NO. 22-491

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

22-0491

TAX ANALYSTS,

Petitioner,

v.

MATTHEW IRBY, West Virginia State Tax Commissioner,

Respondent.

(ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, CIVIL ACTION NO. 22-P-80)

PETITIONER'S REPLY BRIEF

Counsel for Petitioner:
Zachary J. Rosencrance
(W. Va. Bar No. 13040)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25325-1386
Tel: (304) 347-1100 / Fax: (304) 343-3058
E-mail: zrosencrance@bowlesrice.com

Cornish F. Hitchcock
(W. Va. Bar No. PHV-48420)
HITCHCOCK LAW FIRM PLLC
5614 Connecticut Avenue, NW, No. 304
Washington, DC 20015-2604
Tel: (202) 489-4813/ Fax: (202) 315-3552
E-mail: conh@hitchlaw.com

Counsel for Respondent:
Patrick Morrissey, Attorney General
Katherine A. Schultz (W. Va. Bar No. 3302)
Senior Deputy Attorney General
William C. Ballard (W. Va. Bar No. 9557)
Assistant Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Tel: (304) 558-2522/ Fax: (304) 558-2525
E-mail: Kathy.A.Schultz@wvago.gov
E-mail: William.C.Ballard@wvago.gov

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INTRODUCTION[1]

The State Tax Department (the "Department") urges this Court to issue a remarkable holding, namely, that a court may dismiss a Freedom of Information Act case on the pleadings – without affidavits, a *Vaughn* index or any other evidence – if agency counsel simply asserts that the requested records are exempt in their entirety under a provision of the tax code. According to the Department, a court may enter such a ruling, even though the text of the FOIA exemptions protects "information" rather than entire "records," and even though the exemption at issue here protects certain "standards," not entire "records containing standards."

Tax Analysts has never disputed the Department's ability to withhold *portions* of the requested records that the Department can establish – on a proper evidentiary showing – are what the exempting statute calls "standards used or to be used for the selection of returns for examination or data used or to be used for determining such standards." There is no reason to believe that the records requested here are exempt *in their entirety* – even as to the title page, index, table of contents, or publicly available materials such as statutes or case decisions.

The extent to which an FOIA exemption protects agency records generally entails questions of fact to be litigated and resolved on the basis of affidavits, a *Vaughn* index and possibly an *in-camera* inspection. Indeed, this Court has said on several occasions: "Summary judgment is the preferred method of resolving cases brought under FOIA.'" *Highland Mining Co. v. West Virginia University School of Medicine*, 235 W. Va. 370, 380, 774 S.E.2d 36, 46 (2015), quoting *Farley v. Worley*, 215

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[1] The Department recommends oral argument under Rule 20, on the theory that the proper interpretation of the "standards" exemption is a question of first impression; Tax Analysts' brief recommends oral argument under Rule 19, on the theory that the need for a factual record in an FOIA case is clearly settled law. Tax Analysts adheres to that position, but would not object to the Court scheduling the case for a Rule 20 argument.

W.Va. 412, 418, 599 S.E.2d 835, 841 (2004) (internal citation omitted). The circuit court's dismissal order should be reversed and the case remanded for a resolution on the merits.

ARGUMENT

A. The circuit court did not properly consider the standard for dismissal of a complaint under Rule 12(b)(6).

The Department argues dismissal of the case was proper under W. Va. R. Civ. P. 12(b)(6) because there are no facts to be determined, and the Department's interpretation of the pertinent exemption deserves deference. Resp. Br. at 4-5. This Court has held that a case should be dismissed under Rule 12(b)(6) only if it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. pt. 2, *Highmark West Virginia, Inc. v. Jamie*, 221 W. Va. 487, 491, 655 S.E.2d 509, 513 (2007) (internal citation omitted). The complaint in this case more than passed that test.

Specifically, the complaint stated that Tax Analysts has requested the same sort of records from every other state tax department, and to date, 40 other state revenue departments either publish those materials available online or else disclosed them to Tax Analysts with few, if any, redactions. (J.A. 9, ¶¶ 5-6). In addition, because the FOIA requires an agency to produce all non-exempt portions of a requested record, Tax Analysts opposed the Department's motion to dismiss by citing federal FOIA cases where the Internal Revenue Service was allowed to shield portions of similar, internal law enforcement techniques, but only after submitting affidavits and a *Vaughn* index that demonstrated to the trial court's satisfaction that the portions being withheld did, in fact, meet the statutory definition of records that may be withheld. (J.A. 41 & n.4).

This showing is more than enough to warrant denying a motion to dismiss and allowing the case to proceed to litigation on the merits. The point is buttressed by this Court's published

FOIA decisions that reversed the grant of a motion to dismiss.[2] In two unpublished decisions where dismissal was affirmed, the reason was that the FOIA did not cover the requested records;[3] a third unpublished decision that affirmed dismissal involved a more broadly written exemption the scope of which this Court said was "readily apparent."[4] The decision to dismiss this case on the pleadings was thus clear error.

B. This Court's decisions require a *Vaughn* affidavit and affidavits even if an agency believes that the requested record may be withheld in its entirety.

The Department argues that there is no general obligation for an agency to submit a *Vaughn* index and supporting affidavits showing that the agency has segregated and disclosed all non-exempt portions of the requested records. Resp. Br. at 5-9. In the Department's view, an agency need only assert, through counsel, that the requested records are covered by an exempting statute, and a reviewing court should enter judgment on the pleadings. This is not the law.

The Department's argument starts with the obvious point that the FOIA gives the public a "right to inspect or copy any public record . . . except as otherwise expressly provided" in the

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[2] *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W.Va. 648, 453 S.E.2d 631 (1994); *In re Charleston Gazette FOIA Request*, 222 W. Va. 771, 671 S.E.2d 776 (2008); *Shepherdstown Observer, Inc. v. Maghan*, 226 W.Va. 353, 700 S.E.2d 805 (2010); *Smith v. Van Meter,* 244 W.Va. 589, 855 S.E.2d 897 (2021).

[3] *Smith v. Tarr,* No. 13-1230, 2015 WL 148680 (W.Va. Jan. 12, 2015) (memorandum decision) (West Virginia Judicial Investigation Commission records not subject to FOIA); *Smith v. Shoemaker*, No. 11-1230, 2012 WL 5232225 (W. Va. Oct. 19, 2012) (memorandum decision) (federal prisoner may not use state FOIA to obtain court records).

[4] *Appalachian Mountain Advocates v. West Virginia University*, No. 19-266, 2020 WL 3407760 (W. Va. June 18, 2020) (memorandum decision) (upholding dismissal of two requests, citing principles of judicial notice and the "readily apparent" applicability of a broadly written exemption statute that allowed the withholding of "any documentary material, data or other writing made or received by" the agency). Slip op. at 5, n.4, discussing W. Va. Code § 5B-2-1.

exemptions set out in W. Va. § Code 29B-1-4(a). However, the Department is not correct when it argues that whenever an agency cites a statutory exemption, "the first step is to determine whether a particular statute exempts the requested materials." Resp. Br. at 7. This is flatly wrong as a matter of law. A court ruling that an agency has properly invoked a statutory exemption is the ultimate legal conclusion and is thus the *last* step in the analysis.

The Department relies heavily on *Daily Gazette Co. v. Caryl,* 181 W. Va. 42, 380 S.E.2d 209 (1989), but *Caryl* is distinguishable on a number of grounds.

In *Caryl*, a newspaper sought access to "any and all documents related to [the] settlement between" the Department" and a railroad company, a set of records that the Court referred to as "tax compromise records." *Id.* at 43, 210. In *Caryl*, the Department relied on a statute protecting tax returns and information about the personal or business affairs of a corporation. The newspaper cited an exception in that statute, which stated that the protection does not apply "in any proceeding in which the tax commissioner is a party before a court of competent jurisdiction to collect or ascertain the amount" of any tax that was due. W. Va. Code § 11-10-5d(a) (1987).

The Department prevailed in *Caryl* by citing a separate, more specific tax statute, which stated that when the Commissioner agrees to accept compromise settlements, the Commissioner must file with the legislature a quarterly report "summarizing the issues and amounts of liability contained in the agreements and compromises into which he has entered" and shall do so "in a form that preserves the confidentiality of the identity of the taxpayers involved in such agreements and compromises." W. Va. Code § 11-10-5q (1987). The *Caryl* Court concluded that this latter, specific provision was controlling as to disclosures regarding tax compromises.

This result in *Caryl* makes sense because the Court harmonized the two statutes to say that in general, tax cases should be litigated in public in a courtroom; however, if the taxpayer and the

Department decide to settle, the key elements of that settlement should be "summariz[ed]" and disclosed (without revealing the taxpayer's identity), thus providing a measure of accountability as to how the Department is enforcing this state's tax laws.

Likewise, *Caryl* does not support the notion that a *Vaughn* index is excused in this case, and *Caryl* is factually, procedurally and legally distinct for multiple reasons:

- *Caryl* was decided on a motion for summary judgment, not a motion to dismiss.
- *Caryl* involved an all-or-nothing FOIA request for "all" records that "relate to" a specific compromise settlement. There is no indication in the opinion that the newspaper was interested in obtaining any non-exempt portions of that record.
- The legislature had spelled out in a separate statute that specific elements of the requested records must be "summariz[ed]" and disclosed.

Thus, *Caryl* does not support the Department's claim that the "first step" in a FOIA case is for the trial court "to determine whether a particular statute exempts the requested materials." Resp. Br. at 7.

The Department's efforts to distinguish the other cases cited by Tax Analysts are equally unpersuasive. The Department acknowledges that in *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996), this Court did order a remand so that the trial court could consider, as a factual matter, and with the aid of a *Vaughn* index and affidavits, which of the requested documents fell into the category of internal memoranda that could be withheld under the exemption protecting an agency's internal deliberative process (W. Va. Code § 29B-1-4(a)(8)). The present case is different, the Department argues, because this case did not "involve documents specifically protected by a tax statute." Resp. Br. at 8. However, the Department cites no authority, either in the text of the West Virginia FOIA or otherwise, for this proposition that the invocation of a "tax statute" (however defined) displaces the generally

applicable rules governing FOIA litigation, including the need to construe exemptions narrowly and to disclose non-exempt portions. *See* Pet.'s Br. at 8-9.

The Department then attempts to distinguish the federal FOIA cases cited by Tax Analysts where the IRS was able to withhold portions of the requested records under the federal FOIA's law enforcement exemption for records that would reveal "techniques and procedures" and "guidelines" the disclosure of which could "risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).[5] The Department argues, with no authority, that cases involving the federal law enforcement exemption are irrelevant because that exemption "by its nature requires the agency to prove that documents fall into that category." Resp. Br. at 9. That is not the law.[6]

The burden of proof in a FOIA case does not vary from one exemption to the next, both under the federal FOIA and the West Virginia FOIA. *Cf.* 5 U.S.C.§ 552(a)(4)(B) ("the burden is on the agency to sustain its action" in denying a request) with W. Va. Code § 29B-1-5(2) ("the burden is on the public body to sustain its action" in denying a request). Thus when, as here, an agency cites a statute under the "other statutes" exemption, the burden is the same.

Ironically, one of the FOIA cases cited by the Department rejected the very argument that the Department is making about why no *Vaughn* index is needed. In *St. Mary's Medical Center,*

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[5] The cases the Department seeks to distinguish appear in Tax Analysts' opening brief (at 13 n.4) are *Trucept v. IRS*, 2018 WL 4628366 (S.D. Cal. 2018); *Goldstein v, IRS*, 174 F. Supp.3d 38 (D.D.C. 2016), and *Mayer Brown LLP v. IRS,* 562 F.3d 1190 (D.C. Cir. 2009).

[6] It is perplexing why the Department would try to draw a distinction in this area, given that the Department cited law enforcement concerns when it denied Tax Analysts' request. The Department's denial letter explained that "disclosure of the information contained in the [requested] records could reasonably be expected to educate potential tax evaders" by revealing "techniques and procedures used by auditors in reviewing taxpayer records to verify if a taxpayer has remitted the proper amount of tax to the Tax Department." (J.A. 17).

Inc. v Steel of West Virginia, Inc., 240 W. Va. 238, 809 S.E.2d 708 (2018), the Attorney General opposed filing a *Vaughn* index, claiming that the requested records were exempt in their entirety under a statute that shields records compiled during an antitrust investigation. *Id.* at 243, 713.

The circuit court disagreed and ordered the preparation of a *Vaughn* index, which was provided to the court and the requester. The circuit court then ordered an *in-camera* review of unredacted versions of the 349 documents identified in that index. Upon finishing that review, the circuit court concluded that 89 of the 349 documents did not fall within the claimed exemption and should be released. *Id.* at 243-44, 713-14. The requester, having access to the *Vaughn* index, was able to agree that the Attorney General had met his burden of proof as to the more than 200 documents being withheld. *Id.* at 243, 713. The case of *Farley v. Worley, supra,* is to the same effect, as the Court rejected the agency's claim that a *Vaughn* index is required only in cases where an agency cites the FOIA's "internal memorandum" exemption.

St. Mary's perfectly illustrates the value of a *Vaughn* index in terms of providing a requester and the trial court with an evidentiary basis for addressing an agency's exemption claims.[7]

C. Deference to the Department's interpretation is inconsistent with the FOIA.

The heart of the Department's argument is that the circuit court correctly held that the Department "reasonably interpreted" the "standards" exemption, to which that court deferred. (J.A. 9); Resp. Br. at 9-16. Tax Analysts' opening brief explained (at 14-18) why that approach is

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[7] This Court's decision in *St. Mary's* was limited to a collateral issue, namely, whether the Attorney General should be sanctioned for disclosing a copy of the *Vaughn* index to the Federal Trade Commission without the circuit court's permission. This Court concluded that the sanction was unwarranted. We note that the filing of a *Vaughn* index under seal is unusual in FOIA cases, even if, as in *St. Mary's,* the requester's counsel is provided a copy. *St. Mary's* appears to be the only case decided by this Court in which a *Vaughn* index was sealed by the trial court.

at odds with the statutory text of the FOIA and this Court's decisions; the Department's response provides no reason to alter that position.

This Court has emphasized the importance of *de novo* review in FOIA cases,[8] and cases construing the federal FOIA are to the same effect. As one court put it: "The agency's decision that the information is exempt from disclosure receives no deference; accordingly, the district court decides *de novo* whether the agency has sustained its burden." *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143, 147 (2d Cir. 2010). That principle applies even if an agency cites the federal FOIA's "other statutes" exemption to argue that the other statute bars disclosure. *See Lessner v. Department of Commerce*, 827 F.2d 1333, 1335 (9th Cir. 1987) (FOIA's "basic policy" is to "ensure that Congress and not administrative agencies determines what information is confidential. Given the court's responsibility to ensure that agencies do not interpret the exemptions too broadly, . . . deference appears inappropriate in the FOIA context." *See also Association of Retired Railroad Workers, Inc. v. Railroad Retirement Board*, 830 F.2d 331, 334 (D.C. Cir. 1987) (deference inappropriate because "agencies are not necessarily neutral interpreters insofar as FOIA compels release").

The Department makes a plea for deference to the Department's reading of the exempting statute, an argument that relies on two roughly 30-year-old federal FOIA cases from the U.S. Court of Appeals for the First Circuit, which did credit the notion that principles of deference in other areas of administrative law should apply in cases where the IRS seeks to withhold records under the federal taxpayer confidentiality statute (26 U.S.C. § 6103). *Aronson v. IRS,* 973 F.2d 962, 967

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[8] *See* generally *Farley v. Worley*, 215 W.Va. at 422-46, 599 S.E.2d at 845-49.

(1st Cir. 1992); *Church of Scientology International v. IRS,* 30 F.3d 224, 235 (1st Cir. 1994). Those cases are, however, of no assistance to the Department for multiple reasons.

First, and by way of context, questions of deference to an agency's interpretation of a statute normally arise in cases where a party challenges an agency regulation as being inconsistent with the authorizing statute. In those situations, courts typically use the so-called *Chevron* standard of review, which asks (1) whether the "terms of the statute [are] unambiguous"; if so, then "judicial inquiry is complete:" but (2) if the statute is not clear, whether the agency's interpretation of the statutory text is reasonable; if so, the court defers to the agency's reading. *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital,* 196 W.Va. 326, 337, 472 S.E.2d 411, 422 (1996), citing *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *See generally Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

Second, deference is not the first step, but the second (and perhaps unnecessary) step in any *Chevron* analysis. The first step is to determine if the meaning of the relevant statute is clear, and that is a question of law to be determined *de novo*. *West Virginia Health Care Cost Review Authority, supra,* 196 W.Va. at 335, 472 S.E.2d at 420. Here, the exempting statute unambiguously protects "standards," not "documents containing standards." *Aronson* and *Church of Scientology* do not excuse this first step in the analysis. Indeed, those cases make it clear that one reaches questions of deference (if at all) only after conducting a *de novo* examination of the statute as applied to the requested records. *See Church of Scientology International, supra*, 30 F.3d at 228. Here, by contrast, the circuit court leapt immediately to the Department's plea for deference, an approach that would be clear error even if the law were clear that the two-pronged *Chevron* test analysis was required in this area.

Third, the Department ignores an important procedural difference: *Aronson* and *Church of Scientology International* were decided not on motions to dismiss, but on motions for summary judgment, based on a full record that allowed the requester to respond to the IRS's claims and allowed the trial court to examine the nature and content of the requested records and to determine if the records fell within the ambit of the exempting statute. In fact, in *Church of Scientology International*, the court reached questions of statutory construction only after the IRS had produced over 500 pages in whole or in part and submitted a *Vaughn* index, along with two affidavits totaling 21 pages. 30 F.3d at 227 & n.3. This procedure makes perfect sense. In order to understand whether the requested records are covered by the exempting statute, a reviewing court needs to know what those records actually say. We have nothing remotely close to that situation here.[9]

Fourth, the Department fails to note that the approach in *Aronson* and *Church of Scientology International* has been rejected by the six other federal appellate courts to have considered the issue.[10] As one court explained, the federal FOIA seeks to ensure that the

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[9] Apart from *Aronson* and *Church of Scientology International*, the Department cites a case involving classified records and records said to be covered by a statute protecting "intelligence sources and methods." *Katsiaficas v. CIA,* 2017 WL 2172437 (D. Mass. May 17, 2017). However, even in national security cases, agencies such as the CIA must submit a *Vaughn* index and affidavits, and the deference that is accorded is not to the agency's reading of an exemption, but to the nature of the national security risks that could result from disclosure. As the U.S. Supreme Court put it, a CIA official is "familiar with 'the whole picture,' as judges are not," and his affidavit is "worth of great deference, given the magnitude of the national security interests and potential risks at stake." *CIA v. Sims*, 471 U.S. 159, 178 (1985). *See also Larson v. Department of State*, 565 F.2d 857, 865 (D.C. Cir. 2009) (deference is warranted given the "uniquely executive purview" of national security) (internal citation omitted).

[10] *Church of Scientology v. IRS*, 792 F.2d 153 (D.C. Cir. 1986, *aff'd on other grounds*, 484 U.S. 9 (1987); *Grasso v. IRS,* 785 F.2d 70, 74-75 (3d Cir. 1986); *Linsteadt v. IRS*, 729 F.2d 998, 1001-02 (5th Cir. 1984); *Carlson v. United States Postal Service,* 504 F.3d 1123, 1126-27 (9th Cir. 2007); *Long v. IRS*, 742 F.2d 1173, 1177-80 (9th Cir. 1984); *DeSalvo v. IRS*, 861 F.2d 1217, 1219-21 (10th Cir. 1988); *Currie v. IRS*, 704 F.2d 523, 526-28 (11th Cir. 1983).

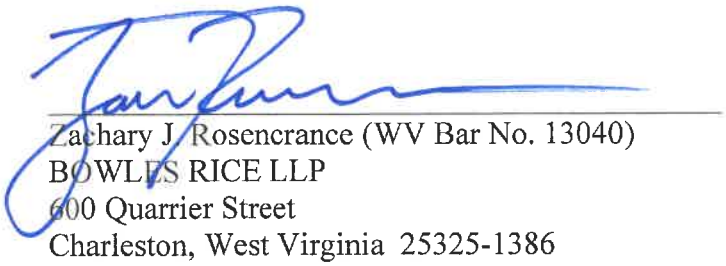
legislature, not administrative agencies, should determine what information is to be confidential, and "given the statutory requirement not to interpret the exemptions too broadly, deference appears inappropriate in the FOIA context." *Lessner v. Department of Commerce, supra,* 827 F.2d at 1335.

Finally, courts "customarily withhold *Chevron* deference from agencies litigation positions." *West Virginia Health Care Cost Review Authority, supra*, 196 W.Va. at 334, 472 S.E.2d at 419. Here, the Department denied the request on the ground that the requested records "contain" standards that are exempt from disclosure (J.A. 17) – a concession that would have required the disclosure of the non-exempt portions. During litigation, the Department, without explanation, changed its position, asserting that the requested records *in their entirety* are exempt "standards." This is plainly not a case that warrants deference.

CONCLUSION

For these reasons and those stated in our opening brief, Tax Analysts respectfully asks this Court to reverse the decision of the circuit court and to remand the case for evidentiary proceedings required in Freedom of Information Act cases, including the filing of a *Vaughn* index with supporting affidavits that make the requisite "detailed justification" for any withholding and, if appropriate, an *in-camera* inspection of the requested records.

TAX ANALYSTS
By Counsel



Zachary J. Rosencrance (WV Bar No. 13040)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1100 / Facsimile: (304) 343-3058
zrosencrance@bowlesrice.com

Cornish F. Hitchcock (WV Bar No. PHV 48420)
HITCHCOCK LAW FIRM PLLC
5614 Connecticut Avenue, NW,. No. 304
Washington, DC 20015-2604
Telephone: (202) 489-4813 / Facsimile: (202) 315-3552
conh@hitchlaw.com

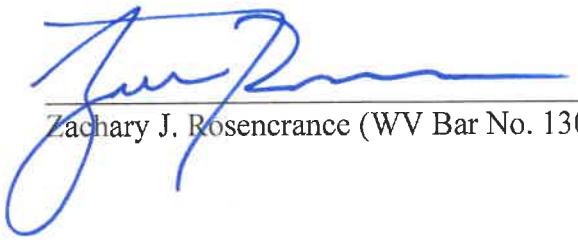
Counsel for Tax Analysts

CERTIFICATE OF SERVICE

I, Zachary J. Rosencrance, counsel for Petitioner Tax Analysts, do hereby certify that on **December 28, 2022**, I served the foregoing **Petitioner's Brief** upon the following party via U.S. Mail and email:

Counsel for Respondent:

Patrick Morrissey, Attorney General
Katherine A. Schultz (W. Va. Bar No. 3302)
Senior Deputy Attorney General
William C. Ballard (W. Va. Bar No. 9557)
Assistant Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Tel: (304) 558-2522/ Fax: (304) 558-2525
E-mail: Kathy.A.Schultz@wvago.gov
E-mail: William.C.Ballard@wvago.gov



Zachary J. Rosencrance (WV Bar No. 13040)