THE WEST VIRGINIA FREEDOM OF INFORMATION ACT

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Other:

THE FREEDOM OF INFORMATION ACT

A SUMMARY OF THE LAW ON FREEDOM OF INFORMATION (PUBLIC RECORDS)

INTENT:

The State statute on public records, known as the Freedom of Information Act, was enacted for the express purpose of providing full and complete information to all persons about the workings of government and the acts of those who represent them as public officials and employees, so that the people may be informed and retain control. Its provisions must be liberally construed to carry out that purpose.

SCOPE:

The Act applies to all State, county and municipal officers, governing bodies, agencies, departments, boards and commissions, and any other bodies created or primarily funded by State or local authority, unless their enabling statute specifically exempts them from its provisions. The records covered by the Act include virtually all documents and information retained by a public body, regardless of their form.

Public records are available to every person for inspection or copying when there has been a request made to the custodian, and when they are not specifically exempted from disclosure. There is no statutory requirement that the request be in writing; however whenever possible, a written request is advisable in order to avoid misunderstandings regarding the timing and scope of the request, and to ensure that the information sought is stated "with reasonable specificity," as required by W. Va. Code § 29B-1-3(4). The custodian must respond within five (5) working days by either granting the request or giving written reasons for its denial. Citizens may be charged a reasonable fee for the costs of copying.

EXEMPTIONS:

While the scope of the Act is expansive and its coverage liberally construed, it does provide specific delineated exemptions from disclosure. These exemptions are strictly construed because the intent of the Act is disclosure and anything less than a narrow construction of exemptions would operate to defeat this intent. The exemptions are set forth in W. Va. Code § 29B-1-4(a), at pages 5 through 7 herein.

ENFORCEMENT:

Any person denied the right to inspect a public record of a public body may sue the public body in circuit court for injunctive or declaratory relief under the Freedom of Information Act. The burden is on the public body to prove to the satisfaction of the court that the records sought are exempt from disclosure. If successful, the person bringing the suit may recover his or her attorney fees and court costs from the public body that denied access to the records.

PENALTIES:

Any custodian of a public record who willfully violates the Act is guilty of a misdemeanor, and upon conviction may be fined from $100.00 to $500.00 or imprisoned in the county jail for up to ten (10) days, or both.

STATUTE

FREEDOM OF INFORMATION ACT

§ 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. (1977, c. 147.)

§ 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. (1977, c. 147.)

§ 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 [§ 29B-1-4] 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. (1977, c. 147; 1992, c. 85.)

§ 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;

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

(17) Specific engineering plans and descriptions of existing public utility plants and equipment; and

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

(b) As used in subdivisions (9) through (16), inclusive, 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), inclusive, 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. (1977, c. 147; 2003, c. 108; 2007, c. 117.)

§ 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. (1977, c. 147.)

§ 29B-1-6. Violation of Article; Penalties.

Any custodian of any public records who shall willfully violate the provisions of this article shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail for not more than ten days, or, in the discretion of the court, by both such fine and imprisonment. (1977, c. 147.)

§ 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 [§ 29B-1-5] 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. (1992, c. 85.)

INTERPRETATIONS OF THE ACT

When posed with a Freedom of Information question, three initial inquiries must be made in order to determine if disclosure of a record is required under the Act. These questions are:

1. Is the entity a **public body** as defined by the Freedom of Information Act?

2. Is the record in question a **public record** as defined by the Freedom of Information Act?

3. Is there a specific **statutory exemption** from the provisions of the Freedom of Information Act or in the statutes relating to the public body?

The answers to these questions may be found in the Act or in the enabling statute of the agency involved. If the material is a public record of a public body, and is not specifically exempted by statute from the disclosure provisions of the WV-FOIA, then the information should ordinarily be disclosed. Of course, if a "public record of a public body" is not in question, there is no further inquiry under the Act because there is no right of public access to the information. An additional question that may arise is whether there is a state constitutional right of access to the information.

Several decisions of the West Virginia Supreme Court of Appeals and Attorney General's Opinions have defined more particularly the kinds of records that must be provided to the public under the WV-FOIA. Although an Opinion of the Attorney General does not have the force of law, it is the official opinion of the State's chief legal officer as to how the West Virginia Supreme Court would rule should the same issue be before the Court. The following summaries give an overview of pertinent decisions along with the type of analysis that has been applied in various contexts. We will also attempt to offer direction concerning the treatment of exemptions under the Act which the Court has not yet addressed.

PUBLIC BODY:

The WV-FOIA definition of a "public body" includes all officers, agencies and departments of the State's executive, legislative and judicial branches of government; counties, school districts and municipalities; and any entities created or primarily funded by State or local authority. W. Va. Code § 29B-1-2(3).

In *Queen v. West Virginia University Hospitals, Inc.*, 179 W. Va. 95, 365 S.E.2d 375 (1987), the West Virginia Supreme Court of Appeals concluded that **West Virginia University Hospitals, Inc.**, a nonstock, nonprofit corporation formed to manage a hospital located on University property, was subject to the WV-FOIA provisions because a State statute (W. Va. Code §§ 18-11C-1 *et seq.*) directed the hospital's incorporation and regulated its activities. The Court noted that the enabling legislation also specified the

corporation's purpose, prescribed the composition of its board of directors (primarily public officers), and imposed various audit and reporting requirements to the State. By so doing, the statute made the hospital an entity created by State authority, and therefore open and accountable to the public and the Legislature.

However, in *4-H Road Community Association v. West Virginia University Foundation, Inc.*, 182 W. Va. 434, 388 S.E.2d 308 (1989) *(per curiam)*, the Supreme Court found that the **West Virginia University Foundation**, a charitable, educational, nonprofit corporation formed by private citizens under the general corporation laws of the State, was not a "public body" subject to the disclosure provisions of the WV-FOIA. The Court's ruling was supported by the facts that the Foundation was not created by legislative mandate and that it did not use public money, property or employees in its operation. The Court also concluded that leases with the University for use of a State-owned building and a close working relationship with the public body did not affect the corporation's private status.

PUBLIC RECORD:

In some instances, a statute specifically exempts certain records from disclosure under the WV-FOIA, even though they otherwise might be considered public records of a public body. *See, e.g.*, W. Va. Code § 4-5-5 [1986] (records of Commission on Special Investigations); W. Va. Code § 29-22-9(b)(14) [1994] (lottery security procedures); W. Va. Code § 36-8-25 [1997] (records of abandoned property). Other statutes may restrict disclosure or require confidentiality of certain records without reference to the WV-FOIA. *See, e.g.*, W. Va. Code § 11-10-5d(a) [2007] (tax information); W. Va. Code § 27-3-1 [2008] (mental health records). If no specific statutory exemption is found, then it must be determined whether the record in question is a "public record" within the meaning of the WV-FOIA.

The WV-FOIA definition of a "public record" includes "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). A "writing" for purposes of the Act includes "any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics." W. Va. Code § 29B-1-2(5). It is obvious from this definition that once it is determined that the record in question is a public record, the form it takes will not prevent disclosure

The definition of a public record was tested in *Daily Gazette Co., Inc. v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1986), in which a newspaper sought disclosure of documents from a sheriff's office regarding "confidential" settlements of lawsuits against the sheriff and his deputies. The sheriff declined to produce the documents because they were not in his possession, were not required by law to be maintained in his records, and were not "public records" under the WV-FOIA because they were prepared and retained by his attorneys.

The West Virginia Supreme Court of Appeals held that **a release or other litigation settlement document** in which one of the parties is a public body, involving an act or omission of the public body in its official capacity, is a "public record" within the liberal definition of the WV-FOIA, which includes any information "relating to the conduct of the public's business," whether or not the record is required by law to be maintained. The fact that the document may involve "personal" as well as "official" conduct does not change its public nature. "[T]he 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." *Id.* at 116, 350 S.E.2d at 744 (citation omitted).

The *Withrow* Court further held that a public record is "retained by a public body" for purposes of the WV-FOIA if it is subject to the control of the public body. Actual possession of an existing document is irrelevant if the record may be produced at the direction of the public body. Although noting that a public body is under no obligation under the WV-FOIA to create a record where none already exists, the Court found a common-law duty to create and maintain, for public inspection and copying, a record of the terms of settlement litigation brought against a public official or his or her employees in their official capacity.

Finally, in *Withrow*, the Court held that a public record does not become private simply because the involved parties agree that a document is to remain confidential. Such an agreement is void to the extent that it conflicts with the State FOIA.

The Court had previously held in a related context that a **confidentiality agreement** between a public body and the supplier of the information may not override the disclosure requirements of the WV-FOIA. *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985). In discussing claimed exemptions under the Act, the Court in *Hechler* declined to address the basic question of whether a **list of names and addresses** of security guards furnished to the Secretary of State was a "public record" within the meaning of the WV-FOIA, because that was not an issue before the Court. Therefore, in a different context such a list might not be found to be a "public record."

In *State v. Nelson*, 189 W. Va. 778, 434 S.E.2d 697 (1993), the Supreme Court held that a **criminal history summary** is a public record, and the trial court did not err in giving an instruction to that effect to the jury. The Court said, "the nature of a 'public record' is not based upon public availability . . . but rather it is based upon whether the public body prepares, owns and retains the record." 189 W. Va. at 787, 434 S.E.2d at 706.

County property books, showing assessed valuations of real and personal property, are public documents and as such are available to the public for inspection under FOIA. *State ex rel. Rose v. Fewell*, 170 W. Va. 447, 294 S.E.2d 434 (1982).

A request for access to **municipal traffic court records** under the WV-FOIA was granted by the Court in *Richardson v. Town of Kimball*, 176 W. Va. 24, 340 S.E.2d 582 (1986), pursuant to W. Va. Code § 51-4-2, which generally requires that court records and

papers be open to public inspection and copying. "Unless a statute provides for confidentiality, court records shall be open to public inspection." Syl. pt. 2, *in part*, *Richardson*. *See also State ex rel. Garden State Newspapers v. Hoke*, 205 W. Va. 611, 616, 520 S.E.2d 186, 191 (1999) ("the court records of civil and criminal proceedings are presumptively open").

The Court in *Richardson* noted that "[t]he court clerk may, of course, 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." 176 W. Va. at 25 n.2, 340 S.E.2d at 583 n.2. Although not specifically addressing the WV-FOIA, this opinion may shed some light on what the Court would find to be reasonable limitations under the Act.

Where a citizen requested the names of taxpayers who owed city **delinquent business and occupation taxes and garbage and sewage bills** and the amounts they owed pursuant to the WV-FOIA, the city was required to provide this material with the names of the taxpayers deleted (redacted); the city did not assert that the process of redacting the records would be unreasonably burdensome or expensive, and a new computer system enabled the city to redact the names of taxpayers carried on its computerized list of taxpayers. *Farley v. Worley*, 215 W.Va. 412, 599 S.E.2d 835 (2004).

Final decisions and orders reached as a result of adjudicatory assemblages of the West Virginia Human Rights Commission are not protected by an exemption under the WV-FOIA. Accordingly, any such decision and order entered on the record of a convened open meeting and properly recorded in the minutes is a "public record" within the meaning of the WV-FOIA, and is subject to public inspection and review. Op. Att'y Gen. (July 17, 1986).

Completed **vouchers for legal fees and expenses** submitted by an attorney to Public Legal Services for reimbursement, and the agency's audit of those vouchers, are "public records" and thus accessible to the public under the WV-FOIA. 61 Op. Att'y Gen. 112 (April 11, 1986).

"The [WV-FOIA] **does not require the creation of public records**[,]" Syl. pt. 1, *Affiliated Construction Trades Foundation v. Regional Jail and Correctional Facility Authority*, 200 W. Va. 621, 490 S.E.2d 708 (1997) -- "only the disclosure of non-exempt information from existing records." *RGIS Inventory Specialists v. Palmer*, 209 W.Va. 152, 159, 544 S.E.2d 79, 86 n.4 (2001). The fact that a public body has the right to obtain a copy of a writing which was prepared and retained by a private party, but has not exercised that right, does not, standing alone, mean that the writing is a "public record" as defined by the Act. However, once such records are filed with the public body, they would be subject to disclosure under FOIA. As the Court held in *Withrow*, "[t]here 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." 177 W. Va. at 119 n.19, 350 S.E.2d at 746 n.9 (citation omitted).

LIMITATIONS ON REQUESTS BY INMATES:

> An inmate may not use the Freedom of Information Act, W. Va.Code § 29B-1-1 et seq., to obtain court records for the purpose of filing a petition for writ of habeas corpus. Instead, an inmate is bound to follow the procedures set out in the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia for filing a petition for writ of habeas corpus and to obtain documentation in support thereof.

Syl. pt. 3, *State ex rel. Wyant v. Brotherton*, 214 W. Va. 434, 589 S.E.2d 812 (2003).

CONSTITUTIONAL RIGHT OF ACCESS:

The constitutional right of public access to the courts of the State (West Virginia Constitution, Article III, Section 17) was the foundation for the Supreme Court's decision in *Daily Gazette Co., Inc. v. West Virginia Board of Medicine*, 177 W. Va. 316, 352 S.E.2d 66 (1986), in which disclosure of **physician disciplinary proceedings** was at issue. A newspaper's request for information from the Board of Medicine under the WV-FOIA was denied on the basis that reports and records of disciplinary proceedings by the Board were strictly confidential and immune from discovery under the Medical Practice Act (W. Va. Code §§ 30-3-1, *et seq.*), and thus exempt from disclosure under the WV-FOIA. Although the issue presented to the Court was what constitutes a public record subject to disclosure, its decision was reached on constitutional grounds rather than under the WV-FOIA.

Relying on its previous decision in *Daily Gazette Co., Inc. v. Committee on Legal Ethics of the West Virginia State Bar*, 174 W. Va. 359, 326 S.E.2d 705 (1984) (hereinafter *State Bar*), which held there was a constitutional right of public access to **attorney disciplinary proceedings**, the Court repeated that the right to access extends to all judicial and quasi-judicial proceedings. Drawing a direct comparison with the *State Bar* decision, the Court held that if the Board of Medicine finds probable cause to substantiate disciplinary charges, then all records and proceedings on such charges are open to the public. If probable cause is not found, the public has a right of access to the charges, and the findings of fact and conclusions of law supporting dismissal. However, this public right of access does not extend to peer review information unless those records are brought before the Board of Medicine after probable cause is found. The actual peer review procedure remains subject to the confidentiality provisions contained in the relevant statute. (See discussion under Exemption No. 5.)

The Court followed the reasoning of the *Board of Medicine* and *State Bar* cases in *Thompson v. W. Va. Board of Osteopathy*, 191 W. Va. 15, 442 S.E.2d 712 (1994) (*per curiam*) in ordering the Board of Osteopathy to consider and adopt formal findings of fact and conclusions of law in support of its decision to dismiss the petitioners' complaint. The Court reasoned that even though the Board failed to find probable cause to substantiate charges of disciplinary disqualification, the petitioners and the public have

a right of access to the **findings of fact and conclusions of law** supporting the dismissal of a complaint.

CIVIL DISCOVERY:

Generally speaking, the exemptions found in the WV-FOIA do not govern civil discovery matters. *Rollins ex rel Rollins v. Barlow*, 188 F.Supp.2d 660 (S.D.W.Va. 2002). In *Maclay v. Jones,* 208 W. Va. 569, 542 S.E.2d 83 (2000), the Supreme Court dealt with a civil discovery request for a State Police officer's **personnel records**. In response to a certified question, the Court found that the "personal information" exemption found in W. Va. Code § 29B-1-4(a)(2) did not prohibit the compelled production of such records during civil litigation. The Court in *Maclay* also dealt with a civil discovery request for records of a West Virginia State Police **internal affairs investigation**, otherwise exempt under W.Va. Code § 29B-1-4(a)(4). The Supreme Court held that "the provisions of this state's FOIA, which address confidentiality as to the public generally, were not intended to shield law enforcement investigatory materials from a legitimate discovery request when such information is otherwise subject to discovery in the course of civil proceedings." *Maclay*, 208 W. Va. at 575, 542 S.E.2d at 89. The Court imposed a balancing test for ordering discovery in such cases, which weighs the requesting party's need for the material against the public interest in maintaining the confidentiality of such information.

Thus, records which are exempt from disclosure to the general public under the WV-FOIA may be discoverable by a party who is in litigation against a public agency.

EXEMPTIONS UNDER THE WV-FOIA:

Even if an entity is a public body and the document in question is a public record under the WV-FOIA, all or part of the information requested may be exempt from disclosure under one of the 18 categories of exemption found in W. Va. Code § 29B-1-4(a). The West Virginia Supreme Court of Appeals has repeatedly stressed that the legislative intent of the WV-FOIA is that of disclosure and not exemption. "The disclosure provisions of [the WV-FOIA] are to be liberally construed, and the exemptions to such Act are to be strictly construed. *W. Va. Code*, 29B-1-1 [1977]." Syl. pt. 4, *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985); *see, e.g.*, Syl. pt. 4, *Farley v. Worley*, 215 W.Va. 412, 599 S.E.2d 835 (2004); Syl. pt. 3, *Town of Burnsville v. Cline*, 188 W. Va. 510, 425 S.E.2d 186 (1992); Syl. pt. 1, *Daily Gazette Co., Inc. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989).

In order to resist disclosure, a public body has the burden of showing that one or more of the exemptions of the WV-FOIA expressly applies to the material being requested. *See* Syl. pt. 2, *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996); Syl. pt. 7, *Queen v. West Virginia University Hospitals, Inc.*, 179 W. Va. 95, 365 S.E.2d 375 (1987); *Daily Gazette Co., Inc. v. Withrow*, 177 W. Va. 110, 116, 350 S.E.2d 738, 744 (1986).

> When a public body asserts that certain documents or portions of documents in its possession are exempt from disclosure under any of the exemptions contained in W. Va.Code, 29B-1-4 (2002 Repl.Vol.) (2003 Supp.), the public body must produce a *Vaughn* index named for *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). The *Vaughn* index must provide a relatively detailed justification as to why each document is exempt, specifically identifying the reason(s) why an exemption under W. Va.Code, 29B-1-4 is relevant and correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies. The *Vaughn* index need not be so detailed that it compromises the privilege claimed. The public body must also submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt. Syllabus point 3 of *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996), is hereby expressly modified.

Syl. pt. 6, *Farley v. Worley*, 215 W.Va. 412, 599 S.E.2d 835 (2004).

The Supreme Court in *Farley* also made clear that an agency is not required to provide a "search certificate" or *Vaughn* index on an initial request for documents under the WV-FOIA. The *Vaughn* index is implicated by FOIA litigation, not simply by the denial of a FOIA request at the administrative level.

One should normally presume that a request for information under the WV-FOIA is a request for all or any, not for all or none, of the information described. An entire document is not exempt from the requirements of the WV-FOIA merely because an isolated portion need not be disclosed. If the exempt portion(s) of a document can be segregated or removed (redacted), the remainder of the document must be disclosed. A public body cannot simply state in a conclusory or cursory manner that redaction would be unreasonably burdensome or costly. However, if the agency can show with reasonable specificity why material could not be segregated, it meets its burden under WV-FOIA.

> In response to a proper Freedom of Information Act request, 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 upon the public body an unreasonably high burden or expense. If the public body refuses to provide redacted or segregated copies because the process of redacting or segregating would impose an unreasonably high burden or expense, the public body must provide the requesting party a written response that is sufficiently detailed to justify refusal to honor the FOIA request on these grounds. Such written response, however, need not be so detailed that the justification would compromise the secret nature of the exempt information.

Syl. pt. 5, *Farley v. Worley*, 215 W.Va. 412, 599 S.E.2d 835 (2004).

Cases involving five of the eighteen exemption classifications have been reviewed by the West Virginia Supreme Court of Appeals in some fashion. The Court has recognized that the exemptions in the WV-FOIA are similar to those in the federal Freedom of Information Act, 5 U.S.C. § 552, and other state acts. *Daily Gazette Co., Inc. v. West Virginia Development Office*, *supra*; *Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50 (1984). Accordingly, where the Court has not addressed an exemption of the WV-FOIA, reference should be made to similar provisions of the federal FOIA.

Although the State Supreme Court has relied on these other sources in arriving at decisions involving the WV-FOIA, when the same language is not found in the federal or other state FOIA, the Court's analysis will be guided by the words and purpose of the WV-FOIA statute and the factual circumstances of the case. *See Queen v. West Virginia University Hospitals, Inc.*, *supra*. Rulings by the West Virginia Supreme Court under the WV-FOIA's exemption categories are discussed below.

EXEMPTION NO. 1: TRADE SECRETS

This exemption was first raised in *Queen v. West Virginia University Hospitals, Inc.*, 179 W. Va. 95, 365 S.E.2d 375 (1987), wherein the Attorney General sought release of a **contract** which the hospital claimed was exempt from disclosure as a "trade secret" under W. Va. Code § 29B-1-4(a)(1). However, the hospital merely asserted in conclusory fashion that its contract met the requirements of the exemption, and that it should be allowed to maintain "business confidentiality." Noting that WV-FOIA exemptions are strictly construed, and that the party claiming the exemption has the burden of showing its express applicability, the Supreme Court held that the hospital's assertions did not meet this burden.

The Court discussed the trade secrets exemption in *AT&T Communications of West Virginia, Inc. v. Public Service Commission of West Virginia*, 188 W. Va. 250, 423 S.E.2d 859 (1992). In that case, AT&T Communications sought a protective order from the Public Service Commission to prevent access by competitors to <u>all</u> information in its **annual reports** required by the PSC. The Court found this request too broad. Noting that the PSC is an administrative agency with the responsibility under the WV-FOIA to disclose information to the public, the Court held, in Syllabus point 2: "In order to obtain a protective order from the Public Service Commission to prevent the disclosure of annual report information, a utility must make a credible showing that the information is a `trade secret' as described in W. Va. Code, 29B-1-4(1)."

Depending upon the circumstances of the case, some direction regarding the trade secrets exemption may be available through comparison with the privacy interest arising under Exemption No. 2 of the WV-FOIA. Additionally, under certain circumstances the person or corporation supplying trade secret information to a public body may seek to enjoin disclosure of the information under the State's Uniform Trade Secrets Act, W. Va. Code §§ 47-22-1 *et seq.* [1986].

The WV-FOIA trade secrets exemption is far more descriptive than that contained in the federal statute, 5 U.S.C. § 552(b)(4), which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

EXEMPTION NO. 2: INFORMATION OF A PERSONAL NATURE

This exemption, found in W. Va. Code § 29B-1-4(a)(2), bars release of information that constitutes an unreasonable invasion of privacy, unless it is shown by clear and convincing evidence that the public interest under the circumstances requires disclosure. The purpose of this exemption is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. The individual's right of privacy must be weighed against the public's right to know. *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).

Not all personal information is private, however. In *Hechler v. Casey*, the West Virginia Supreme Court held that an individual's **name and residential address** are public in nature and therefore not normally exempt from disclosure under this provision as "personal" information. The Court refused to block the release of a list of names and addresses of security guards furnished to the Secretary of State pursuant to his licensing and regulation of their employer. Although general concerns were expressed about the safety of the individuals involved, the Court found the risk of harm from such disclosure to be speculative. Because no one contended otherwise, the Court declined to address the question of whether or not the list was a "public record" within the meaning of the Act.

In *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986), a group of concerned parents sought release by the county school board of the **medical and psychiatric records** of their children's school bus driver, pursuant to the WV-FOIA. The West Virginia Supreme Court adopted a five-factor test to be used in deciding whether public disclosure of private information would constitute an unreasonable invasion of privacy. Those five factors and the Court's discussion include:

(1) Whether disclosure would result in a substantial invasion of privacy and, if so, how serious.

There must first be a substantial invasion into private information, as distinct from non-intimate or public information which may be disclosed. The seriousness of the invasion of privacy is then determined by evaluating the extent to which the release of the information would cause embarrassment or harm to an ordinary man similarly situated in time and place to the person involved. *Id.* at 32, 350 S.E.2d at 543-44.

(2) The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.

The value of the public interest may be monetary, or it may involve the public's legal rights or liabilities. However, curiosity alone is not enough to overcome an individual's right to privacy. In evaluating the purpose for the request, a comparison should be made between how useful disclosure of the information would be to the public versus the potential for misuse of the information. *Id.* at 33, 350 S.E.2d at 544.

(3) Whether the information is available from other sources.

If the information is readily obtainable from public books or records, there is no reason to withhold it. However, if there is a less intrusive format or method by which the information may be obtained, then the courts should force the use of the least intrusive means to disclose the information. If there is no other way to obtain the necessary information, it should be disclosed. *Id.*; *see also Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988), discussed below.

(4) Whether the information was given with an expectation of confidentiality.

Government should protect private secrets given with a legitimate expectation of confidentiality, unless there is some "overridingly important" reason to release them. Consideration should be given to how release of the information will interfere with an agency's ability to carry out its duties, since people may become reluctant to voluntarily supply personal information that may be subject to disclosure. *Cline,* 177 W. Va. at 33, 350 S.E.2d at 544-45.

(5) Whether it is possible to mould relief so as to limit the invasion of individual privacy.

The Supreme Court encourages trial courts to limit the invasion of privacy when possible, such as by the deletion of personal data from documents to be released, noting that complete disclosure is not always necessary. In this case, deletion of the private material was not possible, so the Court limited disclosure to the parents' group requesting the records and not to the public at large. *Id.* at 33, 350 S.E.2d at 545.

The plaintiff in *Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988), sought copies of the entire **microfiche claim records** of the West Virginia Workers' Compensation Fund, containing not only names and addresses for millions of claimants, but also medical information including psychiatric diagnoses and treatment. As an attorney representing injured workers, he received copies of all claim information for his own clients, and was permitted to review, but not copy, the microfiche in question. The West Virginia Supreme Court of Appeals found that the least intrusive method of providing the necessary information was already in use, and denied his request: "Where an individual fails to present, by clear and convincing evidence, a legitimate reason sufficient to overcome the exemption from disclosure found in W. Va. Code § 29B-1-4(2) (1986), and where an

adequate source of information is already available, the records will not be released." Syl. pt. 3, *Robinson*.

The Supreme Court in *Manns v. City of Charleston Police Dept.*, 209 W. Va. 620, 550 S.E.2d 598 (2001) (*per curiam*), addressed **personnel records** in the context of FOIA. The Court held that records of **police department internal investigations** contained "personal information" exempt from disclosure under § 29B-1-4(a)(2), unless the public interest in disclosure outweighed the privacy interests of the police officers involved. Applying the five factors set forth in *Cline* to the records at issue, the Court found that the public interest did not require disclosure of the requested information. *Manns*, 209 W. Va. at 626, 550 S.E.2d at 604.

The West Virginia Supreme Court has also noted that under this exemption, the State and federal laws differ in one important respect: the WV-FOIA favors non-disclosure of personal information unless the public interest clearly requires it, while the federal FOIA favors disclosure unless it would constitute a clearly unwarranted invasion of personal privacy. *See Hechler v. Casey* discussed above. Federal courts also apply a "balancing test" under 5 U.S.C. § 552(b)(6), which turns on whether the privacy interest in non-disclosure of the documents outweighs the public interest in their release.

EXEMPTION NO. 3: TEST INFORMATION

Test questions, scoring keys and other examination data used to administer licensing, employment and academic examinations are within this exemption category of the WV-FOIA, found in W. Va. Code § 29B-1-4(a)(3). The West Virginia Supreme Court of Appeals has not reviewed a case invoking this exemption, and there is no comparable federal FOIA exemption provision.

EXEMPTION NO. 4: LAW-ENFORCEMENT RECORDS

The law-enforcement records which are subject to this WV-FOIA exemption are those dealing with the detection and investigation of crime, and internal records and notations maintained for internal use in matters relating to law enforcement. The primary purpose of this exemption, found in W. Va. Code § 29B-1-4(a)(4), is to prevent premature disclosure of investigatory materials which might be used in a law-enforcement action. *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).

In *Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50 (1984) the Supreme Court noted that although the WV-FOIA appeared to create a blanket exemption for law-enforcement records, "a good argument could be made that material should only be exempt if it protects an interest that weighs more greatly than the public's right to know." *Id.* at 473, 318 S.E.2d 52. The Court's subsequent decision in *Hechler* relied on this language and limited the extent to which law-enforcement records may be held exempt.

In *Hechler v. Casey*, the Supreme Court held that a **list of names and addresses** of security guards, furnished to the Secretary of State's Office as part of the licensing and regulation of their employer, was not exempt from disclosure under this provision. Internal matters relating to law enforcement are confined to confidential investigative techniques and procedures. Records generated pursuant to routine administration or oversight do not fall within this exemption, which is limited to information compiled as part of an inquiry into specific suspected violations of the law. Having concluded that the list in question was not a "law-enforcement record," the Court found it unnecessary in *Hechler* to decide whether this exemption applies to civil enforcement proceedings of administrative agencies. Although the federal FOIA exemption includes the enforcement of both civil and criminal laws, it is not clear whether this exemption to the WV-FOIA includes proceedings of regulatory agencies (like the Secretary of State's Office) who only invoke civil sanctions.

In *State v. Nelson*, 189 W. Va. 778, 434 S.E.2d 697 (1993), the Supreme Court reasoned that if a **criminal history summary** were not a "public record" within the meaning of the WV-FOIA, there would be no need for the exemption for law-enforcement records. The Court did not address whether a criminal history summary would fall within this exemption, because that was not an issue in the case.

Police incident reports are "public records" as defined by the WV-FOIA, and fall within the statutory exemption for law enforcement records. *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W. Va. 648, 453 S.E.2d 631 (1994). Even so, there is a separate Constitutional right of access to some police information, and a law enforcement record may still be disclosed under FOIA if society's interest in seeing the document outweighs the government's interest in keeping it confidential. The Court held in Syllabus Point 1 of *Ogden Newspapers*: "To the extent that information in an incident report dealing with the detection and investigation of crime will not compromise an ongoing law enforcement investigation, we hold that there is a public right of access under the West Virginia Freedom of Information Act." This right of access extends to incident reports involving juveniles, but only if "any information that could reasonably lead to the discovery of their identities" is redacted from the report in order to preserve the confidentiality of juvenile records. 192 W. Va. at 655, 453 S.E.2d at 638.

The Supreme Court in *Manns v. City of Charleston Police Dept.*, 209 W. Va. 620, 550 S.E.2d 598 (2001) (*per curiam)*, also noted that some of the records sought of **police department internal investigations** would be exempt from disclosure under W. Va. Code § 29B-1-4(a)(4) as law-enforcement investigatory records. However, the Court did not address this exemption because it had already held the records to be "personal information" exempt from disclosure under § 29B-1-4(a)(2).

A **prosecuting attorney's office** is a "law-enforcement agency" within the meaning of the Act, and thus its records are exempt from disclosure. Information discovered in a Public Legal Services audit pertaining to possible violations of the law by an attorney, which is turned over to prosecuting authorities, is exempt under the WV-FOIA from access by the

public and media. However, should the authorities decide not to prosecute the attorney in question, the information would then revert back to its original status with Public Legal Services and would no longer be exempt from disclosure. 61 Op. Att'y Gen. 112 (April 11, 1986).

While the federal FOIA law-enforcement record exemption is narrower than the West Virginia exemption, the *Hechler* decision discussed above relied on cases interpreting the federal FOIA to define which law-enforcement records are subject to this exemption under the West Virginia statute. Accordingly, the federal FOIA may be persuasive authority for further clarification of the WV-FOIA exemption. The federal FOIA lists six reasons why law-enforcement records may be exempted from disclosure, but requires disclosure in all other circumstances. Under 5 U.S.C. § 552(b)(7), such records may be withheld if their production could reasonably be expected to (1) interfere with enforcement proceedings; (2) deprive a person of a right to a fair trial or an impartial adjudication; (3) constitute an unwarranted invasion of personal privacy; (4) disclose the identity of a confidential source or information furnished by a confidential source; (5) disclose techniques, procedures or guidelines for law-enforcement investigations or prosecutions; or (6) endanger the life or physical safety of any individual.

EXEMPTION NO. 5: INFORMATION SPECIFICALLY EXEMPTED BY STATUTE

This exemption, found in W. Va. Code § 29B-1-4(a)(5), covers records which the Legislature has declared confidential by a statute other than the WV-FOIA. The West Virginia Supreme Court has directly addressed this exemption in three contexts: (1) health care peer review organizations, (2) tax returns, and (3) unclaimed property. These statutes and their legislative intent were examined by the Court in each of the following cases to determine whether the records fell within this statutory exemption to the WV-FOIA.

As previously discussed, the Court held in *Daily Gazette Co., Inc. v. West Virginia Board of Medicine*, 177 W. Va. 316, 352 S.E.2d 66 (1986), that records of **Health Care Peer Review Organizations**, privileged and confidential under W. Va. Code § 30-3C-3 [1980], were not disciplinary in nature and therefore not subject to disclosure under the WV-FOIA. To further the overall purpose of improving the quality of health care, confidentiality of peer review records and proceedings of peer review bodies were deemed necessary to ensure the effectiveness of professional self-evaluation, and foster physicians' participation in candid evaluation.

Disclosure of **tax compromise or settlement records** was at issue in *Daily Gazette Co., Inc. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989). The Supreme Court held these documents were exempt from disclosure. The Court reasoned that the preservation of taxpayer confidentiality in a required report to the Legislature regarding tax compromises, in effect grants exemption from disclosure of tax compromise records. The Court found that the general confidentiality provisions regarding tax returns and return information found in W. Va. Code § 11-10-5d, coupled with the preservation of taxpayer confidentiality in

W. Va. Code § 11-10-5q(e), clearly showed legislative intent to protect a taxpayer's right to privacy. The decision in *Daily Gazette Co., Inc. v. Caryl* is significant in that it shows a willingness of the Court to examine an entire statute, and not simply a particular section, in order to make a determination of legislative intent regarding confidentiality of records. In a companion case, *State ex rel. Caryl v. McQueen*, 182 W. Va. 50, 385 S.E.2d 646 (1989), the Court held that this confidentiality requirement also prohibited the Attorney General from releasing tax compromise information in his files.

In *Town of Burnsville v. Cline*, 188 W. Va. 510, 425 S.E.2d 186, 191 (1992), a B & O taxpayer in litigation with the town sought to inspect the returns of other taxpayers, in order to prove that the town was selectively enforcing the tax. The Supreme Court held that under W. Va. Code § 11-10-5d(a), the legislature made clear it intended for the contents of all tax returns, including **B & O tax returns**, to remain confidential. However, the Court held that these confidentiality requirements would not be violated by permitting the plaintiff to review the roll of B & O taxpayers, without disclosing the actual contents of the tax returns. Such a list "need only contain the names of the persons or entities being taxed: the amount of tax paid is both private and irrelevant." 188 W. Va. at 515, 425 S.E.2d at 191.

In *Keegan v. Bailey*, 191 W. Va. 145, 443 S.E.2d 826 (1994), the plaintiff sought records of **uncashed checks (stale dated warrants)** issued by the State during the past six years. The State Treasurer contended that the records of the stale dated warrants were abandoned property as defined by the Unclaimed Property Act, and therefore exempt from disclosure under the WV-FOIA. The Supreme Court recognized that abandoned property is exempt from FOIA under the Unclaimed Property Act [now W. Va. Code § 36-8-25]. However, noting that the statute at that time required that such property remain unclaimed for a period of seven years, the Court held that the warrants issued within the past *six* years were not yet abandoned property within the meaning of the statute, and were thus subject to disclosure under FOIA. Following this decision, the Unclaimed Property Act was amended to provide that all warrants for payment issued by the State of West Virginia are presumed abandoned if not presented for payment within six months of issuance. *See* W. Va. Code § 36-8-2(a)(15) [1997].

The comparable federal FOIA exemption is 5 U.S.C. § 552(b)(3), which applies only if the statute exempting the information from disclosure either leaves no discretion on the issue, or establishes particular criteria for withholding information.

EXEMPTION NO. 6: ARCHIVES, HISTORIC DOCUMENTS AND MANUSCRIPTS

The records under this exemption, found in W. Va. Code § 29B-1-4(a)(6), have not been the subject of a case review by the State Supreme Court. These records concern the location of undeveloped historic, prehistoric archaeological, paleontological and battlefield sites, or gifts to a public body with donor restrictions. There is no comparable provision under the federal FOIA. The language of the exemption suggests that its purpose is to encourage the donation and preservation of these records.

EXEMPTION NO. 7: RECORDS PERTAINING TO FINANCIAL INSTITUTIONS

This exemption covers information about examination, operating or condition reports prepared by or for agencies which regulate or supervise financial institutions, except those reports which by law must be published in newspapers. Although this exemption has not been examined by the West Virginia Supreme Court of Appeals, the federal FOIA exemption, 5 U.S.C. § 552(b)(8), contains the same language as W. Va. Code § 29B-1-4(a)(7). The cases in which the federal exemption has been analyzed may give some direction regarding the application of the exemption under the State Act.

EXEMPTION NO. 8: INTERNAL MEMORANDA OR LETTERS

This exemption covers internal memoranda or letters received or prepared by a public body. The first case in which the State Supreme Court addressed W. Va. Code § 29B-1-4(a)(8) was *Veltri v. Charleston Urban Renewal Authority*, 178 W. Va. 669, 363 S.E.2d 746 (1988) (*per curiam*), which involved a **tape recording of a meeting** of the Charleston Urban Renewal Authority. The Court found that the internal memorandum exemption was not intended to cover verbatim recordings of open, public meetings of this type, and held that such a recording does not constitute an "internal memorandum" exempt from disclosure under the Act.

The landmark decision regarding the internal memoranda exemption is *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996) ("*Gazette I*"). In that case, the Gazette sought to obtain copies of documents regarding a proposed pulp mill in Mason County from the West Virginia Development Office. The Development Office withheld certain documents on the grounds that they were "internal memoranda or letters received or prepared by a public body," and thus exempt from disclosure under W. Va. Code § 29B-1-4(a)(8). The circuit court had granted only partial release of the requested records, and permitted redaction of portions of others. In remanding the case with directions for further proceedings, the Supreme Court adopted the **executive "deliberative process" privilege** recognized by federal courts under 5 U.S.C. § 552(b)(5).

The federal FOIA, 5 U.S.C. § 552(b)(5), exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." Under this exemption, an internal agency communication is subject to disclosure if the document is a final decision or the basis of a final decision. Another distinction federal courts have made involves the contents of the communication. If the requested documents contain factual information, the courts have found them to be subject to disclosure. If the documents contain opinions, recommendations, or other pre-decisional, deliberative information, they are exempt under the federal Act.

The West Virginia Supreme Court followed this rationale in *Gazette I*, holding, in Syllabus Point 4:

> *W. Va. Code*, 29B-1-4(8) [1977], which exempts from disclosure "internal memoranda or letters received or prepared by any public body" specifically exempts from disclosure only those written internal government communications consisting of advice, opinions and recommendations which reflect a public body's deliberative, decision-making process; written advice, opinions and recommendations from one public body to another; and written advice, opinions and recommendations to a public body from outside consultants or experts obtained during the public body's deliberative, decision-making process. *W. Va. Code*, 29B-1-4(8) [1977] does not exempt from disclosure written communications between a public body and private persons or entities where such communications do not 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.

The Court also noted that under both State and federal law the agency must specifically assert the deliberative process privilege for every document it seeks to protect.

Following the *Gazette I* decision, the Development Office statute was amended to provide that "[a]ny documentary material, data or other writing made or received by [an economic development agency], for the purpose of furnishing assistance to a new or existing business shall be exempt" from the provisions of the WV-FOIA. *See* W. Va. Code § 5B-2-1 [1997]. Any agreement that obligates public funds is still subject to disclosure once it is "entered into, signed or otherwise made public." *Id.*

The Supreme Court in *Manns v. City of Charleston Police Dept.*, 209 W. Va. 620, 550 S.E.2d 598 (2001) (*per curiam)*, also noted that some of the records sought of **police department internal investigations** would be exempt from disclosure under W. Va. Code § 29B-1-4(a)(8) as internal memoranda. However, the Court did not address this exemption because it had already held the records to be "personal information" exempt from disclosure under § 29B-1-4(a)(2).

The recorded **predecisional discussion and deliberation** of the West Virginia Human Rights Commission in adjudicating matters, whether characterized as "minutes" or otherwise, are exempt from public disclosure under the internal memoranda exemption of the Act. Op. Att'y Gen. (July 17, 1986).

EXEMPTION NOS. 9-18: SECURITY AND UTILITIES

The Legislature in its 2003 Session added eight new exemptions to the FOIA, all dealing with "homeland security" issues (see text of statute at pages 6-8). In 2007, two more exemptions were added for public utility plants and equipment, and proprietary information of telecommunications customers and equipment manufacturers. Exemptions 9 through 18 have yet to be construed by the West Virginia Supreme Court.

ATTORNEY WORK PRODUCT:

Although not specifically exempted under the WV-FOIA, documents prepared by an attorney in representing a client public agency or officer may be **privileged and confidential** as attorney work-product, and therefore exempt from disclosure. In *Daily Gazette Co., Inc. v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1986), the West Virginia Supreme Court noted that preparation of a writing, such as a litigation settlement document, by an attorney for a public body or its insurer is viewed as preparation by the public body for the purpose of the WV-FOIA. The Court continued:

> We need not address any question of whether an attorney's work product is exempt from 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, 177 W. Va. at 117 n.5, 350 S.E.2d at 744 n.5 (citation omitted).

In *Gazette I*, the Supreme Court noted that both the **attorney-client privilege** and the **attorney work-product privilege** are also preserved to government agencies under the federal FOIA, 5 U.S.C. § 552(b)(5), which is the federal counterpart to W. Va. Code § 29B-1-4(a)(8). *See* 198 W. Va. at 571, 482 S.E.2d at 188. It therefore seems likely the Court would hold that Exemption No. 8 of the WV-FOIA also preserves to public agencies and officers both the attorney-client privilege and the attorney work-product privilege in communications with their lawyers.

The United States Supreme Court has held that **agency attorney work product** is exempt from mandatory disclosure under the internal memoranda exemption of the federal FOIA, 5 U.S.C. § 552(b)(5), without regard to the status of the litigation for which it was prepared. *Federal Trade Commission v. Grolier*, 462 U.S. 19, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (1983). However, in *N.L.R.B. v. Sears, Roebuck and Co.*, 421 U.S. 132, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975), the Court also held that memoranda explaining decisions by counsel not to file a complaint are "final opinions" which must be disclosed. Moreover, otherwise exempt information may lose that status when incorporated by reference in non-exempt documents.

ENFORCEMENT:

Any person denied access to public records for examination has a specific cause of action under the WV-FOIA against the agency denying the request. *Daily Gazette Co., Inc. v. West Virginia Development Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999). "A party aggrieved by a public body's failure to disclose records should institute proceedings in the

circuit court of the county in which the records are stored." Syl. pt. 1, *Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50 (1984); *see also* W. Va. Code § 29B-1-5.

In *State ex rel. Dadisman v. Caperton*, 186 W. Va. 627, 413 S.E.2d 684 (1991), the petitioners in a mandamus action sought information regarding alleged delinquent employer contributions owed to the Public Employees Retirement System. The Court said that the petitioners "should follow the normal channels, including, if necessary, filing a Freedom of Information Act request, pursuant to *W. Va. Code*, 29B-1-3 [1977], in order to obtain any unfurnished information about the status of the delinquent employer contributions." *Id.* at 634, 413 S.E.2d at 691.

ATTORNEY'S FEES:

The recovery of attorney's fees by a prevailing party under W. Va. Code § 29B-1-7 was discussed at length in *Daily Gazette Co., Inc. v. West Virginia Development Office,* 206 W. Va. 51, 521 S.E.2d 543 (1999) (*"Gazette II").* The Supreme Court held that the statute requires an award of attorney's fees to a person who has successfully brought a suit for the disclosure of the requested records pursuant to W. Va. Code § 29B-1-5. In order to recover attorney's fees, a plaintiff need not have prevailed on every argument advanced during the litigation, or have received full and complete disclosure of every record sought. The Court held that an award of attorney fees is proper if the FOIA action "contributed to the defendant's disclosure, whether voluntary or by order of court, of the public records originally denied the plaintiff." Syl. pt. 7, in part, *Gazette II.*

Additionally, in *State ex rel. Paige v. Canady*, 197 W. Va. 154, 158 n.6, 475 S.E.2d 154, 158 n.6 (1996), the Supreme Court noted that any recovery from the custodian individually, as opposed to the public body itself, would be permitted only under the narrowest grounds.

CONCLUSION

The Office of the Attorney General hopes that the foregoing information will prove useful in understanding and using the provisions of the Freedom of Information Act. When properly applied, this law can be of tremendous benefit to the citizens of this State by keeping them informed about the actions of their state and local governments. With such information comes the power to make decisions about those governments based upon a full understanding of the facts, and to restrict the actions of elected officials by making them accountable to the public.

If you would like additional information about the materials in this booklet, or if you have questions concerning the Act, please feel free to call our Office at (304) 558-2021.