

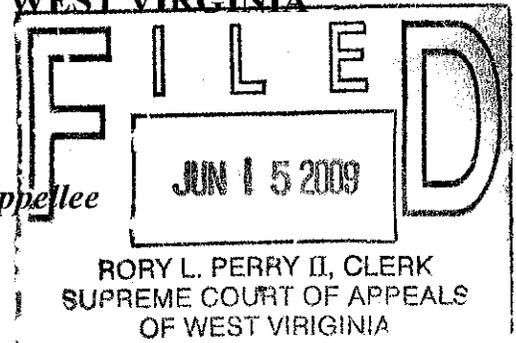
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34768

THE ASSOCIATED PRESS,
Plaintiff Below, Appellant and Cross-Appellee

v.

STEVEN D. CANTERBURY, Administrative Director of the
West Virginia Supreme Court of Appeals,
Defendant Below, Appellee and Cross-Appellant



Hon. Louis H. "Duke" Bloom, Judge
Circuit Court of Kanawha County
Civil Action No. 08-C-835

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I. INTRODUCTION

This is the brief and cross-appeal by the appellee/counter-appellant, Steven D. Canterbury, Administrative Director of the Supreme Court of Appeals of West Virginia, in a case examining the extent to which judicial officers are entitled to privacy with respect to their private and personal e-mails.

The Administrative Director contends that not only did the circuit court not err in refusing to compel the release of eight private and personal e-mails of former Justice Elliott E. Maynard, but the five e-mails for which release was compelled should have been deemed protected from disclosure under the Freedom of Information Act.

Consequently, the Administrative Director requests that the judgment of the Circuit Court of Kanawha County be set aside so as to bring West Virginia into the majority of jurisdictions which protect private and personal e-mails by public officials and employees that do not contain information relating to the conduct of the public's business.

II. STATEMENT OF FACTS

On January 16, 2008, the petitioner, The Associated Press, requested that the Administrative Director provide certain documents pursuant to the Freedom of Information Act.¹ Six days later, on January 22, 2008, the Administrative Director provided much of the information requested by the AP.² Attached to the Administrative Director's prompt response to

¹ Defendant's Response to Plaintiff's Motion for Preliminary and Permanent Injunction, Exhibit A.

² *Id.* at Exhibit B.

the AP's FOIA request was a memorandum by the general counsel for this Court setting forth the reasons the withheld documents were exempt from disclosure.³

On January 23, 2008, a non-lawyer representative of the AP sent another letter to the Administrative Director which did not address the FOIA exemptions raised in the Administrative Director's correspondence.⁴ Five days later, on January 28, 2008, this Court's general counsel responded to this letter, restating "its previously enunciated position" to which the AP's letter was non-responsive.⁵ At that point, the AP did nothing until over a month later when, on February 29, 2008, it sent a much broader request for information.⁶ Within seven days, on March 7, 2008, this Court's general counsel responded to this broader request, agreeing to provide some of the requested documents, indicating that some of the requested documents do not exist, and reiterating the Administrative Director's previous position concerning documents exempt from disclosure under FOIA.⁷

Again, almost three weeks passed without any further activity by the AP, when on March 26, 2008, the AP provided a notice stating: "This letter serves as notice . . . [w]hile the Associated Press believes W. Va. Code § 55-17-1 . . . is inapplicable . . . to Administrative Director Steven D. Canterbury . . . that the Associated Press will assert the claims and seek the relief set forth in the attached Complaint."⁸ Neither the notice nor the draft complaint alleged

³ *Id.* at Exhibit C.

⁴ *Id.* at Exhibit D.

⁵ *Id.* at Exhibit E.

⁶ *Id.* at Exhibit F.

⁷ *Id.* at Exhibit G.

⁸ *Id.* at Exhibit H.

any “irreparable harm.” Moreover, neither the notice nor the draft complaint indicated that the plaintiff intended to seek a preliminary injunction or expedited hearing.

After providing the requisite statutory notice, the AP then filed a complaint for declaratory and injunctive relief on April 30, 2008, less than two weeks prior to the May 2008 primary election in which the subject of the AP’s inquiry was a candidate for reelection.⁹ Thereafter, on May 2, 2008, the AP filed a motion for an expedited hearing and unilaterally scheduled a hearing on its request for injunctive relief on May 12, 2008, the day prior to the May 2008 primary.¹⁰ Finally, on May 6, 2008, the AP served a subpoena on the Administrative Director, returnable to the May 12, 2008, hearing, which the Director moved to quash.¹¹

On May 9, 2008, the Administrative Director filed his response in opposition to the AP’s request for injunctive relief, arguing that (1) the AP had failed to demonstrate any irreparable harm, particularly as it had delayed, until the eve of the primary election, its request for injunctive relief; (2) the AP had failed to verify or file any affidavit in support of its complaint for injunctive relief; (3) FOIA does not apply to private e-mails; (4) FOIA’s application to the “judicial department” is limited to judicial proceedings and administrative matters; and (5) applying FOIA to the private e-mails of judicial officers would violate the separation of powers provision of the West Virginia Constitution.¹²

⁹ Docket Entry No. 1.

¹⁰ Docket Entry Nos. 6, 7.

¹¹ Docket Entry No. 14.

¹² Docket Entry No. 15.

On May 12, 2008, the day prior to the primary election, a hearing was conducted on AP's request for injunctive relief, but the circuit court refused to grant the relief requested; ordered briefing on the issue of subject matter jurisdiction; and scheduled a hearing for June 25, 2008.¹³

As a result of the hearing conducted on June 25, 2008, the circuit court directed the Administrative Director to submit to the Court, under seal, certain e-mail communications that were withheld and to produce a *Vaughn* index, providing a justification as to why each e-mail is exempt from FOIA.¹⁴ On July 7, 2008, the Administrative Director submitted thirteen e-mails, under seal, to the circuit court, and a *Vaughn* index setting forth the exemption claimed was also sent to the circuit court and the AP.¹⁵ Each of the thirteen e-mails contained either a link to an internet news article or editorial, a law firm's website, or a press release.

Although only the thirteen e-mails were the subject of the AP's FOIA request, the circuit court ordered the Administrative Director to research the internet links referenced in the thirteen e-mails, to print those internet articles, and to submit the articles to the circuit court for its review, with which the Administrative Director complied on July 7, 2008,¹⁶ by submitting the articles for which the e-mail links were still active.

On July 18, 2008, the circuit court entered an order requiring the Administrative Director not only to provide copies of the articles for which the internet links were active, but to submit to the Court internet articles, not already provided, under seal, by Friday, July 25, 2008, including

¹³ Docket Entry No. 19.

¹⁴ Docket Entry No. 30.

¹⁵ Docket Entry No. 24.

¹⁶ Docket Entry No. 25.

those for internet links that were no longer active.¹⁷ Because of the difficulty in locating and identifying internet articles for inactive links, the Administrative Director requested additional time and, on July 24, 2008, the circuit court granted an extension to August 1, 2008.¹⁸

On July 30, 2008, the Administrative Director provided the circuit court with an additional four articles for which the internet links were no longer active,¹⁹ and on August 12, 2008, submitted the final article for which the internet link was no longer active.

On September 16, 2008, the circuit court issued its final order, holding that (1) FOIA's application to the "judicial department" is not limited to judicial proceedings and administrative functions, but extends to communications between judges and third-parties who are not judicial employees;²⁰ (2) the application of FOIA to communications between judges and third-parties does not violate separation of powers because the Supreme Court of Appeals has not promulgated rules governing those communications;²¹ (3) e-mails between judges and third-parties who are not judicial employees are "public records" under FOIA where their "content" and "context" relate to the "public's business;"²² (4) five of the thirteen e-mails "regarding Justice Maynard's campaign for re-election are public records subject to disclosure under FOIA;"²³ (5) eight of the thirteen e-mails "are not public records" because they did not "contain

¹⁷ Docket Entry No. 30.

¹⁸ Docket Entry No. 44.

¹⁹ Docket Entry No. 44.

²⁰ Final Order at 8.

²¹ *Id.*

²² *Id.* at 12-13.

²³ *Id.* at 13.

information related to the ‘affairs of government’, Justice Maynard’s ‘official acts’ as a state officer, or the conduct of the public’s business;”²⁴ (6) “had Justice Maynard not recused himself from the *Caperton* case, and other cases involving Massey, these e-mails would have been placed into the public’s business;”²⁵ and (7) the five e-mails were not subject to the “personal information” exemption because they did not “contain information such as that kept in a ‘personal, medical or similar file.’”²⁶

That same day, the Administrative Director, through counsel, transmitted the five e-mails to the AP, together with the associated internet articles.

On September 30, 2008, however, the AP filed a motion for reconsideration, arguing that the circuit court erred in refusing to compel the release of the other eight e-mails.²⁷ On October 20, 2008, however, the circuit court entered an order denying the motion for reconsideration.²⁸

On January 15, 2009, the AP filed an appeal from the circuit court’s rulings, arguing that (1) private communications between judges and third-parties who are not judicial employees are “public records” under FOIA;²⁹ (2) private communications between judges and third-parties are “public records” even if they do not involve the “public’s business;”³⁰ (3) private communications between judges and third-parties are “public records” even if a judge

²⁴ *Id.* (footnote omitted).

²⁵ *Id.* at n.9.

²⁶ *Id.* at 14.

²⁷ Docket Entry No. 56.

²⁸ Docket Entry No. 61.

²⁹ Petition for Appeal at 5.

³⁰ Petition for Appeal at 13-14.

disqualifies himself or herself in all matters in which a third-party communicant might be interested;³¹ (4) there is a legitimate public interest in private communications between judges and third-parties where those communications might be relevant to a judge's disqualification in a particular proceeding;³² and (5) even if neither the requesting party nor anyone else has filed a complaint, there is a legitimate public interest in private communications between judges and third-parties that might evidence a violation of the Code of Judicial Conduct.³³

The Administrative Director submits, however, that (1) private e-mails between a judge and a third-party regarding the judge's re-election efforts are not "public records" under FOIA; (2) private e-mails between a judge and a third-party regarding non-judicial and non-administrative matters are not "public records" under FOIA merely because of the third-party's relationship to litigants in matters pending before the judge; and (3) applying FOIA to compel the production of e-mails between a judge and a third-party regarding private, personal, and non-judicial or administrative matters violates the separation of powers provisions of the West Virginia Constitution.

Wherefore, the Administrative Director requests that the judgment of the Circuit Court of Kanawha County be set aside with a ruling that brings West Virginia into the majority of jurisdictions that protect private and personal e-mails of public officers and employees that do not concern the public's business from compelled disclosure.

³¹ Petition for Appeal at 14-15.

³² Petition for Appeal at 15-16.

³³ Petition for Appeal at 19.

III. STANDARD OF REVIEW

The standard of review of a circuit court's interpretation and application of the Freedom of Information Act is *de novo*.³⁴ Applying a *de novo* standard of review in this case, the Administrative Director submits that the judgment of the Circuit Court of Kanawha County should be reversed and this Court should hold that (1) it is the content of records which determine whether they contain "information relating to the conduct of the public's business" under FOIA; (2) private and personal e-mails between judges and third-parties who are not judicial or governmental officers or employees regarding non-judicial and non-administrative matters are not "public records" and/or are exempted from disclosure under FOIA; (3) private and personal e-mails between judges and third-parties who are not judicial or governmental officers or employees that relate to the re-election activities of judges are not "public records" and are exempted from disclosure under FOIA; (4) private and personal e-mails between judges and third-parties who are not judicial or governmental officers or employees are not "public records" under FOIA merely because of a relationship between those third-parties and litigants appearing before judges; and (5) it would constitute a violation of the separation of powers provision of the West Virginia Constitution to interpret FOIA to compel production of private and personal e-mails between judges and third-parties who are not judicial or governmental officers or employees regarding non-judicial and non-administrative matters.

³⁴ *Farley v. Worley*, 215 W. Va. 412, 419, 599 S.E.2d 835, 842 (2004) ("It is equally well-established that, as here, '[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* [.]').").

IV. RESPONSE TO THE APPELLANT'S ASSIGNMENTS AND APPELLEE'S CROSS-ASSIGNMENTS OF ERROR³⁵

A. THE CIRCUIT COURT ERRED BY FAILING TO HOLD THAT PRIVATE AND PERSONAL E-MAILS BETWEEN JUDGES AND THIRD-PARTIES REGARDING NON-JUDICIAL AND NON-ADMINISTRATIVE MATTERS ARE NOT "PUBLIC RECORDS" AND/OR ARE OTHERWISE EXEMPTED UNDER THE FREEDOM OF INFORMATION ACT.

The circuit court erred in this case by failing to hold that private and personal e-mails between judges and third-parties regarding non-judicial and non-administrative matters are not "public records" and are otherwise exempted under the Freedom of Information Act. The circuit court also erred by ruling that private and personal e-mails between judges and third-parties regarding re-election activities contain "information relating to the conduct of the public's business" under the Freedom of Information Act. Finally, the circuit court erred by ruling that private and personal e-mails between judges and third-parties contain "information relating to the conduct of the public's business" under the Freedom of Information Act if those third-parties have relationships with litigants in cases pending before those judges.

1. The Freedom of Information Act Applies Only to a "Public Record" Containing "Information Relating to the Conduct of the Public's Business" and Exempts "Information of a Personal Nature" Where "Public Disclosure Would Constitute an Unreasonable Invasion of Privacy."

The AP's entire "public record analysis" is as follows: "The e-mail records in question were prepared and retained on the West Virginia Supreme Court of Appeals computer server."³⁶ Significantly, the AP's analysis completely ignores the plain language of the statute as well as the substantial weight of authority from other jurisdictions holding that private and personal e-

³⁵ In addition to responding to the AP's assignments of error, the Administrative Director cross-assigns errors in the record to his prejudice pursuant to the provisions of R. App. P. 10(f).

³⁶ Appellant's Brief at 10.

mails are not “public records” merely because they were created during regular business hours and are resident on government-owned servers.

Plainly, the AP and its amici would like nothing more than for this Court to hold that every e-mail by every public officer or employee created during business hours or on governmental equipment is a “public record,” including e-mails to friends, family members, and others concerning private and personal matters irrespective of whether the content of those e-mails relates to the conduct of the public’s business. If the AP or other media are interested, for example, in the relationship between a public officer or employee and their e-mail correspondent, then, according to the AP, those e-mails become a matter of public interest compelling their disclosure under FOIA. The problem with this simplistic, self-fulfilling argument, however, is that it is contrary to the plain language of the statute and a wealth of authority around the country.

The Freedom of Information Act applies only to “public record[s] of a public body”³⁷ and a “public record” concerns only “information relating to the conduct of the public’s business.”³⁸ The law is clear that a private e-mail by a public official or employee to a private citizen regarding non-governmental matters is not a “public record” subject to compelled disclosure under a freedom of information statute. The Freedom of Information Act also exempts “information of a personal nature” from disclosure where “the public disclosure thereof would constitute an unreasonable invasion of privacy.”³⁹ Only where “the public interest by clear and

³⁷ W. Va. Code § 29B-1-3.

³⁸ W. Va. Code § 29B-1-2(4)(emphasis supplied).

³⁹ W. Va. Code § 29B-1-4(a)(2).

convincing evidence requires disclosure in the particular instance”⁴⁰ can the public disclosure of such information be compelled. Here, the AP presented no “clear and convincing evidence” that private and personal e-mails between a judge and a third-party regarding non-judicial and non-administrative matters should be subject to compelled disclosure under FOIA.⁴¹

2. The Freedom of Information Act Does Not Apply and Otherwise Exempts Personal and Private E-Mails Between Judges and Third-Parties Regarding Non-Judicial and Non-Administrative Matters Even Where Those E-Mails Reference Those Judges’ Re-Election Activities or Those Third-Parties Are Corporate Directors of Litigants Appearing Before Those Judges as Long as Those E-Mails are Unrelated to the Litigation.

Article VIII, Section 3 of the West Virginia Constitution provides that, “The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law. The court shall have general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts. The chief justice shall be the administrative head of all the courts.” Thus, under our constitutional framework, the judiciary is an independent branch of state government entitled to conduct its business under rules promulgated by the Supreme Court of Appeals. For example, this Court has adopted a Code of

⁴⁰ *Id.* (emphasis supplied).

⁴¹ The AP’s first assignment of error – “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” – has no merit. The circuit court expressly held that “FOIA’s exemptions are to be strictly construed, whereas, the disclosure provisions of FOIA must be liberally construed.” Order at 6. Merely because the circuit court did not agree with the AP’s FOIA construct does not mean that the circuit court failed to apply the correct standard. *See, e.g., UB Services, Inc. v. Gatson*, 207 W. Va. 365, 532 S.E.2d 365 (2000) (“[t]his ‘liberality’ rule is not to be utilized when its application would require us to ignore the plain language of the statute.” *Adkins v. Gatson*, 192 W. Va. 561, 565, 453 S.E.2d 395, 399 (1994) (citation omitted).”).

Judicial Conduct, based upon a model code adopted by the American Bar Association, which governs the conduct of judges, including the Justices of the Supreme Court of Appeals.

None of the Canons of the Code of Judicial Conduct were implicated by the private, personal, non-judicial, and non-administrative e-mails involved in this case and, to the extent that the AP believed to the contrary, its remedy was with the Judicial Investigation Commission, not an action under the Freedom of Information Act.⁴²

Canon 2B of the Code of Judicial Conduct provides, "A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment." Judges, however, are not precluded from having a normal life, including social relationships:

Judges, after all, must live in the real world and cannot be expected to sever all of their ties with it upon taking the bench. Nor would it be entirely beneficial to the judicial process for judges to isolate themselves from the rest of society. Involvement in the outside world enriches the judicial temperament and enhances a judge's ability to make difficult decisions. As Justice Oliver Wendell Holmes, Jr. put it, "the life of the law has not been logic: it has been experience."

⁴² If, indeed, as the AP insinuates at length in its brief, Appellant's Brief at 12-29, there has been some violation of the Code of Judicial Conduct and/or this Court's recusal rules violate federal and/or state due process, then it begs the question of why neither the AP nor any of its amici, perfectly willing to participate in this litigation, have bothered to file a complaint or otherwise take any legal action to advance their claims; such inaction reminds one of the wisdom of President Theodore Roosevelt who said:

It is not the critic who counts: not the man who points out how the strong man stumbles or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood, who strives valiantly, who errs and comes up short again and again, because there is no effort without error or shortcoming, but who knows the great enthusiasms, the great devotions, who spends himself for a worthy cause; who, at the best, knows, in the end, the triumph of high achievement, and who, at the worst, if he fails, at least he fails while daring greatly, so that his place shall never be with those cold and timid souls who knew neither victory nor defeat.

"Citizenship in a Republic," Speech at the Sorbonne, Paris, April 23, 1910.

In the real world, judges do not live in ivory towers. They have relatives, friends, and professional acquaintances. They know lawyers, some of whom may have been their law school colleagues, professional associates, or even their partners.⁴³

Thus, the AP's arguments to the contrary notwithstanding, not every letter, note, text message, voice message, e-mail, or other communication between a judge and a relative, friend, or professional acquaintance involves the "public's business." All of the subject e-mails in this case, for example, involve purely private matters and none made any reference, directly or indirectly, to any proceedings before this Court.⁴⁴

Canon 3B(7) provides, "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 concerning a pending or impending proceeding" Here, however, none of the subject e-mails consisted of any ex parte communications or referenced any judicial or administrative matters.

There are four reasons why the subject e-mails are exempt from disclosure under FOIA.

⁴³ Shaman & Fouts, *The Impact of Judicial Relationships on the Appearance of Impartiality*, 11 No. 4 Judicial Conduct Reporter 1 (Winter 1990).

⁴⁴ Indeed, of the thirteen e-mails, five have no text, but include only a link to internet articles. Of the remaining eight e-mails, two are addressed to "Sandra," who apparently works for Don Blankenship, an acquaintance of former Justice Maynard. Of the remaining six e-mails, all make only brief references to the internet article links included or, in the case of one e-mail, an attachment of a Chamber of Commerce meeting agenda. Again, there is absolutely no reference or even suggestion in any of the e-mails to any proceeding before this Court. Rather, all of the e-mails are private communications by the sender to the recipient concerning matters well outside the "public record" and the "public's business." In fact, even the circuit court was unable to determine the subject matter of many of the e-mails without ordering that copies of the articles referenced by links embedded within the e-mails be produced. The Administrative Director has been unable to find any precedent for ordering a public body to produce non-public documents referenced in disputed documents for the purposes of determining whether the disputed documents are subject to a freedom of information statute.

First, despite the AP's misstatements to the contrary, the recipient of the subject e-mails was not a party to the litigation which was the subject of the AP's investigation;⁴⁵ rather, he was merely a corporate officer of a party. Moreover, as one court has noted, “[A judge] must have neighbors, friends and acquaintances, business and social relations . . . the ordinary results of such associations and the impressions they create in the mind of the judge are not the ‘personal bias or prejudice’ to which the statute refers.”⁴⁶ The assertion by the AP's amici that “*Any communication between*” the “head of a company that was a party to pending litigation” and a judicial officer “*relates to how the Court conducted the public's business in the administration of justice,*”⁴⁷ speaks for itself. Obviously, it is not infrequent for judicial officers to have private and personal communications with any number of people in the community that might have an ownership or other interest or connection with a corporate entity with a case pending. Neither the Code of Judicial Conduct nor common sense, however, render such communications, if wholly unrelated to the case pending, improper, unethical, or a matter of the “public's business.”

Second, none of the subject e-mails reference any aspect of any proceeding before this Court, including the litigation which was the subject of the AP's investigation, and it is well-

⁴⁵ Rather, the parties were A.T. Massey Coal Company, Inc.; Elk Run Coal Company, Inc.; Independence Coal Company, Inc.; Marfork Coal Company, Inc., Performance Coal Company; and Massey Coal Sales Company, Inc. See *Caperton v. A.T. Massey Coal Co., Inc.*, 2008 WL 918444 (W. Va.).

⁴⁶ *Comm. of Pa. v. Int'l Union of Operating Engineers*, 388 F. Supp. 155, 159 (E.D. Pa. 1974)(quoting *United States v. Gilboy*, 162 F. Supp. 384, 400 (M.D. Pa. 1958)).

⁴⁷ Amici Brief at 5 (emphasis in original).

settled that a judge's communications with even parties to litigation that does not concern pending or impending litigation is not prohibited.⁴⁸

Third, the e-mails that were directed to be released by the circuit court were broadly related to the sender's re-election activities, which do not involve the "public's business" within the meaning of the Freedom of Information Act,⁴⁹ or were completely unrelated to any judicial or administrative matters.

⁴⁸ In *Matter of Phalen*, 197 W. Va. 235, 242, 475 S.E.2d 327, 334 (1996), for example, where a family law master engaged in ex parte communications with litigants in cases before the master in the form of solicitations to sell Amway products, this Court stated:

In addition to the actual enumerated exceptions to the prohibition of ex parte communications found in Canon 3B(7), a nonenumerated qualification is embedded in the canon. The canon expressly states that ex parte communications "concerning" pending or impending litigation are prohibited. The use of the word "concerning" informs us that ex parte communication that "does not concern" pending or impending litigation is a nonenumerated exception to the canon's prohibition.

(emphasis supplied). If a judicial officer encounters a litigant in a check-out line at a local grocery store, they can talk about the weather and the fortunes or misfortunes of the local sports team to their heart's content. As long as their communication does not "concern[] a pending or impending proceeding," there is no violation of Canon 3B(7) of the Code of Judicial Conduct. Moreover, in the instant case, the recipient of the thirteen e-mails over a twenty-two month period was not even a litigant.

⁴⁹ In *Gallant v. N.L.R.B.*, 26 F.3d 168 (D.C. Cir. 1994), the issue was whether letters and faxes sent by an NLRB member to various persons seeking her re-nomination to the board were subject to the federal freedom of information act. Like the e-mails in the present case, these communications did not involve government business, but were purely for the advancement of the sender's interests. Under those circumstances, the District of Columbia Court of Appeals reasoned as follows:

However, "in cases . . . where documents are created by an agency employee and located within the agency, *use of the document becomes more important in determining the status of the document under FOIA.*" *Bureau of Nat'l Affairs*, 742 F.2d at 1490 (emphasis added). In such cases an agency employee's creation of a document can be attributed to an agency depending on "the purpose for which the document was created, the actual use of the document, and the extent to

Fourth, the Supreme Courts of Arizona, Arkansas, Colorado, Ohio, and Florida have all held that private and personal e-mails by public officers and employees that do not involve the public's business, like the e-mails in this case, are exempt from public disclosure.⁵⁰

In *Griffis v. Pinal County*,⁵¹ the Supreme Court of Arizona held:

Disclosure of purely private documents does nothing to advance the purposes underlying the public records law. The contents of

which the creator of the document and other employees acting within the scope of their employment relied upon the document to carry out the business of the agency." Id. at 1493. Thus, appellant's suggested test that employing agency resources, standing alone, is sufficient to render a document an "agency record," is inconsistent with governing precedent.

On the facts before the district court at summary judgment, we reach the same conclusion that court did. The Cracraft letters were "personal records" of Mary Cracraft, and not "agency records" within the meaning of the FOIA. Nothing in the record here indicates that Cracraft created the correspondence with anything other than the purely personal objective of retaining her job. The actual use of the correspondence, and Cracraft and other employees' lack of reliance on the correspondence to carry out the business of the agency, also supports the district court's finding that the documents were not agency records. Accordingly, even though employing agency resources in the creation of the correspondence is a relevant factor in the agency record analysis, the utilization of agency resources in this case is not as significant as the other factors employed in our precedents, which compel a conclusion that the Cracraft correspondence was personal, rather than attributable to the agency.

(emphasis supplied). Likewise, in the instant case, where the e-mails were sent by a private e-mail account and referenced the sender's personal campaign activities, they simply fail to satisfy the "public's business" test under the West Virginia Freedom of Information Act.

⁵⁰ In the circuit court, the AP dismissed the overwhelming authority contrary to its position as "interpretations of dissimilar foreign States' statutes," Plaintiff's Motion at 8, as if Arizona, Arkansas, Colorado, Ohio, Florida, and other states with nearly identical provisions were remote provinces in China. In both the circuit court's ruling and the AP's brief to this Court, the existence of these decisions is never even acknowledged, let alone distinguished. Yet, these decisions rest upon the simple distinction between "public" information, to which FOIA statutes apply, and "private" information, to which they do not.

⁵¹ 215 Ariz. 1, 156 P.3d 418 (2007).

purely private documents shed no light on how the government is conducting its business or spending taxpayer money.

* * *

Applying the principles discussed above, we reject PNI's argument that all e-mails generated or maintained on a government-owned computer system are automatically public records.⁵² Some e-mails will relate solely to personal matters and will not, therefore, reflect the requisite substantial nexus with government activities. *Accord Denver Publ'g Co. v. Bd. of County Comm'rs*, 121 P.3d 190, 192, 199 (Colo. 2005); *City of Clearwater*, 863 So.2d at 152-54; *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't*, 82 Ohio St.3d 37, 693 N.E.2d 789, 792-93 (1998).⁵³

Consequently, the court set aside an order requiring disclosure of e-mails alleged to be private. Similarly, in the instant case, the e-mails requested relate solely to personal matters, and not to the "public's business," and should have been held to have been exempt from disclosure.

In *Pulaski County v. Arkansas Democrat-Gazette, Inc.*,⁵⁴ the Supreme Court of Arkansas held that e-mails between a county comptroller and other individuals were exempt from disclosure to the extent that they did not involve public matters, stating as follows:

⁵² See also *Democratic National Committee v. United States Department of Justice*, 539 F. Supp. 2d 363, 367 (D.D.C. 2008) ("Moreover, plaintiff fails to point to any case law that would indicate that the server where an e-mail is housed is relevant to its treatment under FOIA. Rather, under D.C. Circuit precedent, it is the content, not the form, of the communication that determines whether it is properly exempt under Exemption 5.") (citation omitted); *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 441, 260 S.W.3d 718, 722 (2007) ("An argument can be made that if an employee is using state computer resources for personal correspondence, that use reflects the 'lack of performance of official functions,' either because state computing resources are being misappropriated or because the employee is handling personal matters while on the state clock. With regard to e-mail at least, that argument is a stretch. Given the prevalence of both public and private employees using their office computers for personal correspondence, employees likely will be able to assert a reasonable expectation of privacy in personal e-mail even if it is generated on a public computer.") (emphasis supplied).

⁵³ *Id.* at 5, 156 P.3d at 422.

⁵⁴ 370 Ark. 435, 446, 260 S.W.3d 718, 725 (2007)

[I]t is necessary to conduct an in camera review of the e-mails to discern whether these e-mails relate solely to personal matters or whether they reflect a substantial nexus with Pulaski County's activities, thereby classifying them as public records.

Again, this is a content-based analysis, focusing not upon the status of the sender, the recipient, or whether the e-mail was sent during regular business hours using governmental equipment, but upon the content of the e-mails and whether they relate to the public's business.

In *Denver Publishing Co. v. Bd. of County Commissioners*,⁵⁵ the Supreme Court of Colorado set aside an order requiring the compelled disclosure of allegedly private e-mails exchanged between county employees, stating as follows:

To be a "public record", an e-mail message must be for use in the performance of public functions or involve the receipt and expenditure of public funds. The simple possession, creation, or receipt of an e-mail record by a public official or employee is not dispositive as to whether the record is a "public record". The fact that a public employee or public official sent or received a message while compensated by public funds or using publicly-owned computer equipment is insufficient to make the message a "public record."⁵⁶

Additionally, the court held:

After considering the content of the e-mail messages, as required by the statute, we conclude that not all of the e-mail messages at issue here have a demonstrable connection to the performance of public functions or involve the receipt or expenditure of public funds.

Again, as none of the e-mails requested in this case are related to the performance of public functions or the receipt or expenditure of public funds, they are exempt from disclosure.

⁵⁵ 121 P.3d 190 (Colo. 2005).

⁵⁶ *Id.* at 199.

In *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*,⁵⁷ the Supreme Court of Ohio held that private e-mails by sheriff's department employees were not "public records" for purposes of compelled disclosure. Despite the legitimate inquiry of whether those e-mails contained racial slurs, the court held

The requested e-mail does not constitute "records" for purposes of R.C. 149.011(G) and 149.43. R.C. 149.43(A)(1) "does not define a 'public record' as any piece of paper on which a public officer writes something." *State ex rel. Steffen v. Kraft* (1993), 67 Ohio St. 3d 439, 440, 619 N.E.2d 688, 689. "To the extent that any item * * * is not a 'record,' i.e., does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed." *State ex rel. Fant v. Enright*, 66 Ohio St.3d at 188, 610 N.E.2d at 999. If, as alleged by Wilson-Simmons, the requested e-mail consists of racist slurs against her by individual co-workers, then, although reprehensible, the e-mail does not serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the sheriff's department. There is no evidence or allegation that the alleged racist e-mail documented sheriff's department policy or procedures. It was allegedly circulated only to a few co-workers and was not used to conduct sheriff's department business.

This conclusion, that the requested e-mail is not a record for purposes of R.C. 149.43, is supported by both state and federal precedent. See *Steffen*, 67 Ohio St.3d at 439, 619 N.E.2d at 689 ("A trial judge's personal handwritten notes made during the course of a trial are not public records."), and cases cited at 67 Ohio St.3d at 440, 619 N.E.2d at 689; *Internatl. Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Voinovich* (1995), 100 Ohio App.3d 372, 654 N.E.2d 139 (Governor's personal calendars and appointment books did not constitute records subject to disclosure under R.C. 149.43 because they did not serve to document any official activities or functions.); *Bur. of Natl. Affairs, Inc. v. United States Dept. of Justice* (C.A. D.C. 1984), 742 F.2d 1484, 1492 ("Where, as here, a document is created by an agency employee, consideration of whether and to what extent that employee used the document to conduct agency business is highly relevant for determining whether that document

⁵⁷ 82 Ohio St. 3d 37, 693 N.E.2d 789 (1998).

is an 'agency record' within the meaning of FOIA [the federal Freedom of Information Act]."); *Gallant v. Natl. Labor Relations Bd.* (C.A. D.C. 1994), 26 F.3d 168, 172 (“[E]ven though employing agency resources in the creation of the correspondence is a relevant factor in the agency record analysis, the utilization of agency resources in this case is not as significant as the other factors employed in our precedents, which compel a conclusion that the * * * correspondence was personal, rather than attributable to the agency.”).

Therefore, although the alleged racist e-mail was created by public employees via a public office's e-mail system, it was never used to conduct the business of the public office and did not constitute records for purposes of R.C. 149.011(G) and 149.43.FN1 *See Bureau of Natl. Affairs and Gallant.*⁵⁸

Similarly, in the instant case, a “public record” under the Freedom of Information Act requires “information relating to the conduct of the public’s business, prepared, owned and retained by a public body.”⁵⁹ Consequently, private e-mails by public officials and employees which do not relate “to the conduct of the public’s business” are outside its purview.

In *State v. City of Clearwater*,⁶⁰ the Supreme Court of Florida likewise affirmed an order rejecting a newspaper’s efforts to seek an order compelling a municipality to release all e-mail sent from or received by two city employees who used government-owned computers for communication. The court reasoned as follows:

“In construing a statute, we look first to the statute's plain meaning.” *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So.2d 898, 900 (Fla. 1996). Based on the plain language of section 119.011(1), we agree with the Second District's conclusion that “private” or “personal” e-mails “simply fall[] outside the current definition of public records.” *Times Publishing*, 830 So.2d at 847. As the Second District explained:

⁵⁸ *Id.* at 41-42, 693 N.W.2d at 792-93.

⁵⁹ W. Va. Code § 29B-1-2(4)(emphasis supplied).

⁶⁰ 863 So. 2d 149 (Fla. 2003).

Such e-mail is not “made or received pursuant to law or ordinance.” Likewise, such e-mail by definition is not created or received “in connection with the official business” of the City or “in connection with the transaction of official business” by the City. Although digital in nature, there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk.⁶¹

Indeed, judicial e-mails, which are the very subject of the instant case, are exempt from disclosure, under the same rationale, under Florida law:

This conclusion is supported by this Court's decision in *In re Amendments to Rule of Judicial Administration 2.051-Public Access to Judicial Records*, 651 So.2d 1185 (Fla.1995), in which we discussed the public's right of access to the judicial branch's official business e-mail:

Official business e-mail transmissions must be treated just like any other type of official communication received and filed by the judicial branch. . . . *E-mail may include transmissions that are clearly not official business and are, consequently, not required to be recorded as a public record.*

Id. at 1187 (emphasis supplied).

Although public access to records of the judicial branch is governed by court rule rather than by chapter 119, we recently acknowledged that the definition of “judicial records” contained in Florida Rule of Judicial Administration 2.051 “is virtually identical to the legislative definition of ‘public records’ contained in section 119.011(1) . . . insofar as section 119.011(1) defines ‘public records’ as ‘all documents . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.’” *Media Gen. Convergence*, 840 So.2d at 1014. Thus, this Court's determination that judicial e-mails that are not

⁶¹ *Id.* at 153 (emphasis supplied).

made or received in connection with official business are not required to be recorded as public records also applies to agency e-mails governed by chapter 119.⁶²

In rejecting the newspaper's argument that private e-mails are public record by virtue of their existence on government e-mail servers, the court further reasoned:

We agree with the trial court's observation that "[c]ommon sense ... opposes a mere possession rule." The trial court explained:

This court noted several times during hearings on this case the absurd consequences of such an application of the law. If the Attorney General brings his household bills to the office to work on during lunch, do they become public record if he temporarily puts them in his desk drawer? If a Senator writes a note to herself while speaking with her husband on the phone does it become public record because she used a state note pad and pen? The Sheriff's secretary, proud of her children, brings her Mother's Day cards to the office to show her friends. Do they become public records if she keeps them in the filing cabinet?

Times Publishing Co. v. City of Clearwater, No. 00-8232-CI-13 at 10 (6th Cir Ct. order filed May 21, 2001). Just as an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of "public records," see *Wisner v. City of Tampa Police Dept.*, 601 So.2d 296, 298 (Fla. 2d DCA 1992), private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer. The determining factor is the nature of the record, not its physical location.⁶³

Moreover, a private e-mail by a public officer or employee regarding non-public subject matter does not become public just because the media expresses an interest in such e-mail. In the Florida case, for example, the newspaper sought the subject e-mails because of allegations that

⁶² *Id.* (emphasis supplied).

⁶³ *Id.* at 154 (emphasis supplied).

city employees “were utilizing their public time and resources for personal benefit,”⁶⁴ an issue of obvious legitimate public interest. Nevertheless, the Supreme Court of Florida held that the private e-mails of public employees were not “public records.”⁶⁵ Similarly, in the case sub judice, a media inquiry does not convert private e-mails of judicial officers and employees into “public records.”⁶⁶

Significantly, the overwhelming majority of courts that have considered the issues in this case have rejected the same arguments advanced by the AP and adopted by the circuit court. Indeed, it has been observed that cases in the foregoing jurisdictions and others “evinced a trend toward creating a distinction between public and personal e-mail records that would exclude personal e-mails from the scope of state public records statutes.”⁶⁷

⁶⁴ *Times Publishing Co. v. City of Clearwater*, 830 So. 2d 844, 848 (Fla. Ct. App. 2002).

⁶⁵ In addition to the Supreme Courts of Arizona, Arkansas, Colorado, Ohio, and Florida, the Washington Court of Appeals has also held that a public employee’s e-mails that are private in nature are exempt from disclosure. *See Tiberino v. Spokane County*, 103 Wash. App. 680, 689-90, 13 P.3d 1104, 1109 (2000) (“Ms. Tiberino’s e-mails contain intimate details about her personal and private life and do not discuss specific instances of misconduct. . . . Any reasonable person would find disclosure of Ms. Tiberino’s e-mails to be highly offensive.”).

⁶⁶ The AP attempts to divert attention away from the e-mails, which are the alleged “public records” at issue, to the controversy which resulted in its efforts to secure the e-mails. Specifically, the AP argues that, “the participation by Justice Maynard in the *Caperton* and other Massey cases were ‘official acts’ of a ‘public official’ . . . as those terms are used in *W. Va. Code* § 29B-1-1.” Appellant’s Brief at 14; *see also id.* at 16. In fact, the AP boldly states, “their content . . . is not before this Court.” *Id.* at 16. This is simply wrong. If the e-mails themselves are not “public records” as that term is defined under FOIA, the inquiry ends there. They do not become “public records” because something outside their existence makes the AP or any other media organization interested in their disclosure. It is for this reason that other courts have rejected similar attempts by media organizations to secure access to personal and private e-mails that themselves do not involve the public’s business.

⁶⁷ Peter S. Kozinets, *Access to the E-Mail Records of Public Officials: Safeguarding the Public’s Right to Know*, 15 *Communications Lawyer* 17, 24 (2007).

In contrast, the only cases cited by the AP in its brief⁶⁸ and relied upon by the circuit court⁶⁹ not only represent a clear minority position, they actually support, upon careful examination, the Administrative Director's position.⁷⁰

⁶⁸ Appellant's Brief at 17-18.

⁶⁹ Final Order at 11-12.

⁷⁰ Alternatively, the AP argued and the circuit court erroneously held that the statutes in the cases relied upon by the Administrative Director were dissimilar. Final Order at 11. Both the AP and the circuit court are simply incorrect.

In Arizona, for example, the term "records" is defined as "all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, including prints or copies of such items produced or reproduced on film or electronic media pursuant to § 41-1348, made or received by any governmental agency in pursuance of law or in connection with the transaction of public business . . ." A.R.S. § 41-1350 (emphasis supplied). The Arizona phrase "transaction of public business" is virtually identical to West Virginia's "conduct of the public's business."

In Arkansas, the term "public records" is defined as "writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds." Ark. St. § 25-19-104(5)(A) (emphasis supplied). The focus in Arkansas, as in West Virginia, is on whether the record relates to the public's business.

In Colorado, the term "public records" is defined as "all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation incorporated pursuant to section 23-5-121(2), C.R.S., or political subdivision of the state . . .," C.R.S.A. § 24-72-202(6)(a)(1), and places no limitation upon such records. This definition is even broader than West Virginia's.

In Florida, the term "public records" is defined as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." F.S.A. § 119.011 (11) (emphasis supplied). Again, the Florida phrase "transaction of official business" is nearly identical to West Virginia's "conduct of the public's business."

In Ohio, the last state in which an appellate court of last resort has embraced the position advocated by the defendant, the term "records" is defined as "any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section

In California, for example, where the term “public records” is defined as “information relating to the conduct of the public’s business,” as in West Virginia, the court held that “purely personal information unrelated to ‘the conduct of the public’s business,’” is not covered by the California statute.⁷¹ At issue in *Commission* was access to the “the names, employing departments, and hiring and termination dates of California peace officers included in the Commission’s database.”⁷² Obviously, as to this type of routine information, the court had no difficulty in holding that these records “relate to the public’s business, because the Commission uses them to monitor the compliance of participating departments with Commission regulations, which is a requirement for eligibility for the services and state funding provided by the Commission.”⁷³ The California court’s analysis makes clear, however, that where e-mails not “related to the public’s business” are involved, it would hold, as have the courts of last resort in Arizona, Colorado, Florida, and Ohio that they are not subject to compelled disclosure.

In Idaho, the term “public record” is defined as “any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency

1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” Ohio R.C. §149.011(G) (emphasis supplied). The Ohio phrase “other activities of the office” is substantially similar to West Virginia’s “conduct of the public’s business.”

⁷¹ *Commission on Peace Officer Standards and Training v. Superior Court*, 42 Cal. 4th 278, 288, 165 P.3d 462, ___, 64 Cal. Rptr. 3d 661, 667 (2007).

⁷² *Id.* at 284, 165 P.3d at ___, 64 Cal. Rptr. 3d at 664.

⁷³ *Id.* at 288 n.3, 165 P.3d at ___ n.3, 64 Cal. Rptr. 3d at 667 n. 3.

regardless of physical form or characteristics.”⁷⁴ Accordingly, it has been observed, “The Idaho public records law provides one of the broadest definitions of public records in the country.”⁷⁵ Even under Idaho’s extraordinarily broad statute, however, the court in *Cowles Pub. Co. v. Kootenai Co. Bd. of County Commissioners*,⁷⁶ rejected one of the AP’s arguments, stating as follows: “It is not simply the fact that the e-mails were sent and received while the employees were at work or the fact that they were ‘in’ the employee’s office that makes them a public record.” In other words, like the cases relied upon by the Administrative Director, an e-mail which is sent or received using a government-owned computer or server does not render “public” a private e-mail; rather, in order to be a “public record,” an e-mail must relate to “the conduct of the public’s business.” This standard was easily satisfied in *Cowles*:

Turning to the first portion of this definition, it is clear that the emails contain information relating to the conduct and administration of the public's business. The public has a legitimate interest in these communications between this elected official and the employee whom he hired and supervised because when the JET Court's financial problems and eventual demise became apparent to the public, Douglas defended Kalani's management to both the Board and the public. Whether he did so as her supervisor defending her job performance, or whether he did so because of an alleged inappropriate relationship is a public concern. Put another way, Douglas's reasons for defending Kalani relate to the conduct and administration of the public's business. Likewise, ICRMP, the County's insurer who examined the emails in relation to Cowles's public record request, settled a potential defamation claim brought by Kalani against the County. The email's content relates to the public's business because the public's business includes job performance by a county employee, the spending policies of a county program, the issues surrounding that program's demise,

⁷⁴ Idaho I.C. § 9-337(13).

⁷⁵ *Access to the E-Mail Records*, *supra* at 18.

⁷⁶ 144 Idaho 259, 159 P.3d 896, 901 (2007).

other employment related claims, and the validity and circumstances surrounding the defamation claim.⁷⁷

Conversely, e-mails between a public official or employee and a private citizen wholly unrelated to the “conduct of the public’s business,” but rather forwarding links to articles on such topics as Muslim marriage, global warming, or state politics, has nothing to do with the “conduct of the public’s business.”

The majority of jurisdictions that have considered the issue have ruled that communications between a public officer or employee and a citizen which are private, personal, and do not involve the conduct of the public’s business, are not subject to compelled disclosure irrespective of whether they were transmitted using publicly-owned equipment or whether the media has a self-proclaimed “public interest” in those communications.⁷⁸ Each of those

⁷⁷ *Id.* at 900 (emphasis supplied). In its brief, the AP describes *Cowles* as follows: “One other court has addressed this precise issue, and concluded that content is not the determinative factor” Appellant’s Brief at 16. First, as the highlighted text of the *Cowles* opinion indicates, the Idaho Supreme Court did focus on the content of the disputed emails. Second, the qualification “[o]ne other court” in the AP’s brief highlights that the overwhelming majority of courts which have examined the issue of the compelled disclosure of private and personal e-mails under freedom of information acts have concluded that whether they meet the statutory definition of a “public document” depends upon their content. In this case, there is no dispute that if only the content of the e-mails is examined, none of them meet our statutory definition of a “public record” because none were even remotely related to “the public’s business.” That is why the AP asks this Court to ignore the “content” of the e-mails because “it is the context in which they were created that make them public records.” Appellant’s Brief at 18.

⁷⁸ Just as a lawyer who asks a question during a trial or hearing invariably believes that it is relevant, any media representative who seeks private communications between a judge and a third-party invariably believes that there is a “public interest” in the subject matter. But, just as a presiding judge must rule on objections to a lawyer’s question under the Rules of Evidence, a court must rule on objections to a public official’s or entity’s refusal to disclose documents requested under the freedom of information statute. Otherwise, under the AP’s approach, every request becomes an exercise in self-fulfillment because as long as a document exists, it is by definition a matter of “public concern” or “public interest” because the request was made. Fortunately, the majority of jurisdictions have rejected this borderless and overly-simplistic approach.

jurisdictions has similar statutes with similar declarations of salutary purpose, but sanctimoniously draping oneself in the mantle of broad legislative purpose,⁷⁹ as the AP in this case, has been inadequate for media representatives in those jurisdictions to overcome the commonsense limitations incorporated into such statutes. Likewise, the Administrative Director submits that this Court should bring West Virginia law into the majority of jurisdictions and hold that communications between judges and third-parties regarding private, personal, and non-judicial or administrative matters are not “public records” under the Freedom of Information Act.⁸⁰

⁷⁹ As previously discussed, the timing of the AP’s filing of a motion for expedited relief, after weeks of inactivity, as well as the timing of its notice of hearing, to occur on the day prior to the primary election, raises a legitimate question of whether its motives were journalistic or political. Moreover, in its brief, the AP goes far afield of the matters litigated in the circuit court, and embarks on a thinly-veiled attack of this Court’s recusal rules, Appellant’s Brief at 21-24, including references to the petition for writ of certiorari and amici briefs and newspaper editorials in support of the petitioner in *Caperton v. A.T. Massey Coal Co., Inc.*, U.S. S. Ct. Docket Nos. 08-22 and 08-217, Appellant’s Brief at 21-24, where the non-recusal of another Justice is the primary issue.

⁸⁰ Alternatively, the Administrative Director asserts that the subject e-mails satisfy the five-factor test for the “personal information” exemption. See Syl. pt. 2, *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986) (“In deciding whether the public disclosure of information of a personal nature under W. Va. Code § 29B-1-4(2) (1980) would constitute an unreasonable invasion of privacy, this Court will look to five factors: 1. Whether disclosure would result in a substantial invasion of privacy and, if so, how serious. 2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure. 3. Whether the information is available from other sources. 4. Whether the information was given with an expectation of confidentiality. 5. Whether it is possible to mould relief so as to limit the invasion of individual privacy.”). With respect to the e-mails in question, the Administrative Director submits that (1) their disclosure would result in an invasion of privacy; (2) the value of the public interest in learning primarily what URL links (wholly unrelated to the public’s business) were sent between a judicial officer and a private citizen is dubious at best; (3) the information (an acquaintance between the judicial officer and the private citizen) is and was well-known; (4) the information (private e-mails) was sent with a reasonable expectation of privacy; and (5) it would not be possible to mold relief (particularly in light of the limited subject matter of the e-mails) that would limit the invasion of privacy.

B. THE CIRCUIT COURT ERRED BY INTERPRETING THE WEST VIRGINIA FREEDOM OF INFORMATION ACT TO COMPEL PRODUCTION OF COMMUNICATIONS BETWEEN JUDGES AND THIRD-PARTIES REGARDING PRIVATE, PERSONAL, AND NON-JUDICIAL OR ADMINISTRATIVE MATTERS.

In addition to its inapplicability to private e-mails, the Freedom of Information Act applies to the "judicial department" only to the extent of its judicial and administrative functions and does not extend, for example, to allegations of conduct in violation of the Code of Judicial Ethics.

Article VIII, Section 1 of the West Virginia Constitution provides, "The judicial power of the State shall be vested solely in a supreme court of appeals and in the circuit courts, and in such intermediate appellate courts and magistrate courts as shall be hereafter established by the legislature, and in the justices, judges and magistrates of such courts." Article VIII, Section 3 of the West Virginia Constitution provides, "The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law. The court shall have general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts. The chief justice shall be the administrative head of all the courts." Thus, under our constitutional framework, the judiciary is an independent branch of state government entitled to conduct its business under administrative rules promulgated by the Supreme Court of Appeals, including a Code of Judicial Conduct, based upon a model code adopted by the American Bar Association.

Article V, Section 1 of the West Virginia Constitution provides, "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of

more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.”⁸¹ A statute enacted in violation of W. Va. Const. art. V, § 1, insofar as it encroaches on the ability of the Court to regulate the judiciary, is “unconstitutional and unenforceable.”⁸² As noted by Justice Cleckley for the Court, for example, in Syllabus Point 3 of *State ex rel. Frazier v. Meadows*,⁸³ “The Judicial Reorganization Amendment provides a hierarchy to be used in resolving administrative conflicts and problems. Under the Amendment, the Judiciary, not the executive branch, is vested with the authority to resolve any substantial, genuine, and irreconcilable administrative conflicts regarding court personnel.”⁸⁴

⁸¹ In its brief to the circuit court, the AP argued, “were the Court to accept the Defendant’s ‘division of powers’ rationale, the same erroneous reasoning would bar application of the WVFOIA to the Executive Branch.” Plaintiff’s Motion at 10 n.4. First, this is a straw-man argument because the Administrative Director always conceded that FOIA applies to the administrative functions of the judicial branch and disclosed those documents in this case numbering in the thousands. Second, other courts have held that FOIA and similar statutes, while ostensibly applicable to the executive branch, are limited by separation of powers concerns. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992)(holding that separation of powers concerns prevent the application of the APA to the President); *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (suggesting that the Vice President should not be subject to FOIA). Indeed, in the same *Washington Post* case upon which the AP relied for its “irreparable harm” argument, the court held, “Office of the Vice President is not an ‘agency’ under FOIA” *Washington Post v. Dept. of Homeland Security*, 459 F. Supp. 2d at 61, 70 (D.D.C. 2006).

⁸² See Syl. pt. 3, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005)(“The provisions contained in W. Va. Code § 55-7B-6d (2001) (Supp. 2004) were enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution. Consequently, W. Va. Code § 55-7B-6d, in its entirety, is unconstitutional and unenforceable.”).

⁸³ 193 W. Va. 20, 454 S.E.2d 65 (1994).

⁸⁴ See also Syl. pt. 2, *State ex rel. Crabtree v. Hash*, 180 W. Va. 425, 376 S.E.2d 631 (1988)(“W. Va. Const. art. VIII, §§ 3 and 8, and all administrative rules made pursuant to the powers derived from article VIII, supersede W. Va. Code, 51-2-10 [1931] and vest the Chief Justice of the Supreme Court of Appeals of West Virginia with the sole power to appoint a judge for temporary service in any situation which requires such an appointment.”); Syl., *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 306 S.E.2d 233 (1983)(“The constitutional separation of

Unquestionably, “The Judicial Branch may honor legislative enactments in aid of judicial power, but is clearly not bound to do so.”⁸⁵ When a statute conflicts with the constitutional obligation of the Court to ensure the sound and independent administration of justice, for example, seeking communications between judges or court personnel concerning judicial matters, the separation of powers dictates that the West Virginia Constitution prevails.

Although FOIA applies to the “judicial department[]” of state government,⁸⁶ the idea that all judicial records, including grand juror, domestic relations, juvenile, or other sealed court records, or the records of the private communications of judicial officers and employees, are subject to a FOIA request by any person or entity, for any reason, legitimate or illegitimate, is clearly contrary to the sound administration of our system of justice.

Independence is one of the cornerstones of our judiciary. “Public records” of judicial bodies, such as court orders, pleadings, and other documents, are readily available to members of the public or the media without resort to a FOIA request. Moreover, administrative records of judicial bodies, including budgetary, financial, and other records maintained concerning the management of the courts should be and are subject to public inspection. The FOIA statute, however, as previously noted, expressly exempts “internal memoranda or letters received or

powers, W. Va. Const. art. V, § 1, prohibits the legislature from regulating admission to practice and discipline of lawyers in contravention of rules of this Court. W. Va. Const. art. VIII, § 1.”); *Lane v. Bd. of Law Examiners*, 170 W. Va. 583, 585, 295 S.E.2d 670, 673 (1982)(“Thus, jurisdiction to establish standards for admission to the practice of law in West Virginia is vested in this Court. While the Legislature may enact statutes in aid of the exercise of that jurisdiction, see *State ex rel. Frieson v. Isner*, *supra*, the Legislature may not usurp, restrict, or impair the power of the judiciary to regulate the practice of law.”);

⁸⁵ *Quelch*, *supra* at 424, 306 S.E.2d at 235.

⁸⁶ W. Va. Code § 29B-1-2(3).

prepared by any public body” from disclosure.⁸⁷ And, the Administrative Director was absolutely justified in refusing to disclose private e-mails of judicial officers and employees. Again, the case law supports the Administrative Director’s position.⁸⁸

In *In re Biechele*,⁸⁹ for example, a newspaper sought certain victim impact statements in conjunction with a criminal proceeding of national interest – the Station nightclub fire which resulted in one hundred deaths. The court nevertheless rejected its argument that Rhode Island’s FOIA statute applied to these judicial records, stating as follows:

Section 38-2-2(4)(i) of the APRA provides a broad definition of public records, as all “documents, papers, letters, . . . or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” The term “agency” includes “any . . . judicial . . . body of the state, . . . or any . . . person . . . acting on behalf of and/or in place of any public agency.” R.I. Gen. Laws § 38-2-2(1). However, subsection (T) explains that judicial bodies are included in the definition only in respect to their administrative functions. Section 38-2-2(4)(i)(T). Administrative function is not defined in the Access to Public Records Act. Black’s Law Dictionary defines “administration” as the “management or performance of the executive duties of a government, institution or business.” Black’s Law Dictionary 44 (7th ed. 1999). Applying the APRA to the judiciary only in their executive capacity is consistent with federal interpretations of the FOIA. The FOIA specifically excludes courts of the United States from its definition of agency. 5 USCS §

⁸⁷ W. Va. Code § 29B-1-4(8).

⁸⁸ Rules already promulgated by this Court applicable to judicial records already establish a “public business” standard. W. Va. Tr. Ct. R. 10.04(b) provides, “Writings and documents relating to the conduct of the public’s business, and which are prepared, owned or retained by a court, circuit clerk, or other court employee, are to be considered ‘public records.’ Requests for such writings must be directed to, and responded to by, the particular court, circuit clerk, or other court employee who retains custody of the particular public records sought.” (emphasis supplied). Consequently, a court’s records, e.g., its personal e-mails or other correspondence not “relating to the conduct of the public’s business,” are exempt from disclosure under Trial Court Rule 10.04.

⁸⁹ 2006 WL 1461192 (R.I. Super.)

551(1)(B). It is apparent the APRA would apply to those carrying out policies and rules in the Clerk's office in the course of managing documents filed with the Court. It is not designed to apply to individual judges reading their office mail. Thus, any reliance the Petitioner originally had regarding the applicability of the APRA to the request at hand is misplaced.⁹⁰

The court further discussed the policy implications of public access to judicial records as follows:

On a practical level, judges receive all sorts of mail at their offices on a day-to-day basis. Criminal defendants, victims, court employees, and members of public submit letters, e-mails, cards, and other objects for various reasons containing various pieces of information. There is no requirement in Rhode Island to keep these documents or announce receipt of these documents. It would be extremely time consuming if all members of the judiciary were required to come up with some sort of inventory, filing, and storage system for every piece of mail it received, so that it could later be provided to the press upon request. Authors of sentencing letters are welcome to send copies of documents previously submitted to the Court, or any other document stating their opinion about the sentence, to members of the media for public consumption, just as any other individual in the United States of America.⁹¹

In *Order and Opinion Denying Request Under Open Records Act*,⁹² the Supreme Court of Texas rejected a request for “any outgoing and incoming telecommunications records (office/cellular/mobile and fax phones) for Texas Supreme Court Justices and their staffs for the period covering Aug. 30, 1996 to April 2, 1997,”⁹³ stating as follows:

The issue is not simply a few telephone records of this Court. The issue is whether records of the judiciary of all kinds and for all

⁹⁰ *Id.* at *10 (emphasis supplied and footnotes omitted).

⁹¹ *Id.*

⁹² 1997 WL 583726 (Tex.).

⁹³ *Id.* at *1.

courts should be subject to disclosure. The judiciary's records reflecting the decisions of cases have been public for centuries. The propriety and advisability of disclosing records relating to judicial administration, the burdens and advantages of it, the reasonable limits upon it, all are issue for the Legislature, subject to the limits of the Constitution and the inherent power of the Judicial Department to control its own functions. The Legislature has determined that the judiciary should not be subject to the Open Records Act at all, not only to relieve it from the additional burdens that Act imposes and to preserve a means of construing and enforcing the Act in disputes between people and the other Departments of Government, but to preserve the independence of the judiciary. The wisdom of the Legislature's decision is shown by the federal Freedom of Information Act, which, like the Open Records Act, simply does not apply to the judiciary. 5 U.S.C. § 551(1)(B).

Neither the Open Records Act nor any other law should be misused to intimidate judges and courts from serving as conscience and oath require. Much concern has been expressed that political criticism of federal judges impinges on their independence. The same concern applies to state judges who do not hold office for life.⁹⁴

In the instant case, there is much more at stake than the subject e-mails. It is the independence of the judicial branch, for not only Supreme Court Justices, but also Circuit Judges, Family Court Judges, Juvenile Court Judges, Magistrates, and Mental Hygiene Commissioners.

In *Office of State Court Administrator v. Background Information Services, Inc.*,⁹⁵ the Supreme Court of Colorado rejected the application of a FOIA statute to computerized court data concerning parties to civil and criminal cases, stating as follows:

The Chief Justice is the executive head of the judicial system. See Colo. Const. art. VI, § 5(2). We previously have recognized that the Chief Justice implements her administrative authority by means of Chief Justice Directives, under the supreme court's general superintending power over the court system. . . . We conclude that

⁹⁴ *Id.* at *6 (emphasis supplied).

⁹⁵ 994 P.2d 420 (Colo. 1999).

it rests within the authority of the Chief Justice, acting by Chief Justice Directive, to direct and control the release of computer-generated bulk data containing court records. The Chief Justice Directive represents an expression of Judicial Branch policy, to be given full force and effect in matters of court administration.⁹⁶

Likewise, under West Virginia's constitutional framework, it is for this Court to determine which private records, such as grand jury, juvenile, domestic relations, and others, are to be made public.

In an issue never raised or briefed in the circuit court, the AP's amici argue that there is a right to "access to judicial records and proceedings under the First Amendment and common law."⁹⁷ Of course, none of the authorities cited by the amici actually support this proposition, for, as this Court has noted, "[t]he Supreme Court never has found a First Amendment right of access to civil proceedings or to the court file in a civil proceeding."⁹⁸ Again, under the doctrine of separation of powers, the judiciary has always properly reserved unto itself the determination of when and under what circumstances the public or the media is to be afforded access and neither the First Amendment nor common law dictates anything to the contrary.

Article VIII, Section 1 of the West Virginia Constitution states, "The judicial power of the State shall be vested solely in a supreme court of appeals" In the independent exercise of the power, Article VIII, Section 3 of the West Virginia Constitution states, "The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have

⁹⁶ *Id.* at 430-31; *see also Copley Press, Inc. v. Administrative Office of Courts*, 271 Ill. App. 3d 548, 648 N.E.2d 324 (1995).

⁹⁷ Amici Brief at 8.

⁹⁸ *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W. Va. 611, 615 n.4, 520 S.E.2d 186, 190 n.4 (1999)(citation omitted).

the force and effect of law. The court shall have general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts.”

With respect to judicial discipline, Article VIII, Section 8 of the West Virginia Constitution states:

Under its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the State, including one of its own members, for any violation of any such code of ethics, code of regulations and standards

Indeed, “The West Virginia Constitution confers on the West Virginia Supreme Court of Appeals, both expressly and by necessary implication, the power to protect the integrity of the judicial branch of government and the duty to regulate the political activities of all judicial officers.”⁹⁹

The federal Freedom of Information Act avoids the separation of powers problems inherent in legislative regulation of the judiciary by providing, “For the purpose of this subchapter . . . ‘agency’ means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include . . . the courts of the United States”¹⁰⁰ Consequently, federal courts and their agencies, including the administrative office of the courts and the probation office, are not subject to the federal

⁹⁹ *State ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 598, 542 S.E.2d 405, 419 (2000).

¹⁰⁰ 5 U.S.C. § 551(1)(B).

Freedom of Information Act.¹⁰¹ As one court has noted, “Courts are exempt from the FOIA’s disclosure requirements in order to assure that the Act would not impinge upon the court’s authority to control the dissemination of its documents to the public.”¹⁰²

Obviously, the West Virginia Freedom of Information Act, unlike the federal act,¹⁰³ applies to the “judicial department[]” of state government,¹⁰⁴ but the term “judicial department” is undefined. Additionally, “[I]t is settled law in this State that the Legislature cannot impose

¹⁰¹ See *Megibow v. Clerk of United States Tax Court*, 432 F.3d 387 (2d Cir. 2005)(United States Tax Court not subject to FOIA); *Lovell v. Alderete*, 630 F.2d 428, 434 (5th Cir. 1980)(“The parole recommendation report prepared by the sentencing district court judge (Form 235) constitutes a court report and thus is exempt from disclosure.”); *Banks v. Department of Justice*, 538 F. Supp. 2d 228, 232-33 (D.D.C. 2008)(“The term ‘agency’ as defined for purposes of FOIA and the Privacy Act expressly excludes the courts of the United States. See 5 U.S.C. §§ 551(1)(B), 552(f)(1). The phrase ‘courts of the United States’ is interpreted such that this exemption applies to the entire judicial branch of government. See *Washington Legal Found. v. United States Sentencing Comm’n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994). The United States Probation Office is an arm of the federal courts. *Maydak v. United States Dep’t of Justice*, 254 F. Supp. 2d 23, 40 (D.D.C. 2003). As such, it is not subject to FOIA and the Privacy Act and plaintiff’s claims against it cannot be maintained. *DeMartino v. Fed. Bureau of Investigation*, 511 F. Supp. 2d 146, 148 (D.D.C.2007) (dismissing FOIA and Privacy Act claims against Probation Office which, ‘[a]s a court unit . . . is not subject to the requirements of the FOIA and Privacy Act’); *Callwood v. Dep’t of Prob. of the Virgin Islands*, 982 F. Supp. 341, 343 (D. Vi. 1997) (concluding that Department of Probation is not an agency subject to the Privacy Act). Likewise, the Administrative Office of the United States Courts is an arm of the federal courts and therefore is not subject to FOIA and the Privacy Act. See *Chambers v. Div. of Prob., Admin. Office of U.S. Courts*, No. 87-0163, 1987 WL 10133, at *1 (D.D.C. Apr. 8, 1987) (dismissing Privacy Act complaint as to the Division of Probation, Administrative Office of the United States Courts). It matters not, as plaintiff argues, that the Administrative Office of the United States Courts ‘is not a court itself.’ Pl.’s Opp’n at 3.”).

¹⁰² *Warth v. Department of Justice*, 595 F.2d 521, 523 (9th Cir. 1979)(emphasis supplied).

¹⁰³ Notably, even AP’s amici concede that access to judicial records under state freedom of information statutes is the exception, rather than the rule. See Amici Brief at 3 (“Unlike many states, West Virginia’s FOIA applies to the ‘judicial department’ . . .”).

¹⁰⁴ W. Va. Code § 29B-1-2(3).

upon any court a duty which requires the performance of an act not judicial in character.”¹⁰⁵ Consequently, for example, “The constitutional separation of powers, W. Va. Const. art. V, § 1, prohibits the legislature from regulating admission to practice and discipline of lawyers in contravention of rules of this Court. W. Va. Const. art. VIII, § 1.”¹⁰⁶

“It is the duty of courts to adopt a construction of a statute that will bring it into harmony with the Constitution, if its language will permit,” this Court has noted and, “The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score.”¹⁰⁷ Here, the potential separation of powers problems can be avoided by rejecting an interpretation of FOIA’s application to the “judicial department” to anything beyond the performance of its judicial and administrative functions.

IV. CONCLUSION

The Administrative Director submits that because (1) a “public record” under the Freedom of Information Act involves only “information relating to the conduct of the public’s

¹⁰⁵ *State v. Huber*, 129 W. Va. 198, 214, 40 S.E.2d 11, 21 (1946).

¹⁰⁶ Syl., *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 306 S.E.2d 233 (1983); see also *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005)(amendment to Medical Professional Liability Act, imposing non-discretionary duty upon circuit court to accept non-unanimous verdict in medical malpractice action, violated constitutional separation of powers, and amendment to Medical Professional Liability Act, requiring 12-member jury in medical malpractice actions, violated constitutional separation of powers)(Per Davis, J., with one Justice concurring, one Justice concurring separately, and one Justice concurring in result).

¹⁰⁷ *State ex rel. Downey v. Sims*, 125 W. Va. 627, 649, 26 S.E.2d 161, 170 (1943)(internal quotations and citation omitted).

business, prepared, owned and retained by a public body;" (2) the Freedom of Information Act exempts "information of a personal nature" from disclosure where "the public disclosure thereof would constitute an unreasonable invasion of privacy;" (3) Supreme Courts of Arizona, Arkansas, Colorado, Ohio, and Florida, and other lower courts, have held that private and personal e-mails by public officers and employees are exempt from public disclosure if they do not contain information relating to the conduct of the public's business; (4) other courts have held, contrary to the position advocated by the AP and its amici, that it is the content of documents that determine whether they are "public records;" and (5) application of the Freedom of Information Act to the "judicial department" should be limited to court filings and administrative matters and extending its application to the private e-mails, correspondence, and other activities of Justices, Judges, Magistrates, and other court officers and employees would violate Articles V and VIII of the West Virginia Constitution, this Court should set aside the judgment of the Circuit Court of Kanawha County and issue an opinion that brings West Virginia into the majority of jurisdictions that protect private and personal e-mails by public officials and employees that do not contain information relating to the conduct of the public's business from compelled public disclosure.

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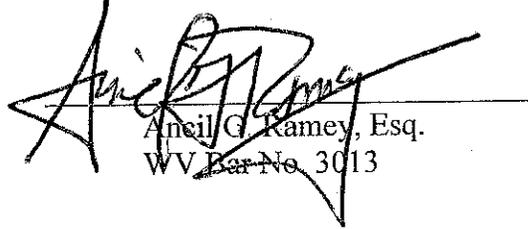
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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on June 15, 2009, I served the foregoing "BRIEF AND CROSS-APPEAL BY THE APPELLEE" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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