

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CASE NO.

MARSHALL COUNTY COMMISSION and MARSHALL COUNTY
COMMUNICATION 911,

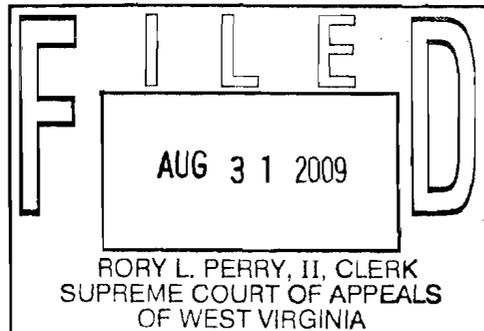
Petitioners,

vs.

JOHN R. BRIGGS and the WEST VIRGINIA HUMAN
RIGHTS COMMISSION,

Respondent.

PETITION FOR WRIT OF PROHIBITION



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I. FACTS AND PROCEDURAL BACKGROUND

On or about December 10, 2007, the Marshall County Commission 911 Department, in an effort to fill two vacancies, advertised for applications for two telecommunication positions. Multiple applications were received including an application from the Complainant, Mr. John R. Briggs. Interviews of the multiple applicants were completed during the beginning of March. The Complainant was one of the applicants selected for an interview. The Complainant's interview occurred on or about March 3, 2008. It was known by the Marshall County Commission prior to his interview that the Complainant was legally blind.

Following the interviews, the Commission discerned which applicants would be extended job offers. The complainant was not one of the selected applicants. The complainant was informed of this decision on or about March 11, 2008. The decision of which applicants to hire, was based on previous employment, education, presentation during the interview and overall qualification for the positions. The two applicants whom were hired were simply better qualified than the complainant.

On or about May, 23, 2008, the Complainant filed a complaint with the West Virginia Department of Health and Human Resources Human Rights Commission. According to the complaint, Mr. Briggs informed the Commission that several options were available for evaluating and accommodating his disability in the workplace following his receipt of a letter informing him that he would not be hired. The Complainant alleges that he is well qualified for the position and has several years experience as a dispatcher. The complainant alleges that despite his qualification for the position he was not hired therefore the Commission must have discriminated against him.

During discovery, counsel for the complainant requested a copy of any recording of the executive session. The Petitioners herein objected to production of the executive session minutes or recordings pursuant to the executive session privilege, the attorney client privilege, the work product doctrine and the privilege attached to the thoughts and impression of counsel, the

Respondents objected to the request. On April 16, 2009, counsel for the complainant filed a Motion to Compel the executive session records.

On May 11, 2009, the Administrative Law Judge (ALJ) held a hearing via telephone regarding the complainant's Motion to Compel. As a result of the hearing, the ALJ as the both the trier of law and the finder of fact ordered an *in camera* review of the requested recording despite objections of counsel as to the violation of attorney client privilege, among others, that would occur.

On May 22, 2009, the respondents, petitioners herein filed a motion for declaratory judgment and appeal of the Administrative Law Judge's Order in the Circuit Court of Marshall County. That petition was subsequently dismissed on jurisdictional grounds.

Additionally on May 22, 2009, an appeal was filed with the Commissioner of the West Virginia Human Rights Commission. That appeal was denied and the order of the Administrative Law Judge was affirmed.

A revised Order requiring the disclosure of the privileged material to the Administrative Law Judge was enter on August 13, 2009 requiring such disclosure on August 28, 2009. Additionally, since the denials of the appeals, several attempts at negotiating a settlement in this matter have been ongoing.

II. RELIEF REQUESTED

The Petitioner respectfully requests the West Virginia Supreme Court of Appeals issue a Writ of Prohibition precluding the Administrative Law Judge for the Human Rights Commission from reviewing material protected by the executive session privilege and the work product doctrine thereby violating the very protection affording by these principals. Further, the Petitioner requests this Court protect the respondents from the inherent injustice that will result if the protected material is published to a third party and the finder of fact.

III. STANDARD OF REVIEW

A. STANDARD OF REVIEW CONCERNING PROHIBITION

“In determining whether to entertain an issue the Writ of Prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary Writ of Prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 712, 601 S.E.2d 25, 32 (2004); Syl. Pt. 1, State ex rel. Weirton Medical Center v. Mazzone, 213 W.Va. 750, 584 S.E.2d 606 (2003); Syl. Pt. 4 State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996). State ex rel. Johnson v. Reed, 219 W.Va. 289, 633 S.E.2d 234, (2006).

“[A] writ of prohibition is available to correct a clear legal error resulting from a trial court's abuse of its discretion in regard to discovery orders.” State ex rel. Wausau Bus. Ins. Co. v. Madden, 216 W. Va. 776, 780, 613 S.E.2d 924, 928 (2005) citing Syl. Pt. 1, State Farm v. Stephens, 188 W. Va. 622, 425 S.E.2d 577 (1992); see also: State ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 712, 601 S.E.2d 25, 32 (W. Va. 2004).

“When a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court's original jurisdiction is appropriate. Id. citing Syl. Pt. 3, State ex rel. U.S. Fidelity and Guar. Co. v. Canady, 194 W.Va. 431, 460 S.E.2d 677 (1995).

IV. ARGUMENT

A. Executive Session Privilege

1. Issue

The first issue presented in this Petition is to what extent any privilege is attached to the minutes and/or recordings of an Executive Session of a Governing Body of a Public Agency. To what extent are the recordings of the executive sessions of the Marshall County Commission regarding hiring decisions privileged. It is believed that the legislature intended to extend a privilege to all matters properly discussed in executive session.

In the underlying matter, this specific issue was raised during discovery. The Complainant/defendant herein requested a copy of any and all recordings of the executive session of the Marshall County Commission relating to the decision not to hire the complainant/defendant herein. The Marshall County Commission, respondent/petitioners herein, objected pursuant to among other things, the executive session privilege. On May 11, 2009, a hearing was held on the complainant's/defendant herein motion to compel the recording. The Order issued as a result of that hearing simply ordered and *in camera* review of the recording. See: Order dated May 27, 2009 attached hereto as Exhibit A.

By this Order, the Administrative Law Judge has effectively stated that no such privilege exists. This defacto denial of the executive session privilege does not solve the dispute in issue. The Court has provided no legal basis for its defacto denial of the executive session privilege and is now, as more fully set forth below, ordering the violation of the attorney client privilege by the respondent/petitioner herein. As set forth below it is clear from the language of the Code as well as the language of the bill introducing the code that the legislature intended the executive sessions of Public Bodies to be privileged.

2. Applicable Law

West Virginia Code § 6-9A-4 states in pertinent part:

(a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in

accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(b) An **executive session** may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. **A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:**

(1) To consider acts of war, threatened attack from a foreign power, civil insurrection or riot;

(2) To consider:

(A) Matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee unless the public officer or employee or prospective public officer or employee requests an open meeting; or

(B) For the purpose of conducting a hearing on a complaint, charge or grievance against a public officer or employee, unless the public officer or employee requests an open meeting. General personnel policy issues may not be discussed or considered in a closed meeting. Final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting;

(3) To decide upon disciplining, suspension or expulsion of any student in any public school or public college or university, unless the student requests an open meeting;

(4) To issue, effect, deny, suspend or revoke a license, certificate or registration under the laws of this state or any political subdivision, unless the person seeking the license, certificate or registration or whose license, certificate or registration was denied, suspended or revoked requests an open meeting;

(5) To consider the physical or mental health of any person, unless the person requests an open meeting;

(6) To discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy such as any records, data, reports, recommendations or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances;

(7) To plan or consider an official investigation or matter relating to crime prevention or law enforcement;

(8) To develop security personnel or devices;

(9) To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision: Provided, That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: Provided, However, that information not subject to release pursuant to the West Virginia Freedom of Information Act does not become subject to disclosure as a result of executive session;

(10) To avoid the premature disclosure of an honorary degree, scholarship, prize or similar award;

(11) Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant. If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded;

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the Freedom of Information Act as set forth in article one [§§ 29B-1-1 et seq.], chapter twenty-nine-b of this code.

3. Legislative Enactment

As set forth above, executive sessions of a governing body are exempted from the Open Governmental Proceedings Act pursuant to West Virginia Code. The legislature, in enacting this code section, determined that “it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advise and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting.” 1999 W.V. ALS 208, attached hereto as *Exhibit B*. This language set forth in the prologue of the bill enacting this code, sets the tone for the entire section. The West Virginia Legislature understood that to efficiently operate, a governing body must be allowed the freedom to discern and discuss information and policy without the fear of reprisal.

4. Full and Frank Discourse

A close comparison can be made to the attorney client privilege. “[T]he attorney-client privilege has as its principal object the promotion of full and frank discourse between attorney and client so as to insure sound legal advice or advocacy. State ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 713, 601 S.E.2d 25, 33 (W. Va. 2004) citing State ex rel. United Hosp. Ctr., Inc. v. Bedell, 199 W. Va. 316, 326, 484 S.E.2d 199, 209 (1997). In the same manner the removal of the executive session from the public domain allows for full and frank discussion of the County Commissioners without fear of reprisal or possibility of litigation regarding preliminary discussions, undue influence from competing interest of the public, and/or coercion through threats of adverse action by members of the public.

A governing body, to operate in an efficient and effective manner must be able and permitted to openly and honestly discuss issues regarding the governance of the public, especially those which have been specifically excluded from disclosure by W. Va. Code §6-9A-4. If the executive sessions of the governing body, in the present case, the Marshall County Commission, are available to every potential litigant or individual who takes offense to a decision of the

Commission or who wishes to do harm to the Commission, the Commission will be hindered as to its ability to fully function. If the Commission is hampered by the fear that every comment or tone of discussion that occurs in executive session may be used to obtain a financial gain, promote skewed results or for attack by litigants, the government will cease to operate in an efficient manner and will most likely be unable due to the fear of reprisal to act in the best interest of the public. The Governing Body must be able to obtain all information available, discern the information, frankly and fully discuss the information and openly engage in the process without the process being scrutinized, twisted, misconstrued, or attacked by members of the public who disagree with the ultimate decision.

5. Language of the Code

It is anticipated that arguments may be raised that if the decision itself is in violation of some law that the records of the executive session are material to the decision itself. However, the legislature, anticipating this argument has already placed safeguards in the code.

Under W. Va. Code §6-9A-4(a), the West Virginia Legislature set forth that “no decision may be made in the executive session.” This provides that the public will have an opportunity to hear the decision and provide input as to the decision’s impact on the public and further provide competing information as to why the decision is harmful or incorrect. Consistent with this provision, no decision was made in the executive session.

Further, matters regarding “final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting.” W. Va Code §6-9A-4(b)(2)(B). In this instant, the Commission must publish its findings to the public. A final decision cannot be made in the executive session and must set forth in the open public meeting. This allows the public as a whole or an individual who feels harmed by the decision an opportunity to object and present competing information regarding the decision.

Additionally, the West Virginia Legislature anticipating the requests for disclosure of

executive session records has already set forth that matters not subject to the Freedom of Information act are not subject to disclosure as a result of the executive session. Specifically, the legislature set forth in W. Va. Code §6-9A-4(b)(2)(9) that “information not subject to release pursuant to the West Virginia Freedom of Information Act does not become subject to disclosure as a result of executive session.” This language was specifically included in the section regarding commercial competition and public funds, however pursuant to the prologue of the bill cited above, the legislature understood the need for some closed meeting, hence the existence of this code section and as such the limited disclosure language must be applied to the entire section.

Finally, the Legislature has incorporated the opportunity for those affected by the code, specifically those individuals affected under the sections regarding employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation and disciplining, suspension or expulsion of any student in any public school or public college or university an opportunity to request an open meeting. See: W. Va. Code § 6-9A-4(b)(2)(A) and (3).

This opportunity ensures that those individuals personally affected by the code can be present for the Commission meetings and discussion that will have a significant impact on their personal life. The Legislature, in an effort to ensure that the public is properly protected incorporated this language as an additional check and balance on the governing body’s authority and power. An individual’s failure to take advantage of this language cannot later form the basis of violation of the non-disclosure privilege that the West Virginia Legislature granted executive sessions.

As set forth above, the West Virginia Legislature has fully analyze the need and necessity of executive session privilege and has incorporated the same into West Virginia Law. Failure to follow this thoroughly developed code and enforce the executive session privilege will result in less effective government.

6. Case Law

West Virginia case law regarding the privilege attached to executive session meetings is limited. However, the Fourth Circuit, in reviewing a decision of the District Court for the Eastern District of Virginia upheld the District Court when that Court determined that some of what is discussed during executive session is privileged. An exception was held to exist regarding ordinary business matters. See: Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth., 87 Fed. Appx. 843, 848 (4th Cir. 2004). This determination by the Eastern District and confirmation by the Fourth Circuit are in line with the legislatively dictated code in West Virginia. As set forth above, ordinary business matters are not appropriate for determination during executive session and must be set forth during the open public meeting. In fact, “no decision may be made in the executive session.” W.Va. §6-9A-4(a).

The West Virginia Legislature was fully aware of the balance needed “to allow government to function and the public to participate in a meaningful manner in public agency decision making.” 1999 W.V. ALS 208. This balance is struck by protecting the executive sessions by allowing the governing body to fully, frankly and openly engage in the decision making process in a privileged forum and requiring that all decisions and final actions of the governing body be published in open public sessions.

B. ALJ’s Authority to Review Material Protected by the Attorney/Client Privilege

1. Issue

The second issue presented in this Petition is whether an Administrative Law Judge has the authority to conduct *in camera* review of recordings protected by the attorney/client privilege and to what extent does the publication of the recordings violate the attorney client privilege and further whether the ALJ as the finder of fact violates the attorney/client privilege when she orders a review of the protected materials.

2. Applicable Law

“[C]onfidential communications made by a client or an attorney to one another are

protected by the attorney-client privilege.” State ex rel. United Hosp. v. Bedell, 199 W. Va. 316, 326, 484 S.E.2d 199, 209 (1997).

“The venerable attorney-client privilege "has as its principal object the promotion of full and frank discourse between attorney and client so as to insure sound legal advice or advocacy.” Syllabus Point 11, in part, Marano v. Holland, 179 W. Va. 156, 366 S.E.2d 117 (1988).

In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal advisor; (3) the communication between the attorney and client must be intended to be confidential.

Syl. Pt. 2, State v. Burton, 163 W. Va. 40, 254 S.E.2d 129 (1979); State v. Rodoussakis, 204 W. Va. 58, 68 (W. Va. 1998).

It is the substance of the communication between an attorney and a client that is protected by the attorney-client privilege and not the fact that there have been communications. Syl. pt 6, State v. Rodoussakis, 204 W. Va. 58 (W. Va. 1998); United States v. Kendrick, 331 F.2d 110, 113 (4th Cir. 1964).

Noting that the Attorney -client privilege is the oldest of the privileges for confidential communications known to the common law, the Supreme Court recently reiterated that its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice.

United States v (Under Seal), 748 F.2d 871, 874 (4th Cir. 1984) citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

“A communication is ‘confidential’ if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Supreme Court Standard 503(a)(4)

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself and his representative and

his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Supreme Court Standard 503(b); See also: Wilstein v. San Tropai Condo. Master Ass'n, 189 F.R.D. 371, 379 (N.D. Ill. 1999) (“[P]rivileged communication does not lose its status as such when an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation. Management personnel should be able to discuss the legal advice rendered to them as agents of the corporation.”).

3. **The Administrative Law Judge Misinterpreted West Virginia Case Law as Providing Authority for *in camera* Review**

The ALJ in this matter misinterpreted and misapplied the West Virginia Supreme Court of Appeals case Peters v. Commission of Wood County, 205 W.Va. 41, 519 S.E.2d 179 (1999). The sole issue in the Peters case was whether the Commission of Wood County properly closed a meeting based solely upon the attorney/client privilege. The Court was very clear when it stated “the **only issue** is whether or not a public, governing body, may close a meeting, **which is otherwise required to be open under** the [Open Government Proceedings Act], because the discussions in that meeting are protected by the attorney/client privilege.” Id. 487, 185. (Emphasis Added). However, the issue in the present case is not whether the meeting was properly closed and the Marshall County Commission properly invoked the executive session privilege but whether the matters discussed during that executive session are protected by the attorney/client privilege. As set forth above, West Virginia Code §6-9A-4, provides for executive sessions, closed to the public, for several reasons. In this matter, there is absolutely no dispute the MCC properly closed the executive session to discuss the employment of an employee for the MCC. This is clearly provided in West Virginia Code §6-9A-4(b)(2)(A).

The West Virginia Supreme Court of Appeals in Peters citing State ex rel. United States Fidelity and Guarantee Co. v. Canady, 194 W.Va. 431, 460 S.E.2d 677 (1995) stated that,

Privileged communications between a public body subject to the requirements of the Open Governmental Proceedings Act...and its attorney are exempted from the open meetings requirement of the Act. The Court further held that, "when a public body closes an open meeting on the basis that the matter should be discussed in the meeting are exempt from the act as a result of the attorney/client privilege and that claim is challenged, the Court should review *in camera* whether the communications do indeed fall within that privilege.

Id. 489-90, 187-88. As clarification, the West Virginia Supreme Court of Appeals remanded the issue back the Circuit Court and directed them to hold an *in camera* hearing to determine whether the communications conducted during the three closed sessions fall within the attorney/client privilege. See: Id. at 490, 188; Nothing in this Order supports the claim that the trier of fact should hear the substance of the plaintiff's communications. Rather, the Court should conduct a hearing to evaluate whether the privilege exists. In the present matter, the issue is not whether the meeting was properly closed, but whether the communications that occurred during the meeting were protected by the attorney/client privilege. According to the West Virginia Supreme Court of Appeals in Peters, the Administrative Law Judge should hold a hearing and apply the proper test to determine whether the communications conducted during the meeting were protected by the attorney/client privilege. See: Id.; see also: State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 658 S.E.2d 728, 733 (2008), and see: State ex rel. Wausau Bus. Ins. Co. v. Madden, 216 W. Va. 776, 613 S.E.2d 924 (2005) in which the West Virginia Supreme Court of Appeals ordered an evidentiary hearing to determine the existence of any privilege. This does not authorized the ALJ to review and listen to the privileged material thereby violating the sanctity of the attorney/client privilege.

West Virginia law is well settled in regards to the tests applicable to determine whether an attorney/client privilege exists.

"[T]hree main elements must be present: (1) both parties must contemplate that the attorney/client relationship does or will exists; (2) the advice must be sought by the client from the attorney in his capacity as a legal advisor, (3) the communication between the attorney and client must be identified to be confidential."

State ex rel. Erie Ins. Prop. & Cas. Company v. Mazzone 218 W.Va. 593, 603, 625 S.E.2d 355, 365 (2005); Syl. Pt. 3, State of West Virginia ex rel. Allstate Insurance Co., v. Madden, 215 W.Va. 705, 601 S.E.2d 25 (2004); Syl. Pt. 5, State ex rel. Brison v. Kaufman, 213 W.Va. 624, 584 S.E.2d 480 (2003); Syl. Pt. 7, State ex rel. Med. Assur. of W.Va., Inc., v. Recht, 213 W.Va. 457, 583 S.E.2d 80 (2003); Syl. Pt. 2, State v. Burton, 163 W.Va. 40, 254 S.E.2d 129 (1979); State v. Rodoussakis, 204 W.Va. 58, 68, 511 S.E.2d 469, 479 (1998).

In the present matter, no such test was conducted. The ALJ merely asked during the hearing on this matter the identity of the individuals who contacted this office for legal advise and whether any representative of this office was at the County Commission executive session meeting. No undertaking to determine the existence of the attorney/client privilege or apply the well established test in West Virginia was accomplished. Additionally, the Court misinterpreting the Peters case, did not Order an *in camera* hearing to apply this test or discuss the elements of the test of attorney/client privilege. The ALJ merely ordered a violation of the attorney/client privilege and that she will personally review and listen to the privileged matter. The three prong test identified above was ignored. This unquestionably inaccurate application of the West Virginia Supreme Court of Appeals decision in Peters is in clear violation of the attorney/client privilege in that it constitutes a forced publication of the privileged matter to a third-party. Additionally, without any determination or hearing that the attorney/client privilege exists, the ALJ has violated the mandates of the Supreme Court of Appeals in the very case that she cited for her authority.

Upon review of the West Virginia case law regarding attorney/client privilege, it appears that there is only limited instances in which it is permissible for the Court can conduct an *in camera* review of the proposed privileged materials. This occurs in the context of the assertion of the crime/fraud exception. "The purpose of the crime/fraud exception to the attorney/client privilege to assure that the 'seal of secrecy' between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime."

State ex rel. Allstate Insurance Company v. Madden, 215 W.Va. 705, 717, 601 S.E.2d 25, 37 (2004), citing United States v. Zolin, 491 U.S. 554, 563 (1989); See Also: Syl. Pt. 2, Thomas v. Jones, 105 W.Va. 46, 141 S.E. 434 (1928). Even then, “the elements of the crime/fraud exception...require the party seeking to establish the exception to demonstrate through non-privileged evidence a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the privileged materials may reveal evidence to establish the claim that the crime/fraud exception applies.” Madden, 215 W.Va., at 718, 601 S.E.2d at 38.

In the present case, no assertion has been made that any party in this matter has attempted to perpetrate a fraud or crime and that was the basis of the communication during the executive session. Further, no showing has been made by the Human Rights Commission that any factual basis supports a good faith belief that *in camera* review of the privileged materials may reveal evidence to establish a crime or fraud or evidence to establish any wrongful act. The Commission has merely asserted that because Mr. Newell could not recall the specific comments made to the County Commission, the recording is discoverable. This is an inaccurate belief since the Commission has had full opportunity to depose Mr. Newell and ascertain the general substance of the communication. The exact words used by Mr. Newell are not important to the resolution of this matter. The substance of his communication in general, as well as the basis of his decision not to hire Mr. Briggs form the basis of this matter. That has been fully discovered through deposition and production of Mr. Newell’s notes and Mr. Briggs’ application file. The Commission has proffered no good faith reason or factual basis to support a violation of the attorney/client privilege by any person, including the ALJ.

The only other time documented in West Virginia case law in which an *in camera* review is conducted of proposed privileged materials, was in the case of State ex rel. Westfield Insurance Company v. Madden, 216 W.Va. 16, 602 S.E.2d 459 (2004). In that particular case, the sole issue before the Court was whether the Court applied the wrong legal standard in requiring Westfield to produce allegedly privileged documents as a sanction for responding to

discovery requests in bad faith. The Court held that in an action for bad faith against an insurer, the general procedure involved with the discovery of documents contained in the insured's litigation file, consists of the party seeking the documents or requesting the documents pursuant to Rule 34(b) of the West Virginia Rules of Civil Procedure, the responding party asserting a privilege identifying the privileged documents, and the party seeking the documents filing a Motion to Compel. The Court at that time and under those limited circumstances may then hold an *in camera* review of the individual documents to determine their discoverability. See: Id.

In the present case, no allegation has been made that discovery responses were done in bad faith, no sanction has been proposed, this is not an insurance bad faith claim, and no privilege is being asserted regarding litigation file documents of an insurance company. This limited use of an *in camera* review is not applicable in the present matter.

Based on our research, at no other time, has the West Virginia Supreme Court of Appeals permitted an *in camera* review of any documents proposed to be protected by the attorney/client privilege. The proper course of action is to conduct an *in camera* hearing to determine the existence of the attorney/client privilege and its applicability to the substance of the communication. That hearing should evaluate the three prong test, not just force the production of privileged communications. The ALJ's actions in this matter are improper and in violation of West Virginia law and violate the longstanding sanctity of the attorney/client privilege.

The ALJ committed further error by relying on language contained within the Peters case and the case of State ex rel. United States Fidelity & Guarantee Company v. Canady, 194 W.Va. 431, 460 S.E.2d 677 (1995), wherein the Court held that, "a party may waive the attorney/client privilege by asserting claims or defenses that put his or her attorney's advise in issue." The Court further explained that, "an attorney's legal advise only becomes an issue where the client takes affirmative action to assert a defense that attempts to prove the defense by disclosing or describing an attorney's communication." Peters, 205 W.Va. 490, 519 S.E.2d 188, citing State ex rel. United States Fidelity & Guarantee Company v. Canady, 1094 W.Va. 431, 460 S.E.2d 677

(1995).

In the present matter, at no time has the respondent and/or the client of this firm asserted any defense or claim that put the attorney's advise in issue. The only issue raised is that the communication had during the executive session is protected by the attorney/client privilege. At no time have the thoughts, impressions, opinion, work product, and/or communications of the attorney been stated or used as a defense. The ALJ has clearly misinterpreted this case and the language of the West Virginia Supreme Court of Appeals and has used that to prejudice the respondent/petitioner herein. This misapplication of the law will result in the clear violation of the attorney/client privilege and a clear violation of established West Virginia law.

4. The ALJ has Ordered a Violation of the Attorney/Client Privilege by Ordering a Review of the Privileged Material by the Finder of Fact.

The ALJ in this matter has ordered an improper violation of the attorney/client privilege by ordering that she as the finder of fact review the privileged communication to make a determination as to its privilege. This is a unique contention, and is equivalent to the publication of privileged material to a jury letting them listen to the material, analyze the material and evaluate the material at their will and then make a determination that the communication that they just listened to, while relevant and material, is privileged and that the jury must disregard the entire communication that they just heard. This practice will result in severe prejudice to any party properly asserting the attorney/client privilege, and will have chilling effect on future cases when parties raise the attorney/client privilege.

It is well established that despite possibly being material and relevant, communications had between attorneys and clients and the discussion of that information between the client representatives in a confidential setting, is protected by the attorney/client privilege despite its contradiction to the general open discovery rules. See: State ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 713, 601 S.E.2d 25, 33 (2004) ("As a result of this rule, many documents that could very substantially aid a litigant in a lawsuit are neither discoverable nor admissible as evidence."); United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984) ("Although the

privilege has a venerable pedigree and helps to ensure competent and complete legal services, it is nonetheless inconsistent with the general duty to disclose and impedes the investigation of the truth.”).

The ALJ as the finder of fact cannot violate the attorney client privilege by reviewing the privileged communications. The very act of publishing the communication to a third party is exactly what is meant to be protected by the privilege and would constitute a per se waiver of the privilege by the client. Lawyer-Disciplinary Bd. v. McGraw, 194 W. Va. 788, 798 (1995) citing Syl. pt. 12, Marano v. Holland, 179 W. Va. 156, 366 S.E.2d 117 (1988) (“ ... as a general principle, if privileged communication is disclosed to third parties, then the attorney-client privilege is waived.”); see also: United States v. Jones, 696 F.2d 1069 (4th Cir. 1982) (disclosure inconsistent with confidential nature of attorney-client relationship waives attorney client privilege.).

A review of the privileged material by the finder of fact is a clear violation of the attorney/client privilege, West Virginia law and flies in the face of centuries of established and unquestioned law. State ex rel. Doe v. Troisi, 194 W. Va. 28, 35 459 S.E.2d 139, 146 (1995) citing 8 Wigmore, Wigmore on Evidence § 2290 at 542-43 (1961) (noting the history of the privilege and stating the privilege has been largely unquestioned dating from the reign of Elizabeth I). This violation of the attorney/client privilege must not be allowed.

C. The Order of the Administrative Law Judge denying the executive session privilege constitutes a violation of the separation of powers doctrine and is therefore inappropriate

“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 legislative.” W.Va. Const. Art. V, Section 1.

The West Virginia Supreme Court of Appeals “has held that the plain meaning of this article is such that it calls for obedience not interpretation or construction. State ex rel. County

Court v. Demus, 148 W.Va. 398, 401, 135 S.E.2d 352, 355 (1964).

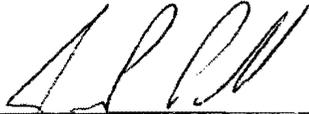
In the underlying matter, the ALJ operating as judicial officer has effectively ruled that the legislative privilege of the executive session does not exist. The executive session privilege as set forth in detail above, is a legislatively granted right given to governing bodies to allow them to operate efficiently and effectively. The ALJ, by her Order, has encroached on the providence of the legislature and essentially nullified the legislature's determination that executive sessions are protected and privileged from disclosure.

The ALJ is an officer of the judiciary. As set forth in West Virginia Code of State Rules Section 772-7, Sub Section 7.4.a, the conduct of the Administrative Law Judge shall, where applicable, be guided by the judicial Code of Ethics. Additionally, as set forth in multiple sections of the code, the Administrative Law Judge operates as a judicial officer exercising many of the same powers as the Judges of the multiple Courts within this State. These powers include the control of discovery, control of witnesses, control of the case and docket, determination of disputes, resolution of motions, evidentiary issues and jurisdictional issues. See: W.Va. CSR §77-2-7. The ALJ is clearly a judicial officer.

As an officer of the judiciary, the ALJ is prohibited from interfering with the powers of the legislature. Under the open governmental proceedings act, West Virginia Code §6-9A-4, "the governing body of a public agency may hold executive session during a regular special or emergency meeting in accordance with the provisions of the section." W.Va. Code §6-9A-4(a). This executive session is closed from the public portions of the meeting and is not susceptible to discovery. This legislatively granted right allows the governing body of a public agency to discern and discuss matters permitted under the code in closed forum absent from the public eyes. As discussed above, this closed and privileged session allows the governing body to fully and frankly discuss the matter without fear of reprisal, litigation, or attack. By the ALJ's Order in this matter, she has essentially eliminated the right granted by the West Virginia Legislature and has violated the separation of powers doctrine. This violation of the separation of powers

doctrine is inappropriate and must not be permitted to occur.

MARSHALL COUNTY COMMISSION
and MARSHALL COUNTY
COMMUNICATIONS 911
By Counsel



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CERTIFICATE OF SERVICE

Service of the foregoing **PETITION FOR WRIT OF PROHIBITION** was had upon the following by mailing a true and correct copy thereof by United States mail, postage prepaid, this

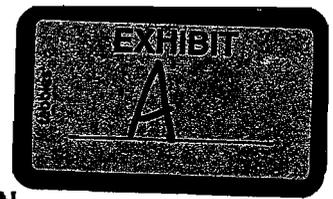
28 day of August, 2009:

Jamie S. Alley
Senior Assistant Attorney General
Civil Rights Division
812 Quarrier Street, 4th Floor
P.O. Box 1789
Charleston, WV 25326

Phyllis H. Carter
Chief Administrative Law Judge
West Virginia Human Rights Commission
1321 Plaza East, Room 108-A
Charleston, WV 25301



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BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOHN R. BRIGGS,
Complainant,

v.

DOCKET NO. EDB-466-08

**MARSHALL COUNTY COMMISSION and
MARSHALL COUNTY COMMUNICATIONS 911,**

Respondents.

**ORDER PROVIDING FOR *IN CAMERA* REVIEW OF RECORDINGS
IN DISPUTE IN RESPONSE TO COMMISSION'S MOTION TO COMPEL
AND RESPONDENTS' MOTION FOR PROTECTIVE ORDER**

On Monday, May 11, 2009, the undersigned convened a teleconference to discuss pending discovery motions from the West Virginia Human Rights Commission and the Respondents Marshall County Commission and Marshall County Communications 911 in the above-referenced matter. Participants in the teleconference were Senior Assistant Attorney General Jamie S. Alley, on behalf of the Commission and the Complainant, John R. Briggs, and Jason P. Pockl, Esquire, and Bailey & Wyant, P.L.L.C., on behalf of the Respondents, Marshall County Commission and Marshall County Communications 911. During this teleconference, the undersigned heard arguments related to the Commission's Motion to Compel and the Respondents' corresponding Motion for Protective Order.

On April 16, 2009, the West Virginia Human Rights Commission filed a Motion to Compel with this tribunal. In the Motion, the Commission and the Complainant seek an order compelling Respondents to produce any existing records of meetings between 911 Director Larry Newell, Marshall County Administrator Betsy Frohnappel and the Marshall County Commissioners regarding the hiring decisions in the above-referenced matter. In support of the Motion, the Commission asserts that it propounded written discovery that sought specific information regarding the substance of contacts between 911 Director Newell and the Marshall County Commission regarding Newell's hiring

recommendations, the hiring decision and/or the Complainant. The Commission asserted that the Respondents' Answers and Supplemental Responses to these Interrogatories were vague and incomplete. The Commission further indicated that during his discovery deposition, 911 Director Newell testified that he did not recall the details of his conversations with the Marshall County Commissioners, but that he believed there was a record of the conversations. By way of its Motion, the Commission asks that the Respondents be compelled to produce the recording of this meeting.

On April 21, 2009, counsel for Respondents submitted Respondents' Response to the Commission's Motion to Compel Discovery and Motion for Protective Order. Respondents agree that there is a recording of the meeting between Mr. Newell and the Marshall County Commission. However, the Respondents assert that the record is protected from discovery by the executive session privilege, the attorney-client privilege and the work product doctrine.

In support of their contentions, Respondents assert that the Marshall County Commission's March 11, 2008, executive session is protected from discovery by the executive session privilege because of the executive session exemption established in the Open Governmental Proceedings Act, W. Va. Code § 6-9A-1 *et seq.* Additionally, Respondents contend that the record of the conversation is protected by the attorney-client privilege and the work product doctrine because Director Newell and Ms. Frohnappel discussed legal advice about the hiring decisions with the Marshall County Commissioners in the closed session. Respondents assert that they contacted counsel and sought legal advice about the hiring decisions in anticipation of possible litigation. They further assert that the advice was obtained to avoid and/or prepare for possible litigation related to the outcome of the hiring process. No attorneys were directly involved in the session; however, because legal advice was discussed in the closed meeting, Respondents contend that the record of the meeting is protected by the attorney-client privilege and the work product doctrine.

Respondents request that the Commission's Motion to Compel be denied and that this tribunal enter a Protective Order establishing that the Commission not be granted the requested discovery.

On April 27, 2009, counsel for the Commission filed the Commission's Response and Reply to Respondents' Response to the Commission's Motion to Compel Discovery and Motion for Protective Order. In this submission, the Commission asserted that the Open Governmental Proceedings Act governs *public* access to government meetings, but does not apply to discovery. The Commission notes that there are no West Virginia cases that establish an "executive session privilege" as a bar to civil discovery.

In its Reply, the Commission does acknowledge the possibility that there may be some portions of the recording that fall under the attorney-client privilege and/or the work product doctrine. The Commission refers to cases from other jurisdictions to support its contention that any non-privileged portions of the recording should be provided in discovery. To that end, the Commission proposes that this tribunal conduct an *in camera* review of the March 11, 2008, recording to determine whether all or part of the recording is subject to discovery.

Counsel for both parties were given an opportunity to address their respective positions and provide additional argument during the May 11, 2009, teleconference. The argument provided by both parties was consistent with their respective written submissions. During the teleconference, counsel for Respondents confirmed that the recording was an audio recording. It was also confirmed that counsel for Respondents was not present at the March 11, 2008, meeting.

This tribunal is persuaded by the rationale adopted by the West Virginia Supreme Court in Peters v. County Commission of Wood County, 205 W. Va. 481, 519 S.E.2d 179 (1999). In that case, the West Virginia Supreme Court of Appeals decided that it is permissible for a public body to convene in executive session for the purpose of receiving legal advice. *Id.* However, the mere presence of an attorney is not sufficient to close a public meeting.

In Peters, an *in camera* review was deemed necessary by the Court to determine whether the conversations at issue fell within the attorney-client privilege and were, therefore, properly closed from the public. In discussing the requirements for executive session, the Peters Court held:

Accordingly, we hold today that privileged communications between a public body subject to the requirements of the Open Governmental Proceedings Act, West Virginia Code §§ 6-9A-1 to -7 (1993 and Supp. 1998), and its attorney are exempted from the open meetings requirement of the Act. Such executive session may be closed to the public only when the following statutory requirements are met: 1) a majority affirmative vote of the members present of the governing body of the public body, as required by West Virginia Code § 6-9A-4; 2) the notice requirements as found in West Virginia Code § 6-9A-3 shall be followed; and, 3) the written minutes requirements as found in West Virginia Code § 6-9A-5 shall be followed. However, a public agency is not permitted to close a meeting that otherwise would be open merely because an agency attorney is present.

Peters, 205 W. Va. at 489, 519 S.E.2d at 187.

The Peters Court also considered when waiver of the attorney-client privilege occurs as a result of asserting claims or defenses that place the legal advice in issue and favorably recalled the holding in a prior decision by the Court:

Appellants rely on State ex rel. United States Fidelity and Guaranty Company v. Canady, 194 W. Va. 431, 460 S.E.2d 677 (1995), wherein we held that "[a] party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue." Id. at 442, 460 S.E.2d at 688. This Court further explained that an attorney's legal advice only becomes an issue where a client takes affirmative action to assert a defense and attempts to prove that defense by disclosing or describing an attorney's communication." Id. at 442, 460 S.E.2d at 688 n.16.

Peters, 205 W. Va. at 490, 519 S.E.2d at 188.

Consistent with the direction found in the Peters case, as well as the other authority cited by the Commission which is consistent therewith, an *in camera* review of the March 11, 2008, recording is necessary to resolve this discovery matter and privilege dispute.

Based upon a review of the written submissions of the parties, argument of counsel during the teleconference and the guidance of the applicable law, the Respondents are hereby **ORDERED** to produce a complete and legible copy of the audio recording of the March 11, 2008, meeting between Lany Newell, Betsy Frohnafel and the Marshall County Commissioners for *in camera* review by the

undersigned Chief Administrative Law Judge. Such complete and legible copy of the referenced recording shall be produced to the undersigned at the Offices of the West Virginia Human Rights Commission, 1321 Plaza East, Room 108A, Charleston, West Virginia 25301-1400, on or before 5:00 p. m., on the 27th day of May, 2009.

The purpose of the *in camera* review is to establish whether or not the recorded conversations, during which counsel for the Respondents was not present, are either in whole or in part protected by a recognized privileged and therefore exempt from discovery.

Upon completion of the *in camera* review, the undersigned will issue a further ruling detailing the findings of the *in camera* review. In the event that it is determined that the entire recording is protected by a recognized privilege, a further order will be entered denying the Commission's Motion to Compel and granting the Respondents' application for Protective Order. In the event that it is determined that some or all of the recording is not subject to a recognized privilege, an order will be entered establishing a schedule for the production of the discoverable portions of the recording to the Commission, with the understanding that any portions of the recording provided to the Commission must be maintained in a confidential manner and may not be disclosed to any third party without the prior approval and permission of this tribunal.

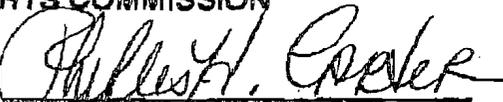
The Respondents' objection to this ruling is hereby noted and preserved.

It is so ORDERED.

Entered this 27th day of May, 2009.

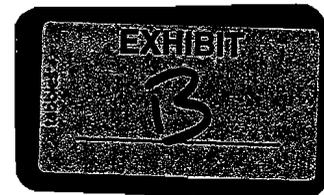
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

By



PHYLLIS H. CARTER
CHIEF ADMINISTRATIVE LAW JUDGE

1999 W.V. ALS 208; 1999 W. Va. Acts 208; 1999 W.V. Ch. 208; 1999 W.V. HB 2005



LEXSEE 1999 WV CH 208

WEST VIRGINIA ADVANCE LEGISLATIVE SERVICE
STATENET

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WEST VIRGINIA 74TH LEGISLATURE

HOUSE BILL 2005

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1999 W.V. ALS 208; 1999 W. Va. Acts 208; 1999 W.V. Ch. 208; 1999 W.V. HB 2005

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT to amend and reenact sections one, two, three, four, five, six and seven, article nine-a, chapter six of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto five new sections, designated sections eight, nine, ten, eleven and twelve; to amend and reenact section two, article five-g, chapter sixteen of said code; and to further amend said article by adding thereto five new sections, designated sections three, four, five, six and seven, all relating generally to open governmental and nonprofit hospital meetings; declaring legislative policy; providing definitions; providing that proceedings be open; requiring public notice of meetings; providing for exceptions; establishing requirements for minutes and providing for exceptions; providing for enforcement by injunction; providing that actions taken in violation of this article are voidable; providing for voidability of bond issues; establishing criminal penalties; providing for payment of attorney fees and expenses; prohibiting action by reference, secret or written ballot; providing for broadcasting or recording of meetings; creating an open governmental meetings committee within the West Virginia ethics commission; providing for advisory opinions; establishing for immunity; establishing duty of attorney general, secretary of state, clerks of county commissions, city clerks and recorders to provide information; providing definitions for open hospital proceedings; requiring proceedings to be open; requiring public notice of meetings; providing exceptions; establishing requirements for minutes; providing for enforcement by injunctions; providing that actions in violation are voidable; providing for violations; and penalties.

To view the next section, type .np* TRANSMIT.

To view a specific section, transmit p* and the section number. e.g. p*1

Be it enacted by the Legislature of West Virginia:

That sections one, two, three, four, five, six and seven, article nine-a, chapter six of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article be further amended by adding thereto five new sections, designated sections eight, nine, ten, eleven and twelve; that section two, article five-g, chapter sixteen of said code be amended and reenacted; and that said article be further amended by adding thereto five new sections, designated sections three, four, five, six and seven, all to read as follows:

CHAPTER 6. GENERAL PROVISIONS RESPECTING OFFICERS.

ARTICLE 9A. OPEN GOVERNMENTAL PROCEEDINGS.

Section 6-9A-1. Declaration of legislative policy.

The Legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this

1999 W.V. ALS 208; 1999 W. Va. Acts 208; 1999 W.V. Ch. 208; 1999 W.V. HB 2005

state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions. The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government created by them.

Open government allows the public to educate itself about government decision-making through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government.

Public access to information promotes attendance at meetings, improves planning of meetings, and encourages more thorough preparation and complete discussion of issues by participating officials. The government also benefits from openness because better preparation and public input allow government agencies to gauge public preferences accurately and thereby tailor their actions and policies more closely to public needs. Public confidence and understanding ease potential resistance to government programs.

Accordingly, the benefits of openness inure to both the public affected by governmental decision making and the decision makers themselves. The Legislature finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advise and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decision making.

Section 6-9A-2. Definitions.

As used in this article:

(1) "Decision" means any determination, action, vote or final disposition of a motion, proposal, resolution, order, ordinance or measure on which a vote of the governing body is required at any meeting at which a quorum is present.

(2) "Executive session" means any meeting or part of a meeting of a governing body which is closed to the public.

(3) "Governing body" means the members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

(4) "Meeting" means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

(A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding;

(B) Any on-site inspection of any project or program;

(C) Any political party caucus;

(D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

(5) "Official action" means action which is taken by virtue of power granted by law, ordinance, policy, rule, or by virtue of the office held.

(6) "Public agency" means any administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section,

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committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power. The term "public agency" does not include courts created by article eight of the West Virginia constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.

(7) "Quorum" means the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.

Section 6-9A-3. Proceedings to be open; public notice of meetings.

Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, all meetings of any governing body shall be open to the public. Any governing body may make and enforce reasonable rules for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend. This article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised: Provided, That persons who desire to address the governing body may not be required to register to address the body more than fifteen minutes prior to time the scheduled meeting is to commence.

Each governing body shall promulgate rules by which the date time, place and agenda of all regularly scheduled meetings and the date time, place and purpose of all special meetings are made available, in advance, to the public and news media. except in the event of an emergency requiring immediate official action.

Each governing body of the executive branch of the state shall file a notice of any meeting with the secretary of state for publication in the state register. Each notice shall state the date time, place and purpose of the meeting. Each notice shall be filed in a manner to allow each notice to appear in the state register at least five days prior to the date of the meeting.

In the event of an emergency requiring immediate official action, any governing body of the executive branch of the state may file an emergency meeting notice at any time prior to the meeting. The emergency meeting notice shall state the date time, place and purpose of the meeting and the facts and circumstances of the emergency.

Upon petition by any adversely affected party any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section.

Section 6-9A-4. Exceptions.

(a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:

- (1) To consider acts of war, threatened attack from a foreign power, civil insurrection or riot;
- (2) To consider:

(A) Matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee unless the public officer or employee or prospective public officer or employee requests an open meeting; or

(B) For the purpose of conducting a hearing on a complaint, charge or grievance against a public officer or employee, unless the public officer or employee requests an open meeting. General personnel policy issues may not be discussed or considered in a closed meeting. Final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting;

(3) To decide upon disciplining, suspension or expulsion of any student in any public school or public college or university. unless the student requests an open meeting;

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(4) To issue, effect, deny, suspend or revoke a license, certificate or registration under the laws of this state or any political subdivision, unless the person seeking the license, certificate or registration or whose license, certificate or registration was denied, suspended or revoked requests an open meeting;

(5) To consider the physical or mental health of any person, unless the person requests an open meeting;

(6) To discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy such as any records, data, reports, recommendations or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances;

(7) To plan or consider an official investigation or matter relating to crime prevention or law enforcement;

(8) To develop security personnel or devices;

(9) To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision: Provided, That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: Provided, however, That information not subject to release pursuant to the West Virginia freedom of information act does not become subject to disclosure as a result of executive session;

(10) To avoid the premature disclosure of an honorary degree, scholarship, prize or similar award;

(11) Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant. If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded;

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act as set forth in article one, chapter twenty-nine-b of this code;

Section 6-9A-5. Minutes.

Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

(1) The date, time and place of the meeting;

(2) The name of each member of the governing body present and absent;

(3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and

(4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

Section 6-9A-6. Enforcement by injunctions; actions in violation of article voidable; voidability of bond issues.

The circuit court in the county where the public agency regularly meets has jurisdiction to enforce this article upon civil action commenced by any citizen of this state within one hundred twenty days after the action complained of was taken or the decision complained of was made. Where the action seeks injunctive relief, no bond may be required unless the petition appears to be without merit or made with the sole intent of harassing or delaying or avoiding return by the governing body.

The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation this article. An injunction may also order that subsequent actions be taken or decisions be made in conformity with the provisions of this article: Provided, That no bond issue that has been passed or approved by any governing body in this state may be annulled under this section if notice of the meeting at which the

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bond issue was finally considered was given at least ten days prior to the meeting by a Class I legal advertisement published in accordance with the provisions of article three, chapter fifty-nine of this code in a qualified newspaper having a general circulation in the geographic area represented by that governing body.

In addition to or in conjunction with any other acts or omissions which may be determined to be in violation of this Act, it is a violation of this Act for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.

Any order which compels compliance or enjoins noncompliance with the provisions of this article, or which annuls a decision made in violation of this article shall include findings of fact and conclusions of law and shall be recorded in the minutes of the governing body.

Section 6-9A-7. Violation of article; criminal penalties; attorney fees and expenses in civil actions.

(a) Any person who is a member of a public or governmental body required to conduct open meetings in compliance with the provisions of this article and who willfully and knowingly violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars: Provided, That a person who is convicted of a second or subsequent offense under this subsection is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars.

(b) A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article may be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust.

(c) Where the court, upon denying the relief sought by the complaining person in the action, finds that the action was frivolous or commenced with the primary intent of harassing the governing body or any member thereof or, in the absence of good faith, of delaying any meetings or decisions of the governing body, the court may require the complaining person to pay the governing body's necessary attorney fees and expenses.

Section 6-9A-8. Acting by reference; written ballots.

(a) Except as otherwise expressly provided by law, the members of a public agency may not deliberate, vote, or otherwise take official action upon any matter by reference to a letter, number or other designation or other secret device or method, which may render it difficult for persons attending a meeting of the public agency to understand what is being deliberated, voted or acted upon. However, this subsection does not prohibit a public agency from deliberating, voting or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted or acted upon, are available for public inspection at the meeting.

(b) A public agency may not vote by secret or written ballot.

Section 6-9A-9. Broadcasting or recording meetings.

(a) Except as otherwise provided in this section, any radio or television station is entitled to broadcast all or any part of a meeting required to be open.

(b) A public agency may regulate the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting, so as to prevent undue interference with the meeting. The public agency shall allow the equipment to be placed within the meeting room in such a way as to permit its intended use, and the ordinary use of the equipment may not be declared to constitute undue interference: Provided, That if the public agency, in good faith, determines that the size of the meeting room is such that all the members of the public present and the equipment and personnel necessary for broadcasting, photographing, filming and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public agency, acting in good faith and consistent with the purposes of this article, may require the pooling of the equipment and the personnel operating it.

Section 6-9A-10. Open governmental meetings committee.

The West Virginia ethics commission, pursuant to subsection (j), section one, article two, chapter six-b of this code, shall appoint from the membership of the commission a subcommittee of three persons designated as the West Virginia ethics commission committee on open governmental meetings. The chairman shall designate one of the persons to chair

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the committee. In addition to the three members of the committee, two additional members of the commission shall be designated to serve as alternate members of the committee.

The chairman of the committee or the executive director shall call meetings of the committee to act on requests for advisory opinions interpreting the West Virginia open government meetings act. Advisory opinions shall be issued in a timely manner, not to exceed thirty days.

Section 6-9A-11. Request for advisory opinion; maintaining confidentiality.

(a) Any governing body or member thereof subject to the provisions of this article may seek advise and information from the executive director of the West Virginia ethics commission or request in writing an advisory opinion from the West Virginia ethics commission committee on open governmental meetings as to whether an action or proposed action violates the provisions of this article. The executive director may render oral advise and information upon request. The committee shall respond in writing and in an expeditious manner to a request for an advisory opinion. The opinion shall be binding on the parties requesting the opinion.

(b) Any governing body or member thereof that seeks an advisory opinion and acts in good faith reliance on the opinion has an absolute defense to any civil suit or criminal prosecution for any action taken in good faith reliance on the opinion unless the committee was willfully and intentionally misinformed as to the facts by the body or its representative.

(c) The committee and commission may take appropriate action to protect from disclosure information which is properly shielded by an exception provided for in section four of this article.

Section 6-9A-12. Duty of attorney general, secretary of state, clerks of the county commissions and city clerks or recorders.

It is the duty of the attorney general to compile the statutory and case law pertaining to this article and to prepare appropriate summaries and interpretations for the purpose of informing all public officials subject to this article of the requirements of this article. It is the duty of the secretary of state, the clerks of the county commissions, joint clerks of the county commissions and circuit courts, if any, and the city clerks or recorders of the municipalities of the state to provide a copy of the material compiled by the attorney general to all elected public officials within their respective jurisdictions. The clerks or recorders will make the material available to appointed public officials. Likewise, it is their respective duties to provide a copy or summary to any newly appointed or elected person within thirty days of the elected or appointed official taking the oath of office or an appointed person's start of term.

CHAPTER 16. PUBLIC HEALTH.

ARTICLE 5G. OPEN HOSPITAL PROCEEDINGS.

Section 16-5G-2. Definitions.

As used in this article:

(1) "Decision" means any determination, action, vote or final disposition of a motion, proposal, resolution, order or measure on which a vote of the governing body is required at any meeting at which a quorum is present;

(2) "Executive session" means any meeting or part of a meeting of a governing body of a hospital that is closed to the public;

(3) "Governing body" means the board of directors or other group of persons having the authority to make decisions for or recommendations on policy or administration to a hospital owned or operated by a nonprofit corporation, nonprofit association or local governmental unit, the membership of which governing body consists of two or more members;

(4) "Hospital" means any hospital owned or operated by a nonprofit corporation, nonprofit association or local governmental unit;

(5) "Meeting" means the convening of a governing body of a hospital for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter: Provided, That a medical staff conference is not a meeting; and

(6) "Quorum" means, unless otherwise defined by applicable law, a simple majority of the constituent membership of a governing body.

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Section 16-5G-3. Proceedings to be open; public notice of meetings.

Except as expressly and specifically otherwise provided by law, and except as provided in section four of this article, all meetings of a governing body of a hospital shall be open to the public. Any governing body may make and enforce reasonable rules and regulations for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend. This article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised: Provided, That persons who desire to address the governing body may not be required to register to address the body more than fifteen minutes prior to time the scheduled meeting is to commence.

Each governing body shall promulgate rules by which the date time and place of all regularly scheduled meetings and the date time, place and purpose of all special meetings are made available, in advance, to the public and news media, except in the event of an emergency requiring immediate official action.

Each governing body shall file a notice of any meeting by causing a notice of the meeting to be printed in a local newspaper: Provided, That the governing body may otherwise provide by rule or regulation an alternative procedure that will reasonably provide the public with notice. Each notice shall state the date time, place and purpose of the meeting.

In the event of an emergency requiring immediate official action, any governing body may provide an emergency meeting notice at any time prior to the meeting. The emergency meeting notice shall state the date time, place and purpose of the meeting and the facts and circumstances of the emergency.

Upon petition by any adversely affected party, any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section.

Section 16-5G-4. Exceptions.

(a) This article does not prevent the governing body of a hospital from holding an executive session during a regular, special or emergency meeting, after the presiding officer has identified the authorization under this article for the holding of such executive session and has presented it to the governing body and to the general public, but no official action shall be made in such executive session.

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a hospital as defined in this article for the following:

(1) The appointment, employment, retirement, promotion, demotion, disciplining, resignation, discharge, dismissal or compensation of any officer or employee, or other personnel matters, or for the purpose of conducting a hearing on a complaint against an officer or employee, unless the officer or employee requests an open meeting;

(2) The disciplining, suspension or expulsion of any student or trainee enrolled in a program conducted by the hospital, unless the student or trainee requests an open meeting;

(3) Investigations and proceeding involving the issuance, denial, suspension or revocation of the authority or privilege of a medical practitioner to use the hospital and to engage in particular kinds of practice or to perform particular kinds of operations, unless the person seeking the authority or privilege or whose authority or privilege was denied, suspended or revoked requests an open meeting;

(4) Matters concerning the failure or refusal of a medical practitioner to comply with reasonable regulations of a hospital with respect to the conditions under which operations are performed and other medical services are delivered;

(5) To consider the work product of the hospital's attorney or the hospital administration;

(6) The physical or mental health of any person, unless the person requests an open meeting;

(7) Matters which, if discussed in public, would be likely to affect adversely the reputation of any person;

(8) Any official investigation or matters relating to crime prevention or law enforcement;

(9) The development of security personnel or devices; or

(10) Matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving competition which, if made public, might adversely affect the financial or other interest of the state or any political subdivision or the hospital.

Section 16-5G-5. Minutes.

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Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

- (1) The date, time and place of the meeting;
- (2) The name of each member of the governing body present and absent;
- (3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and
- (4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

Section 16-5G-6. Enforcement by injunctions; actions in violation of article voidable.

The circuit court in the county where a hospital is located has jurisdiction to enforce this article upon civil action commenced by any citizen of this state within one hundred twenty days after the action complained of was taken or the decision complained of was made. Where the action seeks injunctive relief, no bond may be required unless the petition appears to be without merit or made with the sole intent of harassing or delaying or avoiding return by the governing body.

The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of this article. An injunction may also order that subsequent actions be taken or decisions be made in conformity with the provisions of this article.

Any order which compels compliance or enjoins noncompliance with the provisions of this article, or which annuls a decision made in violation of this article shall include findings of fact and conclusions of law and shall be recorded in the minutes of the governing body.

Upon entry of an order, the court may, where the court finds that the governing body intentionally violated the provisions of this article, order the governing body to pay the complaining person's necessary attorney fees and expenses. Where the court, upon denying the relief sought by the complaining person in the action, finds that the action was frivolous or commenced with the primary intent of harassing the governing body or any member thereof or, in the absence of good faith, of delaying any meetings or decisions of the governing body, the court may require the complaining person to pay the governing body's necessary attorney fees and expenses.

Any person who intentionally violates the provisions of this article is liable in an action for compensatory and punitive damages not to exceed a total of five hundred dollars.

Section 16-5G-7. Violation of article; penalties.

(a) In addition to or in conjunction with any other acts or omissions which may be determined to violate this Act, it is a violation of this Act for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.

(b) Any person who is a member of a governing body of a hospital required to conduct open meetings in compliance with the provisions of this article and who willfully and knowingly violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or confined in jail not more than ten days, or both fined and confined.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

HISTORY:

Approved by the Governor on April 8, 1999

SPONSOR: (BY DELEGATES AMORES, MAHAN, LINCH, FAIRCLOTH AND TRUMP)
[Passed March 21, 1999; in effect ninety days from passage.]