

THE WEST VIRGINIA FREEDOM OF INFORMATION ACT AND WHAT ARE WORK SESSIONS



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"A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives." -James Madison

Disclaimer

- ▶ The information and materials herein are provided for general information purposes only and are not intended to constitute legal or other advice or opinions on any specific matters and are not intended to replace the advice of a qualified attorney.

Freedom of Information Act (WV)

- ▶ Fundamental philosophy of the American constitutional form of representative government
- ▶ Government is the servant of the people, and not the master of them
- ▶ 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.
- ▶ FOIA is merely a means of obtaining that information
- ▶ 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.

Criticisms of FOIA

- ▶ FOIA is subject to many "abuses"
- ▶ FOIA is a drain on scarce governmental resources
- ▶ Frequently overused by non-tax payers including prisoners and non-citizens [there are some restrictions on prisoners]
- ▶ Circumvent discovery in litigation
- ▶ Businesses use FOIA in attempts to gain information and advantage over their competitors
- ▶ Some accuse journalists of attempting to invade personal privacy and arguably endanger national security through FOIA requests

West Virginia Freedom of Information Act

Provides for public access to "public records"

W.Va. Code §29B-1-3:

- ▶ (1) Every person has a right to inspect or copy any public record of a public body in this state
- ▶ (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.

What is a public record

- ▶ “any writing containing information prepared or received by a public body, the content or context of which judged either by content or context relates to the conduct of the public’s business”
- ▶ Definitions are at W.Va. Code §29B-1-2

Examples

- ▶ Lawsuit settlement document
- ▶ Tape recording
- ▶ The certified payrolls of a private company acting as a subcontractor in the construction of a state correctional facility were not public records
- ▶ Where 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"

CUSTODIAN'S DUTIES

- ▶ Custodian **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.
- ▶ 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.
- ▶ W.Va. Code §29B-1-3(c)

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REQUESTS

- ▶ All requests must state with **reasonable specificity** the information sought. Custodian, upon demand for records 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.
 - ▶ **Don't forget to provide to the Secretary of State**
- W.Va. Code §29B-1-3(d and f); §29B-1-3a



DENIAL

- ▶ 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.

W.Va. Code §29B-1-3(d)

FEES

- ▶ The public body **may establish fees** reasonably calculated to reimburse it for its actual cost in making reproductions of such records.
- ▶ W.Va. Code §29B-1-3(e)

SEARCH FEES

NO—

In 2015, the West Virginia Legislature amended this statute

"[a] public body may not charge a search or retrieval fee or otherwise seek reimbursement based on a man-hour basis as part of costs associated with making reproduction of records."

W. Va. Code § 29B-1-3.

IF YOU DENY AND CLAIM IT IS EXEMPT BE PREPARED TO PROVE THAT

- ▶ The party claiming exemption from disclosure has the burden of showing that the exemption applies to the information requested. Queen v. West Virginia Univ. Hosp., 179 W.Va. 95, 365 S.E.2d 375 (1987); Farley v. Worley, 215 W.Va. 412, 599 S.E.2d 838 (2004). Note that these exemptions are not likely applicable in defense of discovery requests made in the course of civil proceedings *where* the governmental entity is a party. See Manns v. City of Charleston Police Dep't, 209 W.Va. 620, 550 S.E.2d 598 (2001); Maclay v. Jones, et. al. 208 W.Va. 569, 542 S.E.2d 83 (2000).

WHAT IF ONLY SOME INFORMATION IS EXEMPT?

- ▶ In response to a proper FOIA request a public body has a duty to redact or segregate exempt from non-exempt information contained within the public record and to disclose the nonexempt information unless the segregation or redaction results in an unreasonably high burden or expense
- ▶ Must also provide the requestor with a written response that is significantly detailed to justify its refusal to honor the FOIA request
- ▶ Hechler v. Casey, 175 W.Va. 434, 333 S.E.2d 799 (1985)

WITHHOLDING DOCUMENTS

- ▶ When a public body asserts that certain documents or portions are exempt from disclosure:
 - ▶ Must produce a Vaughn index
 - ▶ Must contain a relatively detailed justification as to why each document is exempt, specifically identifying each reason why an exemption is relevant
 - ▶ Must also submit an affidavit indicating why disclosure of the documents would be harmful and why such documents should be exempt
- ▶ Farley v. Worley, 215 W.Va. 412, 599 S.E.2d 838 (2004) and AP v. Canterbury, 224 W.Va. 708, 688 S.E.2d 317 (2009) the court may examine the disputed records *in camera* pursuant to W.Va. Code §29B-1-5(2).

W.Va. Code §29-B-1-4 Exemptions

- ▶ (1) Trade secrets and commercial or financial information that is privileged or confidential need not be disclosed.

§29-B-1-4 EXEMPTIONS

- ▶ (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 own personal, medical or similar file;

The intent of this provision is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. Accordingly, a court must balance or weigh the individual's right of privacy against the right of the public to know.

Manns v. City of Charleston Police Dep't. 209 W.Va. 620, 550 S.E.2d 598 (2001).

PERSONAL INFORMATION

- ▶ Tax compromise information, including B&O tax returns, is exempt from disclosure. Daily Gazette Co. v. Caryl, 181 W.Va. 42, 380 S.E.2d 209 (1989); Town of Burnsville v. Cline, 188 W.Va. 510, 425 S.E.2d 186 (1992).
- ▶ Personnel records of public employees are not "public records". That does not mean that they are privileged from disclosure under all circumstances. Rollins ex rel Rollins v. Barlow, 188 F.Supp.2d 660 (S.D.W.Va. 2002)

PERSONAL INFORMATION

- ▶ Many jurisdictions have found that payroll records, attendance, employment, vacation, and sick leave records are not private facts of a personal nature. Payroll records and time sheets are public records not exempt from disclosure in West Virginia. In Re Gazette FOIA Request, 222 W.Va. 771, 671 S.E.2d 776 (2008).
- ▶ Where an individual fails to present, by clear and convincing evidence, a legitimate reason sufficient to overcome [this] exemption from disclosure, and where an adequate source of information is already available, the records will not be released. Robinson v. Merritt, 180 W.Va. 26, 375 S.E.2d 204 (1988).

PERSONAL INFORMATION

- ▶ Names and addresses are not usually exempt from disclosure as they are public in nature and are information normally shared by strangers. Therefore their disclosure would not result in an unreasonable invasion of privacy. Hechler v. Casey, 185 W.Va. 434, 333 S.E.2d 799 (1985).
- ▶ In balancing the public interest and the purpose of the disclosure the court must first determine the value of the public interest and then the purpose for which the information is sought. If disclosure would result in a substantial invasion of privacy the court must measure the seriousness of the invasion and further determine whether disclosure would constitute an unreasonable invasion. Child Protection Group v. Cline, 177 W.Va. 29, 350 S.E.2d 541 (1986).

LAW ENFORCEMENT RECORDS

In The Ogden Newspapers, Inc. v. City of Williamstown, 192 W.Va. 648, 453 S.E.2d 631 (1994), the court recognized a right of media access to certain juvenile law enforcement records.

Court held:

(1) to the extent that information in a police incident report will not compromise an investigation, there is a public right of access under FOIA ; and

(2) When an incident affecting public safety and welfare can be publicized without revealing the identities of juveniles by means other than nondisclosure, a report of such incident should be released to the press with the names of any juvenile, together with any information that could reasonably lead to the discovery of the identity of the juvenile, redacted.

LAW ENFORCEMENT RECORDS

- ▶ “Internal records and notations . . . which are maintained relating to law enforcement” refers to confidential investigative techniques and procedures.” Hechler v. Casey, 175 W.Va. 434, 333 S.E.2d 799 (1985).
- ▶ Exemption does not extend to 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.
- ▶ Public access where contained in a police incident report and where disclosure will not compromise an ongoing law enforcement investigation. Ogden Newspapers, Inc. v. City of Williamson, 192 W.Va. 648, 453 S.E.2d 631 (1994).

WHITE CHICKS



§29-B-1-4 EXEMPTIONS (continued)

- ▶ (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; Records identifying motor vehicles used, and the agencies using them, for undercover investigation activities conducted by state law-enforcement agencies or other agencies that are authorized by this code to use undercover or unmarked vehicles;

§29-B-1-4 EXEMPTIONS

- ▶ (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;

§29-B-1-4 EXEMPTIONS (continued)

- ▶ (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;

§29-B-1-4 EXEMPTIONS

- ▶ (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;

FLOOR PLAN AND STRUCTURAL DIAGRAM

§29-B-1-4 EXEMPTIONS

- ▶ (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;

§29-B-1-4 EXEMPTIONS

- ▶ (16) Codes for facility security systems; or codes for secure applications for such facilities referred to in subdivision (15) of this section;
- ▶ (17) Specific engineering plans and descriptions of existing public utility plants and equipment;
- ▶ (18) Customer proprietary network information of other telecommunications carriers, equipment manufacturers and individual customers, consistent with 47 U.S.C. § 222; and

§29-B-1-4 EXEMPTIONS

- ▶ (19) Records of the Division of Corrections, Regional Jail Authority and the Division of Juvenile Services relating to design of corrections, jail and detention facilities owned or operated by the agency, and the policy directives and operational procedures of personnel relating to the safe and secure management of inmates or residents, that if released, could be utilized by an inmate or resident to escape a facility, or to cause injury to another inmate, resident or to facility personnel.

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§29-B-1-4 EXEMPTIONS

- ▶ (20) Information related to applications under §61-7-4 of this code, including applications. . .permits, renewals, or any other information that would identify an applicant for or holder of **a concealed weapon permit**. . . [Except] may be disclosed to a law-enforcement agency or officer under certain enumerated circumstances'
- ▶ (21) **Personal information of law-enforcement** - SSN, health information, home address, personal address, personal telephone numbers, and personal email addresses and those of his or her spouse, parents, and children as well as the names of the law-enforcement officer's spouse, parents, and children;
- ▶ (22) Information provided by a person when he or she elects to remain anonymous after winning a draw **game prize**, pursuant to §29-22-15a of this code; and
- ▶ (23) Individually identifiable **customer information created or maintained by a city or county or other public entity providing utility services** . . including, but not limited to, customer names, addresses, and billing and usage records. Nothing contained herein is intended to limit public disclosure by a city or county of billing information [.]

§29-B-1-4 EXEMPTIONS

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

INTERNAL MEMORANDA

- ▶ Exempts written governmental communications consisting of “advice, opinions and recommendations that reflect a public body's deliberative, decision-making process; written advice, opinions and recommendations from one public body to another.”
- ▶ “Written advice, opinions and recommendations to a public body from outside consultants or experts obtained during the public body's deliberative decision-making process.” Daily Gazette Co. v. West Virginia Dev. Office, 206 W.Va. 51, 521 S.E.2d 543 (1999).

HOW DOES THE OPEN MEETINGS ACT APPLY TO WORK SESSIONS

What are Work Sessions

- ▶ They fall under the definition of a meeting under the Open Meetings Act
- ▶ Therefore they must be open to the public unless the matters are those allowable for executive session

Work Session

- ▶ “Work session” - a meeting where a quorum is present and matters requiring official action may be discussed and considered but no votes are taken or decisions made
- ▶ THEREFORE subject to the Open Meetings Act and **notice** must be provided
- ▶ **Minutes are required** - but if the work session is followed by a formal meeting the minutes of the work session may be incorporated into the meeting of the subsequent meeting as a single document
- ▶ The governing body **may record** the session but is not required to do so