

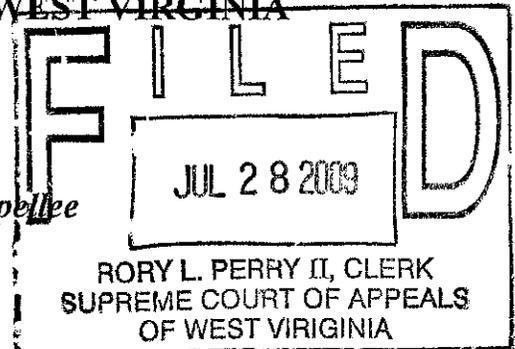
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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. INTRODUCTION¹

The AP does not dispute that the FOIA applies only to documents which involve “the conduct of the public’s business.”² Its analytical error is to equate “public interest” with “the conduct of the public’s business” by arguing that FOIA applies to the subject e-mails “because their disclosure vindicates a state interest of the highest order – judicial integrity.”³ The Legislature could have chosen to extend FOIA’s application to documents the disclosure of which is in the “public interest,” but did not do so, and this Court should reject the AP’s arguments that would effectively amend the statute.

A private e-mail between a judge and a third-party that does not involve performance of the judge’s adjudicatory or administrative functions simply does not involve “the conduct of the public’s business” and if either the AP or anyone else wants access to such e-mail because of a “public interest” in either its content or the relationship between the judge and the third-party, they should try to convince the Legislature to amend the statute. No amount of prurient or other public interest in private e-mail correspondence not involving performance of a public official’s duties makes the sending or receipt of such email “the conduct of the public’s business.” A public official’s e-mail to a relative, a social acquaintance, or other person involving private subject matter does not involve “the conduct of public’s business,” it involves “the conduct of private business.”

¹ In addition to responding to the AP’s assignments of error in his initial brief, the Administrative Director cross-assigned errors pursuant to the provisions of R. App. P. 10(f). This brief replies to the arguments made by the AP in response to the Administrative Director’s cross-assignment of errors.

² AP’s Reply Brief at 1.

³ *Id.*

Other courts with similar statutes under similar circumstances have refused to intrude upon legislative prerogative to define the scope of freedom of information acts and the Administrative Director respectfully submits that this Court should follow their lead and hold that because the subject e-mails did not involve the performance of the sender's adjudicatory or administrative functions, but were private communications, they did not relate to the "conduct of the public's business," and are not subject to the Freedom of Information Act.

II. STATEMENT OF FACTS

With respect to the AP's allegedly purely journalistic motives, although the Administrative Director cannot dispute the representation that the "decision to litigate the instant FOIA issue was made by the national office of The Associated Press,"⁴ it is likely that the national office learned about local matters from local employees, and the timing of the complaint, filed less than two weeks prior to the May 2008 primary,⁵ and the timing of its motion for expedited hearing, scheduled for the day prior to the primary,⁶ speaks for itself.

With respect to the allegedly "narrow" scope of the AP's request,⁷ its initial request was for "all e-mails and phone records for all accounts issued to Justice Elliott E. Maynard The AP also wants all visitor logs or comparable records pertaining to Justice Maynard I assume you will respond within five days"⁸ Respectfully, to describe as "narrow" a request for "all e-mails and phone records" and "all visitor logs," which would have included e-mails and phone

⁴ AP's Reply Brief at 3.

⁵ Docket Entry No. 1.

⁶ Docket Entry Nos. 6, 7.

⁷ AP's Reply Brief at 4.

⁸ Complaint for Declaratory and Injunctive Relief, Exhibit A.

records of communications with the other Justices, the Administrative Director, an Administrative Assistant, and law clerks, is incorrect.

Indeed, the AP later specifically requested Justice Maynard's internal communications:

The Associated Press wants all records or documents reflecting any and all communications to and/or from and/or between [Justice] Elliott E. Maynard, Justice Maynard's law clerks and/or administrative assistant and/or secretary, to or from any of the following:

1. Donald Blankenship;
2. Brenda Magann; and
3. Anyone acting on behalf of Mr. Blankenship;
4. Any employee or agent of Mr. Blankenship;
5. Any employee or agent of Massey Energy Co., or any of its subsidiaries;

Please also produce all emails to or from Brenda Magann to or from a government email address assigned to Brenda Magann, including any attachments.

Please produce all communications between you [the Administrative Director] and [Justice] Elliott E. Maynard that concern Donald L. Blankenship and/or Brenda Magann and/or photographs that include Justice Maynard. . . .

Please produce all responsive documents, which shall include but not be limited to e-mails, phone records, visitor logs, and fax machine logs.

I assume you will respond within five days⁹

The AP also asserts that it has not "sought records unrelated to the public's business,"¹⁰ but an e-mail, for example, from Ms. Magann to a relative concerning a family illness, which would have been included within its request, would be totally "unrelated to the public's business." Moreover, an e-mail, for example, from Justice Maynard extending birthday wishes

⁹ *Id.* at Exhibit E.

¹⁰ AP's Reply Brief at 5.

to an acquaintance whom also happened to be an employee of a Massey subsidiary would be “unrelated to the public’s business.”

With respect to the AP’s reference to “Appellee’s wildly inaccurate characterization of the relief sought by the AP,”¹¹ the Administrative Director notes the following from the AP’s own complaint filed in this matter:

20. By letter delivered February 29, 2009 . . . plaintiff requested records or documents, from January 1, 2006 to the present, reflecting any and all communications to and/or from and/or between [Justice] Elliott E. Maynard, Justice Maynard’s law clerks and/or administrative assistant and/or secretary, to or from any of the following:

1. Donald Blankenship;
2. Brenda Magann; and
3. Anyone acting on behalf of Mr. Blankenship;
4. Any employee or agent of Mr. Blankenship;
5. Any employee or agent of Massey Energy Co., or any of its subsidiaries . . .

22. The plaintiff has the statutory right to the requested records and there is no legal basis for the defendant’s refusal to disclose them to the plaintiffs.

WHEREFORE, the plaintiffs pray that this Court . . .

(3) order the defendant to make the request records available to the plaintiff¹²

There may have been a “wildly inaccurate characterization of the relief sought by the AP,” but it was not by the Administrative Director. The only reason what is now before this Court is so

¹¹ AP’s Reply Brief at 5.

¹² Complaint for Declaratory and Injunctive Relief at 6-7.

narrow is because the Administrative Director's position regarding the impropriety of the AP's extraordinarily broad requests has already been largely sustained, not because the AP has ever been reasonable in the breadth of its requests. The AP's description of its positions in this appeal, with due respect, is revisionist history with little regard for accuracy.

III. APPELLEE'S CROSS-ASSIGNMENTS OF ERROR

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: (1) 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; (2) 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;" and (3) by ruling that private and personal e-mails between judges and third-parties contain "information relating to the conduct of the public's business" if those third-parties have relationships with litigants in cases pending.

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."

One thing upon which the AP and the Administrative Director agree is that the heart of the issue currently before this Court involves statutory interpretation. The Administrative Director relies upon the statutory language "information relating to the conduct of the public's business" and "information of a personal nature," whereas the AP repeatedly wordsmiths the statutory language:

The only way this Court can concur with Appellee's position would be to find that judicial integrity . . . is unrelated to the public's business.¹³

Appellee's assertion that the AP has sought records unrelated to the public's business¹⁴

Where Appellant disagrees with the lower court is in its holding that Justice Maynard's act of recusal was the determining factor of whether these communications related to the public's business.¹⁵

[T]he central question presented in this appeal . . . the extent of Justice Maynard's relationship with Don Blankenship . . . is related to the public's business¹⁶

The AP consistently has argued that . . . *the content* of the e-mails . . . are "related to the public's business"¹⁷

What is omitted from these and other references to FOIA in the AP's brief is essential statutory language -- "the conduct of."

The Freedom of Information Act applies only to "public record[s] of a public body"¹⁸ and a "public record" concerns only "information relating to the conduct of the public's business."¹⁹ It does not define "public record," as does the AP, as information in which there might be a "public interest" or might be considered to be "the public's business." Rather, as argued by the Administrative Director, an e-mail sent by any public official, including a judge, to a third-party

¹³ AP's Reply Brief at 1 (emphasis supplied).

¹⁴ *Id.* at 5 (emphasis supplied).

¹⁵ *Id.* (emphasis supplied).

¹⁶ *Id.* (emphasis supplied).

¹⁷ *Id.* at 6 (emphasis supplied).

¹⁸ W. Va. Code § 29B-1-3.

¹⁹ W. Va. Code § 29B-1-2(4)(emphasis supplied).

not involving the performance of the official's or judge's official duties, but related to an entirely private matter, does not involve "the conduct of the public's business" and is not subject to our Freedom of Information Act, no matter how much "public interest" or how much the e-mail might be considered "the public's business."

Plainly, if a document is not a "public record" under FOIA, a court need inquire no further,²⁰ no matter how interested the AP might be in its disclosure. Not only did the Legislature choose to limit the scope of FOIA to "information related to the conduct of the public's business," i.e., information arising from the performance of official duties, but it also provided that an officer's or an employee's private communications are protected by exempting "information of a personal nature" from disclosure where "the public disclosure thereof would constitute an unreasonable invasion of privacy."²¹ Indeed, only where "the public interest by clear and convincing evidence requires disclosure in the particular instance"²² 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.²³

²⁰ Thus, if this Court agrees with the Administrative Director that private e-mails between judges and third-parties that do not involve performance of the judge's adjudicatory or administrative functions are not "related to the conduct of the public's business," then it need not address any of FOIA's exemptions.

²¹ W. Va. Code § 29B-1-4(a)(2).

²² *Id.* (emphasis supplied).

²³ With respect to this issue, the AP makes a confusing argument that because the Administrative Director "fail[ed] to submit a sworn affidavit," the privacy exemption was somehow waived. AP's Reply Brief at 33. Of course, this ignores that the Administrative Director testified at a hearing in this matter. Ordinarily, a party is not required to offer an affidavit when he or she testifies under oath. It also ignores the law that it is the burden of the

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.

As noted in the Administrative Director's initial brief, 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. In another attempt at misdirection, the AP argues that all of these cases are "inapposite" because "judges *specifically* are exempted from disclosure requirements" in these states.²⁴ The primary problems with this argument are that (1) it is wrong and (2) none of the cases in Arizona, Arkansas, Colorado, Ohio, or Florida involve judges or their exemption, but involve other governmental employees and interpretation of functionally identical statutory provisions.²⁵

requesting party where "information of a personal nature" is involved, such as a private e-mail, to establish "the public interest by clear and convincing evidence."

²⁴ AP's Reply Brief at 14.

²⁵ In its brief, the AP argues, "*Withrow's* finding that other states' freedom of information laws more restrictive than WVFOIA conveniently is ignored by Appellee," AP's Reply Brief at 26, is also wrong. First, as this Court recognized in *Daily Gazette Co. v. West Virginia Development Office*, 206 W. Va. 51, 62 n.9, 521 S.E.2d 543, 554 n.9 (1999), one of the holdings in *Withrow* has been superseded by statute. Second, this Court never made any "finding" in *Withrow* that "other states' freedom of information laws" are generally "more restrictive" than our FOIA statute; rather, this Court merely observed that:

W. Va. Code, 29B-1-2(4) [1977] 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

First, in *Griffis v. Pinal County*,²⁶ where the employee was not a judge, but a county manager, 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 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.²⁷ 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*

restrictive freedom of information statutes in some of the other states. See Braverman and Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720, 733-35 (1981).

Daily Gazette Co., Inc. v. Withrow, 177 W. Va. 110, 115, 350 S.E.2d 738, 742 (1986)(emphasis supplied). As none of the decisions by other state courts of last resort relied upon by the Administrative Director turn upon this "as required by law" or "pursuant to law" language, this Court should not be persuaded with an argument by the AP which misstates this Court's holding in *Withrow*.

²⁶ 215 Ariz. 1, 156 P.3d 418 (2007).

²⁷ 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).

ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't, 82 Ohio St.3d 37, 693 N.E.2d 789, 792-93 (1998).²⁸

Consequently, the court set aside an order requiring disclosure of e-mails alleged to be private.

In Arizona, under the relevant statutory language, 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.” The Administrative Director cannot explain the AP’s assertion that, “The Arizona open records statute does not contain a definition of public records”²⁹ and any judicial exemption obviously had nothing to do with the Arizona Supreme Court’s decision involving a county manager’s e-mails.

Second, in *Pulaski County v. Arkansas Democrat-Gazette, Inc.*,³⁰ 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:

[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.

²⁸ *Id.* at 5, 156 P.3d at 422.

²⁹ AP’s Reply Brief at 27.

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

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 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. Again, any judicial exemption found in the Arkansas statute had nothing to do with a decision involving a county comptroller.

Third, in *Denver Publishing Co. v. Bd. of County Commissioners*,³¹ involving a county recorder and a chief deputy county recorder, 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."³²

³¹ 121 P.3d 190 (Colo. 2005).

³² *Id.* at 199.

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.

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 and the Colorado Supreme Court's decision, involving a county recorder and a chief deputy county recorder, did not involve interpretation of any judicial exemption.³³

³³ The AP's brief discusses the decision in *Office of State Court Administrator v. Background Information Services, Inc.*, 994 P.2d 420, 430-31 (Colo. 1999), where 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 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.

AP's Reply Brief at 16-17. But *Office of State Court Administrator* involves no express statutory exemption, but rather the limits imposed by the separation of powers on a legislature's ability to intrude into the judiciary's administrative functions.

Fourth, in *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*,³⁴ 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

³⁴ 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.*³⁵

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.”³⁶ 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 Ohio, 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 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” and the Administrative Director disputes the AP’s characterization of the Ohio definition as “narrow.”³⁷

³⁵ *Id.* at 41-42, 693 N.W.2d at 792-93.

³⁶ W. Va. Code § 29B-1-2(4)(emphasis supplied).

³⁷ AP’s Reply Brief at 27.

Finally, a case involving a sheriff department's employees had nothing to do with any judicial exemption.

Fifth, in *State v. City of Clearwater*,³⁸ 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:

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.³⁹

Indeed, judicial e-mails, which are the 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:

³⁸ 863 So. 2d 149 (Fla. 2003).

³⁹ *Id.* at 153 (emphasis supplied).

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 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 119.⁴⁰

In rejecting the newspaper's argument that private e-mails are public records by virtue of their existence on government e-mail servers,⁴¹ the court further reasoned:

⁴⁰ *Id.* (emphasis supplied).

⁴¹ In its brief, the AP states, “Contrary to Appellee's assertions, the AP does not claim that (1) all e-mails on government internet servers ‘relate to the conduct of the public's business’” and refers to this as a “straw-man” argument. AP's Reply Brief at 23-24. Yet, the AP twice described these e-mails as “taxpayer-funded *ex parte* communications” in its trial court brief. Plaintiff's Memorandum in Support of Motion for Preliminary and Permanent Injunction, and for Declaratory Judgment at 15, 20. Moreover, this argument which the AP now claims it never made, was articulated in another brief it filed in the trial court as follows:

C E-MAIL COMMUNICATIONS BETWEEN A JUDGE AND THE CEO OF A PARTY LITIGANT USING THE STATE-FUNDED COMPUTER SYSTEM ARE “PUBLIC RECORDS” UNDER THE WVFOIA. . . .

Justice Maynard sent the emails from his government issued email account. He sent the thirteen emails to Mr. Blankenship via a government computer system

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 Dep't*, 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.⁴²

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

paid for by the West Virginia taxpayers administered by Defendant Canterbury. . .

The e-mails at issue herein were prepared, owned and retained by a public body – the judicial department of the State of West Virginia.

Plaintiff's Supplemental Memorandum in Support of Motion for Preliminary Injunction and Declaratory Judgment at 6-7. Apparently, the AP now concedes that its "state-funded computer system" argument has no merit, but for it to say that it never made the argument is inaccurate.

⁴² *Id.* at 154 (emphasis supplied).

city employees “were utilizing their public time and resources for personal benefit,”⁴³ 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.”⁴⁴ Similarly, in the case sub judice, a media inquiry does not convert private e-mails of judicial officers and employees into “public records.”⁴⁵

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” and, again, the Administrative Director cannot understand the AP’s contention that, “The Florida

⁴³ *Times Publishing Co. v. City of Clearwater*, 830 So. 2d 844, 848 (Fla. Ct. App. 2002).

⁴⁴ 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.”).

⁴⁵ The AP attempts to divert attention 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.

Statute defines public records much more narrowly.”⁴⁶ The Florida statute references transacting official business and the West Virginia statute references conducting the public’s business. These are functional equivalents and the reasoning of the Florida Supreme Court is apposite, not inapposite. Finally, the Florida Supreme Court’s decision, involving municipal employees, had nothing to do with application of any judicial exemption.⁴⁷

⁴⁶ AP’s Reply Brief at 27.

⁴⁷ Frankly, the Administrative Director is surprised that the AP persists in relying on the California and Idaho cases.

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. *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). At issue in *Commission* was access to “the names, employing departments, and hiring and termination dates of California peace officers included in the Commission’s database.” *Id.* at 284, 165 P.3d at ___, 64 Cal. Rptr. 3d at 664. 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.” *Id.* at 288 n.3, 165 P.3d at ___ n.3, 64 Cal. Rptr. 3d at 667 n. 3. 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 regardless of physical form or characteristics.” Idaho I.C. § 9-337(13). Accordingly, it has been observed, “The Idaho public records law provides one of the broadest definitions of public records in the country.” *Access to the E-Mail Records, supra* at 18. Even under Idaho’s extraordinarily broad statute, however, the court in *Cowles Pub. Co. v. Kootenai Co. Bd. of County Commissioners*, 144 Idaho 259, 159 P.3d 896, 901 (2007). 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*:

The AP's repeated incantations of the salutary purposes of the Freedom of Information Act,⁴⁸ with which the Administrative Director wholeheartedly agrees as reflected in his production of hundreds of pages of covered and non-exempted documents to the AP, cannot negate that state courts of last resort in Arizona, Arkansas, Colorado, Ohio, and Florida interpreting statutes with similar salutary purposes and definitions of documents covered have ruled that private e-mails that do not involve a public officer's or employee's performance of his or her official duties are not subject to compelled disclosure. Moreover, the AP's argument that the Administrative Director "takes the position that the *context* of the e-mails involved in this case is irrelevant"⁴⁹ is simply incorrect. Rather, the Administrative Director has always taken the position that it is both a communication's "content" and "context" that determines whether it is a "public record" under FOIA. Here, the "context" of the subject e-mails was personal and private

"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, other employment related claims, and the validity and circumstances surrounding the defamation claim." *Id.* at 900.

⁴⁸ AP's Reply Brief at 1 ("broad mandate of disclosure"); 11 ("liberally construed to carry out the expressed public policy of providing to the public full and complete information"); 14 ("any exemption from the disclosure requirements of the WVFOIA must be expressly stated in the law"); 18 ("the overarching mandate of the WVFOIA: that the disclosure provisions of the Act must be liberally construed to effectuate its remedial purpose"); 20 ("required by the Legislature to liberally construe the WVFOIA's definition of public record"); 21 ("the disclosure provisions of the WVFOIA . . . must be 'liberally construed'"); 22 ("the WVFOIA mandates that the term 'conduct of the public's business' be construed liberally"); 23 "an unnecessarily narrow construction of the term public record is ad odds with the mandated liberal construction"); 26 ("other states freedom of information laws are more restrictive than WVFOIA"); 27 ("WVFOIA's extraordinarily broad definition of 'relating to the conduct of the public's business.'"); 28 ("extraordinarily broad definitions of 'public record' like that used in the WVFOIA."); 29 ("extraordinarily broad definition of 'public record' of the WVFOIA"); 36 ("West Virginia law also requires exemptions to the WVFOIA to be construed strictly and narrowly.").

⁴⁹ AP's Reply Brief at 8, citing Administrative Director's Brief at 18.

communications between a judge and a third-party and their “content” had nothing to do with the adjudicatory or administrative functions of a court, but had to do with things like “global warming,” “muslim marriage,” “Logan’s Law,” and other non-judicial/non-administrative subject matter.⁵⁰

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.

The AP’s response to the Administrative Director’s constitutional argument is internally inconsistent. It accepts the proposition that “the e-mail communications between Justice Maynard and Mr. Blankenship involved purely ‘private, personal, and non-judicial matters’”⁵¹ in order to argue that their disclosure would not “interfere with the functioning of the judiciary.”⁵²

⁵⁰ AP’s Brief at Ex. A (Vaughn index).

⁵¹ AP’s Reply Brief at 8.

⁵² *Id.* The manner in which the AP tries to twist the subject matter of the e-mails that have been disclosed amply illustrates the Administrative Director’s concerns about the independence of the judiciary. For example, an e-mail referencing a political opponent’s website’s reference to litigation against Massey in a wholly-unrelated matter is linked with the *Caperton* case because of its timing in conjunction with oral argument in the latter. AP’s Reply Brief at 8, n.7. And, a reference to a state chamber of commerce annual meeting agenda in an undisclosed e-mail now compromises the sender because “the Chamber of Commerce regularly appears before the Court in amicus capacity, and . . . Mr. Blankenship is a member of the Board of Directors of the United States Chamber of Commerce.” AP’s Reply Brief at 20, n.20. Taking these arguments to their logical conclusion, the AP is entitled to all of the e-mails and other communications by the members of this Court with any union, organization, group, or individual who appear before this Court as an amicus in an individual or representative capacity as such “relationship” might “have affected or influenced” a member of this Court’s “decision-making” in a case in which such union, organization, group, or individual may have appeared as an amicus even if the e-mail or other communication was sent to a social acquaintance and the subject matter of the e-mail or other communication had absolutely nothing to do with this Court’s adjudicatory or administrative functions. This cannot be what the Legislature intended when it enacted the Freedom of Information Act.

On the other hand, the AP argues that those same e-mails involve “the conduct of the public’s business” for purposes of securing their disclosure.

Obviously, the AP cannot have it both ways. If the e-mails are purely private and personal, and were not written in furtherance of Justice Maynard’s adjudicatory or administrative duties, then they do not involve “the conduct of the public’s business” and are not subject to FOIA. On the other hand, if a mere public interest in a judge’s relationship with a third-party compels the disclosure of electronic or other communications between the judge and the third-party where neither the context nor the content of the communication involves performance of the judge’s adjudicatory or administrative duties, then the independence of the judiciary, in the form of intrusion into the personal and social lives of judges, is threatened.

Judicial independence involves much more than intrusion into the internal adjudicatory functions of a court, such as claiming a right of access to research memoranda, draft opinions, or other similar documents. If judges are going to be precluded from having any privacy in their familial and social relationships, and their e-mails and other private, non-judicial, non-administrative communications are going to be subjected to scrutiny merely because, as the AP would have it, there is a “public interest” in those communications, such will have a deleterious impact on their ability to function as judges.

Although the AP dismisses the Administrative Director’s argument as “incomprehensible,”⁵³ Article V, Section 1 of the West Virginia Constitution provides, “The legislative, executive and judicial departments⁵⁴ shall be separate and distinct, so that neither

⁵³ AP’s Reply Brief at 9.

⁵⁴ The AP mischaracterizes the Administrative Director’s testimony concerning the term “judicial department.” AP’s Reply Brief at 9-10. Obviously, the term appears in the West

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.”⁵⁵ 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.”⁵⁶ As noted by Justice Cleckley for the Court, for example, in Syllabus Point 3 of *State ex rel. Frazier v. Meadows*,⁵⁷ “The Judicial Reorganization Amendment provides a hierarchy to be used in resolving administrative conflicts and problems. Under the Amendment,

Virginia Constitution’s separation of powers provision, upon which the Administrative Director has relied throughout this litigation. It is true, however, that the term is undefined in the Freedom of Information Act, and is used nowhere else in the West Virginia Code. Obviously, there are many judicial records for which there is no express FOIA exemption, e.g., domestic relations records, which are not subject to disclosure. Thus, the Administrative Director stands by his argument that it is reasonable to conclude that the Legislature’s use of the term “judicial department” was limited to the judiciary’s administrative and not its adjudicatory functions.

⁵⁵ In its brief to the circuit court, the AP argued, “[W]ere 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).

⁵⁶ 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.”).

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

the Judiciary, not the executive branch, is vested with the authority to resolve any substantial, genuine, and irreconcilable administrative conflicts regarding court personnel.”⁵⁸

Unquestionably, “The Judicial Branch may honor legislative enactments in aid of judicial power, but is clearly not bound to do so.”⁵⁹ 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,⁶⁰ 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,⁶¹ are

⁵⁸ 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 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.”);

⁵⁹ *Quelch, supra* at 424, 306 S.E.2d at 235.

⁶⁰ W. Va. Code § 29B-1-2(3).

⁶¹ Although the AP describes these possible applications of its interpretation of FOIA as “straw-men arguments,” AP’s Reply Brief at 12 n.11, the Administrative Director submits that if someone determines that there is a “public interest” in such documents, the judiciary will be confronted with resolving the disputes that ensue. Moreover, although the AP dismisses the Administrative Director’s concerns by claiming that “each of the types of records identified appear to be addressed by WVFOIA’s specific exemptions,” it argues that “courts cannot seal

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, and other than misdirection, the AP's reply brief presents nothing to the contrary.⁶²

Moreover, as noted by the Administrative Director in his initial brief, there is already a judicial forum if the AP has a complaint about Justice Maynard's social relationship with Don Blankenship – the Judicial Investigation Commission.⁶³ Like the Circuit Judge who conducted

otherwise public records,” AP's Reply Brief at 12 n.11, which plainly raises separation of powers issues.

⁶² Nowhere in its reply brief does the AP address the cases of *In re Biechele*, 2006 WL 1461192 (R.I. Super.); *Order and Opinion Denying Request Under Open Records Act*, 1997 WL 583726 (Tex.); *Office of State Court Administrator v. Background Information Services, Inc.*, 994 P.2d 420 (Colo. 1999); *Copley Press, Inc. v. Administrative Office of Courts*, 271 Ill. App. 3d 548, 648 N.E.2d 324 (1995), all of which, in one way or the other, address the separation of powers implications of unwarranted intrusions into the independence of the judiciary.

⁶³ With respect to the Code of Judicial Conduct, the AP states in its reply brief that, “This argument was not raised below and Appellee waived the right to raise it in this appeal.” AP's Reply Brief at 12. The following, however, is an excerpt from the Administrator's supplemental brief filed below:

25. 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.”

26. 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.

27. 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.”

an appropriate in camera review of the thirteen e-mails that are the subject of this appeal,⁶⁴ the Judicial Investigation Commission would have the subpoena power to review the subject e-mails to determine whether the parade of horrors insinuated by the AP has any validity. It appears, however, that the AP is less interested in the validity of its insinuations than in prolonging a dispute over e-mails referencing “global warming,” “muslim marriage,” “Logan’s Law,” and other subject matter⁶⁵ shedding absolutely no light on any improper conduct by Justice Maynard. The AP’s persistence, however, appears to be more about “heat” than “light.”

28. 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.”

29. As noted by Justice Cleckley for the Court, for example, in *Syllabus Point 3 of State ex rel. Frazier v. Meadows*, “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.”

30. Certainly, “The Judicial Branch may honor legislative enactments in aid of judicial power, but is clearly not bound to do so.”

31. 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.

Defendant’s Supplemental Memorandum of Law at 11-13 (footnotes omitted). Plainly, this argument was asserted by the Administrative Director in the same terms as on appeal and, notwithstanding the AP’s inaccurate reports to the contrary, not waived.

⁶⁴ As previously noted, the Administrative Director believes in camera review of the subject e-mails was entirely appropriate, but does not believe it is appropriate for a reviewing court to require a public entity to research and create additional documentation (in this case, researching and producing internet articles referenced in the subject e-mails) for purposes of review under the FOIA.

⁶⁵ AP’s Brief at Ex. A (Vaughn index).

IV. CONCLUSION

To accept the AP's argument that a public interest in the relationship between a judge and another person is sufficient to require the disclosure of all e-mails or other communication between the judge and that person is to raise the specter that judges enjoy no privacy and that any and all of their social, familial, and other relationships are open to public scrutiny. Here, whatever the relationship between Justice Maynard and Don Blankenship, a non-party to any litigation before this Court, the trial court's in camera inspection of each and every one of the subject e-mails has confirmed that not a single one involved Justice Maynard's adjudicatory or administrative duties; rather, for the five e-mails that were, in the Administrative Director's view, improperly directed to be disclosed, the only finding was that because they involved Justice Maynard's re-election efforts, which again did not involve any of his adjudicatory or administrative duties, they were subject to public disclosure under FOIA.

The Administrative Director submits, however, that because (1) a "public record" under the Freedom of Information Act involves only "information relating to the conduct of the public's 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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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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