Insurance Co.*, 183 W. Va. 9, 393 S.E.2d 647 (1990).

In addition to attorneys’ fees, a successful plaintiff in a Freedom of Information Act suit is entitled to have court costs paid by the public body that has unlawfully withheld information. *Smith v. Bradley*, 223 W.Va. 286, at 293, 673 S.E.2d 500, at 507 (2007).

a. Attorney fees.

Reasonable attorney fees may be awarded to successful FOIA plaintiffs. *Daily Gazette Co. Inc. v. W.Va. Development Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999). West Virginia Code § 29B-1-7 provides:

Any person who is denied access to public records requested pursuant to this article and who successfully brings a suit filed pursuant to section five of this article shall be entitled to recover his or her attorney fees and court costs from the public body that denied him or her access to the records.

In *Smith v. Bradley*, the Court outlined the rules relating to eligibility and entitlement for an award of statutory attorney fees:

Under § 29B-1-7 the successful FOIA Plaintiff need not have prevailed on every argument he/she advanced during the FOIA proceedings or have received the full and complete disclosure of every public record he/she wished to inspect or examine. An award of attorney’s fees is proper even when some of the requested records are ordered to be disclosed while others are found to be exempt from disclosure or are released in redacted form. In the final analysis, a successful FOIA action, such as would warrant an award of attorney’s fees as authorized by W. Va. Code § 29B-1-7, is one which has contributed to the defendant’s disclosure, whether voluntary or by order of court, of the public records originally denied the plaintiff.

Smith v. Bradley, 223 W.Va. 286, at 292, 673 S.E.2d 500, at 506 (2007), citing, *Daily Gazette Co. Inc. v. W.Va. Development Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999).

b. Court and litigation costs.

Court costs may be awarded to successful FOIA plaintiffs. *Smith v. Bradley*, 223 W.Va. 286, at 293, 673 S.E.2d 500, at 507 (2007).

10. Fines.

A “willful” violation of the Freedom of Information Act by a custodian of public records is a misdemeanor, punishable by a fine of “not less than two hundred dollars nor more than one thousand dollars. W. Va. Code § 29B-1-6.

11. Other penalties.

Imprisonment in the county jail for not more than twenty days is an alternative sanction that, in lieu of or in addition to a fine, may be im-

posed in the courts’ discretion. W. Va. Code § 29B-1-6. Once a circuit court has ordered production of documents or disclosure of information, noncompliance with the order of the court may be punished as contempt of court. W. Va. Code § 29B-1-5(2).

12. Settlement, pros and cons.

At some point in an FOIA suit, particularly if the inevitable delay renders the request moot, it may seem the cost of continuing the proceeding exceeds the value of any possible victory. In other cases, it may become apparent that a full victory is unlikely. In either circumstance, the possibility of a settlement should be considered.

In determining whether settlement is advisable, the two most important factors to consider are (a) the likelihood that the same issues will arise in future access requests, and (b) the likelihood the court ultimately will rule in your favor if you persist in the suit.

A formal settlement which includes the public body’s agreement to disclose certain information will have some practical precedential value, at least for other requests made of the same body, particularly since the terms of every such settlement agreement becomes a public record. *Daily Gazette v. Withrow*, *supra*. However, a favorable court decision obviously is much more likely to insure future requests are granted.

Conversely, an unfavorable court decision will have a more detrimental effect than an unfavorable settlement. Unless one is prepared to appeal an adverse ruling by the circuit court, even a mediocre settlement agreement generally is preferable to an adverse ruling.

E. Appealing initial court decisions.

1. Appeal routes.

The only appeal route from an adverse circuit court ruling in a FOIA suit is to the West Virginia Supreme Court of Appeals.

2. Time limits for filing appeals.

The losing party has four months from the entry of the circuit court’s ruling to appeal to the state Supreme Court.

3. Contact of interested amici.

The Reporters Committee for Freedom of the Press has a substantial interest in reporters’ rights of access to government information and frequently files friend-of-the-court briefs for open records issues when they are being considered at the highest appeal level in the state. Other news organizations and associations within the state also may want to support your position by filing *amicus* briefs, since any decision in your case will affect them all. The West Virginia Supreme Court of Appeals generally welcomes *amicus* briefs from other interested parties and appears to give them full consideration.

F. Addressing government suits against disclosure.

In re Charleston Gazette FOIA Request, a City refused to release to a newspaper certain payroll records of police officers 222 W.Va. 771, 671 S.E.2d 776 (W.Va. 2008). After refusing to disclose the requested records, the City sought a declaratory judgment. The Supreme Court of Appeals confirmed that a public body may seek a declaratory judgment as a means of vindicating its’ authority to withhold records made exempt by FOIA or other statute. In the case, however, the Court decided on the merits that the City had erred in failing to disclose the payroll records requested by the newspaper.

Open Meetings

I. STATUTE -- BASIC APPLICATION.

Generally speaking, the coverage provisions of the Act are written in broad terms consistent with the Legislature's intent to give all members of the public as much access to meetings held by their governmental representatives as possible. To provide this expansive coverage, the Legislature has chosen general language as opposed to specific language naming each public agency subject to the provisions of the Open Meetings Act.

The general term "public agency," for example, is used to cover practically any governmental agency or council. Therefore, in the following discussion concerning the Act's application, the conclusions reached usually are based upon the fact the particular agency, person, or level of government falls within the broad language of the statute. Where a specific provision in the Open Meetings Act addresses a particular situation, it will be noted.

A. Who may attend?

Any member of the public may attend a meeting subject to the Open Meetings Act.

B. What governments are subject to the law?

All levels of government, ranging from a city council to the State Legislature, fall within the general term "public body" used in the Act. The requirements of the statute apply to "this state or any political subdivision." W. Va. Code § 6-9A-2(6). Courts and family law masters are specifically excluded.

C. What bodies are covered by the law?

The Open Meetings Act applies to the meetings of every "governing body" of "any public agency." W. Va. Code § 6-9 A-2 (3). The 1999 amendments to the Open Meetings Act replaced the term "public body" with "public agency." A public agency is defined as follows:

[A]ny administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power. The term "public agency" does not include courts created by article eight of the West Virginia constitution or the system of family law masters created by article four [§ § 48A-4-1 *et seq.*, repealed], chapter forty-eight-a of this code.

W. Va. Code § 6-9A-2(6). (The 1978 amendment to this statute removed "any political party executive committee" from the definition of "public body.") See *Hamrick v. Charleston Area Medical Center, Inc.*, 220 W.Va. 495, 499, at 648 S.E.2d 1, at 5 (W. Va. 2007). In *Hamrick*, the West Virginia Court stated that the "1999 changes to the definitional section of the Open Government Act changed the term "public body" to "public agency;" this change does not seem to have made any substantive difference."

A "governing body" consists of "the members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members." W. Va. Code § 6-9A-2(3).

1. Executive branch agencies.

Since the Open Meetings Act applies only to proceedings of the "governing body" of a public agency, defined as entities with two or more members, individual executives such as a governor or mayor are not covered by the statute. This conclusion simply means a governor can meet with his staff without being required to open such a meeting to the public. However, where the mayor is acting in connection with

a city council meeting, he becomes part of a public agency and the meeting would be covered by the Open Meetings Act.

No executive branch agencies are specifically excluded from the statute's coverage.

2. Legislative bodies.

The Act applies to all legislative bodies, such as the State Legislature or a city council. A 1993 amendment to the statute provides that "a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the legislature."

3. Courts.

The Open Meetings Act excludes courts from its coverage. In the definition of public agency, it is stated that such term "does not include courts created by article eight of the West Virginia constitution or the system of family law masters created by article four [§ § 48A-4-1 *et seq.*, repealed], chapter forty-eight-a of this code." This exclusion does not mean courts are permitted to meet in secret. Courts are required by Article III, Section 17 of the West Virginia Constitution to be open to the public.

The public's right of access to judicial proceedings — civil and criminal, trial and pretrial — under the state constitution is even greater than the access rights provided by the federal constitution. *E.g.*, *State ex rel. Herald Mail Company v. Hamilton*, 165 W. Va. 103, 267 S.E.2d 544 (1980). The state Supreme Court's decisions in *Daily Gazette v. W. Va. State Bar*, *supra*, and *Daily Gazette v. W. Va. Board of Medicine*, *supra*, discussed in the Foreword and below, have extended constitutional access requirements to all public bodies exercising quasi-judicial powers.

4. Nongovernmental bodies receiving public funds or benefits.

As noted in the previous sections, the Open Meetings Act's coverage depends upon whether a "governing body" of a "public agency" is involved. Public agencies include "[A]ny administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power."

Nongovernmental bodies with no connection or agency relationship with government, by definition, are not public agencies and therefore not subject to the Act. However, it could be argued that public funding creates an agency relationship between the nongovernmental body and government sufficient to make it subject to the statute, particularly if the organization is performing a public function. Any conclusion concerning whether a nongovernmental body which receives public funds is subject to the Open Meetings Act would have to be based upon the facts of the particular case.

It should be noted that even though a particular agency or committee may not fall within the definition of public agency, the Legislature, through additional legislation, could mandate that a nonpublic body be required to abide by the Act. For example, the Legislature has required hospitals owned or operated by nonprofit corporations, nonprofit associations, or local governmental units to be open to the public "in the same manner and to the same extent as required of public bodies in [the Open Meetings Act]." W. Va. Code § 16-5G-2 (1982). This openness requirement is based primarily on the fact these hospitals receive either public funds or special benefits under state tax laws, and that there is an obvious and significant public interest in their operations.

5. Nongovernmental groups whose members include governmental officials.

The question regarding the applicability of the Open Meetings Act to a nongovernmental group whose members include governmental

officials is simply whether the inclusion of these governmental officials is sufficient to make the group an agency of government. The argument for coverage would be stronger if the governmental officials are acting within this nongovernmental group in their official, rather than private, capacities. Again, any conclusion regarding the coverage of the Open Meetings Act in this situation would have to be based upon the facts of the particular case.

6. Multi-state or regional bodies.

Where a multistate or regional body holds a meeting in this state, the threshold question is whether it is a “public agency” under the Open Meetings Act. The statute’s definition of public agency is limited to agencies of government in this state, whether it be on the local, county, or state level of government. The fact that the membership of these two bodies is not limited to this state, but includes other states, seems to preclude the Act from being applied to the entire multistate or regional body. However, to the extent a multistate or regional body consists in part of state representatives who form a public agency within the larger organization, this West Virginia public agency would be subject to the Act.

7. Advisory boards and commissions, quasi-governmental entities.

The Open Meetings Act’s definition of a “public agency” — as “[A]ny administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power.” W. Va. Code § 6-9A-2. In addition, the statute’s definition of “governing body” specifically includes entities whose function is “to make decisions for or recommendations to a public agency on policy or administration.”

8. Other bodies to which governmental or public functions are delegated.

The public agency definition also is broad enough to cover other bodies to which governmental or public functions are delegated. As with most of these categories, any conclusion concerning the applicability of the Open Meetings Act depends upon the particular facts.

9. Appointed as well as elected bodies.

Whether an agency is appointed or elected makes no difference under the Open Meetings Act as long as it is a public agency.

D. What constitutes a meeting subject to the law.

What constitutes a meeting was extensively addressed by the West Virginia Supreme Court of Appeals in *McComas v. Fayette County Board of Education*, 197 W. Va. 88, 475 S.E.2d 280 (1996). In that case, persons opposed to a county plan for school consolidations challenged a gathering of four of the five members of the county board of education. In holding it was a meeting and thus subject to the state’s Open Meetings Act, the court was not persuaded that those attending did not plan on the others showing up, that no formalities were followed, that no votes were taken or resolutions adopted, or that no one voiced an opinion on the proposed plans.

The 1999 amendments to the Open Meetings Act, however, modified the statutory definition. The amendment of that definition was prompted, in part, by adverse reaction to the court’s holding in *McComas*. The amendment provides:

“Meeting,” means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter that results in an official action. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

(A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of

claims proceeding;

(B) Any on-site inspection of any project or program;

(C) Any political party caucus;

(D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

W. Va. Code § 6-9A-2 (4).

The 1999 amendments to the Act added subsection (4) (D) to the list of activities that do not fall within the definition of “meeting.” Moreover, those amendments added a definition of the term “official action” which bears on the meaning of subsection (4) (D). “Official action” means action taken by virtue of power granted by law, ordinance, policy, rule, or by virtue of the office held.”

While the amended definition of “meeting” and the new definition of “official action” offer explicit additional legislative guidance as to the scope of the term, the extent to which the amendment modifies the court’s holding in *McComas* is not at all clear. It seems obvious, at least, that the new definition narrows the potential breadth of the court ruling insofar as it relates to application of the Act to discussions between public officials in informal settings. There has not yet been a judicial opinion interpreting the amended term.

In *Foundation For Living v. The Cabell-Huntington*, 214 W. Va. 818, 591 S.e.2d 744 (2003) the West Virginia Supreme Court held that a lower court finding of fact that a meeting held by the Cabell-Huntington Board of Health to discuss a proposed non-smoking ordinance was for educational purposes and did not violate the open meetings act. The meeting at issue fell within the exception for “general discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned . . . educational, training . . . or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to official action” W. Va. Code § 6-9A-2(4)(D).

1. Number that must be present.

a. Must a minimum number be present to constitute a “meeting”?

A meeting is defined as “the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in official action.” The term “does not include (A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding; (B) Any on-site inspection of any project or program; (C) Any political party caucus; (D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or (E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.” W. Va. Code § 6-9A-2(4). Subsections (D) and (E) were added by the 1999 amendments.

“Quorum” is defined as “a simple majority of the constituent membership of a governing body.” W. Va. Code § 6-9A-2(7). In *Appalachian Power*, *supra*, the West Virginia Supreme Court interpreted these

two provisions to mean a meeting is subject to the Open Meetings Act only if the convening is for the purpose of making a decision or deliberating toward a decision, and if some statute or rule requires a quorum as a prerequisite to convening. However, while the court's opinion in *McComas* clearly broadened the definition of "meeting," the continued viability of *McComas*' interpretation of the breadth of the term "meeting" is questionable; the new definition most certainly narrows the scope of the term from that identified in *McComas*.

Also, the quorum requirement need not be explicit. In *Common Cause v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991), the court reviewed the state Legislature's process of preparing an annual "budget digest," which by statute must be "prepared at the direction of and approved by members of the conferees committee on the budget." The court held the statute "contemplates preparation of the Budget Digest by the entire Conferees Committee on the Budget (or a quorum thereof)," and that the process therefore must comply with the Open Meetings Act.

b. What effect does absence of a quorum have?

The absence of a quorum at a meeting has the effect of preventing the public agency from either deliberating toward or making a decision, but does not affect whether the provisions of the Open Meetings Act apply.

2. Nature of business subject to the law.

a. "Information gathering" and "fact-finding" sessions.

There is no specific provision in the Act excluding meetings involving information gathering or fact-finding. However, in defining the word "meetings," the statute specifically excludes "(A) any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding, (B) any on-site inspection of any project or program, (C) any political party caucus," (D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or (E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting. W. Va. Code § 6-9A-2(4). But whether these exemptions would apply would depend on the facts. *McComas* indicates that information gathering and fact-finding are important precursors to decision making, and such meetings may be subject to the Open Meetings Act. Even in the case of an adjudicatory hearing conducted by quasi-judicial agencies, under the *State Bar* and *Board of Medicine* decisions there is a constitutional right of access to "all reports, records, and non-deliberative materials introduced at such hearings, including the record of the final action taken." *Daily Gazette v. W. Va. Board of Medicine*, 352 S.E.2d at 70, quoting *Daily Gazette v. W. Va. State Bar*, *supra*, Syllabus pt. 5.

b. Deliberations toward decisions.

The Open Meetings Act does not mention deliberations toward decisions. Before *McComas*, *supra*, the West Virginia Supreme Court had held that deliberations toward decisions constitute an adjudicatory session, exempt from the Act under W. Va. Code § 6-9A-2(4) (*Appalachian Power*, *supra*) and deliberations seemed to be exempt from the public's constitutional right of access to adjudicatory proceedings under the *State Bar* and *Board of Medicine* decisions. However, the Supreme Court was moving toward interpreting the Open Meetings Act to require public scrutiny of some of the deliberative processes of government in *Common Cause of W. Va. v. Tomblin*, *supra*. There, the court ruled that the process by which the Legislature's Conferees Committee on the Budget prepares an informal but influential budget "digest" setting forth its view of the specific purposes for which general appropriations should be used, must comply with the Open Meetings Act. The court noted that the contents of the digest are

the result of "various compromises and agreements [which] emerge from myriad negotiations" by legislators and ruled that this process of negotiation and compromise must be open to public view. Not only must the digest be approved in public meetings, the court held, but the Conferees Committee must create and maintain for public inspection "memoranda of the negotiations, compromises and agreements or audio recordings of committee or subcommittee meetings where votes were taken or discussions had that substantiate the material which is organized and memorialized in the Budget Digest." *Id.*, Syllabus pt. 5. *McComas*, *supra*, makes clear that such meetings may be subject to the Open Meetings Act.

3. Electronic meetings.

a. Conference calls and video/Internet conferencing.

A 1999 amendment to the Open Meetings Act definition of "meeting" explicitly states, "meetings may be held by telephone conference or other electronic means." W. Va. Code § 6-9A-2(4) Most state agencies provide a conference call number to facilitate participation in the meeting by its members and electronic attendance by members of the public. The 800 access number is often printed in the state register.

If a government body meeting were held via electronic means such as email, text or instant messaging, social media. or online discussion boards it would be subject to the requirements of the Open Meetings Law.

b. E-mail.

There have been no reported meetings conducted via computer, whether by way of an online chat or through e-mail.

c. Text messages.

There have been no reported meetings conducted using text messaging.

d. Instant messaging.

There have been no reported meetings conducted via instant messaging.

e. Social media and online discussion boards.

There have been no reported meetings conducted using social media or online discussion boards.

E. Categories of meetings subject to the law.

1. Regular meetings.

a. Definition.

As noted previously, a meeting is "the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. The term does not include (A) any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding, (B) any on-site inspection of any project or program, (C) any political party caucus, (D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or (E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting." W. Va. Code § 6-9A-2(4).

b. Notice.

(1). Time limit for giving notice.

The Open Meetings Act requires that, except in emergencies, state executive agencies must give notice of their meetings "at least five days prior to the date of the meeting":

Each governing body of the executive branch of the state shall file a notice of any meeting with the secretary of state for publication in the state register. Each notice shall state the date, time, place and purpose of the meeting. Each notice shall be filed in a manner to allow each notice to appear in the state register at least five days prior to the date of the meeting.

W. Va. Code § 6-9A-3. In the event of “an emergency requiring immediate official action,” these executive agencies “may file an emergency meeting notice at any time prior to the meeting.” *Id.*

The Act does not prescribe any particular time limit for giving notice of the meetings of other public bodies. Instead, the applicable time limit is established by each such agency, whose governing body is required to promulgate rules providing for notice of meetings to be made “in advance . . . except in the event of an emergency requiring immediate official action.” *Id.* In the cases of state agencies, these regulations must be filed in the office of the Secretary of State and published in the state register.

(2). To whom notice is given.

For most public bodies, the Act simply states that advance notice of a meeting must be given “to the public and news media.” *Id.* Again, the statute requires the governing body of each public agency to promulgate rules establishing specific notice provisions. However, as noted above, the Act provides a special rule for the governing bodies of the executive branch of the state, which are required to “file a notice of any meeting with the secretary of state for publication in the state register.” *Id.*

(3). Where posted.

Except for the requirement that state executive agencies file notice of their meetings with the secretary of state for publication in the state register, the statute does not state where notice of meetings must be posted. The Attorney General has advised that posting a notice on the courthouse door will fulfill the requirements of the statute for county commission meetings, Op. Att’y Gen., June 23, 1978, and that all state agencies should, at a minimum, file notice with the Secretary of State. Op. Att’y Gen., Nov. 20, 1978.

(4). Public agenda items required.

There are no provisions in the Open Meetings Act specifying agenda items that must be included in the notice of a public agency’s regular meetings. However, the notice of any special meeting must include the purpose of the meeting. W. Va. Code § 6-9A-3.

(5). Other information required in notice.

The contents of the notice are left up to the governing body to determine when it promulgates its notice regulations. At a minimum, the Act requires the notice to state the date, time, place and agenda of regular meetings, and the time, place and purpose of special meetings. Every notice given by the governing bodies of the executive branch of the state must include the time, place and purpose of the meeting. Notice of the agenda of a meeting is required of all governing bodies; when the governing body of the state government’s executive branch is required to file a notice of a meeting with the secretary of state including the date, time, place and the “purpose” of the meeting rather than its agenda.

(6). Penalties and remedies for failure to give adequate notice.

Although the Open Meetings Act does not spell out the notice requirements for most public bodies, it does include a very specific penalty for the failure to provide adequate notice in accordance with the statute. Where an “adversely affected party” files a petition challenging the public agency’s action, any court of competent jurisdiction “may invalidate any action taken at any meeting for which notice did not comply” with the notice requirements of the Act. W. Va. Code § 6-9A-3.

The impact of this provision can be significant. In *Wetzel County Solid Waste Authority v. W. Va. Division of Natural Resources*, 184 W. Va. 482, 401 S.E.2d 227 (1990), a landfill company’s permit to dispose of large quantities of waste material was invalidated. After years of litigation, the permit issue was decided on the basis of a circuit judge’s ruling that the county commission’s approval of the permit at a meeting was invalid, because the commission had failed to give adequate notice that the permit would be considered, as required by the Open Meetings Act.

Further, it is a criminal misdemeanor offense for any member of a public or governmental body to willfully and knowingly violate the provisions of the act. Upon conviction, a fine of not less than one hundred dollars nor more than five hundred dollars may be imposed. The 1999 amendments deleted the optional sanction of imprisonment in the county jail for not more than ten days. W. Va. Code § 6-9A-7.

c. Minutes.

(1). Information required.

Every public agency is required to maintain minutes of its meetings, which must include at least: (a) the date, time and place of the meeting; (b) the name of each member of the governing body present and absent; (c) all motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and (d) the results of all votes and, upon the request of a member, the vote of each member, by name. W. Va. Code § 6-9A-5.

In addition, a 1993 amendment requires public bodies to record in their minutes any court order which compels compliance or enjoins non-compliance with the Open Meetings Act, or which annuls a decision made in violation of the Act. W. Va. Code § 6-9A-6.

(2). Are minutes public record?

The minutes of open meetings are public records and must be made available to the public within a reasonable time after the meeting is held. W. Va. Code § 6-9A-5. Any tape recording made of the meeting also is a public record. *Veltri v. Charleston Urban Renewal Authority*, *supra*.

2. Special or emergency meetings.

a. Definition.

An emergency meeting is defined simply as a meeting required to be held because “immediate official action” is required.

b. Notice requirements.

(1). Time limit for giving notice.

The governing bodies of the executive branch of the state in the event of an emergency requiring immediate official action “may file an emergency meeting notice at any time prior to the meeting.” W. Va. Code § 6-9A-3. The time limit for giving notice of an emergency meeting is not stated with regard to other public bodies, which must promulgate their own notice rules. *Id.*

(2). To whom notice is given.

The Open Meetings Act does not state to whom notice of an emergency meeting is to be given. The governing bodies of the executive branch of the state presumably would file the notice of an emergency meeting with the Secretary of State.

(3). Where posted.

The posting of an emergency notice for most public bodies would depend upon their own rules. It is not clear under the Open Meetings Act where the notice of an emergency meeting filed by a governing body of an executive branch of the state would be posted since there probably would not be time for such notice to be published in the state register.

(4). Public agenda items required.

In the case of emergency meetings held by executive agencies of state government, the notice must include the purpose of the meeting. There is nothing in the Act specifying the agenda items that must be included in the emergency meeting notices of other public bodies, but the provision that notice of all “special” meetings include the purpose presumably would apply to emergency meetings also.

(5). Other information required in notice.

For most public bodies, there is no particular information required to be included in the notice of an emergency meeting. The notice of an emergency meeting filed by the governing bodies of the executive branch of the state must include “the date, time, place and purpose of the meeting and the facts and circumstances of the emergency.”

(6). Penalties and remedies for failure to give adequate notice.

The penalties and remedies described above in reference to general notice requirements of the Open Meetings Act also apply to emergency meetings.

c. Minutes.

Emergency meetings are subject to the same requirements as any other meetings with respect to maintaining, and granting public access to minutes.

3. Closed meetings or executive sessions.**a. Definition.**

An executive session is “any meeting or part of a meeting of a governing body which is closed to the public.” W. Va. Code § 6-9A-2(2). The Act specifies twelve topics that may be considered in such a closed session, and these are discussed later in this outline. No decision may be made in an executive session. W. Va. Code § 6-9A-4 (a).

b. Notice requirements.**(1). Time limit for giving notice.**

The Open Meetings Act does not require any formal written notice be given before a public agency may go into executive session. Before a regular, special or emergency meeting can be closed, the presiding officer of the governing body must first identify the authorization under the statute for holding an executive session and present the issue to the governing body and to the general public. The governing body must approve of the closure by majority vote. W. Va. Code § 6-9A-4.

(2). To whom notice is given.

The presiding officer is required to announce to the other members of the governing body and the general public that the public agency is going to go into executive session and to provide the authority for doing so.

(3). Where posted.

There is no requirement for posting the notice of an executive session. Under the statute, the presiding officer simply can give notice orally during the course of the meeting.

(4). Public agenda items required.

There is no requirement for particular public agenda items to be included in the presiding officer’s request to go into executive session. However, since the request must specify the justification for a closed session, it necessarily must give some description of the items to be discussed.

(5). Other information required in notice.

There is no other information required in the request for an executive session.

(6). Penalties and remedies for failure to give adequate notice.

The Open Meetings Act does not provide any penalties for failing to follow the rules set out for going into executive session. The Act does provide that the public agency cannot make any decision in executive session; therefore any decision reached in such a closed meeting would be voidable.

c. Minutes.**(1). Information required.**

The Act’s 1999 amendments appear to exempt minutes of executive sessions from public disclosure; the amendment appears to presume that such minutes will be prepared. Provision is made for the later disclosure of that portion of executive session minutes when they contain reference to confidential settlement and other matters that are later rendered non-confidential by subsequent action.

(2). Are minutes a public record?

The 1999 amendments indicate that the official minutes of the executive session need not be made available to the public. W. Va. Code § 6-9A-5. If an agency makes an informal written record of a discussion held in a closed executive session, these notes also probably are exempt from the Freedom of Information Act. Op. Att’y Gen., July 17, 1986.

d. Requirement to meet in public before closing meeting.

An initial public session, during which the presiding officer presents the justification for closure and the body votes on the issue, is a prerequisite to any executive session. W. Va. Code § 6-9A-4.

e. Requirement to state statutory authority for closing meetings before closure.

The presiding officer of a governing body must publicly state the authority under the Act for requesting the governing body go into executive session. *Id.*

f. Tape recording requirements.

The Open Meetings Act does not require a public agency to tape record either the regular meeting or meetings held in executive session. However if such a tape were made at an open meeting, it would constitute a public record under the Freedom of Information Act. *Veltri v. Charleston Urban Renewal Authority, supra.*

F. Recording/broadcast of meetings.

The 1999 amendments to the Open Meetings Act add a provision regarding the allowance of radio and television recordings. That section provides:

(a) Except as otherwise provided in this section, any radio or television station is entitled to broadcast all or any part of a meeting required to be open.

(b) A public agency may regulate the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting, so as to prevent undue interference with the meeting. The public agency shall allow the equipment to be placed within the meeting room in such a way as to permit its intended use, and the ordinary use of the equipment may not be declared to constitute undue interference: Provided, That if the public agency, in good faith, determines that the size of the meeting room is such that all the members of the public present and the equipment and personnel necessary for broadcasting, photographing, filming and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public agency, acting in good faith and consistent with the purposes of this article, may require the pooling of the equipment and the personnel operating it.

W. Va. Code § 6-9A-9. While the amendment contemplates video and sound recordings made at meetings by radio and television stations, it would seem that the right to make such recordings should also be extended to reporters and other members of the public.

G. Are there sanctions for noncompliance?

The West Virginia Open Governmental Proceedings Act, specifically W.Va. Code § 6-9A-7 provides for both civil and criminal penalties for noncompliance. Subsection (a) provides that any person who is a member of a public or governmental body required to conduct open meetings under the Act who willfully and knowingly violates the Act's provisions is guilty of a misdemeanor and is subject to a fine of not more than five hundred dollars. Second or subsequent offenses also constitute misdemeanors for which a minimum fine of not less than one hundred nor more than one thousand may be imposed. W.Va. Code § 6-9A-7(a).

Subsection (b) provides that a public agency whose governing body found in a civil action to have conducted a meeting in violation the Act may be liable to a prevailing party for fees and other expenses incurred by the plaintiff in connection with litigating the issue of whether the governing body violated the statute. The subsection contains a caveat that exempts the public agency from paying attorney fees and costs if the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust. W.Va. Code § 6-9A-7(b).

Subsection (c) of W.Va. Code § 6-9A-7 permits a court denying relief in a civil action brought under the Act that where the court, may require the complaining person to pay the governing body's necessary attorney fees and expenses if, and only if, the court further finds that the action was frivolous or commenced with the primary intent of harassing the governing body or any member thereof or, in the absence of good faith, of delaying any meetings or decisions of the governing body.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open meetings statute.

1. Character of exemptions.

The Open Meetings Act does not permit the closing of a meeting simply because the public agency believes closure would serve the public interest. To the contrary, the statute mandates that "except as expressly and specifically otherwise provided by law . . . all meetings of any governing body shall be open to the public." W. Va. Code § 6-9A-3 (emphasis added).

Unfortunately, many of the exemptions (called "exceptions") specified in the Open Meetings Act are so broad that they are subject to abuse and, even though a public agency cannot make a decision while in executive session, it is possible that everything but the actual decision will be made in an executive session and the reasons behind the decision will not be disclosed. The recent decisions of *Tomblin, supra*, and *McComas, supra*, may offer some protection against this practice.

a. General or specific.

There is no general exception to the Open Meetings Act, but there are nine specific exceptions that are deemed reasons for which a governing body may go into "executive session."

b. Mandatory or discretionary closure.

The nine specific exceptions of the Open Meetings Act merely authorize a closed session at the discretion of the governing body; a majority vote is required to invoke the provisions permitting executive sessions. Note that in the case of the five exemptions directed toward protecting individual privacy, the individual involved may demand a public meeting.

2. Description of each exemption.

The Open Meetings Act, as amended in 1999, specifically exempts twelve categories of information from its provisions. These excep-

tions, which are stated in much broader language than the exemptions under the Freedom of Information Act, permit public bodies to meet in closed executive session to discuss the following items:

(a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:

(1) To consider acts of war, threatened attack from a foreign power, civil insurrection or riot;

(2) To consider:

(A) Matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee unless the public officer or employee or prospective public officer or employee requests an open meeting; or

(B) For the purpose of conducting a hearing on a complaint, charge or grievance against a public officer or employee, unless the public officer or employee requests an open meeting. General personnel policy issues may not be discussed or considered in a closed meeting. Final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting;

(3) To decide upon disciplining, suspension or expulsion of any student in any public school or public college or university, unless the student requests an open meeting;

(4) To issue, effect, deny, suspend or revoke a license, certificate or registration under the laws of this state or any political subdivision, unless the person seeking the license, certificate or registration or whose license, certificate or registration was denied, suspended or revoked requests an open meeting;

(5) To consider the physical or mental health of any person, unless the person requests an open meeting;

(6) To discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy such as any records, data, reports, recommendations or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances;

(7) To plan or consider an official investigation or matter relating to crime prevention or law enforcement;

(8) To develop security personnel or devices;

(9) To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involv-

ing commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision: Provided, That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: Provided, However, that information not subject to release pursuant to the West Virginia freedom of information act does not become subject to disclosure as a result of executive session;

(10) To avoid the premature disclosure of an honorary degree, scholarship, prize or similar award;

(11) Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant. If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded;

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act as set forth in article one [§ § 29B-1-1 et seq.], chapter twenty-nine-b of this code.

W. Va. Code § 6-9A-4. There are no decisions of the West Virginia Supreme Court of Appeals interpreting any of these exceptions to the Act. It is certain, however, that all of these exceptions, and particularly numbers two and four, are limited by the constitutional requirement, discussed below, that quasi-judicial proceedings of public bodies be open to the public.

B. Any other statutory requirements for closed or open meetings.

A few specific statutes mandate certain proceedings be open or closed to the public. As in the case of specific public record statutes, discussed in the preceding section of this outline, these provisions may create a greater right of public access to particular proceedings.

Several statutes require “all meetings” of particular agencies to be open to the public. These include the Public Energy Authority (W. Va. Code § 5D-1-21), the Community Infrastructure Authority (W. Va. Code § 31-19-19), the Railroad Maintenance Authority (W. Va. Code § 29-18-23), and the Water Development Authority (W. Va. Code § 20-5C-21). Except for the Railroad Maintenance Authority Act, all of these statutes require the public agency to maintain the confidentiality of any “information relating to secret processes or secret methods of manufacture or production” and presumably these agencies could close portions of their meetings if necessary to comply with this mandate. However, the other exceptions in the Open Meetings Act apparently are not available to these bodies.

Most statutes that mandate confidentiality of particular proceedings are confined to judicial or adjudicatory proceedings, which would not be subject to the Open Meetings Act in any event. These statutes preclude public access to actions for divorce, W. Va. Code § 48-2-27, or adoption, W. Va. Code § 48-4-10, as well as juvenile proceedings, W. Va. Code § 14-2A-17, § 49-5-17. Additionally, grievance proceedings for employees of boards of education (W. Va. Code § 18-29-3) and for public employees (W. Va. Code § 29-6A-3), and meetings of medical peer review proceedings (W. Va. Code § 30-3C-3) are required by statute to be closed to the public, unless the involved individuals request a public proceeding.

In 1999, the West Virginia Legislature enacted amendments to the West Virginia Open Hospital Proceedings Act. Prior to the amend-

ments the statute simply provided that the public non-profit hospital boards were subject to the same requirements as other governing bodies covered by the Open Meetings Act, (W. Va. Code § 16-5G-1et seq.) The amendments provide comprehensive guidance relating to such hospital meetings, displacing its former reliance upon the Open Meetings Act. In many respects the new provisions of the amended hospital act adopt provisions of the Open Meetings Act as it was constituted prior to its most recent amendments (enacted in 1999). Thus, one interested in issues relating to meetings of public non-profit hospital boards must look to the Open Hospital Proceedings Act rather than the generally applicable Open Meetings Act for guidance. See, e.g., *Hamrick v. Charleston Area Medical Center, Inc.*, 648 S.E.2d 1 (W. Va. 2007) (“The definition of ‘governing body’ that was added to the Hospital Act in 1999 closely tracks the definition used in the 1982 Open Meetings Act-with the word “hospital” substituted for the words ‘public body.’ ”)

C. Court mandated opening, closing.

As discussed previously, the open courts mandate of the state constitution provides a broad right of public access to judicial and quasi-judicial proceedings.

The state Supreme Court has held that this provision creates a “fundamental constitutional right of access” to civil and criminal judicial proceedings, as well as to the records and proceedings of quasi-judicial agencies. The court has relied on this provision to rule that disciplinary hearings held by the licensing bodies for attorneys and physicians, based upon charges of professional misconduct or incompetence, must be open to the public. The public also must be given access to “all reports, records, and nondeliberative materials introduced at such hearings, including the record of the final action taken.” *Daily Gazette v. W. Va. State Bar*, *supra*, at 706; *Daily Gazette v. W. Va. Board of Medicine*, *supra*, at 70. These rulings apply to all agencies exercising quasi-judicial powers.

In addition, the state constitution provides greater public access to actual judicial proceedings than does the federal constitution. In *State ex rel. the Herald Mail Company v. Hamilton*, 165 W. Va. 103, 267 S.E.2d 544 (1980), the Supreme Court of Appeals held the state constitution “confers an independent right on the public to attend civil and criminal trials, and not simply a right in favor of the litigants to demand a public proceeding.” 267 S.E.2d at 548 (citations omitted). And in its *State Bar* decision, the court outlined the scope of the open courts mandate:

This fundamental constitutional right of access is not limited to formal trials, but extends to other types of judicial and quasi-judicial proceedings. For example, in *Hamilton*, 267 S.E.2d at 551, this court recognized a public right of access to pretrial hearings in criminal cases. See also *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (first amendment right of access to pretrial voir dire); *Sentinel Star Co. v. Edwards*, 387 So. 2d 367 (Fla. App. 1980) (common law right of access to post-trial hearing concerning juror interview); *Herald Co. v. Weisenberg*, 89 A.D.2d 224, 455 N.Y.S.2d 413 (1982), *aff'd*, 59 N.Y.2d 378, 465 N.Y.S.2d 862, 452 N.E.2d 1190 (1983) (right of access to unemployment compensation hearing); *In re Estate of O'Connell*, 90 Misc. 2d 555, 394 N.Y.S.2d 816 (1977) (“open courts” statute requires examination of witness in will contest in surrogate’s court to be public proceeding); *In re Petition of Daily Item*, 310 Pa. Super. 222, 456 A.2d 580 (1983) (right of access to preliminary hearings based upon “open courts” provision); *Cohen v. Everette City Council*, 85 Wash. 2d 385, 535 P. 2d 801 (1975) (“open courts” provision held to preclude sealing of transcript of city council’s license revocation proceeding by court that reviewed transcript on appeal); *State ex rel. La Crosse Tribune v. Circuit Court*, 340 N.W.2d 460 (Wis. 1983) (“open courts” statute applied to voir dire proceedings).

Daily Gazette v. W. Va. State Bar, 326 S.E.2d at 710 n.9.

III. MEETING CATEGORIES -- OPEN OR CLOSED.

A. Adjudications by administrative bodies.

Adjudicatory hearings by state or municipal bodies fall within the Open Meeting Act definition of “meeting.” However, in defining the word “meeting,” the Legislature excepted “any meeting for the purpose of making an adjudicatory *decision* in any quasi-judicial, administrative or court of claims proceeding.” W. Va. Code § 6-9A-2(6). The exemption thus exempts meetings of such bodies in which the members discuss among themselves decisions that they must make in the course of an adjudication. The West Virginia Supreme Court in *Appalachian Power* held that deliberations toward a decision regarding a utility rate increase fell within this adjudicatory exception. This broad exception may not prevail under *McComas, supra*, to the extent that deliberations in the nature of fact-finding meetings may be required to be conducted openly so that the public can learn the facts behind a given decision, but *McComas* clearly did not involve an adjudicatory decision. Therefore, the nature and scope of this exception is unclear.

Again, it is important to remember that although quasi-judicial proceedings are exempt from the requirements of the Open Meetings Act, they are covered by the open courts mandate of the state constitution, as outlined in the *State Bar* decision.

B. Budget sessions.

The statute does not permit budget sessions to be closed to the public. As discussed earlier, the state Supreme Court held in *Common Cause v. Tomblin* that the process of preparing the Budget Digest must be conducted in conformance with the Open Meetings Act.

C. Business and industry relations.

The Open Meetings Act permits executive sessions to be held to discuss “[m]atters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving competition which, if made public, might adversely affect the financial or other interest of the state or any political subdivision.” (W. Va. Code § 6-9A-4(9)). This broad exception probably would extend to many discussions for attracting business to the state, especially considering the confidentiality accorded economic development under W. Va. Code § 5B-2-1 as amended in 1997. There is a proviso added in the 1999 amendments that requires later disclosure of the content of closed meetings in certain circumstances:

(11) [I]nformation relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: Provided, However, that information not subject to release pursuant to the West Virginia freedom of information act does not become subject to disclosure as a result of executive session.

D. Federal programs.

The statute does not except meetings involving federal programs from the requirement that they be open to the public.

E. Financial data of public bodies.

Unless it comes within the scope of exemption nine — “[m]atters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving competition which, if made public, might adversely affect the financial or other interest of the state or any political subdivision” (W. Va. Code § 6-9A-4(9)) — there is no specific exception allowing meetings concerned with financial data of public bodies to be closed.

The 1999 amendments added a subsection (12) to W. Va. Code § 6-9A-4(b). Subsection (b)(12) allows executive sessions involving discussions of “any matters which, by express provision of federal law, state statute or rule of court . . . or which is not considered a public record within the meaning of the freedom of information act” is “rendered confidential.”

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

The ninth exception covers “[m]atters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving competition which, if made public, might adversely affect the financial or other interest of the state or any political subdivision” (W. Va. Code § 6-9A-4(9)). That section was amended in 1999 to include the following *proviso*: “information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings only until the commercial competition has been finalized and completed.”

The 1999 amendments also added a second *proviso* which states: “that information not subject to release pursuant to the West Virginia freedom of information act does not become subject to disclosure as a result of executive session.” *Id.* Furthermore, the 1999 amendments added an exception 12 which states that an executive session may be held to “discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act as set forth in article one [§§ 29B-1-1 et seq.], chapter twenty-nine-b of this code.” (W. Va. Code § 6-9A-4(12)).

The West Virginia Freedom of Information Act exempts from disclosure documents which constitute “trade secrets,” which is defined as including but limited to “any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors.” Thus, while there is no specific exception allowing closed meetings to consider financial data, trade secrets or proprietary data of private corporations and individuals, the second *proviso* of subsection (9) seems to require that if documents relating to such private data or trade secrets are discussed in executive session, the documents need not be disclosed under the first *proviso* that requires disclosure after “the commercial competition has been finalized and completed.” There are not yet any reported cases construing these new *provisos*.

Finally, in the FOIA case, *Town of Burnsville v. Cline, supra*, the court held the state tax code — which prohibits “any officer or employee of the state . . . to disclose information concerning the personal affairs of any individual or the business of any single firm or corporation . . . or any particulars set forth” in any tax forms required to be filed with the state tax commissioner — also prohibited officials of a town from disclosing Business & Occupation Tax returns filed with the town. Although the court ruled the tax code’s confidentiality provisions did not apply to a list of the names of businesses filing B&O tax returns, it required the list to be “treated as any confidential material and not leave [the circuit judge’s] chambers.” *Town of Burnsville v. Cline*, 425 S.E. 2d at 186. It is possible that a court interpreting the Open Meetings Act may be persuaded by this decision to determine that meetings discussing such information must be kept confidential.

It should also be noted that a number of other statutes require particular agencies to maintain the confidentiality of information relating to secret processes or secret methods of manufacture or production. *See, e.g.*, the Public Energy Authority (W. Va. Code § 5D-1-21), the Community Infrastructure Authority (W. Va. Code § 31-19-19), and the Water Development Authority (W. Va. Code § 20-5C-21).

G. Gifts, trusts and honorary degrees.

The 1999 amendments to the Open Meetings Act permit executive sessions to “avoid the premature disclosure of an honorary degree, scholarship, prize or similar award.” (W. Va. Code § 6-9A-4(10)).

H. Grand jury testimony by public employees.

The statute authorizes closed sessions for the discussion of “[a]ny official investigation or matters relating to crime prevention or law

enforcement.” (W. Va. Code § 6-9A-4(7)). Moreover, Rule 6 of the West Virginia Rules of Criminal Procedure mandates the confidentiality of all grand jury testimony — regardless of whether the witness is a public employee.

I. Licensing examinations.

Subject to the access requirements of the open courts provision of the state constitution, discussed previously, the Open Meetings Act permits public bodies to meet in executive session to “issue, effect, deny, suspend or revoke a license, certificate or registration under the laws of this state or any political subdivision.” (W. Va. Code § 6-9A-4(4)). The person seeking such license may request an open meeting.

J. Litigation; pending litigation or other attorney-client privileges.

The Open Meetings Act does not specifically exempt discussions of pending litigation, or any other attorney-client communications, from its scope. In the 1999 amendments, the following provisions were added:

(11) Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant. If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded;

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act as set forth in article one [§§ 29B-1-1 *et seq.*], chapter twenty-nine-b of this code.

The new Exemption 11 requires the disclosure of any final litigation or other settlement.

The new exemption 12 would appear to exclude discussions of attorney work product and attorney-client communications at meetings as they fall within exemption 8 of the West Virginia FOIA, as interpreted in *Daily Gazette Co. Inc. v. W. Va. Development Office, supra*.

K. Negotiations and collective bargaining of public employees.

There is no exemption for collective bargaining negotiations or discussions; this is not surprising because public employees in West Virginia are not authorized to engage in collective bargaining.

L. Parole board meetings, or meetings involving parole board decisions.

The Open Meetings Act does not specifically authorize the closure of parole board meetings. Although parole board proceedings might arguably fall within W. Va. Code § 6-9A-4(7), it is more likely that the courts would not apply that exception in such circumstances. Moreover, the state Supreme Court narrowed the scope of a similar exemption under the Freedom of Information Act in *Hechler v. Casey, supra*. Further, to the extent that the parole board exercises quasi-judicial functions, its proceedings are subject to the constitutional open courts mandate.

M. Patients; discussions on individual patients.

The Open Meetings Act permits closed sessions to discuss the “physical or mental health of any person, unless such person requests an open meeting.” (W. Va. Code § 6-9A-4(b)(5)). Moreover, a number of specific statutes, discussed in the Freedom of Information Act section of this outline, provide for confidentiality for mental health, hospital and nursing home records concerning individual patients.

N. Personnel matters.

The statute contains an exceptionally broad exemption for discussions of personnel matters, including “[t]he appointment, employ-

ment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of any public officer or employee, or other personnel matters, or for the purpose of conducting a hearing on a complaint against a public officer or employee.” (W. Va. Code § 6-9A-4(2)). The 1999 amendments added the following language to subsection (2): [An executive session may be held only when a closed session is required] “for the purpose of conducting a hearing on a complaint, charge, or grievance against a public officer or employee, unless [he] requests an open meeting.” (W. Va. Code § 6-9A-4(2) (B)). However, under the *State Bar and Board of Medicine* decisions, discussed above, it is doubtful whether an adjudicatory hearing on a complaint against a public officer or employee may be conducted in a closed session.

The 1999 amendments also added the explicit prohibition of executive sessions to discuss or consider “general personnel policy issues.” *Id.*

Finally, the 1999 amendments mandated that “final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting.” *Id.*

O. Real estate negotiations.

“Matters involving or affecting the purchase, sale or lease of property” may be discussed in executive session. W. Va. Code § 6-9A-4(9).

P. Security, national and/or state, of buildings, personnel or other.

The statute permits closed meetings to discuss “[m]atters of war, threatened attack from a foreign power, civil insurrection or riot,” W. Va. Code § 6-9A-4(1), as well as the “development of security personnel or devices.” W. Va. Code § 6-9A-4(8).

Q. Students; discussions on individual students.

Another broad exemption under the Act authorizes executive sessions to discuss the “disciplining, suspension or expulsion of any student in any public school or public college or university, unless such student requests an open meeting.” W. Va. Code § 6-9A-4(b)(3).

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

The 1999 amendments substantially change the language of the personal privacy exception to the Act. The amended W. Va. Code § 6-9A-4(b)(6) provides that executive session is appropriate:

To discuss any material the disclosure of which would constitute an unwarranted invasion of an individual’s privacy such as any records, data, reports, recommendations or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual’s personal and family circumstances.

No court decisions have yet interpreted or applied this new provision.

A. When to challenge.

1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

The Open Meetings Act does not provide for any particular expedited procedure for reviewing a request to attend upcoming meetings, although it does authorize the issuance of an injunction to enforce the statute’s provisions. W. Va. Code § 6-9A-6. Any citizen of the state may bring an action in circuit court under the statute. Ordinarily no bond will be required unless it appears to the court that the petition was filed solely to harass or delay the governing body.

Alternatively, the right of access to a pending meeting could be asserted through a petition for a writ of mandamus or prohibition, in

circuit court or the Supreme Court of Appeals. Such an action would be given expedited treatment.

2. When barred from attending.

Section 3 of the Open Meetings Act specifically authorizes the enforcement of the right to attend an open meeting through a civil action filed in the circuit court where the public agency regularly meets. The suit must be brought within 120 days “after the action complained of was taken or the decision complained of was made. No bond need be posted as a prerequisite to injunctive relief” unless the petition appears to be without merit or made with the sole intent of harassing or delaying or avoiding return by the governing body. Circuit courts are authorized to “compel compliance or enjoin noncompliance” and “annul a decision made in violation of this article.”

3. To set aside decision.

Section 3 of the Open Meetings Act specifically authorizes a court of competent jurisdiction to “invalidate any action taken at any meeting for which notice did not comply with the requirements of this section. W. Va. Code § 6-9A-3. Section 6 seems to broaden the court’s authority to annul a decision for non-compliance with provisions other than the notice requirements.

4. For ruling on future meetings.

Courts can grant prospective relief enjoining a governing body of a public agency from proceeding as it has in the past and ordering the public agency to conduct its future meetings in conformity with the Open Meetings Act. W. Va. Code § 6-9A-6.

5. Other.

The Open Meetings Act provides a practical limitation on challenges made to bond issues. If notice of the meeting at which the bond issue was finally considered was given at least ten days prior to the meeting by a Class I legal advertisement in a qualified newspaper having general circulation in the geographical area, then the bond issue will not be rendered void in a challenge by a citizen. W. Va. Code § 6-9A-6.

It should also be noted that the 1999 amendments provide for a process by which “any governing body or member thereof . . . may seek advice, information from the executive director of the West Virginia ethics commission” or “an advisory opinion from the West Virginia ethics commission committee on open governmental meetings” for purposes of determining whether “an action or proposed action violates the provisions” of the Act. W. Va. Code § 6-9A-11. The West Virginia ethics commission committee on open governmental meetings was created by the 1999 amendments. W. Va. Code § 6-9A-10. All written advisory opinions of the committee are available from Office of the West Virginia Secretary of State (304-558-6000). These opinions may provide additional clarification that may help one determine whether a court is advisable.

B. How to start.

1. Where to ask for ruling.

a. Administrative forum.

There is no provision in the Open Meetings Act for an administrative challenge to a public agency’s actions. However, it is possible that some agencies may have promulgated regulations that provide such an administrative forum. In that case, provisions regarding time limits for requesting or receiving a ruling or subsequent administrative remedies should also be contained in the agency’s regulations. With few exceptions, such regulations must be filed with the office of the Secretary of State and can be obtained either from that office or from the agency involved.

b. State attorney general.

The Open Meetings Act does not provide for any appeal to the state Attorney General, and that office generally will issue a written opin-

ion only upon the request of state department heads, prosecuting attorneys, or certain other public officials. In the case of an impending egregious violation of the Open Meetings Act, it might be possible to obtain an informal ruling from the Attorney General’s office or from the public agency’s other legal advisor, thereby averting such action.

The 1999 amendments added a new subsection 12 to W. Va. Code § 6-9A-4 that provides:

It is the duty of the attorney general to compile the statutory and case law pertaining to this article and to prepare appropriate summaries and interpretations for the purpose of informing all public officials subject to this article of the requirements of this article. It is the duty of the secretary of state, the clerks of the county commissions, joint clerks of the county commissions and circuit courts, if any, and the city clerks or recorders of the municipalities of the state to provide a copy of the material compiled by the attorney general to all elected public officials within their respective jurisdictions. The clerks or recorders will make the material available to appointed public officials. Likewise, it is their respective duties to provide a copy or summary to any newly appointed or elected person within thirty days of the elected or appointed official taking the oath of office or an appointed person’s start of term.

Copies of the Office of Attorney General’s compilation of the statutory and case law as well as the required summaries and interpretations should be available upon request by that office. (304-558-2021). Moreover, the 1999 amendments to the Open Meetings Act also impose specific duties upon the Attorney General to assist state and municipal government bodies and officials in achieving compliance with that statute. W. Va. Code § 6-9A-12. The Web site of the Office of the Attorney General provides access to an excellent summary of the requirements of the Open Meetings Act: <http://www.wvago.gov/pdf/OpenMeetingsHandbook2006.pdf>

The 1999 amendments to the Open Meeting Law § 6-9A-11 requires the West Virginia Ethics Commission to rule on requests for advisory opinions regarding interpretations of that statute. Any person subject to the provisions of the Act may request an opinion concerning his or her own conduct. This includes an elected or appointed public official or a public employee of State, county or local government. An individual may inquire as to whether she or he is subject to the Ethics Act. The Commission will not respond to requests for written advice on the propriety of someone else’s conduct. The identity of the requester will not be disclosed in the Commission’s written opinion.

Information relating to such advisory opinions are available online at: <http://www.ethics.wv.gov/advisoryopinion/Pages/default.aspx>. Any governing body or member thereof subject to the law may seek advice and information from the executive director of the West Virginia ethics commission or request in writing an advisory opinion from the West Virginia Ethics Commission Committee on Open Governmental Meetings as to whether an action or proposed action violates the law. Requests for a formal advisory opinion must be submitted to the West Virginia Ethics Commission in writing at 210 Brooks St., Charleston, WV 25301, Phone (304) 558-0664, WV Toll Free 1-866-558-0664, Fax (304) 558-2169. The letter should contain a complete statement of the facts, including your name, your official position, a brief description of the powers of your agency, commission or office and the nature of the issue.

The members of the Commission will review your letter, but their deliberations and written response will not disclose your name or the identity of your specific public entity.

c. Court.

The only statutory procedure for asserting a right of access under the Open Meetings Act is a petition filed in circuit court pursuant to W. Va. Code §§ 6-9A-3 and 6. It is possible that one may assert a right of access in a common law mandamus or prohibition proceeding.

C. Court review of administrative decision.

1. Who may sue?

Any “citizen” of this state may file a petition challenging the action of a public agency under the Open Meetings Act. W. Va. Code §§ 6-9A-3 and 6. Although the statute originally required the plaintiff to “show a good faith and valid reason for making the application,” the provision was deleted in a 1993 amendment. Only a person “adversely affected” by a decision may have the decision invalidated solely on the grounds the body gave improper notice of the meeting. W. Va. Code § 6-9A-3.

2. Will the court give priority to the pleading?

There is no provision directing the court to give priority to a citizen’s petition challenging a public agency’s actions under the Open Meetings Act. However, if the petition seeks to enjoin an imminent violation of the statute, an expedited hearing will be available.

3. Pro se possibility, advisability.

It is possible for such a petition to be filed *pro se* (without the assistance of a lawyer), although the Act does not address this situation in particular. Whether filing a petition *pro se* is advisable depends upon the complexity of the facts involved and the knowledge of the person filing the petition. The advisability of proceeding without a lawyer is discussed in more detail in the section above on the Freedom of Information Act.

4. What issues will the court address?

In a judicial proceeding under the Open Meetings Act, the court will address any issue arising under the statute, including a request for an order in a particular pending meeting be open, establishing general rules concerning access to future meetings, and invalidating decisions made at illegal meetings. *McComas v. Fayette County Board of Education, supra*. The 1999 amendments create addition issues that a court may be called upon to address. One such issue is whether “a governing body or member thereof has acted in good faith reliance upon an advisory opinion of the West Virginia ethics commission committee on open governmental meetings. If the court found such reliance, W. Va. Code § 6-9A-11 provides that it shall constitute an “absolute defense to any civil suit or criminal prosecution.”

While that section seems to provide that a court may not overturn an advisory opinion of the committee on open governmental meetings, such an interpretation would seem to violate the constitutional separation of powers doctrine by prohibiting judicial review or erroneous interpretations of law by an administrative agency.

It is unlikely that such a result was intended by the legislature; it is more likely that the advisory opinion provides an “absolute defense” to that portion of a lawsuit seeking attorneys’ fees and costs when a litigant successfully argues that the Open Meetings Act has been violated. Thus, while a court may issue a declaratory judgment or an injunction in a suit brought under the Act, the court would be barred from awarding costs and fees to the successful litigant. No judicial decisions have yet addressed this issue.

5. Pleading format.

There is no established pleading format. The petition should contain a short and plain statement of the facts entitling the petitioner to relief and a description of the relief sought. If injunctive relief is sought, the petition must be verified, although generally no bond would be required. The form of the pleading will depend on the nature of the relief sought. It may be a petition for writ of mandamus, a writ of prohibition, a declaratory judgment action, or a complaint seeking injunctive relief.

6. Time limit for filing suit.

Under a 1993 amendment to Section 6 of the Open Meetings Act, circuit courts have jurisdiction to enforce the Act only if the action was

commenced “within one hundred twenty days after the action complained of was taken or the decision complained of was made.” W. Va. Code § 6-9A-6 (1993). Formerly, the statute provided that actions to enjoin or annul actions taken or decisions made in violation of the statute must be filed within thirty days after the date of the action or decision.

Although it is not clear whether the time limit established in Section 6 also applies to actions brought under Section 3, the one hundred twenty day time limit should not apply if the petitioner was unaware of the agency’s actions because of its failure to give the required notice of its meeting.

7. What court.

A petition under the Open Meetings Act must be filed in “the circuit court in the county where the public agency regularly meets.” W. Va. Code § 6-9A-6. In extraordinary cases, a petition could be filed in the state Supreme Court, seeking a writ of mandamus or prohibition. See the preceding section, on the Freedom of Information Act, for a more detailed discussion of the availability of this remedy.

8. Judicial remedies available.

The Open Meetings Act specifically authorizes injunctive relief, as well as the judicial annulment of official actions taken in violation of the statute. *Id.* There is one exception to the court’s power to annul any decision made in violation of the statute: no bond issue that was passed or approved by any public agency may be annulled for non-compliance with the Act “if notice of the meeting at which such bond issue was finally considered was given at least ten days prior to such meeting by a Class I legal advertisement” published in a newspaper circulated within the public agency’s geographical area. *Id.*

A court also could enter a declaratory judgment determining the public’s access rights in a given situation, as well as any other remedy the court deems appropriate.

W. Va. Code § 6-9A-6 requires that any order which compels compliance or enjoins non-compliance with the provisions of the statute, or which annuls a decision made in violation of the Act, “shall include findings of fact and conclusions of law and shall be recorded in the minutes of the governing body.”

9. Availability of court costs and attorneys’ fees.

In 1993 the Open Meetings Act was amended to permit the courts to order the governing body to pay the “necessary attorney fees and expenses” of persons bringing suit under the statute if (a) the court entered an order compelling compliance or enjoining noncompliance with the statute, or annulling a decision made in violation of the act; and (b) the court finds the governing body “intentionally violated the provisions” of the statute. W. Va. Code § 6-9A-6(7).

Conversely if the court which denies the relief sought by the plaintiff in an Open Meetings Act suit, W. Va. Code § 6-9A-7(c) permits the court to require the plaintiff to pay the public agency’s necessary attorney fees and expenses, if the court finds “that the action was frivolous or commenced with the primary intent of harassing the governing body or any member thereof or, in the absence of good faith, of delaying any meetings or decisions of the governing body.” *Id.*

Moreover, the 1999 amendments added a provision that provides that when “a governing body or member thereof has acted in good faith reliance upon an advisory opinion of the West Virginia ethics commission committee on open governmental meetings . . . it shall constitute an absolute defense to any civil suit or criminal prosecution.” W. Va. Code § 6-9A-11. While that section seems to provide that a court may not overturn an advisory opinion of the committee on open governmental meetings, such an interpretation would seem to violate the constitutional separation of powers doctrine by prohibiting judicial review or erroneous interpretations of law by an administrative agency. It is unlikely that such a result was intended by the legislature; it is more likely that the advisory opinion provides an “absolute

defense” to that portion of a lawsuit seeking attorneys’ fees and costs when a litigant successfully argues that the Open Meetings Act has been violated. Thus, while a court may issue a declaratory judgment or an injunction in a suit brought under the Act, the court would be barred from awarding costs and fees to the successful litigant. No judicial decisions have yet addressed this issue.

Even prior to the amendments authorizing the award of attorneys’ fees under the Freedom of Information and Open Meetings Acts, the Supreme Court had ruled that a willful disregard of law by an agency in denying access to public documents is sufficient to support an award of attorneys’ fees. In *Richardson v. Town of Kimball*, *supra*, the court allowed recovery of reasonable attorneys’ fees against the town for “deliberate disregard” of the mandatory provisions of the open court records statute. In *Daily Gazette v. Withrow*, *supra*, the court held a trial court could award attorney fees to a person prevailing in an action under the Freedom of Information Act if “the evidence before the trial court . . . show[s] bad faith, vexatious, wanton or oppressive conduct on the part of the custodian of the public record(s).”

The *Withrow* court emphasized that entitlement to attorneys’ fees is “ordinarily, a question of fact, which requires development before the trial court.” *Withrow*, 350 S.E.2d at 748. The same rule probably will apply to awards of attorney fees under Section 6 of the Open Meetings Act. It is extremely important, therefore, that the record developed in the circuit court include evidence concerning the agency’s conduct. See also, *Daily Gazette v. W. Va. Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996).

10. Fines.

Section 7 of the Open Meetings Act provides that a knowing and willful violation of the Open Meetings Act by a member of a public or governmental body constitutes a misdemeanor. The Act provides for a fine of not less than \$100 nor more than \$500. For second and subsequent offenses a fine of not less than \$100 nor more than \$1000 may be levied. W. Va. Code § 6-9A-7.

11. Other penalties.

Prior to the 1999 amendments, the Act required that upon conviction of the misdemeanor offense of willfully and knowingly violating the provisions of the Open Meetings Act, a member of a public or governmental body may be imprisoned in the county jail for not more than ten days, in addition to the fine. W. Va. Code § 6-9A-6. That provision was removed from the Act in 1999.

D. Appealing initial court decisions.

1. Appeal routes.

The only appeal route from a circuit court decision is to the West Virginia Supreme Court of Appeals.

2. Time limits for filing appeals.

An appeal to the state Supreme Court must be filed within four months after the challenged order was issued by the circuit court.

3. Contact of interested amici.

Any person wishing to file an *amicus* brief in the West Virginia Supreme Court must file a motion making the request. Generally speaking, the current Supreme Court routinely grants such motions.

The Reporters Committee for Freedom of the Press has a substantial interest in reporters’ rights of access to government information and frequently files friend-of-the-court briefs for open meetings issues when they are being considered at the highest appeal level in the state. Other news organizations and associations within the state also may want to support your position by filing *amicus* briefs, and you should contact such potential supporters as soon as possible.

V. ASSERTING A RIGHT TO COMMENT.

A. Is there a right to participate in public meetings?

The Open Meetings Act does not address the issue of the public’s right to comment at public meetings. Section 6-9A-3 provides that “persons who desire to address the governing body may not be required to register more than fifteen minutes prior to [the] time the scheduled meeting is to commence.” The statute does not explicitly provide a public *right* to comment and there are no West Virginia cases addressing this issue. However, as a general matter, when a public agency allows public comment at a meeting, it cannot arbitrarily allow some persons to speak while excluding others similarly situated from so doing.

B. Must a commenter give notice of intentions to comment?

As noted above, a governing body may require those persons who wish to speak to register no more than fifteen minutes prior to the start of a scheduled meeting.

C. Can a public body limit comment?

A governing body “may make and enforce reasonable rules for attendance and presentation at any meeting,” but this power is limited to “any meeting where there is not enough room for all members of the public who wish to attend.” W. Va. Code § 6-9A-3.

D. How can a participant assert rights to comment?

Not specified.

E. Are there sanctions for unapproved comment?

The Act provides that “this article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised.”

Statute

Open Records

Chapter 29B. Freedom of Information

Public Records

§ 29B-1-1. Declaration of policy

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.

§ 29B-1-2. Definitions

As used in this article:

(1) "Custodian" means the elected or appointed official charged with administering a public body.

(2) "Person" includes any natural person, corporation, partnership, firm or association.

(3) "Public body" means every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other body which is created by state or local authority or which is primarily funded by the state or local authority.

(4) "Public record" includes any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body.

(5) "Writing" includes any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics.

§ 29B-1-3. Inspection and copying

(1) Every person has a right to inspect or copy any public record of a public body in this state, except as otherwise expressly provided by section four of this article.

(2) A request to inspect or copy any public record of a public body shall be made directly to the custodian of such public record.

(3) The custodian of any public records, unless otherwise expressly provided by statute, shall furnish proper and reasonable opportunities for inspection and examination of the records in his or her office and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them. The custodian of the records may make reasonable rules and regulations necessary for the protection of the records and to prevent interference with the regular discharge of his or her duties. If the records requested exist in magnetic, electronic or computer form, the custodian of the records shall make such copies available on magnetic or electronic media, if so requested.

(4) All requests for information must state with reasonable specificity the information sought. The custodian, upon demand for records made under this statute, shall as soon as is practicable but within a maximum of five days not including Saturdays, Sundays or legal holidays:

- (a) Furnish copies of the requested information;

(b) Advise the person making the request of the time and place at which he or she may inspect and copy the materials; or

(c) Deny the request stating in writing the reasons for such denial.

Such a denial shall indicate that the responsibility of the custodian of any public records or public body to produce the requested records or documents is at an end, and shall afford the person requesting them the opportunity to institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.

(5) The public body may establish fees reasonably calculated to reimburse it for its actual cost in making reproductions of such records.

§ 29B-1-4. Exemptions

(a) The following categories of information are specifically exempt from disclosure under the provisions of this article:

(1) Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors;

(2) Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance: Provided, That nothing in this article shall be construed as precluding an individual from inspecting or copying his or her own personal, medical or similar file;

(3) Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination;

(4) Records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement;

(5) Information specifically exempted from disclosure by statute;

(6) Records, archives, documents or manuscripts describing the location of undeveloped historic, prehistoric, archaeological, paleontological and battlefield sites or constituting gifts to any public body upon which the donor has attached restrictions on usage or the handling of which could irreparably damage such record, archive, document or manuscript;

(7) Information contained in or related to examination, operating or condition reports prepared by, or on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions, except those reports which are by law required to be published in newspapers;

(8) Internal memoranda or letters received or prepared by any public body;

(9) Records assembled, prepared or maintained to prevent, mitigate or respond to terrorist acts or the threat of terrorist acts, the public disclosure of which threaten the public safety or the public health;

(10) Those portions of records containing specific or unique vulnerability assessments or specific or unique response plans, data, databases, and inventories of goods or materials collected or assembled to respond to terrorist acts; and communication codes or deployment plans of law enforcement or emergency response personnel;

(11) Specific intelligence information and specific investigative records dealing with terrorist acts or the threat of a terrorist act shared by and between federal and international law-enforcement agencies, state and local law enforcement and other agencies within the department of military affairs and public safety;

(12) National security records classified under federal executive order and not subject to public disclosure under federal law that are shared by federal agencies, and other records related to national security briefings to assist state and local government with domestic preparedness for acts of terrorism;

(13) Computing, telecommunications and network security records, passwords, security codes or programs used to respond to or plan against acts of terrorism which may be the subject of a terrorist act;

(14) Security or disaster recovery plans, risk assessments, tests, or the results of those tests;

(15) Architectural or infrastructure designs, maps or other records that show the location or layout of the facilities where computing, telecommunications or network infrastructure used to plan against or respond to terrorism are located or planned to be located; and

(16) Codes for facility security systems; or codes for secure applications for such facilities referred to in subdivision (15), subsection (a) of this section.

(b) As used in subdivisions (9) through (16), subsection (a) of this section, the term “terrorist act” means an act that is likely to result in serious bodily injury or damage to property or the environment and is intended to:

(1) Intimidate or coerce the civilian population;

(2) Influence the policy of a branch or level of government by intimidation or coercion;

(3) Affect the conduct of a branch or level of government by intimidation or coercion; or

(4) Retaliate against a branch or level of government for a policy or conduct of the government.

(c) Nothing in the provisions of subdivisions (9) through (16), subsection (a) of this section, should be construed to make subject to the provisions of this chapter any evidence of an immediate threat to public health or safety unrelated to a terrorist act or the threat thereof which comes to the attention of a public entity in the course of conducting a vulnerability assessment response or similar activity.

§ 29B-1-5. Enforcement

(1) Any person denied the right to inspect the public record of a public body may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.

(2) In any suit filed under subsection one of this section, the court has jurisdiction to enjoin the custodian or public body from withholding records and to order the production of any records improperly withheld from the person seeking disclosure. The court shall determine the matter de novo and the burden is on the public body to sustain its action. The court, on its own motion, may view the documents in controversy in camera before reaching a decision. Any custodian of any public records of the public body found to be in noncompliance with the order of the court to produce the documents or disclose the information sought, may be punished as being in contempt of court.

(3) Except as to causes the court considers of greater importance, proceedings arising under subsection one of this section shall be assigned for hearing and trial at the earliest practicable date.

§ 29B-1-6. Violation of article; penalties

Any custodian of any public records who willfully violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than two hundred dollars nor more than one thousand dollars, or be imprisoned in the county jail for not more than twenty days, or, in the discretion of the court, by both fine and imprisonment.

§ 29B-1-7. Attorney fees and costs

Any person who is denied access to public records requested pursuant to this article and who successfully brings a suit filed pursuant to section five of this article shall be entitled to recover his or her attorney fees and court costs from the public body that denied him or her access to the records.

Open Meetings

Code of West Virginia

Chapter 6. General Provisions Respecting Officers

Open Governmental Proceedings

§ 6-9A-1. Declaration of legislative policy

The Legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions. The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government created by them.

Open government allows the public to educate itself about government decisionmaking through individuals’ attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government.

Public access to information promotes attendance at meetings, improves planning of meetings, and encourages more thorough preparation and complete discussion of issues by participating officials. The government also benefits from openness because better preparation and public input allow government agencies to gauge public preferences accurately and thereby tailor their actions and policies more closely to public needs. Public confidence and understanding ease potential resistance to government programs.

Accordingly, the benefits of openness inure to both the public affected by governmental decisionmaking and the decision makers themselves. The Legislature finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decisionmaking.

§ 6-9A-2. Definitions

As used in this article:

(1) “Decision” means any determination, action, vote or final disposition of a motion, proposal, resolution, order, ordinance or measure on which a vote of the governing body is required at any meeting at which a quorum is present.

(2) “Executive session” means any meeting or part of a meeting of a governing body which is closed to the public.

(3) “Governing body” means the members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

(4) “Meeting” means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

(A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding;

(B) Any on-site inspection of any project or program;

(C) Any political party caucus;

(D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

(5) "Official action" means action which is taken by virtue of power granted by law, ordinance, policy, rule, or by virtue of the office held.

(6) "Public agency" means any administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power. The term "public agency" does not include courts created by article eight of the West Virginia constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.

(7) "Quorum" means the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.

6-9A-3. Proceedings to be open; public notice of meetings

Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, all meetings of any governing body shall be open to the public. Any governing body may make and enforce reasonable rules for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend. This article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised: Provided, That persons who desire to address the governing body may not be required to register to address the body more than fifteen minutes prior to time the scheduled meeting is to commence.

Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media, except in the event of an emergency requiring immediate official action.

Each governing body of the executive branch of the state shall file a notice of any meeting with the secretary of state for publication in the state register. Each notice shall state the date, time, place and purpose of the meeting. Each notice shall be filed in a manner to allow each notice to appear in the state register at least five days prior to the date of the meeting.

In the event of an emergency requiring immediate official action, any governing body of the executive branch of the state may file an emergency meeting notice at any time prior to the meeting. The emergency meeting notice shall state the date, time, place and purpose of the meeting and the facts and circumstances of the emergency.

Upon petition by any adversely affected party any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section.

§ 6-9A-4. Exceptions

(a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:

(1) To consider acts of war, threatened attack from a foreign power, civil insurrection or riot;

(2) To consider:

(A) Matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee unless the public officer or employee or prospective public officer or employee requests an open meeting; or

(B) For the purpose of conducting a hearing on a complaint, charge or grievance against a public officer or employee, unless the public officer or employee requests an open meeting. General personnel policy issues may not be discussed or considered in a closed meeting. Final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting;

(3) To decide upon disciplining, suspension or expulsion of any student in any public school or public college or university, unless the student requests an open meeting;

(4) To issue, effect, deny, suspend or revoke a license, certificate or registration under the laws of this state or any political subdivision, unless the person seeking the license, certificate or registration or whose license, certificate or registration was denied, suspended or revoked requests an open meeting;

(5) To consider the physical or mental health of any person, unless the person requests an open meeting;

(6) To discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy such as any records, data, reports, recommendations or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances;

(7) To plan or consider an official investigation or matter relating to crime prevention or law enforcement;

(8) To develop security personnel or devices;

(9) To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision: Provided, That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: Provided, however, That information not subject to release pursuant to the West Virginia freedom of information act does not become subject to disclosure as a result of executive session;

(10) To avoid the premature disclosure of an honorary degree, scholarship, prize or similar award;

(11) Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant. If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded;

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act as set forth in article one, chapter twenty-nine-b of this code.

§ 6-9A-5. Minutes

Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

(1) The date, time and place of the meeting;

(2) The name of each member of the governing body present and absent;

(3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and

(4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

§ 6-9A-6. Enforcement by injunctions; actions in violation of article voidable; voidability of bond issues

The circuit court in the county where the public agency regularly meets has jurisdiction to enforce this article upon civil action commenced by any citizen of this state within one hundred twenty days after the action complained of was taken or the decision complained of was made. Where the action seeks injunctive relief, no bond may be required unless the petition appears to be without merit or made with the sole intent of harassing or delaying or avoiding return by the governing body.

The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of this article. An injunction may also order that subsequent actions be taken or decisions be made in conformity with the provisions of this article: Provided, That no bond issue that has been passed or approved by any governing body in this state may be annulled under this section if notice of the meeting at which the bond issue was finally considered was given at least ten days prior to the meeting by a Class I legal advertisement published in accordance with the provisions of article three, chapter fifty-nine of this code in a qualified newspaper having a general circulation in the geographic area represented by that governing body.

In addition to or in conjunction with any other acts or omissions which may be determined to be in violation of this article, it is a violation of this article for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.

Any order which compels compliance or enjoins noncompliance with the provisions of this article, or which annuls a decision made in violation of this article shall include findings of fact and conclusions of law and shall be recorded in the minutes of the governing body.

§ 6-9A-7. Violation of article; criminal penalties; attorney fees and expenses in civil actions

(a) Any person who is a member of a public or governmental body required to conduct open meetings in compliance with the provisions of this article and who willfully and knowingly violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars: Provided, That a person who is convicted of a second or subsequent offense under this subsection is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars.

(b) A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article may be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust.

(c) Where the court, upon denying the relief sought by the complaining person in the action, finds that the action was frivolous or commenced with the primary intent of harassing the governing body or any member thereof or, in the absence of good faith, of delaying any meetings or decisions of the governing body, the court may require the complaining person to pay the governing body's necessary attorney fees and expenses.

§ 6-9A-8. Acting by reference; written ballots

(a) Except as otherwise expressly provided by law, the members of a public agency may not deliberate, vote, or otherwise take official action upon any matter by reference to a letter, number or other designation or other secret device or method, which may render it difficult for persons attending a meeting of the public agency to understand what is being deliberated, voted or acted upon. However, this subsection does not prohibit a public agency from deliberating, voting or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted or acted upon, are available for public inspection at the meeting.

(b) A public agency may not vote by secret or written ballot.

§ 6-9A-9. Broadcasting or recording meetings

(a) Except as otherwise provided in this section, any radio or television station is entitled to broadcast all or any part of a meeting required to be open.

(b) A public agency may regulate the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting, so as to prevent undue interference with the meeting. The public agency shall allow the equipment to be placed within the meeting room in such a way as to permit its intended use, and the ordinary use of the equipment may not be declared to constitute undue interference: Provided, That if the public agency, in good faith, determines that the size of the meeting room is such that all the members of the public present and the equipment and personnel necessary for broadcasting, photographing, filming and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public agency, acting in good faith and consistent with the purposes of this article, may require the pooling of the equipment and the personnel operating it.

§ 6-9A-10. Open governmental meetings committee

The West Virginia ethics commission, pursuant to subsection (j), section one, article two, chapter six-b of this code, shall appoint from the membership of the commission a subcommittee of three persons designated as the West Virginia ethics commission committee on open governmental meetings. The chairman shall designate one of the persons to chair the committee. In addition to the three members of the committee, two additional members of the commission shall be designated to serve as alternate members of the committee.

The chairman of the committee or the executive director shall call meetings of the committee to act on requests for advisory opinions interpreting the West Virginia open government meetings act. Advisory opinions shall be issued in a timely manner, not to exceed thirty days.

§ 6-9A-11. Request for advisory opinion; maintaining confidentiality

(a) Any governing body or member thereof subject to the provisions of this article may seek advice and information from the executive director of the West Virginia Ethics Commission or request in writing an advisory opinion from the West Virginia Ethics Commission Committee on Open Governmental Meetings as to whether an action or proposed action violates the provisions of this article. The executive director may render oral advice and information upon request. The committee shall respond in writing and in an expeditious manner to a request for an advisory opinion. The opinion is binding on the parties requesting the opinion.

(b) Any governing body or member thereof that seeks an advisory opinion and acts in good faith reliance on the opinion has an absolute defense to any civil suit or criminal prosecution for any action taken in good faith reliance on the opinion unless the committee was willfully and intentionally misinformed as to the facts by the body or its representative.

(c) A governing body or member thereof that acts in good faith reliance on a written advisory opinion sought by another person or governing body has an absolute defense to any civil suit or criminal prosecution for any action taken based upon a written opinion of the West Virginia ethics commission committee, as long as underlying facts and circumstances surrounding the action were the same or substantially the same as those being addressed by the written opinion.

(d) The committee and commission may take appropriate action to protect from disclosure information which is properly shielded by an exception provided in section four of this article.

6-9A-12. Duty of attorney general, secretary of state, clerks of the county commissions and city clerks or recorders

It is the duty of the attorney general to compile the statutory and case law pertaining to this article and to prepare appropriate summaries and interpretations for the purpose of informing all public officials subject to this article of the requirements of this article. It is the duty of the secretary of state, the clerks of the county commissions, joint clerks of the county commissions and circuit courts, if any, and the city clerks or recorders of the municipalities of the state to provide a copy of the material compiled by the attorney general to all elected public officials within their respective jurisdictions. The clerks or recorders will make the material available to appointed public officials. Likewise, it is their respective duties to provide a copy or summary to any newly appointed or elected person within thirty days of the elected or appointed official taking the oath of office or an appointed person's start of term.