

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**AT CHARLESTON**

**No. 35446**

**THE SHEPHERDSTOWN OBSERVER, INC.**

Appellant,

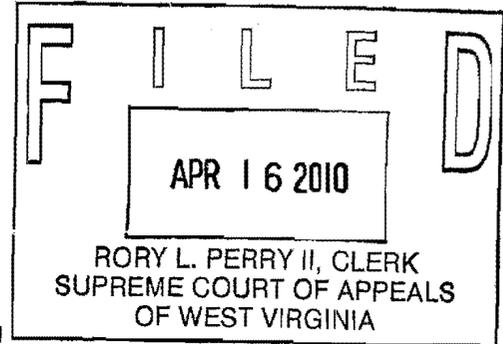
v.

Jefferson County Civil Action N. 09-C-169  
(Hon. David H. Sanders, Judge)

**JENNIFER MAGHAN,**

Clerk of the County Commission  
Of Jefferson County

Respondent.



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**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS AND THE SOCIETY OF PROFESSIONAL  
JOURNALISTS, IN SUPPORT OF APPELLANT, THE  
SHEPHERDSTOWN OBSERVER, INC.**

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## STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press (“the Reporters Committee”) is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and freedom of information litigation in state and federal courts since 1970. The Reporters Committee files this Brief along with its Motion for Leave to File Brief of *Amicus Curiae* and respectfully requests that this Court grant its Motion.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

*Amici* represent journalists who regularly use government openness and accountability laws to effectively report on governmental affairs to the general public. This case concerns an issue critical to the media and the public in general: whether West Virginia’s freedom of information law requires public records to have been created by a public body in the first instance. Requiring public records to have been created by the public body in the first instance creates a loophole in the freedom of information laws and sets a harmful precedent that would severely affect *amici*’s ability to perform this public function.

## SUMMARY OF ARGUMENT

All of the records requested in this case are public and should be released by this Court under West Virginia's Freedom of Information Act (hereinafter, "FOIA"). It is irrelevant whether the public body created the record in the first instance. First, both the "prepare" and the "retain" requirements under West Virginia's FOIA must be liberally construed. Second, this Court has already adopted the reasonable and logical interpretation that the word "and" used in the phrase "prepared, owned and retained by a public body" is to be read as "or." To interpret the statute as requiring literal, physical preparation on the part of the public body would have far-reaching and devastating effects on West Virginia's system of open government and government accountability. Additionally, citizens submitting referendum petitions are acting as legislators, not as private citizens, and thus are not afforded protection from identification. The lower court should not have considered this argument.

## ARGUMENT

### **A. The requested petition signatures are public records under West Virginia's Freedom of Information Act and should be released.**

#### **1. Both the "prepare" and the "retain" requirements under West Virginia's FOIA must be liberally construed.**

West Virginia's FOIA is an expansive statute that has been liberally interpreted by this Court. See *Daily Gazette Company, Inc. v. Withrow*, 177 W. Va. 110, 115; 350 S.E.2d 738, 748 (1986); *4-H Road Community Ass'n v. WVU Foundation, Inc.*, 182 W.Va. 434, 388 S.E.2d 308 (1989); *Queen v. West Virginia Univ. Hosps., Inc.*, 179 W.Va. 95, 365 S.E.2d 375 (1987). West Virginia's Supreme Court has mandated "the fullest possible disclosure" of information concerning government. *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799, 808 (1985).

Moreover, the purpose of the legislation as stated in the statute itself is to open the workings of government to the public, and in order for this objective to be carried out, the FOIA must be liberally construed:

“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.” *W.Va.Code 29B-1-1 [1977]*.

This Court has also broadly defined what is "owned and retained by a public body." *Daily Gazette Co., Inc. v. Withrow*, 177 W.Va. 110, 350 S.E.2d 738 (1986), which is cited by the lower court in support of dismissal, actually contains a lengthy discussion on what it means for a public body to "prepare and retain" a record, and how both the "retain" and the "prepare" requirements are flexible and should be construed liberally, in favor of the requester. The Court held that "lack of possession of an existing writing by a public body at the time of a request under the State's Freedom of Information Act is not by itself determinative of the question whether the writing is a "public record" under W.Va.Code, 29B-1-2(4), as amended, which defines a "public record" as a writing "retained by a public body." *Daily Gazette Co., Inc. v. Withrow* at 116-117. Instead, this Court held that the writing is "retained" if it is subject to the control of the public body. *Daily Gazette Co., Inc. v. Withrow* at 117. Specifically, this Court concluded that while the sheriff may not have actual possession of the requested documents, he had control over their production in that he could authorize his attorney or the county's insurer's attorney to produce copies of the documents.

This Court in *Daily Gazette Co., Inc. v. Withrow* also discussed flexibility in the "prepare" standard, noting that documents do not always have to be literally physically prepared by the public body in order to be considered a public record. *Id.* at 117. Preparation by a private

attorney, for example, does not automatically exempt the record from FOIA, though attorney-client privilege may at times apply. *Id.* A public body can be compelled to produce records under FOIA if those records are in the hands of its attorney, bank, or other agent. "Preparation of a writing, such as a litigation settlement document, by an attorney for a public body or by an attorney for a public body's insurer is viewed as preparation by the public body for the purpose of *W. Va. Code*, 29B-1-2(4) [1977]. Otherwise, a public body could thwart disclosure under the State FOIA by having an attorney or an insurer's attorney prepare every writing which the public body wishes to keep confidential." *Id.* at 117.

Likewise, in this case, the clerk should not be permitted to circumvent freedom of information laws by claiming that the public body did not itself prepare the petition, even though the signatures proved instrumental in conducting the public's business.

This Court has also previously interpreted the "prepared, owned and retained by a public body" requirement in a case that is directly on point and that the lower court notably failed to address. In *Daily Gazette v. W. Va. Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996), a "public record" was held to include written communications between a public body and private persons or entities. The Court recognized only a very narrow exception to the disclosure requirement where such communications "do not consist of advice, opinions or recommendations to the public body from outside consultants or experts obtained during the public body's deliberative, decision-making process." *Id.* Therefore, notwithstanding this limited exception under *W. Va. Code* § 29B-1-4(8)), it is clear that documents kept by a public body and containing information relating to the conduct of the public's business are not exempt from disclosure simply because they were initially "prepared" by some other person or entity.

**2. Even if the clerk did not “prepare” the records, the records were “retained” by a public body and are thus subject to release under West Virginia’s FOIA.**

The lower court erred in focusing only on the term “prepare” and not the term “retain.” The U.S. Supreme Court has held that when applying the federal Freedom of Information Act that “agency possession *or control* is prerequisite to triggering any duties under the FOIA.” *Kissinger v. Reporters Committee*, 445 U.S. 136, 151, 100 S.Ct. 960, 969, 63 L.Ed.2d 267, 282 (1980) (emphasis added).

Similarly, West Virginia's FOIA applies to "any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body." W. Va. Code § 29B-1-2(4). As this Court has noted, this provision "constitutes a liberal definition of a 'public record' in that it applies to any record which contains information relating to the conduct of the public's business, without the additional requirement that the record is kept 'as required by law' or 'pursuant to law,' as provided by the more restrictive freedom of information statutes in some of the other states." *Daily Gazette v. Withrow*, 350 S.E.2d at 742-43 (citations omitted). As opposed to requiring that the record is kept “as required by law” or “pursuant to law,” in order to demonstrate that the public body “controls” the record, *W.Va.Code*, 29B-1-2(4) [1977] allows requesters to show that the public body “controls” the record through several potential methods, including owning, retaining and preparing the documents. *Daily Gazette v. Withrow*, 350 S.E.2d at 744. (holding that “the writing is 'retained' if it is subject to the control of the public body.”) *See also* Braverman and Heppler, *A Practical Review of State Open Records Laws*, 49 *Geo.Wash.L.Rev.* 720, 733-35 (1981).

Because West Virginia’s FOIA statute applies to any record that contains information “relating to the conduct of the public's business,” it is *less* restrictive than the states that consider

public records to be only those kept “pursuant to law.” But even those states that have statutes containing this stricter standard do not require that the records be literally and physically prepared by the public body.

North Carolina is one such state that considers public records only those that are kept “pursuant to law.” Even with this restrictive FOIA statute, however, the state has clearly established that records need not be both prepared and retained by the public body in order to be considered a “public record.” In the case *Durham Herald v. Low-Level Radioactive Waste*, 110 N.C. App. 607, 430 S.E.2d 441 (1993), *rev. denied*, 334 N.C. 619, 435 S.E.2d 334 (1993), the Supreme Court of North Carolina concluded that the General Assembly intended that the papers in question “would become public records only when they are received by the Authority in the proper exercise of its discretion,” rather than immediately upon creation or collection by the consultants or contractors preparing the documents. It is irrelevant whether or not the public body created the record in the first instance.

In much the same vein, this Court in *Affiliated Construction Trades Foundation v. Regional Jail and Correctional Facility Authority*, 200 W.Va. 621, 622, 490 S.E.2d 708, 709 (1997), established that just because a public agency has a statutory right to copy writings prepared, owned, and retained by a private entity, these writings do not automatically become public records under the FOIA. The court held that where a public body has a legal right to obtain a copy of any writing relating to the conduct of the public's business, which was prepared and retained by a private party, but public body does not exercise that right, the fact that public body has right to obtain a copy of the document does not, standing alone, mean that writing is a “public record” as defined by FOIA. Conversely, if the public body avails itself of records prepared by a private entity, providing there is a statutory right to access the documents, those

records automatically become public. Thus, the statutory right to access the records satisfies the requirement that the public body "controls" the records.

In this case, the clerk had a statutory right to see the names on the referendum petition. In fact, the clerk is *required* by statute to view and verify the signatures in order for the petition to bring about a vote. When the clerk took possession of the records in order to perform her statutorily required duty, she exercised control over the records.

The U.S. Supreme Court affirms this point. In *Forsham v. Harris*, 445 U.S. 169, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980), the court drew a distinction between records which have been *in fact* obtained, and records that merely *could have been* obtained. Here, the court held that "the FOIA imposes no duty on the agency to create records. By ordering HEW [the federal agency] to exercise its right of access, we effectively would be compelling the agency to "create" an agency record since prior to that exercise the record was not a record of the agency." Thus, when a public body in fact obtains records it possessed a right to access, as the clerk in this case did, the records necessarily become public records.

This Court has repeatedly treated a record used by a public body as a public record under the FOIA, even if the body did not "prepare" the document. *Daily Gazette Company v. Development Office, supra*; *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985), (ordering release of a list containing the names and addresses of private security guards, which had been furnished to the Secretary of State's office by their employer under an "agreement" it would be kept confidential); *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (W.Va.1986) (ordering a school board to disclose a school bus driver's medical and psychiatric records which had been submitted to the school board by the driver's physicians). Similarly, the court ruled in a non-FOIA case that private, confidential documents become public records,

available for public disclosure, when the public body receives and uses the records. *Daily Gazette v. W. Va. Board of Medicine*, 177 W. Va. 316, 352 S.E.2d 66 (1986). Thus, it is clear that this Court has already adopted the reasonable and logical interpretation that the word "and" used in the phrase "prepared, owned and retained by a public body" is to be read as "or."

**B. The policies underlying FOIA and the First Amendment support the release of the petition records.**

The lower court's assertion that the available checks on the clerk's verification of the signatures, such as contacting the Secretary of State's Fraud unit, overcome the public's right of access to the petition records goes entirely against the spirit and intent of the freedom of information laws. Moreover, the lower court's argument that the available checks on the clerk's power negate the need for public access is unfounded and contrary to every established principle of open government. "If [federal] FOIA is to be more than a dead letter, it must necessarily incorporate some restraint upon the agency's powers to move documents beyond the reach of the FOIA requester." *Kissinger v. Reporters Committee*, *supra* at 159.

The lower court erred in concluding that there is "no valid public purpose in making the signatures public." (Order of Aug. 21, 2009 at 22). The lower court should not have considered this argument. Requesters in West Virginia are entitled to access to public records and need not state a purpose for making the request. Yet, the requester's purpose can only enhance his right to receive records under West Virginia's Freedom of Information Act. In fact, where this Court has at all considered a requester's purpose, the Court has used a balancing test to determine whether a requester's valid purpose or "legitimate interest" can overcome a privacy exemption. *Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988). A requester's stated purpose, or lack thereof,

however, cannot be used to support the withholding of records that are public, where no exemption applies.

**1. A voter referendum petition is not akin to a secret ballot or the right to vote.**

The lower court erred in simply assuming that the referendum petition at issue in this case is akin to a secret ballot or the right to vote. Courts have recognized that this assumption is inappropriate and that the referendum process should be treated very differently from the right to vote, in part because the secret ballot system sprang from a unique historical context that does not extend to the referendum process. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993).

In *Taxpayers United*, the U.S. Court of Appeals for the Sixth Circuit carefully distinguished between the right to initiate legislation, which was a “wholly state-created right,” and the right to vote, which is granted to United States citizens through the federal constitution. “[R]eferendums, unlike general elections for a representative form of government, are not constitutionally compelled.” *Id.* at 296-97.

Because the petitioners in *Taxpayers United* had “not been prohibited from exercising a fundamental constitutional right,” the court found that signing a petition was not entitled to the same First Amendment protection as exercising the right to vote. *Id.* at 296-97. Therefore, the referendum process is not automatically entitled to the same protections as the voting process.

Additionally, the referendum process does not share the same unique history as the secret ballot. Reformation of the ballot system was brought about not because of a belief in a privacy right in voting, as the lower court in the instant case erroneously reasoned, but as a clear need to correct an election process rife with corruption and fraud. *See Burson v. Freeman*, 504 U.S. 191, 200-202 (1992).

Prior to reform, voting ballots were distributed by the political parties, which created ballots with distinctive colors and designs to ensure that it would be easy to tell for which party an individual voted. *Id.* at 200. As a result, parties could either confuse voters by imitating popular party ballots or corrupt voters by threatening them or bribing them to vote for a particular party. *Id.* at 201. The privacy concern was actually a secondary concern during the reform period, which focused primarily on the integrity of the voting process and the safety of the voters, instead of the individual right of privacy that is incidentally involved. *See Burson*, 504 U.S. at 200.

The history behind the secret ballot is instructive for the Court's ruling in this case. Contrary to the lower court's assertion, the right to a secret ballot was not established because of a privacy right or an interest in anonymous voting. Rather, the secret ballot was created because of a primary need to eliminate corruption in the voting process. A citizen exercising the right to vote, is acting in a fundamentally different manner than a citizen who is exercising the right to legislate. A citizen casting a vote is only seeking to select officials who will later become responsible for creating and enacting legislation on a wide range of legislation. A citizen participating in a referendum is actively trying to govern on a specific legislative initiative. These are two separate activities and should be treated as such.

**2. The application of a First Amendment “chilling effect” analysis to a referendum petition is inappropriate.**

The clerk has dropped her initial claim that referendum petition signatures are private in favor of the argument that the petition records are not public because they were not prepared by the public body in the first instance. The lower court, however, based its ruling in part on the

argument that disclosing the petition signatures would create a “chilling effect” on the right to petition the government.

This argument is flawed. Submitting a referendum petition — as opposed to the purely private action to “petition the government for a redress of grievances” in the First Amendment — is analogous to state action, and not to private citizens expressing political views. Citizens involved in the referendum process are no longer acting as private citizens, but rather as legislators and state actors actively attempting to utilize the referendum power to revoke legislation. (*Perdue v. Wise*, 216 W.Va. 318, 327, 607 S.E.2d 424, 433 (2004), comparing the constitutional amendment referendum process to acts of the legislature).

The petition signers in this case clearly engaged in a legislative act, which has not been afforded the traditional protections under the First Amendment. If the Court allows referendums to be placed on the ballot without disclosing the identities of the government actors/citizens who petitioned for the referendum, the general public has no way of holding the government accountable for the legislation.

Journalists need access to public records that shed light on the referendum process in order to inform the public about its government and hold state actors accountable. Here, the clerk was responsible for certifying valid and invalid petition signatures, and a high rate of signatures were found to be invalid. There is a strong public interest in scrutinizing the certification process and without reporter coverage, the public remains uninformed. Regardless of the number of available government “checks” on the certification process, the public relies on journalists to provide independent review of state actions. The fact that one government office is available to police another cannot overcome the crucial need for public transparency and accountability to the people.

Federal, state and local governments in the United States are founded upon a strong tradition of open government and accountability. To create a loophole in West Virginia's freedom of information law would be to ignore this foundation and to promote government secrecy in enacting legislation.

### CONCLUSION

In sum, the requested petition signatures are public records under West Virginia's Freedom of Information Act and should be released. Both the "prepare" and the "retain" requirements under West Virginia's FOIA must be liberally construed, and this Court has already established that a record used by a public body is a public record under the FOIA, even if the body did not "prepare" the document in the first instance. Additionally, the policies underlying FOIA and the First Amendment support the release of the petition records. Citizens submitting referendum petitions are acting as legislators, not as private citizens, and thus are not afforded First Amendment protection. This Court should find in favor of appellants.



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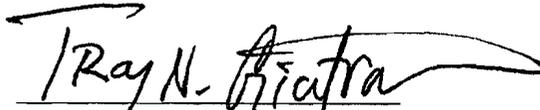
## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing *amici curiae* brief was sent by United States first class mail, postage prepaid, on this 16th day of April 2010, to each of the following:

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