

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34768

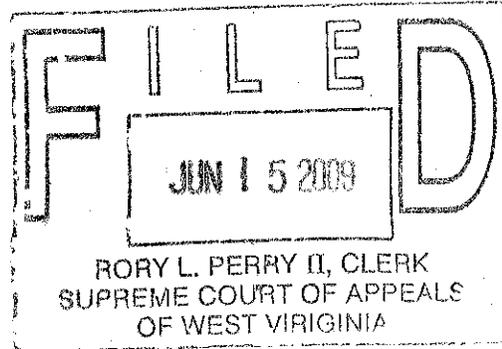
THE ASSOCIATED PRESS,

Appellant and Cross-Appellee

v.

**STEVEN D. CANTERBURY,
Administrative Director of the
West Virginia Supreme Court of Appeals,**

Appellee and Cross-Appellant



***AMICUS CURIAE* BRIEF ON BEHALF OF
THE WEST VIRGINIA JUDICIAL ASSOCIATION**

Counsel for the Amicus

Carte P. Goodwin, Esq.
West Virginia Bar # 8039
GOODWIN & GOODWIN, LLP
300 Summers Street
Suite 1500
Charleston, WV 25301
Telephone: (304) 346-7000
Facsimile: (304) 344-9692
cpg@goodwingoodwin.com

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COMES NOW the West Virginia Judicial Association [the "Association"], by Goodwin & Goodwin, LLP, and Carte P. Goodwin, its attorney, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, and hereby submits to this Court its brief *amicus curiae* in the above-referenced matter.

I. INTRODUCTION AND INTEREST OF AMICUS

The Association is a voluntary association of West Virginia state court judges. It has often been granted leave by this Court to file briefs *amicus curiae* in cases in which its members have an interest.¹

¹ See, e.g., *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 535 S.E.2d 727 (2000); *State ex rel. Farley v. Spaulding*, 203 W. Va. 275, 507 S.E.2d 376 (1998); *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 454 S.E.2d 65 (1994).

This case turns on whether the Freedom of Information Act (“FOIA” or “the Act”), W.Va. Code § 29B-1-1 *et seq.*, compels disclosure of certain written communications of a state judicial officer. Accordingly, the resolution of this case is of interest to all of the members of the Association, which urges this Court to exercise caution in formulating a resolution to the instant case. Given the unique role that the judicial branch plays in our tripartite system of government, this Court should tread carefully in applying the Freedom of Information Act to compel disclosure of judicial communications. The adoption of a bright line rule could dangerously expand the contours of the Act and potentially undermine the public’s interest in a fair and impartial judiciary. The disclosure of a judicial communication pursuant to a FOIA request should be based on a delicate balancing of numerous factors particular to each individual case. At a minimum, this balancing test should involve weighing the public’s acknowledged right to access information against the equally compelling interest in maintaining judicial confidentiality. A hard and fast rule based on the communication’s mere existence, custody, or the identity of its sender or recipient could threaten to upset this delicate balance.

The Association submits this *amicus* brief to urge this honorable Court to carefully consider the unique role of the judicial branch as this Court applies FOIA to judicial communications, and to carefully examine the factors that may be relevant in determining whether a particular communication by a judicial officer falls with the Act’s definition of a “public record.”

II. DISCUSSION OF LAW

In light of the distinctive functions that our Constitution vests in the judicial branch, the questions raised in the instant case involving the compelled disclosure of judicial communications should be handled with great care. As this Court has observed,

Since the powers and functions, and indeed the entire structure, of the judicial branch are unique and unlike any other department of government, the rules regulating those powers and functions must, of necessity, be adapted to recognize those differences.

Philyaw v. Gatson, 195 W. Va. 474, 477, 466 S.E.2d 133, 136 (1995) (in resolving challenge to the constitutional provision – applicable only to members of the judicial branch – requiring resignation prior to seeking election to a nonjudicial office, holding that the “resign-to-run” requirement of W. Va. Const., art. VIII, §7 applied equally to judicial officers and employees of the judicial branch).

Obviously, the express language of the Freedom of Information Act includes the “judicial department” in the definition of those public agencies subject to the Act. W. Va. Code § 29B-1-2(3) (defining “public body” as “every state officer, agency, department, including the executive, legislative and judicial departments”). Nevertheless, because of the unique and distinctive role of the judicial branch, the application of FOIA to the judiciary presents concerns that are largely absent in accessing public information from other governmental branches and agencies. Simply put, “[j]udges and judicial officers, are in a different position [from administrative decision makers], and are deserving of special protections.” *State ex rel. Kaufman*, *supra*, 207 W. Va. at 669, 535 S.E.2d at 734.

In *Kaufman*, this Court recognized the widely-held rule that judicial officers may not be compelled to testify regarding their mental processes or reasoning in reaching official judgments. *Id.* at 735. In addition to protecting jurists from testifying about their *thoughts* or *reasons* in formulating judicial decisions, the law also extends protection to confidential *communications* expressed during the course of judicial deliberations. The so-called “deliberative process privilege” allows government officials to withhold documents that would reveal advisory recommendations or internal deliberations comprising the process by which governmental

decisions are made. In *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 198 W.Va. 563, 573, 482 S.E.2d 180, 190 (1996), this Court examined the contours of this privilege and indicated that it applies to “documents which reflect [an] agency’s group-thinking during its deliberative or decision-making process; to one agency’s advice or recommendations to a separate government agency during the latter’s deliberative or decision-making process; and to outside consultants or experts whose opinions or recommendations are sought by a government agency in the course of its policymaking process.”²

More pointedly, even in jurisdictions that have declined to adopt the deliberative process privilege for other governmental employees, courts have been open to recognizing the judicial deliberations privilege based on the unique powers and functions of the judicial branch. In *Thomas v. Page*, 837 N.E.2d 483 (Ill. App. Ct. 2005), an Illinois appellate court conceded that Illinois law did not recognize a “deliberative process privilege” for executive branch officials, but nevertheless concluded that judicial deliberations should be protected:

[I]n the instant case, we are not being asked to establish a privilege for another branch of government. Rather, the judiciary, as a co-equal branch of government, supreme within its own assigned area of constitutional duties, is being asked to exercise its inherent authority to protect the integrity of its own decision-making process.

² Although this privilege is often invoked in the context of FOIA cases, “it originated as a common law privilege.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997), and federal cases from around the country have applied the federal common law deliberative process privilege to discovery requests outside the FOIA context. *See, e.g., United States v. Lake County Bd. Of Comm’rs*, 233 F.R.D. 523 (N.D. Ind. 2005); *Otterson v. Nat’l R.R. Passenger Corp.*, 228 F.R.D. 205 (S.D.N.Y. 2005); *Scott v. Bd. of Educ.*, 219 F.R.D. 333 (D.N.J. 2004) (applying deliberative process privilege in §1983 case).

Like most states, West Virginia has incorporated this common law privilege into its open records law. *See* W. Va. Code § 29B-1-4(a)(8) (specifically exempting from disclosure “[i]nternal memoranda or letters received or prepared by any public body”). As the Circuit Court noted, judicial communications between judges and other court personnel concerning judicial decision-making “would clearly reflect the judicial decision making process and would be exempt from disclosure under FOIA.” September 16, 2008 Final Order at 8, n.5.

Id. at 490.³ The rationale of this holding is consistent with this Court's succinct observation that:

While recognizing that judges are subject to the rule of law as much as anyone else, this Court cannot ignore the special status that judges have in our judicial system, and the effect this difference has on the process.

Kaufman, supra, 207 W.Va. at 668, 535 S.E.2d at 733.

Due to this "special status" that the judiciary occupies in our form of government, the Legislature and this Court have recognized that the public's right to information often must be balanced against – and sometimes must cede to – the equally compelling public interest in maintaining the integrity of the judicial process. As noted, internal and pre-decisional communications reflecting a judge's thoughts or impressions of a case are protected from disclosure in accordance with the explicit exemptions set forth in the Freedom of Information Act. *See* W. Va. Code § 29B-1-4(a)(8). Yet, even in circumstances that do not involve such deliberative communications, the judiciary's need for confidentiality has often trumped attempts to rigidly apply FOIA or other recognized means of accessing court documents.

For instance, in *Kaufman, supra*, this Court expressed its displeasure with attempts to use the Freedom of Information Act to obtain otherwise confidential information regarding a judge's

³ *See also Babets v. Sec'y of the Executive Office of Human Serv.*, 526 N.E.2d 1261, 1264 (Mass. 1988) (acknowledging the court's power to adopt common law privileges, but declining to adopt an executive deliberative process privilege for Massachusetts). Although the *Babets* court declined to adopt the privilege for executive branch departments, one commentator has observed that "it did so in a context that is arguably distinguishable from that involving a judicial deliberative communications process." Charles W. Sorenson, Jr., *Are Law Clerks Fair Game? Invading Judicial Confidentiality*, 43 Val. U. L. Rev. 1, 73 n.359 (2008). Indeed, the Massachusetts Supreme Judicial Court appears to recently have acknowledged the existence of such a judicial privilege. In a disciplinary proceeding against an attorney who conducted a sham interview of a judge's former law clerk as part of a misguided investigation into the judge's potential bias, the court noted, "We have no doubt that, at the time he embellished the job ruse, [the accused], an experienced attorney, **knew that the communications about deliberative processes that flow between judge and law clerk were confidential and an important aspect of the administration of justice.**" *In re Crossen*, 880 N.E.2d 352, 373 (Mass. 2008) (emphasis added). In reaching this conclusion, the *Crossen* court pointed to several authorities supporting the need to preserve the confidentiality of the "inner workings" of a court, including its prior decision in *Glenn v. Aiken*, 569 N.E.2d 783, 786 (Mass. 1991), where it held that "[p]robing the mental processes of a trial judge, that are not apparent on the record of the trial proceeding, is not permissible".

mental processes, writing: “[T]his court would look with disfavor upon any attempt to do indirectly what this opinion prevents a party from doing directly. However labeled, any attempt to invade the thought processes of a judge, would be destructive of judicial responsibility, and will not be permitted.” 207 W. Va. at 667 n.6, 535 S.E.2d at 732 n.6 (internal quotation and citation omitted). Similarly, this Court has concluded that certain considerations – including the fair administration of justice, the constitutional rights of criminal defendants, and the need to protect the integrity of the judicial process – may justify limiting the public’s access to certain court proceedings or documents. See e.g., Syl. pt. 6, in part, *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W. Va. 611, 520 S.E.2d 186 (1999) (“The qualified public right of access to civil court proceedings guaranteed by Article III, Section 17 of the Constitution of West Virginia is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or other compelling public policies.”); Syl pt. 1, *State ex rel. Herald Mail Co. v. Hamilton*, 165 W. Va. 103, 267 S.E.2d 544 (1980) (“Article III, Section 14 of the West Virginia Constitution, when read in light of our open courts provision in Article III, Section 17, provides a clear basis for finding an independent right in the public and press to attend criminal proceedings. However, there are limits on access by the public and press to a criminal trial, since in this area a long-established constitutional right to a fair trial is accorded the defendant.”).

Similar limits are placed on the public’s ability to access information during the initial phases of disciplinary proceedings against judicial officers or members of the bar. See W. Va. Rules of Judicial Disciplinary Procedure 2.4 (“The details of complaints filed or investigations conducted by the Office of Disciplinary Counsel shall be confidential[.]”); see also W. Va. Rules of Lawyer Disciplinary Procedure 2.6 (same). The straightforward rationale for limiting access

to these otherwise public proceedings echoes the aforementioned justifications for protecting the confidentiality of the judicial process and may be best articulated by noted legal scholar Laurence Tribe, who observed that:

Nobody can seriously doubt that judges would be unable to perform their delicate mission of assuring equal justice under law if their thought processes and confidential deliberations could be subjected routinely to public gaze and official censure.

Tribe, *Trying California's Judges on Television: Open Government or Judicial Intimidation?*, 65 A.B.A.J. 1175, 1178 (1979). Indeed, maintaining the confidentiality of such proceedings is “vitaly needed to encourage collegiality, candor, and courage – both political and intellectual – protection needed not only for the benefit of judges but for the benefit of society as a whole.” *Id.* at 1179.

Given this backdrop, it becomes clear that the application of FOIA to judges is simply different: it raises different questions, it involves different processes, and it requires different considerations. No case better exemplifies these differences than this Court’s holding in *State ex rel. Wyant v. Brotherton*, 214 W. Va. 434, 589 S.E.2d 812 (2003). In *Brotherton*, two inmates sought to use the Freedom of Information Act to obtain certain documents from a circuit court for the purpose of preparing petitions for writs of habeas corpus. Among the documents sought by the petitioners were copies of the underlying indictments, trial transcripts, sentencing orders and the like – all of which appeared to satisfy even the strictest interpretation of FOIA’s definition of a public record: “[A]ny writing containing information relating to the conduct of the public’s business, prepared, owned and retained by a public body.” *See* W. Va. Code § 29B-1-2(4). And yet, the Court refused to compel disclosure pursuant to FOIA, instead deferring to the judiciary’s own procedures and prerogatives. Pointing to the judicially established rules

governing post-conviction proceedings, the *Brotherton* court concluded that these rules must override FOIA:

Consequently, we hold that 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.

Brotherton, 214 W. Va. at 440, 589 S.E.2d at 818.

The *Brotherton* holding is particularly notable in light of the Court's explicit acknowledgement that its holding conflicted with the more generalized provisions of the Freedom of Information Act and internal court rules regarding public access to court documents. *Id.* n. 13 ("We recognize that Rule 10.04 of the West Virginia Trial Court Rules permits access to court files and other court records under the FOIA. While this rule is in conflict with our interpretation today of the Habeas Corpus Rules, the Habeas Corpus Rules are more specific in the realm of habeas corpus proceedings, and thus, must govern our decision."). Indeed, there can be little dispute that the requested court documents fell within the Freedom of Information Act's definition of "public records," and it is unlikely that any of the exemptions articulated in W. Va. Code § 29B-1-4 could have been relied upon to justify nondisclosure. As Justice Albright observed plainly in his dissenting opinion, "I see no basis in the provisions of FOIA for denying the request." *Id.* at 819 (Albright, J., dissenting).

Fortunately, however, the majority did not so confine its analysis; instead, it explored the intricacies of the Freedom of Information Act and attempted to balance the manner in which FOIA should be applied to judicial proceedings – where the public's interest in access is confronted with a competing and equally compelling public interest in preserving judicial independence. Although its precise holding may be limited to its particular facts, the import of

Brotherton rests in its subtle recognition of the singular nature of the judicial branch. The principle underlying *Brotherton* is that the inherent nature of the judicial process – and the unique responsibilities of those justices and judges charged with administering the process – does not lend itself easily to the rote application of a statutory scheme like the Freedom of Information Act, particularly when a statutory enactment potentially conflicts with the constitutional obligations and prerogatives of the judiciary.

This is not to suggest that FOIA's legislative intent should be circumvented through specious reasoning or by judicially carving out the "judicial department" from the Act. To the contrary, public documents containing information relating to the conduct of the public's business should – subject to the application of available exemptions and privileges – be disclosed. However, as the instant dispute suggests, it is never quite that simple. Rather, myriad disputes swirl around the factors that courts should consider in determining whether a communication by a judicial officer falls within the definition of a "public record," or instead is a private correspondence with a personal acquaintance unrelated to the conduct of the public's business.

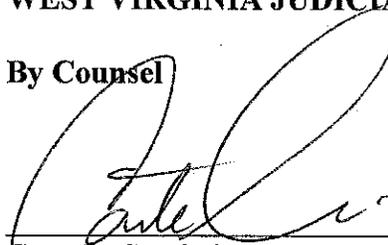
It is into this maelstrom that the Association urges caution. Although undoubtedly complex in their own right, FOIA disputes involving the time sheets of municipal police officers or the travel records of a cabinet secretary – and the corresponding analysis and legal interpretation necessary to resolve such disputes – simply do not raise the type of concerns presented by the instant case. Given the constitutional dynamics at play here, the danger of a bright line rule rendering a document a "public record" based on its mere presence in a government file or the identity of its recipient – and without regard to the content of the record itself – is even more pronounced.

Accordingly, this Court should proceed with caution prior to compelling disclosure of confidential judicial communications. To do otherwise would invite disruption and discord into the sanctity of the judicial process, a process that cannot exist without preserving candor and confidentiality in a judge's chambers.

WHEREFORE, the West Virginia Judicial Association respectfully requests that this Court clarify the applicability of the Freedom of Information Act to judicial communications and articulate the considerations that should be weighed in determining whether such communications contain information relating to the conduct of the public's business.

WEST VIRGINIA JUDICIAL ASSOCIATION

By Counsel



Carte P. Goodwin, Esq.
West Virginia Bar # 8039
Goodwin & Goodwin, LLP
300 Summers Street
Suite 1500
Charleston, WV 25301
Telephone: (304) 346-7000
Facsimile: (304) 344-9692
cpg@goodwingoodwin.com