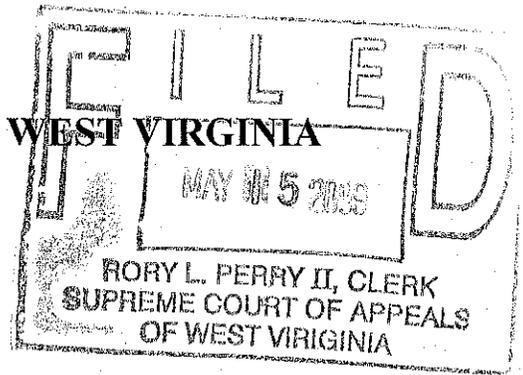


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 34768



THE ASSOCIATED PRESS,

Appellant,

v.

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

Appellee.

APPELLANT'S BRIEF

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II THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

In January, 2008, Appellant, the Associated Press (“AP”) requested, *inter alia*, disclosure under the West Virginia Freedom of Information Act (“WVFOIA”) of certain public records in the custody of Appellee Canterbury, the Administrative Director of the Supreme Court of Appeals of West Virginia. Those public records included communications between former Justice Elliott E. Maynard and Massey Energy CEO Don Blankenship. The Appellee refused to produce those records asserting that (1) application of the West Virginia Freedom of Information Act (“WVFOIA”) to communications of judicial officers would violate the *Constitution* of West Virginia; (2) the e-mail communications of West Virginia judicial officers are not “public records” as defined by the WVFOIA; and (3) the e-mails at issue were exempt from disclosure as they contain matters of a personal nature.

A preliminary injunction hearing was held in the Circuit Court of Kanawha County on June 25, 2008 at which time the Appellee disclosed, for the first time, that records of such communications existed. Upon learning that records existed that fell within the category identified by the AP’s WVFOIA request, the Circuit Court directed Appellee to produce a *Vaughn* index identifying the records, and producing them for *in camera* inspection.¹ The *Vaughn* index identified

¹ June 25, 2008 Hearing Transcript at 57. See *Syllabus* Point 3, *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W.Va. 563, 565, 482 S.E.2d 180 (1996):

“3. When a public body asserts that certain documents in its possession are exempt from disclosure under *W. Va. Code*, 29B-1-4(8) [1977], on the ground that those documents are “internal memoranda or letters received or prepared by any public body,” 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

records of thirteen (13) emails, some with attachments, exchanged between Justice Maynard and Don Blankenship, the Chairman and CEO of a litigant (Massey Energy) before the Supreme Court. Those records were reviewed *in camera* by the Circuit Court.

Both parties submitted briefs following the production of the *Vaughn* index. On September 16, 2008 the Circuit Court issued a Final Order, rejecting Appellee's legal arguments, and ordering five (5) e-mail records be disclosed to the AP because each "contain[ed] information relating to the public's business." However, the Circuit Court held that eight (8) other email records identified in the *Vaughn* index need not be disclosed under the WVFOIA. The Circuit Court found that although the eight (8) e-mails met the statutory definition of public records when they were created, they were no longer "public records" because Justice Maynard had recused himself from the *Caperton* case months after the e-mails were written.

The Circuit Court came to this conclusion despite confirming all eight (8) of the undisclosed e-mails, like the five (5) that were ordered disclosed, were sent by Justice Maynard to Massey CEO Blankenship while Massey had a case pending before the Supreme Court. The Circuit Court found that those eight (8) emails, like the five it ordered be disclosed, were public records when they were created. The unusual basis for the Circuit Court's ruling distinguishing the eight (8) emails from the five (5) emails it ordered be disclosed, was Justice Maynard's *ex post facto* recusal from the rehearing of *Caperton v. AT Massey Coal, Inc.* ___ S.E.2d ___, 2008 WL 918444 (W.Va., April 3

document is exempt, specifically identifying the reasons why *W. Va. Code*, 29B-1-4(8) [1977] 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."

2008), *cert. granted*, 129 S.Ct. 593 (Nov. 14, 2008) (the “*Caperton case*”). Appellant timely filed a Motion to Reconsider under Rule 59, requesting that the lower court reconsider the September 16, 2008 Order to the extent that it held that the eight (8) emails were not public records. On October 20, 2008 the Circuit Court summarily denied the motion to reconsider in a one page Order. This appeal followed.

III STATEMENT OF FACTS

Appellee Canterbury has responsibility for handling Freedom of Information Act requests for the West Virginia Supreme Court of Appeals. Transcript of June 25, 2008 evidentiary hearing at 4, 39. Appellant made a Freedom of Information Act (“FOIA”) request to Appellee on January 16, 2008. *Id.* at 5. Appellee denied the Appellant’s FOIA request as it related to Chief Justice Maynard’s emails, explaining his reasons in two memoranda, one written by Appellee’s counsel, and the other written by the Supreme Court’s director of finance. *Id.* On January 23, 2008 the Appellant asked Appellee to reconsider the denial of the FOIA request. *Id.* at 6. On January 28, 2008, Appellee’s counsel wrote a letter on behalf Steven D. Canterbury reiterating the denial of the AP’s FOIA request. *Id.* at 7.

On February 28, 2008 Appellant made a second FOIA request to Appellee. *Id.* at 7. This request concerned communications between and amongst certain specified individuals identified in the request. This request was denied also, for the same reasons stated in letters previously sent from Appellee to Appellant.

At the injunction hearing, Mr. Canterbury testified that in considering and denying the second Associated Press FOIA request, he understood Appellant’s interest in determining the existence of communications between Chief Justice Elliott Maynard, the Chief Justice’s staff, and/or Supreme Court Administrative Office employee Brenda MaGann and specified private persons or

entities not employed by the Supreme Court of Appeals. *Id.* at 13-14. Appellee admitted that he understood the Associated Press' interest was in reviewing whatever documents may exist concerning (1) Chief Justice Maynard's trip to France and Monte Carlo where he met with Massey Energy CEO Don Blankenship and Ms. MaGann, and (2) Chief Justice Maynard's relationship with Mr. Blankenship and/or any employee or agent of Massey Energy. *Id.* at 14-15.

Appellee testified Chief Justice Maynard's emails were gathered and reviewed by Supreme Court personnel and that documents existed that were responsive to Appellant's FOIA request. June 25, 2008 Hearing Transcript at 17-19. Appellee further testified he was familiar with the exemptions in the Freedom of Information Act, and upon review of the emails, he could not identify any that were exempt pursuant to the WVFOIA personal record exemption. *Id.* at 29, *W.Va. Code* § 29B-1-4(a)(2). Appellee testified there were at most a couple dozen responsive emails that fell within the personal records exemption, but admitted he did not assert the personal records exemption as a basis for withholding the documents. *Id.* at 30.

Appellee testified he and his counsel believed the use of the term "judicial department" in the FOIA statute "was a very strange use of language" and that he and his counsel "couldn't figure out exactly what 'judicial department' meant." *Id.* at 31-32.

Appellee further testified he understood Appellant was not seeking internal communications between Justices and or Court staff concerning any pending case. *Id.* at 37-39. He admitted he understood the Appellant was not seeking anything to do with the Supreme Court's work of resolving litigation before the Court. *Id.* He also admitted he understood Appellant was seeking communications between Chief Justice Maynard/Justice Maynard's staff/law clerks, and representatives of Massey Energy. *Id.* at 40.

IV ASSIGNMENT OF ERRORS AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

1. Whether records of e-mail communications between a sitting Justice and the CEO of a party litigant on a government owned and operated electronic computer network were "public records" under the WVFOIA when each met the statutory definition of "public record" when created and no WVFOIA exemption applied to them?

Decided in the negative by the court below.

2. Whether a record that is within the WVFOIA definition of "public record" may be transformed *ex post facto* by the subsequent action of the record's creator into a record that need not be disclosed under the WVFOIA?

Decided in the affirmative by the court below.

3. Were the eight (8) withheld communications between Justice Maynard and Massey CEO Don Blankenship, occurring while Massey had cases pending before the Supreme Court of Appeals and West Virginia trial courts, the subject of legitimate public interest and thus are public records containing information relating to the conduct of the public's business?

Decided in the negative by the Court below.

V DISCUSSION OF LAW

This is an important case of first impression concerning public confidence in the integrity of West Virginia's judicial system and vindication of citizens' right of access to public records relating to the affairs of government as mandated by the West Virginia Freedom of Information Act. Citizens' right to such information contained in public records includes the right inspect and copy, "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." *W.Va. Code* § 29B-1-1. "Public records" are broadly defined as "any writing containing information relating to the conduct of the public's business." *W.Va. Code* § 29B-1-2 (4).

The Legislature's policy underlying the West Virginia Freedom of Information Act is clear,

emphatic and unequivocal:

“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.”

W.Va. Code § 29B-1-1 (emphasis added).

Indeed, the public’s right to be informed concerning the affairs of their government lies at the very core of the principles of democratic governance. As explained below, in the case at bar, the circuit court erred in allowing the withholding of information in public records that would have informed the public about important issues involving the effectiveness of West Virginia’s judicial system and the integrity and impartiality of its judiciary.

A STANDARD OF APPELLATE REVIEW

This Court has explained the standard of review in cases concerning the West Virginia

Freedom of Information Act is *de novo*:

“FOIA . . . is viewed through the evidentiary burden placed upon the public body to justify the withholding of materials . . . (“In performing that review, however, we are mindful that the ‘burden is on the agency’ to show that requested material falls within a FOIA exemption.” (citation omitted)); *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 326 (D.C.Cir.1999) (“At the summary judgment stage, . . . the agency has the burden to show that it acted in accordance with the statute [.]”). *See also* *W. Va. Code* § 29B-1-5(2) (1977) (Repl.Vol.2003) (“[T]he burden is on the public body to sustain its action.”); *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 62, 459 S.E.2d 329, 339 (1995) (“[I]n making a ruling, ‘the judge must view the evidence presented through the prism of the substantive

evidentiary burden.” ’ (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202, 215 (1986)).

It is equally well-established that . . . “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). *Cf.* W. Va.Code § 29B-1-5(2) (in reviewing a public body's actions in response to a FOIA request, “[t]he court shall determine the matter *de novo* [.]”).”

Farley v. Worley, 215 W.Va. 412, 418-419, 599 S.E.2d 835, 841 - 842 (W.Va.2004).

B THE CIRCUIT COURT DID NOT LIBERALLY CONSTRUE WVFOIA'S DISCLOSURE MANDATE NOR DID IT PROPERLY APPLY WVFOIA'S BURDEN OF PROOF TO THE EIGHT (8) WITHHELD EMAILS

In its Final, Order the Circuit Court correctly observed that,

“given the purpose of FOIA the Supreme Court of Appeals has held that FOIA's exemptions are to be strictly construed, whereas the disclosure provisions of FOIA must be liberally construed.”

This finding was consistent with this Court's straightforward direction that:

“a liberal interpretation should be given to the definition of ‘public record.’”

Ogden Newspapers, Inc. v. City of Williamstown, 192 W.Va. 648, 651, 453 S.E.2d 631, 634 (1994)

(emphasis added). *See Hechler v. Casey*, 175 W.Va. 434, 443, 333 S.E.2d 799, 808 (1985):

“This liberal construction of the State FOIA and the concomitant strict construction of the exemptions thereto are of fundamental importance in deciding any case involving construction of this statute.”

The lower court also found, “the general policy of [FOIA] is to allow as many public records as possible to be made available to the public.” This, too, was consistent with this Court's holding that, “[a]s a rule, statutes enacted for the public good are to be interpreted in the public's favor.” *Ogden Newspapers, Inc., supra*, 192 W.Va. at 651, 453 S.E.2d at 634. Therefore, public bodies generally have “a responsibility to disclose as much information to the public as possible” if the

record sought does not fall within the WVFOIA's enumerated exemptions. Circuit Court September 16, 2008, Final Order at 5-6.

Generally, in rejecting Appellee's arguments below, the Circuit Court followed both the FOIA statute and this Court's mandates regarding judicial review under the WVFOIA. However, on the specific and limited issue presented in the instant appeal, the lower court failed to construe the statute liberally, ignoring the requirement of liberally interpreting what constitutes a public record. The lower court instead erroneously allowed non-disclosure of records it conceded met the statutory definition of "public record" at the time the e-mails were created:

"It is important to note that had Justice Maynard not recused himself from the Caperton case, and other cases involving Massey, these emails would have been placed into the public's business by Caperton's Motion to Recuse and the public release of the photographs of Justice Maynard and Don Blankenship. Because the information contained within the e-mail communications would have shed light on the extent of Justice Maynard's relationship with Don Blankenship and whether or not that relationship may have affected or influenced Justice Maynard's decision-making in Massey cases, the public would have been entitled to that information. Justice Maynard did, however, recuse himself. Therefore, the Court finds that the remaining e-mails do not contain information relating to the conduct of the public's business."

September 16, 2008 Final Order at 13, n.9 (emphasis added). Thus, rather than applying the required "liberal interpretation" of a "public record," the Circuit Court instead took a narrow, restrictive view of the public interest – arbitrarily concluding that the public interest was totally negated by Justice Maynard's recusal.

Appropriate liberal interpretation of the term "public record" and liberal construction of the WVFOIA do not permit a court to transform what it concedes is a public record when created, into a non-public record that need not be disclosed to the public. Liberal construction of the WVFOIA and the Circuit Court's decision are totally incompatible. Records that meet the Act's definition of

“public records” in which the public has a legitimate interest cannot be converted into “exempt” records withheld because of an *ex post facto* act of the creator of the record (here, Justice Maynard’s decision to prospectively recuse himself from Massey cases). *A fortiori*, a “public record” that is not exempt under one of WVFOIA’s explicit exemptions is a public record that must be disclosed.

C WVFOIA REQUIRES PUBLIC RECORDS BE DISCLOSED UNLESS THEY FALL WITHIN ENUMERATED EXEMPTIONS

1 THE WVFOIA DEFINITION OF “PUBLIC RECORD”

The WVFOIA defines a “public record” as,

“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). It is beyond cavil that the WVFOIA’s disclosure requirement must be construed in favor of disclosure, and any asserted exemption must be construed narrowly:

“The disclosure provisions of this State’s Freedom of Information Act, *W.Va. Code*, 29B-1-1 *et seq.* as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed. *W.Va. Code*, 29B-1-1.”

Syl. Pt. 4, Hechler v. Casey, 175 W.Va. 434, 333 S.E.2d 799 (1985). The liberal construction in favor of disclosure and concomitant narrow application of exemptions are not mere platitudes - this Court consistently has emphasized their fundamental importance in deciding any case involving the FOIA statute:

“liberal construction of the State FOIA and the concomitant strict construction of the exemptions thereto are of fundamental importance in deciding any case involving construction of this statute.”

Id., 333 S.E.2d at 808.

In *Ogden Newspapers, Inc., supra*, this Court held that, “a liberal interpretation should be given to the definition of ‘public record.’” Likewise, in *Daily Gazette Co. Inc. v. Withrow*, 177 W.Va. 110, 115, 350 S.E.2d 738, 743 (1986), this Court held that “*W.Va. Code*, 29B-1-2(4)

constitutes a liberal definition of a 'public record' in that it applies to any record which contains information "relating to the conduct of the public's business," without the additional requirement that the record is kept "as required by law" or "pursuant to law," as provided by the more restrictive freedom of information statutes in some other states. *Withrow, supra*, 177 W.Va. at 115, 350 S.E.2d at 742, citing, Braverman and Heppler, *A Practical Review of State Open Records Laws*, 49 Geo.Wash.L.Rev. 720, 733-35 (1981).² "Liberally construing the WVFOIA term "relating to the conduct of the public's business" as this Court must, all thirteen (13) e-mails at issue necessarily fall within the scope of "public records" that must be disclosed under the WVFOIA.

The e-mail records in question were prepared and retained on the West Virginia Supreme Court of Appeals computer server. It is beyond cavil, and the circuit court so found, that the eight (8) withheld email records are writings that were prepared, owned and retained by a public body. Circuit Court Final Order, September 16, 2008, at 10. Moreover, as explained below, the circuit court explicitly acknowledged that the withheld records did, in fact, "relate to the conduct of the public's business" at the time they were created. *Id.* at 13, n. 9. Thus, all the statutory elements defining a "public record" under the WVFOIA are met with regard to the withheld e-mail records.

2 THE CIRCUIT COURT FOUND NO WVFOIA EXEMPTIONS APPLICABLE TO THE WITHHELD E-MAILS

W.Va. Code § 29B-1-3 mandates,

"every person has a right to inspect or copy any public record of a public body in this state, *except as otherwise expressly provided by section four of this article.*"

(Emphasis added). The lower court acknowledged that only the explicit exemptions specified in

² Importantly, as the *Withrow* Court noted, the WVFOIA definition of "public record" is much broader than that of most other states. *Withrow, supra*, 177 W.Va. at 115, 350 S.E.2d at 743.

the WVFOIA may provide a basis for withholding of public records.³ The Circuit Court rejected the Appellees argument that the five (5) e-mails it directed be disclosed fall within WVFOIA's personal record exemption, *W.Va.Code* § 29-B-1-4(a)(2) or any other exemption. September 16, 2008 Final Order at 14-15. The lower court, having already concluded the eight (8) emails at issue herein were not "public records," did not discuss the personal record exemption in regard to those emails. It is abundantly clear, however, that the same reasoning that led the circuit court to conclude the five (5) emails were not exempt applies to the eight withheld emails as well.⁴

³ The WVFOIA also provided for withholding of public records that may be exempted from disclosure by other statutes. *W.Va.Code* § 29-B-1-3. No such claim based on other statutory exemptions was made below by Appellee Canterbury.

⁴ While Appellee never asserted the personal privacy exemption in withholding the emails, he later asserted it mid-way through the litigation. *See* September 16, 2008 Final Order at 14, n. 10. This belated assertion of the exemption is insufficient for Appellee to meet his burden on any of the emails, and constitutes a waiver. Nevertheless, even if the exemption had been asserted timely, it clearly would not apply to the emails in question. Exemption 2 of the WVFOIA states in relevant part:

"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[.]"

W.Va. Code § 29B-1-4(a)(2).

Importantly, Appellee asserted below that "of the thirteen (13) e-mails, five (5) have no text, but include only a link to internet articles. Of the remaining eight (8) e-mails, two (2) are addressed to "Sandra," who apparently works for Don Blankenship. Of the remaining six(6) e-mails, all make only brief references to the internet article links included or, in the case of one(1) e-mail, an attachment of a Chamber of Commerce meeting agenda." Defendant Reply Brief. Thus, by Defendant's admission, these records clearly do not contain "information of a personal nature such as that kept in a personal, medical or similar file." E-mails with little or no attendant comments written by the Chief Justice, links to articles and a meeting agenda bear no resemblance to the type of record of a highly personal and private nature that WVFOIA exemption 2 was designed to protect from public disclosure. Therefore, while records "of a personal nature the public disclosure thereof would constitute an unreasonable invasion of privacy" are entitled to the protection of the exemption, the e-mail records at issue here are not

The lower court's decision to exempt the eight (8) public record e-mails from disclosure solely on the basis of Justice Maynard's recusal violated the explicit mandate of *W. Va. Code* § 29B-1-3 ("Every person has a right to inspect or copy any public record of a public body in this state, except as otherwise expressly provided by section four of this article"). The WVFOIA specifically rejects giving any public servants, including judges, "the right to decide what is good for the people to know and what is not good for them to know" for reasons other than those explicitly identified by law. *W. Va. Code* § 29B-1-1.

3 THE CIRCUIT COURT ERRED IN HOLDING THAT PUBLIC RECORDS (THE WITHHELD E-MAILS) WERE RENDERED NONE OF THE PUBLIC'S BUSINESS BY VIRTUE OF JUSTICE MAYNARD'S SUBSEQUENT DECISION TO RECUSE HIMSELF FROM CASES INVOLVING MASSEY ENERGY

The critical element of whether information is a "public record" is the right of citizens to know how the public's business has been conducted. The breadth of the policy underlying the WVFOIA is very broad and includes the following:

- "all persons are . . . 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."⁵

medical or similar personnel records. They are, if Appellee accurately characterized them, innocuous references to documents and articles to which no conceivable personal privacy interest could attach. The WVFOIA, as noted above, places the burden on the public body claiming an exemption to prove entitlement thereto. Here, Appellee Canterbury failed to explain how these e-mails, with the content he has described, conceivably could fall within the narrow scope records of a personal nature to which exemption 2 applies. Thus, Appellee failed to meet even the threshold test for consideration of entitlement to the exemption. It is not necessary for this Court to engage in the five point balancing test applicable to records that arguably fall within the scope of exemption 2.

⁵ In *Farley v. Worley*, 215 W.Va. 412, 420, 599 S.E.2d 835, 843 (2004), this Court held that the focus of WVFOIA is on the public's right to "*full and complete information* regarding the affairs of government":

- “The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”
- “The people insist on remaining informed so that they may retain control over the instruments of government they have created.”
- “To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.”

W.Va. Code § 29B-1-1 (emphasis supplied).

If a record *relates* to conduct of the public’s business, it is a “public record” as that term is used in WVFOIA.⁶ The Circuit Court’s Final Order acknowledged that the eight (8) e-mails shed

“The FOIA’s declaration of policy provides that all persons are ‘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.’ *W. Va. Code* § 29B-1-1 (emphasis added). [. . .] And, while observing that FOIA’s policy ‘is to allow as many public records as possible to be available to the public [,]’ our recognition as to the disclosure of documents originated from the broader recognition that agencies have ‘a responsibility to disclose as much information to the public as [they] can.’”

⁶ This Court recently had occasion to address the meaning of the similar term “related” and stated as follows:

“The word “related” is variously defined as “associated; connected” and as “[h]aving mutual relation or conne[ct]ion.” Other jurisdictions that have examined this phrase likewise have construed “related to” as meaning “connected to [or] associated with”; “connected, associated, bearing on, pertaining to, or involving”; and “to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.” *Cf. CPF Agency Corp. v. R & S Towing Serv.*, 34 Cal.Rptr.3d 106, 111, 132 Cal.App.4th 1014, 1022 (2005) (interpreting “related to,” as used in Interstate Commerce Act, as requiring “more than an indirect, remote, or tenuous effect” (internal quotations and citations omitted)).”

West Virginia Consol. Public Retirement Bd. v. Weaver, 671 S.E.2d 673, 680 (W.Va.2008) (footnotes omitted). Being mindful that, unlike the statute at issue in *Weaver, supra*, the Legislature in enacting the WVFOIA has indicated how the statute is to be construed, and directed that the FOIA be liberally construed, it is plain that the term “relates to” in the FOIA

light on whether or not the Justice's relationship with Mr. Blankenship affected or influenced the his decision-making in Massey cases.⁷ If information contained in a government created, owned and retained record sheds light on a how an individual has performed his/her responsibilities as a public official, the information *ipso facto* relates to conduct of the public's business.⁸ If at the time a record was created it "related to the conduct of the public's business" it is a public record. Subsequent events cannot transform a public record into a record that is none of the public's business.

Moreover, the participation by Justice Maynard in the *Caperton* and other Massey cases were "official acts" of a "public official," *as was his recusal itself*, as those terms are used in *W.Va. Code* § 29B-1-1. Surely official acts impacting the public perception of the integrity of the judiciary relate to "the affairs of government" as to which "all persons . . . are entitled to full and complete information." *Id.*

Importantly, the court below ordered the release of five (5) e-mails that fell within the scope of the AP's WVFOIA request. The reason articulated by the Circuit Court for directing disclosure

must be given the broadest reasonable interpretation. Nevertheless, under any of the foregoing defining words, it is clear that the eight (8) withheld emails relate to the public's business.

⁷ Neither the content nor the context in which the e-mails were created has changed since they were created. Simply put, Justice Maynard's recusal decision did not alter the fact that the e-mails are records shedding light on Justice Maynard's conduct of public business concerning a party in a case before the Court.

⁸ E-mails that, prior to Justice Maynard's recusal, "would have shed light on the extent of Justice Maynard's relationship with Don Blankenship and whether or not that relationship may have affected or influenced Justice Maynard's "official acts" of decision-making in Massey cases" also relate, *a fortiori*, to conduct of the public's business. While Justice Maynard's decision to recuse himself may have mooted the issue of the effect of his participation in the *Caperton* case, it did not, and could not as a matter of law, terminate the public's entitlement to full and complete information regarding Justice Maynard's official acts in participating in the decisions in *Caperton* and other Massey cases. Citizens are entitled to, in the words of the WVFOIA, full and complete information regarding Justice Maynard's participation in those cases and his later decision to recuse himself from Massey cases.

of those public records was that they related to “Justice Maynard’s campaign for reelection” and because “his campaign for public office is related to the method by which the people ‘retain control over the instruments of the government they created” September 16, 2008 Final Order at 13 .

The lower court found the five (5) e-mails were public records in spite of the fact that (1) the primary election had been held four (4) months before the entry of the court’s order and (2) voters had not re-nominated Justice Maynard to run for another term. Just as Justice Maynard’s electoral defeat and the end of his campaign did not transform the five (5) e-mail public records containing information relating to Justice Maynard’s campaign for public office into records that are none of the public’s business, Justice Maynard’s recusal from Massey cases did not, and could not, have transformed the remaining eight (8) e-mails into records that are unrelated to the public’s business.

D THE LEGITIMATE PUBLIC INTEREST IN DISCLOSURE OF THE WITHHELD E-MAILS

The trial court concluded Justice Maynard’s decision to recuse himself from Massey cases essentially mooted the public interest in determining whether the Justice should have heard arguments and voted in Massey cases. September 16, 2008 Final Order at 13. The Circuit Court found that the withheld e-mails do not “contain information related to the ‘affairs of government,’ Justice Maynard’s ‘official acts’ as a state officer, or the conduct of the public’s business” because of the Justice’s *ex post facto* decision to recuse himself. *Id.* In reaching this conclusion, the Circuit Court misapprehended both the extent and overarching significance of the public interest in disclosure, as well as the impact on that legitimate public interest of its decision to allow the eight (8) e-mails to be withheld.

The facts surrounding Justice Maynard’s participation in Massey cases, his prior acknowledgment of only a social relationship with Mr. Blankenship, and his belated decision to

recuse himself after the Justice's close friendship with the Massey Energy Chairman became a topic of national news. These circumstances clearly relate to, are connected to or associated with "official acts" of Justice Maynard and "the affairs of [the judicial branch] of government" regarding which "all persons are . . . entitled to full and complete information." *W.Va.Code* § 29B-1-1 (emphasis added).

For example, the eight (8) email records at issue are of legitimate public interest, *inter alia* because citizens of West Virginia are entitled to know whether the withheld e-mail records "prepared, owned and retained by a public body" are exculpatory, thus helping to restore public confidence in the state's judicial system, or whether they reflect a conflict of interest, unethical or corrupt conduct involving a member of the judiciary. In other words, regardless of their *content* - whether they are innocuous, as Appellee argued below - or whether they reveal something mendacious or sinister, is not the question before this Court. The question is whether the withheld "writing contain[ed] information relating to the conduct of the public's business" and thus fall within the WVFOIA definition of "public record" and must be disclosed.⁹ One other court has addressed this precise issue, and concluded that the content is not the determinative factor if the emails are of legitimate public interest - emails of legitimate public interest meet the definition of a public record.

⁹ The Circuit Court concluded that both the content and the context under which the records were created were relevant to determining whether the records related to the public's business such that they were a public record. September 16, 2008 Final Order at 12-13. However, when the Court made its decision, it seems to only have considered its *in camera* review of the content of the emails, and not the context, *i.e.*, whether there is a legitimate public interest in the records. *Id.* at 13, n.9. As explained *infra* (and as determined by the *Cowles*, *infra*, court), the proper test for determining whether the record is a public record lies in its *context*, *i.e.*, whether there is a legitimate public interest in disclosure of the record. Thus, in *Cowles*, emails the content of which reflected an intimate relationship were nevertheless disclosed because of the legitimate public interest in the nature of the relationship.

In *Cowles Publishing Co. v. Kootenai County Board of County Commissioners*, 159 P.3d 896 (Id. 2007), the Idaho Supreme Court affirmed the release of e-mail communications between an elected county prosecutor, and the manager of the county's Juvenile and Education Training (JET) court, who was an employee whom the prosecutor had hired and supervised. As Judge Bloom observed below, the language of the WVFOIA and the Idaho FOIA are similar (indeed, they are virtually identical) as they relate to public records.¹⁰ September 16, 2008 Final Order at 12-13.

After the JET court failed to produce regular quarterly reports of its finances, its federal funds were suspended. *Cowles Publishing Co., supra*, 159 P.3d at 898. The prosecutor defended the employee and allowed the program to continue, using county monies instead of federal funds. *Id.* Meanwhile, the local media began reporting about an alleged improper relationship between the prosecutor and the employee. *Id.* A reporter submitted a public records request to the County Board of Commissioners for all e-mail correspondence between the two officials. *Id.* The county released approximately 400 e-mails in whole or in part, but withheld 597 e-mails. *Id.* *Cowles Publishing Co.* filed a lawsuit to obtain access to the remaining e-mails. The trial court ordered their release. *Id.* at 898-99.

In *Cowles*, the custodian of records argued that the e-mails fell outside the scope of Idaho's public records law because they were personal private (romantic) communications that did not constitute records of government business.¹¹ The Idaho Supreme Court rejected this argument,

¹⁰ I.C. § 9-337.

¹¹ In *Cowles, supra*, the government asserted that the e-mails were not public records because they related to a romantic relationship between the prosecutor and the JET court manager. Likewise, in the instant case, the Appellee asserted below that the communications were not public records because they related to the friendship between Justice Maynard and Mr. Blankenship.

finding that the e-mails clearly contained, “information relating to the conduct and administration of the public’s business.” *Id.* at 900. The *Cowles Publishing* court explained that “[t]he public has a legitimate interest in these communications between an elected official and the employee who[m] he hired and supervised,” because when the JET court’s problems became public, the prosecutor vigorously defended the employee’s management to both the county board and the public, and whether he did so as her supervisor “or ... because of an alleged inappropriate relationship is a public concern.” *Id.* (emphasis added).

Cowles held that it was the e-mails “relation to legitimate public interest that makes them a public record.” *Id.* at 901 (emphasis added). The prosecutor’s defense of the employee’s work “put these e-mails within the purview of the public’s business,” as did the county’s review and use of the e-mails when investigating the financial problems and demise of the JET court. *Id.*

Application of the “public concern” / “legitimate public interest” standard articulated in *Cowles* to the case at bar should have resulted in the Circuit Court ordering disclosure of all of Justice Maynard’s emails to Mr. Blankenship. This Court need not engage in a review of the content of the emails for the purpose of determining if they constitute public records. In *Cowles*, the fact that e-mails contained information relating to *a private romantic relationship* between two public officials did not make them a public record, it was the context in which the relationship took place that was determinative.

In the case at bar, *the long friendship between Justice Maynard and Mr. Blankenship* does not make the eight (8) withheld e-mails public records, it is the context in which they were created that make them public records — Justice Maynard’s participation in cases involving his close friend’s company, the Justice’s defense of that relationship and his failure to fully disclose the nature of his relationship with the CEO of a party litigant, and Justice Maynard’s *ex post facto* decision to

recuse himself from all Massey cases after nationwide media attention focused on the friendship. The narrow issue presented here requires only that this Court determine whether a legitimate public interest in the emails is extant.

In regard to the legitimate public interest, the notoriety and public interest in the relationship between Justice Maynard and Mr. Blankenship is obvious and palpable. Both Justice Maynard and Mr. Blankenship were quoted widely, defending their relationship and Justice Maynard's impartiality, just as the prosecutor in Idaho defended his relationship with the county employee. As a direct result of the relationship with Mr. Blankenship, Justice Maynard thereafter affirmatively took *official action*, recusing himself from cases concerning his close friend's company. That relationship was a major focus of the primary election campaign wherein Justice Maynard was denied nomination for re-election.

In direct contrast to the trial court's conclusion, Justice Maynard's official action of *recusal* actually confirms and supports the AP's assertion that all records in the possession and control of Appellee Canterbury that document the Justice's communications with Mr. Blankenship are "public records." This is so because of the legitimate public interest in that relationship as explained below. Indeed, Justice Maynard's belated acknowledgment of the significant public interest in the impartiality of judges was the very reason he took the *official action* of recusing himself in the *Caperton* case.

**1 THERE IS LEGITIMATE PUBLIC INTEREST IN INFORMATION
RELATING TO WHETHER THE COURT'S RECUSAL RULE 29
EFFECTIVELY ELIMINATES JUDICIAL CONFLICTS OF
INTEREST**

Under Rule 29 of the West Virginia Rules of Appellate Procedure a justice of the West Virginia Supreme Court may decide whether or not to recuse her/himself when recusal is sought by

a party. The rule does not provide for review of that decision by an impartial judicial officer or otherwise require any independent determination regarding the propriety of recusal.¹² Application of the rule has been and is a matter of “enormous statewide and national public interest.” Indeed exactly the same words were used by Massey Energy in a similar FOIA action in a Kanawha County Circuit Court. In that case Massey asserted that Court Administrator Canterbury unlawfully refused to disclose to a FOIA requester the e-mails of Justice Larry Starcher. Massey Energy Company v. Steven D. Canterbury No. 08-C-1401, (Cir. Ct. of Kanawha County) (Walker, J.) (“Massey FOIA case”).¹³

¹² Rule 29 provides in relevant part:

(b) Grounds for Disqualification. A justice shall disqualify himself or herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct or, when sua sponte, for any other reason the justice deems appropriate.

(f) Decision on Motion. The justice shall promptly notify the Clerk of the Supreme Court of his or her decision on the motion for disqualification and the Clerk of the Supreme Court shall promptly notify the other justices and the parties of such decision.

See discussion of Rule 29 by Judge Copenhaver in *Massey Energy Co. v. Supreme Court of Appeals of West Virginia*, Civil Action No. 2:06-0614, 2007 WL 2778239 (U.S.D.Ct. S.D. W.Va. 2007) (Slip Opinion). A review of rules of other courts indicates that such a rule is not uncommon, but it has generated considerable controversy including that related to the review of *Caperton* by the Supreme Court of the United States.

¹³ In that case, later dismissed for failure of Massey to give statutory notice of its intent to sue, Massey Energy asserted that the public interest in the disclosure of e-mails of Justice Starcher was heightened by “the enormous statewide and national public attention” involving Justice Starcher’s refusal to recuse himself in a different Massey Energy case. See, *Memorandum In Support of Plaintiff’s Motion for Preliminary and Permanent Injunctive Relief and for Declaratory Judgment*, (“Massey FOIA case”), at p. 5. Justice Starcher had refused to recuse himself in response to Massey’s “Motion to Recuse Judge Starcher” filed in *Wheeling Pittsburgh Steel Corporation v. Central West Virginia Energy Company and Massey Energy Company*, Brooke County Civil Action No. 05-C-85-MJG, *cert. den’d* 129 S.Ct. 626, 172 L.Ed.2d 609 (2008), (“the Wheeling Pittsburgh

The issue of the effectiveness of Rule 29 in preventing judges from participating in cases in which they have a conflict of interest or appearance of a conflict of interest was present in *Caperton*, and in other Massey Energy cases. Although Justice Maynard recused himself from *Caperton* after fully participating in the Court's original decision in favor of Massey (as well as other earlier cases in which Massey was a party), the controversy continues unabated over the application of Rule 29 in other Massey cases, and cases generally.

The Rule 29 recusal issue is the focus of other pending cases. Petitions for writs of *certiorari* in the Wheeling Pittsburgh Steel case and in *Caperton* were filed and reviewed by the Supreme Court of the United States.¹⁴ The *Caperton* case was accepted, docketed, argued and is awaiting decision as of the date of the filing of this brief. Supreme Court *certiorari* petitions in both cases asserted that the Rule 29 recusal provisions do not adequately protect litigants' constitutional due process rights.¹⁵ Many *amicus curiae* briefs in the later case were submitted in support of both parties in the *Caperton* case.¹⁶

Steel case"). Massey Energy filed a Petition for Certiorari in the Supreme Court of the United States asserting that Justice Starcher's refusal to recuse himself in the Wheeling Pittsburgh Steel Company case violated constitutional due process guarantees. *Central West Virginia Energy Co. and Massey Energy Company v. Wheeling Pittsburgh Steel Corp., et al.*, Supreme Court of the U.S. Docket No. 08217; <http://origin.www.supremecourtus.gov/docket/08-217.htm>

¹⁴ See *Hugh M. Caperton, et al v. A.T. Massey Coal Company, Inc.*, U.S. Supreme Court Docket No. 08-22 and Supreme Court of the U.S. No. 08-217; <http://origin.www.supremecourtus.gov/docket/08-217.htm> .

¹⁵ *Id.*

¹⁶ The *Caperton* case drew 18 *amicus* briefs representing very diverse interests. All briefs are available online at:

http://www.scotuswiki.com/index.php?title=Caperton_v._A.T._Massey_Coal_Company%2C_Inc.%2C_et_al.

It has been observed that:

In yet another case, Massey Energy filed suit against the West Virginia Supreme Court challenging the constitutionality of Rule 29 on its face and as applied. That case is pending before the United States District Court for the Southern District of West Virginia (Copenhaver, J.). *Massey Energy Co. v. Supreme Court of Appeals of West Virginia*, Civil Action No. 2:06-0614, 2007 WL 2778239 (U.S.D.Ct. S.D. W.Va. 2007) (Slip Opinion). In seeking federal court relief against the West Virginia Supreme Court, Massey Energy alleged in relevant part:

“Rule 29 of the West Virginia Rules of Appellate Procedure . . . violates Plaintiffs’ Fourteenth Amendment due process right to a fair hearing before an impartial tribunal and to the appearance of justice insofar as the rule . . . permits a single justice . . . who is the subject of a disqualification motion exclusively to determine the merits of that motion”¹⁷

The public interest in the Rule 29 recusal issue and the corollary issue of the integrity of the judicial process in proceedings before the West Virginia Supreme Court gained additional national and international attention by virtue of a September 7, 2008 *New York Times* editorial that stated, *inter alia*:

“The Caperton appeal is supported by (in addition to those favoring it at the petition stage) a broad array of good-government groups, defense lawyers, the Conference of Chief Justices of state courts as well as former state court justices, and groups of "political accountability" and business ethics - ten amici briefs. By contrast, the Massey company has the support of half that number. Its amici include a separate group of former justices of state courts, conservative law professors, two advocacy groups that are active in campaign finance litigation (the James Madison Center and the Center for Competitive Politics), and seven states warning the Court against fashioning "an entirely new body of federal government law to govern day-to-day recusal practices in state courts."

http://www.scotuswiki.com/index.php?title=Caperton_v._A.T._Massey_Coal_Company%2C_Inc.%2C_et_al.

¹⁷ *Massey Energy Co. v. Supreme Court of Appeals of West Virginia*, Civil Action No. 2:06-0614, 2007 WL 2778239 (U.S.D.Ct. S.D. W.Va. 2007) (Slip Opinion).

“Conflict-of-interest disputes often turn on arcane points of law, but that is hardly the case with the controversy over the West Virginia Supreme Court and Massey Energy. . . . Judicial neutrality and the appearance of neutrality are basic elements of due process. Not every contribution to a judicial campaign triggers due process concerns significant enough to require recusal, but Mr. Blankenship’s outsized campaign expenditures surely did. . . . Across the country, state courts are drowning in a sea of special-interest campaign money. The American Bar Association has good standards for judicial recusal, which nearly every state court system and the federal judiciary have adopted. . . . Unfortunately, compliance is spotty. Situations like the Massey Energy case create an unmistakable impression that justice is for sale.”¹⁸

As the *New York Times* editorial confirms the significant legitimate public interest in the application of Rule 29 of the West Virginia Rules of Appellate Procedure. Whether the rule is effective in preventing Justices from participating in cases where they have a conflict or appearance of a conflict of interest is, as Massey Energy emphasized, a matter of “enormous statewide and national public interest.” *Id.*

An indication of the overarching public interest in Rule 29 recusals is reflected in the unanimous decision of the Board of Directors of the Conference of Chief Justices to file an *amicus curiae* brief in *Caperton*.¹⁹ That *amicus* brief supported neither Caperton nor Massey Energy. Importantly, however, the Chief Justices emphasized they believed that “*critical interests of the state*

¹⁸ Editorial available online at: <http://www.nytimes.com/2008/09/07/opinion/07sun3> . The Associated Press does not contend that Justice Maynard or any current or former Justice of this Court has engaged in improper or unethical conduct or that justice in West Virginia is, in fact, “for sale.” It is, however, axiomatic that the mere appearance of impropriety created by a judge’s conduct is detrimental to the public’s confidence in our system of justice.

¹⁹ The Conference of Chief Justices is comprised of the Chief Justices or Chief Judges of the highest courts of each State, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam and the Virgin Islands.

courts are at stake . . . in this case."²⁰

The lower court's finding that Justice Maynard's eight (8) e-mails "[i]n no way . . . contain information related to the 'affairs of government', Justice Maynard's 'official acts' as a state officer, or the conduct of the public's business" misapprehended the facts and the law.²¹ The WVFOIA mandates that every person is "entitled to full and complete information regarding . . . the official acts" of Justice Maynard. The Circuit Court found as a fact that the information contained in the withheld e-mails shed "light on the extent of Justice Maynard's relationship with Don Blankenship and whether or not that relationship with him may have affected or influenced Justice Maynard's decision-making in Massey cases." September 16, 2008 Final Order at 13, n. 9. As shown above, there is an overarching legitimate public interest in the disclosure of the withheld e-mails that clearly contain information regarding the official acts of Justice Maynard and the affairs of government.

**2 THERE IS A LEGITIMATE PUBLIC INTEREST IN DETERMINING
 THAT A JUSTICE OF THE WEST VIRGINIA SUPREME COURT
 ACTED IN ACCORD WITH THE CODE OF JUDICIAL CONDUCT**

In January 2008, two weeks after the appellee in the *Caperton* case moved to recuse him,

²⁰ "Brief of the Conference of Chief Justices As *Amicus Curiae* in Support of Neither Party," at 2, is available at:

http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-22_NeutralAmCuConfofChiefJustices.pdf

²¹ When presenting its case for disclosure of all of Justice Maynard's e-mails, the AP could not have anticipated that the recusal of Justice Maynard could be seen as outcome determinative of the public's right of access to those communications. Although Appellee Canterbury had the burden of showing entitlement to withhold the records, at no time did he argue below that recusal transformed the content of the e-mails into information that is none of the public's business. Therefore, Appellant moved for Reconsideration to address that conclusion reached *sua sponte* by the lower court. The motion for reconsideration was denied without any explanation in a one page order entered by the circuit court on October 20, 2008.

Justice Maynard acknowledged the controversy surrounding his participation in the case “has now become an issue of public perception and public confidence in the courts.” “The mere appearance of impropriety regardless of whether it is supported by fact,” Justice Maynard conceded, “can compromise the public confidence in the courts.” From the foregoing, it is self-evident that whether or not Justice Maynard’s official actions in participating in Massey Energy cases was consistent with the Code of Judicial Conduct is a matter of significant legitimate public interest and concern. The commentary to Canon 1 emphasizes the important interest at stake:

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. . . . Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

In its Final Order the lower Court found that “[b]ecause the information contained within the e-mail communications would have shed light on the extent of Justice Maynard’s relationship with Don Blankenship and whether or not that relationship may have affected or influenced Justice Maynard’s decision-making in Massey cases, the public would have been entitled to that information.” Obviously, then, the public still is entitled to disclosure of that information because citizens have a legitimate public interest in knowing, *inter alia*, whether or not Justice Maynard’s relationship with Massey Energy Chairman and CEO Don Blankenship may have affected or influenced the Justice’s decision-making.

The Code of Judicial Conduct is violated when a judges’ decision-making is influenced or affected by his/her relationship with an officer of a corporate litigant. See Canon 3 E (1), W.Va.

Code of Judicial Conduct.²² Canon 3 E. (1) requires that a judge “should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.” See *People v. Lester*, 2002 WL 553844, *1 (N.Y. Just. Ct. 2002) (“The Code of Judicial Conduct and the Uniform Court Rules for all the trial courts proscribe ex parte or unilateral communications with the Court. These rules are in effect to avoid prejudice to one side because the other has ‘the ear of the Court’. Our adversarial system of jurisprudence cannot co-exist with actual or apparent conflicts of interest; bias and prejudice; bribery and deceit or other below the belt tactics by one side over the other.”).²³

²² The Commentary to Canon 3 E (1) states that “a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply.” (Emphasis supplied).

²³ A Petition for leave to file a *Brief of Amici Curiae of The Reporters Committee for Freedom of the Press, The American civil Liberties Union of West Virginia, the Association of Capitol Reporters and Editors, the radio and Television News Directors Association, and the Society of Professional Journalists in support of Appellant*, The Associated Press has been presented to the Court in the case at bar. The brief asserts additional compelling and thoughtful argument in support of disclosure, and particularly compelling is the following:

“Any record of those communications should be treated as part of the court record so that the parties and the public may fully understand the extent to which the judge’s personal relationship was at play in the case. It is the common practice of judges, as recognized in a variety of cases, court rules, and federal agency regulations, when receiving questionable communications to enter them into the relevant case’s docket and file them with the court clerk. See e.g. *Moran v. Guerreiro*, 37 P.3d 603, 618, n.14 (Haw. Ct. App.2001) (“We gather from a review of the record in this case that it is a circuit court administrative practice that when ex parte communications are received in a judge’s chambers, the communications are routinely filed in the back portion of the case folders.”); *Warns v. Barker*, 2006 WL 436189, *4 (N.D. Cal. 2006) (Holding with regard to ex parte communications outside the statutorily prescribed process, “[I]f such a communication is received by the judge, he should announce on the record its receipt to all parties prior to sentencing. If he intends to wholly

Justice Maynard did not apprise the lawyers or the parties to the *Caperton* and other Massey cases of his long and close friendship with Mr. Blankenship, nor of his email communications with Mr. Blankenship during the pendency of these cases. But, Justice Maynard did identify his relationship with Mr. Blankenship as follows in response to a recusal motion files in *In Re Flood Litigation* (W.Va. Sup.Ct. Docket No. 31688), a 2004 case wherein Massey affiliates were defendants:

“The fact that I know Mr. Blankenship socially is insufficient to disqualify me . . . or to cause my partiality to reasonably be questioned. [I]t is an inescapable fact of life that justices will have associations and friendships

disregard such communication he should so state on the record.”); Cook County, Ill. Circuit Court Rule 17.2 (“If an ex parte communication in connection with any matter pending before the judge occurs, the judge shall disclose the circumstances and substance of said communication to all parties of record at the next hearing in open court and, if a court reporter is available, on the record.”); 38 C.F.R. § 18b.95 (2008)§§ (“A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision.”). These examples provide instruction which this Court can rely on in interpreting its own law, as the trial court did in this instance where West Virginia law was not clear.

When communications are filed in the court record, the communications are then presumptively public under the standards set out by the common law and First Amendment. *See FTC v. Standard Fin. Management Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) (“[W]e rule that relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of the adjudicatory proceedings, become documents to which the presumption of public access applies.”). Here, Justice Maynard’s failure to act within the bounds of the profession’s common practice by disclosing his personal relationship and the communications does not change the question of access to the communications once they have been made and he has had the opportunity to influence the Court’s judicial process. Keeping these ex parte communications secret compounds the problem and highlights the impropriety in this instance.”

with parties coming before this Court.”

Recusal Statement (November 3, 2004) (emphasis added). To the parties involved in *In Re Flood Litigation* Justice Maynard disclosed only that he “knew” Mr. Blankenship “socially.” It was not until the release of the Monte Carlo photos that he disclosed to the public and parties in pending cases that he had a twenty-year-long close friendship with Mr. Blankenship.

Moreover, the Justice’s characterization of his relationship with Mr. Blankenship as “social” may be seen as problematic in light of one of the released five e-mails ordered released in the case at bar. The released October 11, 2007 e-mail was written by Justice Maynard to Mr. Blankenship at 1 a.m., — hours after the *Caperton* case was argued before the West Virginia Supreme Court on October 10, 2007. That e-mail indicates that the relationship between the two men was much more than that of mere social acquaintances – so close that Justice Maynard expressed skepticism that Mr. Blankenship was responsible for the deaths of two coal miners in the Aracoma coal mine fire.²⁴

Canon 3 B. (7) provides that a “judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter.”²⁵ The issue of whether or not Justice Maynard’s participation in Massey cases comported with his obligations under Canon 3 remains unresolved by his subsequent recusal. The public confidence in the courts can be restored

²⁴ At the time the October 11, 2007 e-mail was written, Mr. Blankenship and a Massey subsidiary were both defendants in a Logan County wrongful death action brought by the widows of the two deceased coal miners. See, *Delorice Bragg, et al. v. Aracoma Coal Co., Inc.*, Civil Action No. 06-C-372-P.

²⁵ It is arguable that *Delorice Bragg, et al. v. Aracoma Coal Co., Inc.*, Civil Action No. 06-C-372-P was such a “pending” or “impending” matter under Judicial Conduct Canon 3 (B) (7) in so far as the case could eventually have come before the Supreme Court on appellate review or may have come before Justice Maynard for rulings during a period when he was serving as Chief Justice of the Court.

by full and complete public disclosure of information in the e-mails that contain information relating to whether or not Justice Maynard's relationship with Don Blankenship "may have affected or influenced Justice Maynard's decision-making in Massey cases."

The lower court found that the information contained in the e-mails would enable citizens to answer the question of whether Justice Maynard's decisions in Massey cases were influenced by his relationship with Mr. Blankenship. Justice Maynard's *ex post facto* recusal in no way moots the legitimate public interest in the nature of that relationship. Indeed, the public's legitimate interest in remaining informed is at its greatest when suspicions exist that the integrity of the judiciary may have been compromised by undisclosed relationships between judges and litigants. The public policy of the WVFOIA is that citizens are entitled to full and complete disclosure of information relating to Justice Maynard's "official act" of participating in the *Caperton* and other Massey cases and his "official acts" in recusing himself from those cases. *W.Va. Code* § 29B-1-1.

VI CONCLUSION

The Circuit Court erred in refusing to order the disclosure of eight (8) e-mails it implicitly had conceded fit the WVFOIA definition of "public record." The circuit court rejected Appellee Canterbury's argument that these public records fall within a specific WVFOIA exemption, but ordered them withheld without any statutory basis. The WVFOIA and this Court's cases make clear that public records may be withheld from disclosure only if they fall within one of the explicit exemptions set forth in the FOIA or are made exempt by another statute. Absent a statutory exemption to support its ruling, the Circuit Court could articulate only one ground for withholding the e-mails at issue: the fact that Justice Maynard's had recused himself months after first participating in Massey Energy cases.

The Circuit Court refused to order disclosure, notwithstanding the fact that it specifically

found the subject e-mails shed “light on the extent of Justice Maynard’s relationship with Don Blankenship and whether that relationship may have affected or influenced Justice Maynard’s decision-making in Massey cases.” The lower court’s ruling is not supported by statutory or case law or logic. Records that fit the WVFOIA definition of “public records” when created cannot be transformed by a subsequent unilateral act of their creator into records the public has no legitimate interest in accessing.

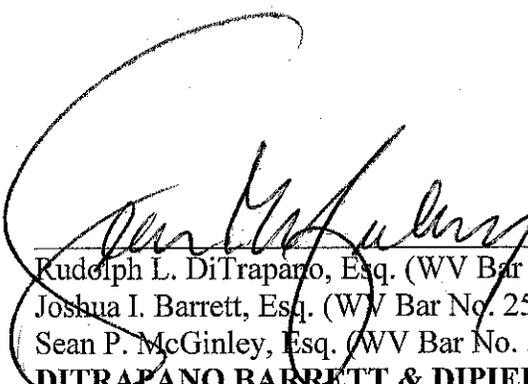
As demonstrated above, the public has a legitimate interest in information contained in public records that, *inter alia*, shed light on the effectiveness of Rule 29 of the West Virginia Rules of Appellate Procedure in preventing Justices from participating in cases in which they have a conflict of interest or in which their participation would create an appearance of impropriety. So too is there a legitimate public concern and interest in determining whether a judge or justice has complied with the canons of judicial conduct when performing official acts.

Appellant Associated Press respectfully requests this Court to reverse the final order of the circuit court of Kanawha County and order the withheld public records disclosed.

PRAYER FOR RELIEF

The Associated Press respectfully requests and prays this Court reverse the Final Order of the Circuit Court of Kanawha County insofar as the Court refused to order the release and disclosure of the eight heretofore undisclosed (8) emails between Justice Mayanrd and Massey Energy CEO Blankenship, affirming the order in all other respects, and remand with directions to the Circuit Court to enter judgment requiring the release of the remaining e-mails. Appellant also requests an award of statutory attorney fees and costs.

THE ASSOCIATED PRESS,
-----Appellant-----
By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 34768

THE ASSOCIATED PRESS,

Appellant,

v.

STEVEN D. CANTERBURY,

Administrative Director of the
West Virginia Supreme Court of Appeals,

Appellee.

CERTIFICATE OF SERVICE

I, Sean P. McGinley, hereby certify on May 15, 2009 I served the foregoing **APPELLANT'S BRIEF** on counsel for Appellee by hand delivery on the following:

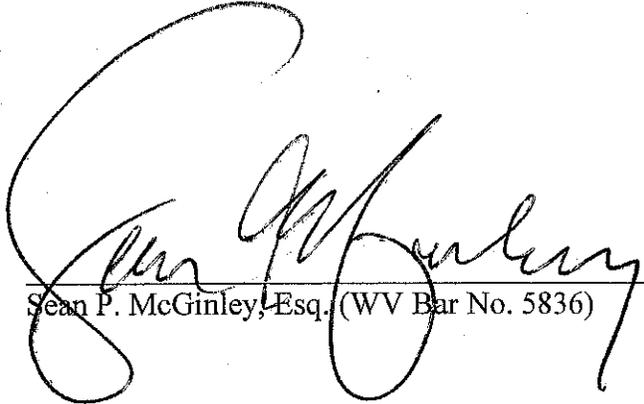
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