

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Charleston Gazette-Mail d/b/a  
HD Media, LLC,

Plaintiff Below, Petitioner,

v.

Appeal No. 23-ICA-248

West Virginia University Board of Governors,

Defendant Below, Respondent.

**BRIEF OF RESPONDENT**  
**WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS**

Appeal from the Circuit Court of Monongalia County  
Honorable Cindy Scott, Presiding

Natalie Atkinson (WV Bar #12030)  
Philip J. Combs (WV Bar # 6056)  
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**TABLE OF CONTENTS**

I. STATEMENT OF THE CASE.....1

    A. This Court Should Strike Petitioner’s Reliance on Facts outside the Record.....1

    B. Procedural History of the Case .....1

    C. The Circuit Court Granted Summary Judgment as to all Claims Against the University.....3

II. SUMMARY OF ARGUMENT .....6

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....11

IV. ARGUMENT.....11

    A. The WVOGPA Permits Governing Bodies to Hold Closed Sessions When Necessary to Carry Out the Business of Government .....11

    B. The Lower Court Did Not Err in Finding that the Board’s Preliminary Discussions About the University’s Response to the Ongoing Coronavirus Pandemic and Social Justice Issues Are Exempted from West Virginia’s Open Meetings Law .....13

        i. With the exception of the privileged discussion with its counsel, all topics at issue fit within the “commercial competition” exception .....13

        ii. Petitioner’s narrow reading of the (b)(9) exception is insupportable.....17

    C. The Lower Court Did Not Abuse its Discretion When it Ruled that Section 6-9A-4(b)(12) Exempts Review of Deliberative Memoranda from the Open Meeting Requirements.....19

    D. The WVOGPA Expressly Permits a Public Body to Enter Executive Session to Receive the Counsel of Its Attorney .....22

    E. The Board’s June 19, 2020 Meeting Agenda Provided Notice of All Topics to be Discussed in Executive Session .....24

        i. The Board’s agenda was sufficiently descriptive.....24

ii. The circuit court appropriately found that any deficiency in the June 19, 2020 meeting agenda was de minimis and did not justify an award of fees.....29

F. It is Not the Province of this Court to Award Attorney’s Fees.....30

V. CONCLUSION.....30

**TABLE OF AUTHORITIES**

**Cases**

*Capriotti v. Jefferson Cnty. Planning Comm’n*, No. 13-1243, 2015 WL 869318, at \*8 (W. Va. Feb. 26, 2015) ..... passim

*Daily Gazette Co. v. West Virginia Dev. Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996)..... 19

*Highland Mining Co. v. West Virginia University School of Medicine*, 235 W. Va. 370, 774 S.E.2d 36 (2015) ..... 20, 21

*Peters v. County Comm’n of Wood Cnty.*, 209 W. Va. 94, 543 S.E.2d 51 (2000) ..... 6, 9, 22

*State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 484 S.E.2d 199 (W. Va. 1997) ..... 22

*United States Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021)..... 19

**Other Authorities**

Ethics Comm. Advisory Opinion No. 2008-17 ..... 28

Ethics Comm. Advisory Opinion No. 2009-02 ..... 28

Ethics Comm. Advisory Opinion No. 2009-04 ..... 28

W. Va. Code § 29B-1-3-1 ..... 7, 9, 19

W. Va. R. App. P. 20 ..... 11

W. Va. University Bd. of Governors R. 5.1 Section 2.2..... 3, 21

W.Va. Code § 6-9A-1 ..... passim

## I. STATEMENT OF THE CASE

### A. This Court Should Strike Petitioner's Reliance on Facts outside the Record.

Petitioner Charleston Gazette-Mail, d/b/a HD Media, LLC (“Petitioner”) spends the first pages of its brief arguing about recent news stories about West Virginia University’s (the “University”) academic transformation initiative. None of this is in the record nor does it matter. There is no nexus between the University’s 2023 academic transformation initiative and the question presented in this case, that is, whether several small snippets of University Board of Governors’ (“Board”) meetings and subcommittee meetings were properly (or improperly) held in executive session between June and September 2020, more than three years ago. No facts relating to the University’s 2023 budget and academic program review are in the record, and this Court should strike the first two pages of Petitioner’s brief, including the citations to various news sources in footnotes 1 – 5.

### B. Procedural History of the Case.

Petitioner filed suit on October 19, 2020, alleging the Board violated the West Virginia Open Governmental Proceedings Act, § 6-9A-1 *et. seq.* (“WVOGPA”) by entering executive session for portions of its meetings, special meetings, and committee meetings on June 19, 2020; July 24, 2020; August 14, 2020; September 4, 2020; and September 18, 2020. JA 3–13. Petitioner amended its complaint on October 21, 2020.<sup>1</sup> JA 25–35. The Amended Complaint alleges that the Board unlawfully discussed the following topics in executive session: (1) the University’s ongoing response to the COVID-19 pandemic, (2) the University’s budgets, (3) a petition signed in the

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<sup>1</sup> At the time this lawsuit was filed, Petitioner was represented by Sean P. McGinley, a former partner at DiPiero Simmons McGinley & Bastress, PLLC. *See* JA 25–35. Mr. McGinley passed away unexpectedly on June 3, 2021, before any action (including discovery and motions practice) had been taken in the case.

wake of George Floyd’s murder and accusing the University of being “systemically anti-Black”; (4) “a talk with the athletic director about the ‘outlook for this upcoming season’”; (5) the business college; (6) emergency pay policy; (7) federal Title IX regulations; (8) tuition and fees; and (9) capital projects. JA 26–27.

From the beginning, Petitioner took the position that its allegations alone were sufficient to mandate judgment in its favor. Petitioner did not engage in discovery and refused to sign a protective order. It served no document requests, propounded no interrogatories, noticed no deposition of the Board’s fact witnesses or experts, and presented no affidavits in response to the Board’s summary judgment motions. Petitioner moved for partial summary judgment on October 28, 2021, with no supporting affidavits or evidence. JA 126–159; *see also* JA 602 (Circuit Court Order I at 3).<sup>2</sup>

In stark contrast, the Board defended this action through discovery, by retaining experts with decades of experience in university governance, and by submitting the testimony of key fact witnesses. The Board served interrogatories, requests for production of documents, and requests for admission on Petitioner. The Board designated four expert witnesses in support of its positions: James Moeser, Ph.D., former chancellor of the University of North Carolina at Chapel Hill; Nathan Dickmeyer, Ph.D., a higher education consultant with extensive experience; Tom Flaherty, former chair of the Board; and Rob Alsop, Vice President for Strategic Initiatives at West Virginia University. JA 53–125. Each of these experts gave the circuit court critical insight into the interests of a governing body, particularly in safeguarding matters of a commercially sensitive nature. *See*

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<sup>2</sup> The Circuit Court issued two summary judgment orders in this case. The first (Circuit Court Order I), was entitled “Order Granting in Part Defendant’s Motion for Summary Judgment” and was entered on February 27, 2023. JA 600–11. The second (Circuit Court Order II), was entitled “Order Resolving the Motion for Summary Judgment and the Cross Motion for Summary Judgment on all Remaining Claims” and was entered on April 28, 2023. JA 612–28.

*id.* Vice President Alsop also submitted affidavits as a fact witness with personal knowledge of every event at issue in Petitioner’s lawsuit. JA 351–58; JA 368–73. Petitioner, on the other hand, failed to present a single fact that would overcome Vice President Alsop’s sworn testimony. *See* JA 602 (Circuit Court Order I at 3).

**C. The Circuit Court Granted Summary Judgment as to all Claims Against the University.**

On January 5, 2022, the circuit court held a hearing and orally granted partial summary judgment in favor of the Board. The circuit court held that as to three of the topics at issue – the University’s response to the COVID-19 pandemic, preliminary discussions regarding University budgets, and preliminary deliberations over social justice issues related to George Floyd’s murder – the Board committed no violation of the WVOGPA. On February 27, 2023, the circuit court reduced its ruling to writing.<sup>3</sup> JA 600-11, Circuit Court Order I.

In Circuit Court Order I, Judge Scott begins with a thorough review of Petitioner’s allegations. JA 600–02, Circuit Court Order I at 1–3. The circuit court then reviewed the statutory and regulatory framework by which the Board delegates the day-to-day management of the University to its senior management. JA 602, Circuit Court Order I at 3; *see also* W. Va. University Bd. of Governors R. 5.1 Section 2.2 (delegating “the power and control over the day-to-day business affairs and operations of West Virginia University” to its President, who in turn is authorized to make further delegations of managerial authority to other University administrators). As the court noted, the University’s Administration receives a delegation of authority from the

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<sup>3</sup> While the signature line indicates that Circuit Court Order I was entered in 2022, this is a typographical error. The parties submitted the proposed order in 2022, but as seen from the clerk’s stamp, Circuit Court Order I was not filed until 2023. *See* JA 610.

Board to make day-to-day managerial decisions on behalf of the University. *Id.* Managerial deliberations and decisions are not subject to the WVOGPA. *Id.*

The court then reviewed Vice President Alsop’s un rebutted sworn factual testimony. JA 602–04, Circuit Court Order I at 3–4. As this testimony established, the three topics at issue – deliberations regarding COVID-19, University budgets, and social justice concerns – were deliberative matters on which the University’s Administration sought the Board’s input and counsel. The Board entered executive session to receive briefing on the Administration’s preliminary deliberations over these matters. JA 603–04, Circuit Court Order I at 4–5.

The circuit court then analyzed in detail the WVOGPA’s statutory scheme. JA 605–08, Circuit Court Order I at 6–9. The court noted that although there is a preference for open meetings, this preference must be balanced against the legitimate need for some government functions to be kept confidential. *Id.* The court then applied the facts as established through Vice President Alsop’s un rebutted factual testimony to the statutory framework, ruling that the Board appropriately entered executive session to discuss the Administration’s preliminary deliberations regarding the response to the ongoing pandemic, preliminary deliberations on a petition calling for increased racial diversity on campus, and the University’s budget. JA 608–10, Circuit Court Order I at 9–11.

The circuit court asked the parties to provide further briefing on Petitioner’s claim that the Board violated the WVOGPA by discussing six other topics in executive session: “a talk with the athletic director about the ‘outlook for this upcoming season’; the business college; emergency pay policy; federal Title IX regulations; tuition and fees, [and] capital projects.” *See* JA 26–27, Am. Compl. ¶ 7; JA 613, Circuit Court Order II at 2. All six topics were mentioned in an offhand

comment made by Elmer Coppoolse, a member of the Board and chair of the finance committee, following the closed portion of a subcommittee meeting on June 19, 2020. *See id.*

The Board filed a supplemental motion for summary judgment addressing why the Board properly discussed each of the topics identified by Mr. Coppoolse in executive session. JA 346–444. Following a second round of briefing, a final hearing was held on March 28, 2022. At the hearing, Petitioner complained that the Board had not properly disclosed the confidential communication of the Board’s general counsel, which had been discussed in executive session on June 19, 2020. Following the hearing, and in response to Petitioner’s concern, the Board submitted the affidavit of Stephanie Taylor, general counsel for the University, for *in camera* review. *See* JA 507–11; JA 520–23. The affidavit explained that the Board closed its meeting to receive an update on Title IX regulations and suggestions for implementing the regulations at the University.<sup>4</sup> *Id.*

On April 28, 2023, the circuit court entered a final order. JA 612–28, Circuit Court Order II. The circuit court found that the Board’s June 19, 2020, meeting agenda was insufficient to give notice of the topics that would be addressed in executive session. JA 623, 627–28, Circuit Court Order II. The circuit court then assessed whether this technical misstep warranted any relief to Petitioner and found that it did not. *Id.* at 623, Circuit Court Order II at 12. The court reasoned that Ms. Taylor’s briefing to the Board regarding changes to the federal Title IX regulations was privileged and properly discussed in a closed meeting. JA 624, Circuit Court Order II at 13. As to the other five topics – the talk with the athletic director, the discussion of capital projects and the

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<sup>4</sup> A redacted version of Ms. Taylor’s affidavit was filed on the public docket as an attachment to the Board’s Notice Submitting Privileged Material for Review *In Camera*. JA 507–99. The Board has filed a motion to supplement the record with Ms. Taylor’s unredacted affidavit, along with the privileged memorandum she provided to the Board’s committee on June 19, 2020. The Board asserts attorney client privilege as to both the unredacted affidavit and the memorandum, which have been hand-delivered to the Court to be placed under seal.

new business college, the briefing on the emergency pay policy and tuition and fees – the court found that these were all matters involving commercial competition and were exempt from the public meetings requirements. JA 624–25, Circuit Court Order II at 13–14.

The court held that these topics were *also* exempt from the WVOGPA because they were presented to the Board in an internal, deliberative memorandum prepared by the Administration and reflecting the Administration’s views on matters up for managerial decision. JA 626–27, Circuit Court Order II at 15–16. In other words, because the discussion centered on the Administration’s pre-decisional, deliberative memoranda under WVFOIA, the executive session discussion was appropriate. *Id.*

The court therefore granted the Board’s supplemental summary judgment motion, finding that the Board closed a portion of its June 19, 2020 meeting for reasons recognized by the WVOGPA. JA 627–28, Circuit Court Order II at 16–17.

## **II. SUMMARY OF ARGUMENT**

This Court should uphold the circuit court’s rulings finding the Board committed no substantive violation of the WVOGPA. West Virginia’s open meeting requirements are not without exception. *See* W. Va. Code § 6-9A-4. As the circuit court ruled, each of the topics challenged by Petitioner falls within an express exception to the WVOGPA. This Court reviews the final order and ultimate disposition of the lower court under an abuse of discretion standard. Syl. Pt. 1, *Peters v. County Comm’n of Wood Cnty.*, 209 W. Va. 94, 543 S.E.2d 51 (2000). On the un rebutted factual record below, the circuit court did not abuse its discretion in granting summary judgment to the Board.

Between June 2020 and September 2020, small portions of five of the Board’s meetings or subcommittee meetings (June 19, 2020; July 24, 2020; August 14, 2020; September 4, 2020; and

September 18, 2020) were held in executive session. *See* JA 600–01, Circuit Court Order I at 1–2. The un rebutted evidence below demonstrated (1) the Board complied with all statutory prerequisites to enter executive session for portions of these meetings and (2) the nine topics at issue properly fit within one of two statutory exceptions to West Virginia’s open meetings law.

The WVOGPA’s general rule favoring open meetings is subject to a number of exceptions. *See* W. Va. Code §§ 6-9A-3, 6-9A-4. As relevant here, the exceptions permit governmental meetings to be held in executive session (a) “[t]o 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” (the “commercial competition” exception); and (b) “[t]o 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 [West Virginia Freedom of Information Act]” (the “deliberative process” exception). W. Va. Code §§ 6-9A-4(b)(9) & (12). The West Virginia Freedom of Information Act (“WVFOIA”), in turn, expressly provides that internal, deliberative memoranda prepared by a public body are not subject to public disclosure requirements. *See* W. Va. Code § 29B-1-4(a)(8). For each meeting at issue, the Board entered executive session in reliance on one or both of these exceptions.

The circuit court correctly ruled that each closed-session topic challenged by Petitioner falls outside the ambit of the WVOGPA’s open meetings laws:

- **The University’s response to the COVID-19 pandemic:** The Board’s discussion of the administrative response to the COVID-19 pandemic involved issues that were commercially competitive in nature such that premature disclosure would harm the financial interests of the University. The discussion was based on a pre-decisional, deliberative memorandum provided by University Administration (which is not considered a public record within the meaning of WVFOIA) and was

not subject to the open meetings requirements for this independent reason. These conversations allowed the Board to provide advice and counsel on operational decisions reserved for the Administration, and the Board took no formal action while in executive session.

- **Discussion of University budgets:** The Board’s preliminary discussion of University budgets was closely related to the unique challenges posed by the COVID-19 pandemic, and implicated the same commercial concerns. This discussion was likewise based on internal memoranda supplied by the Administration.
- **Social justice concerns:** The Board’s limited discussion about a petition raising concerns about social justice on campus following George Floyd’s murder was a matter “involving commercial competition.” If made public prematurely, the University’s response to the petition and the concerns it expressed might adversely affect the financial interests of the University.
- **Talk with the athletic director:** The University’s athletic director made a presentation to the Board’s finance subcommittee during the executive session held on June 19, 2020. The presentation focused on planning for athletic events in light of the ongoing COVID-19 pandemic. This discussion involved matters of a commercially competitive nature which would harm the University if prematurely disclosed.
- **Business college and capital projects:** The Board reviewed information while in executive session about the impact of COVID-19 on various capital projects, including the new business college. This briefing fell under the commercial competition exception of the WVOGPA. As with the other topics, concerns about capital projects were presented to the Board’s committee by the Administration in an internal, deliberative memorandum.
- **Emergency pay policy and tuition and fees:** The Administration’s preliminary deliberations over the COVID-19 pandemic included consideration of whether to extend an emergency pay policy. The Administration also brief the Board on Fiscal Year 2020 and 2021 budgets while in executive session, within the context of considering the University’s response to the ongoing pandemic. These preliminary discussions were commercially competitive in nature and based on information set forth in the Administration’s internal memoranda.
- **Title IX regulations:** The Board entered executive session to receive counsel from its attorney, the general counsel for the University. The discussion was privileged in nature and centered on updates to Title IX regulations and recommendations for their implementation at the University. Privileged communications are exempted from the open meetings requirement.

Like the court below, this Court should reject Petitioner’s narrow reading of the WVOGPA’s exception for commercial competition. The statute allows the governing body of a public agency to discuss in closed session “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.*” W. Va. Code § 6-9A-4(b)(9) (emphasis added). Petitioner argues that this exception applies only if the matters of commercial competition involve the investment of public funds. Pet. Br. 26–28. The argument finds no support in the plain text of the statute and should be rejected.

The Court should similarly dismiss Petitioner’s textual challenge to the “deliberative process” exception of the WVOGPA, W. Va. Code § 6-9A-4(b)(12). Pet. Br. 23–24. The WVFOIA exempts “internal memoranda or letters received or prepared by any public body” from public disclosure. W. Va. Code § 29B-1-4(a)(8). The WVOGPA allows a governing body to discuss documents exempted from the WVFOIA in closed session. W. Va. Code § 6-9A-4(b)(12). The circuit court properly ruled that if a document is not subject to public disclosure under WVFOIA, a public body’s discussion of that document may occur in executive session. JA 626, Circuit Court Order II at 15. Accordingly, the Board did not violate the WVOGPA when it entered executive session to discuss the internal, deliberative memorandum prepared by the University’s Administration, including Vice President Alsop.

Next, the Court should reject Petitioner’s arguments regarding the Board’s privileged communications with its counsel. The Act expressly permits a public body to close its meetings to receive the legal advice of its attorney. W. Va. Code § 6-9A-4; Syl. Pt. 2, *Peters v. Cnty. Comm’n of Wood Cnty.*, 209 W. Va. 94, 543 S.E.2d 651 (2000). In accordance with the Act, the Board entered executive session on June 19, 2020, to receive a briefing from its attorney on regulatory

changes impacting the University. Petitioner's refusal to participate in the discovery process left it with a misimpression about the nature of the briefing. Once it became clear that Petitioner challenged the Board's assertion of attorney-client privilege, the Board submitted an affidavit from the University's general counsel, along with the privileged memorandum for *in camera* review. JA 507–11; JA 520–23. The Board committed no violation of the Act by discussing privileged matters in closed session and followed proper procedure for submitting evidence of the privileged discuss for the lower court's review.

Petitioner raises an assignment of error alleging inadequate notice in the June 19, 2020 agenda of the Board's finance subcommittee. The Board provided a public agenda in advance of the meeting which described in detail the topics it expected to discuss in executive session. JA 349. Petitioner alleges the agenda lacked sufficient detail based on a public statement made by a Board member after the executive session had concluded. JA 614, Circuit Court Order II. Petitioner did no discovery to confirm what was discussed or inquire into the Board's reasons for entering closed session on this occasion. *See* JA 615, Circuit Court Order II at 4. The affidavits of Vice President Alsop, who was present for the entire subcommittee meeting, describe in detail the topics discussed in executive session and make clear that each topic was identified on the public agenda released in advance of the meeting. *See* JA 351–58; JA 368–73.

The circuit court found that the agenda lacked sufficient specificity but awarded no relief to Petitioner. JA 623, Circuit Court Order II at ¶ IV.A. This was well within the circuit court's discretion. W. Va. Code § 6-9A-7. Even if the Court finds the agenda needed to be more descriptive, the circuit court's decision not to award relief should not be disturbed.

Petitioner's final assignment of error asks this Court to award attorneys' fees as a remedy. Even if the Court reverses the lower court and finds that the Board violated West Virginia's open

meetings laws – and to be clear, the Board firmly believes there was no such violation – the appropriate remedy is not for this Court to decide. W. Va. Code § 6-9A-7; *see Capriotti v. Jefferson Cnty. Planning Comm’n*, No. 13-1243, 2015 WL 869318, at \*8 (W. Va. Feb. 26, 2015) (memorandum decision). The Court should refuse Petitioner’s request for relief because this decision rests exclusively with the lower court.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The West Virginia Open Governmental Proceedings Act “balance[s] the[] interests” of the public affected by governmental decision making and the decision makers themselves by favoring public meetings, subject to certain exceptions. The circumstances in which a public agency may close its meetings, consistent with those exceptions, is an issue of fundamental public importance. W. Va. R. App. P. 20. The Board requests Rule 20 oral argument.

### **IV. ARGUMENT**

#### **A. The WVOGPA Permits Governing Bodies to Hold Closed Sessions When Necessary to Carry Out the Business of Government.**

The WVOGPA’s general rule is that “all meetings of any governing body shall be open to the public.” W. Va. Code § 6-9A-3. This openness inures to the benefit of both the government decisionmakers and the public they serve. *See id.* § 6-9A-1. Open meetings promote public education and participation while encouraging preparation and thorough debate on the part of government officials. *See id.* As a governing body subject to the WVOGPA, the Board recognizes the benefits of open government and adheres strictly to the law’s mandates. *See* W. Va. Code § 6-9A-2(4) (defining a governing body as “members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration”).

The general rule is not without limitation. Indeed, the WVOGPA expressly states that it would be “unrealistic, if not impossible, to carry on the business of government should every

meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data[,] or intelligence needed by a governing body were required to be a public meeting.” W. Va. Code § 6-9A-1. The government simply cannot carry out its duties if all meetings are open to the public. *See id.* Accordingly, the Act allows the governing body of a public agency to enter executive session in certain delineated circumstances. *See* W. Va. Code § 6-9A-4 (setting out exceptions to the open meetings requirement).

The WVOGPA’s exceptions are the result of the Legislature’s reasoned balancing of the interests at stake: the public’s need for open government, on the one hand, and the government’s particularized, legitimate need for privacy, on the other. *See* W. Va. Code § 6-9A-4. When a matter to be discussed falls within an exception, the Act allows the governing body to enter executive session to discuss the matter in a closed meeting. *Id.*

The WVOGPA endorses twelve exceptions to the open meetings rule, W. Va. Code § 6-9A-4, though only two are relevant to Petitioner’s appeal. The Board relied on the exceptions set forth in subsections (b)(9) and (b)(12) in entering each executive session at issue. As relevant here and as outlined by these exceptions, the Act allows a governing body to enter executive session to take the following actions:

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 . . . .

[and]

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 [West Virginia] Freedom of Information Act[.]

W. Va. Code §§ 6-9A-4(b)(9), (b)(12).

Subsection (b)(9) protects a public agency’s sensitive commercial interests from public scrutiny. It allows a governing body to convene in closed session to discuss matters of commercial competition which might adversely impact the public’s interest if exposed prematurely. Subsection (b)(12) preserves the privacy of confidential government matters, including discussions protected by the attorney-client privilege, and the discussion of documents appropriately designated as confidential.

The circuit court committed no error in endorsing the Board’s interpretation of the WVOGPA. The Board properly relied on the (b)(9) and (b)(12) exceptions – and issued public agendas providing notice of its intent to do so – in entering each closed session challenged by Petitioner.

**B. The Lower Court Did Not Err in Finding that the Board’s Preliminary Discussions About the University’s Response to the Ongoing Coronavirus Pandemic and Social Justice Issues Are Exempted from West Virginia’s Open Meetings Law.**

**i. With the exception of the privileged discussion with its counsel, all topics at issue fit within the “commercial competition” exception.**

The lower court correctly found that the University’s response to the COVID-19 pandemic, including preliminary discussions relating to University budgets, tuition and fees, and University athletics, and an emergency leave policy sufficiently implicate matters of commercial competition that premature disclosure could adversely affect the University’s interests. The Board’s closed discussion of a petition raising concerns about social injustice on campus, in the unique environment following George Floyd’s death, was exempt from the public meetings rules for the same reason.

COVID-19 Response. As set forth above, the WVOGPA authorizes the Board to enter executive session to discuss “matters involving commercial competition, which if made public,

might adversely affect the financial or other interest of the state.” W. Va. Code § 6-9A-4(b)(9). The University Administration’s response to the COVID-19 pandemic is such a matter, as are its preliminary discussions over the University budget and issues relating to social justice on campus. JA 608–10; JA 624–25; *see also* JA 351–57, 368–72. The COVID-19 pandemic was a public health crisis of unprecedented scale. The uncontroverted evidence below demonstrates that the University was diligent in working to preserve the health of its students, faculty, and staff and produced a flood of information detailing its efforts in doing so. *See* JA 355–56. The issue presented here is whether the University’s response to COVID-19 sufficiently implicates matters of commercial competition so premature disclosure could adversely affect the University’s interests. W. Va. Code 6-9A-4(b)(9). The lower court held that it did. JA 608–10; JA 624–25.

Indeed, the uncontroverted evidence of record demonstrated that the University’s COVID-19 response implicated commercial considerations, so as to warrant closed session preliminary discussions. The Board’s expert, Dr. Moeser, offered the following opinion on this subject:

Every aspect of the University’s operations was affected by the pandemic—student enrollment, housing and food contracts, with obvious ramifications for on-campus staff; the University’s business relationships were heavily impacted by the pandemic; and research and economic development, which was already highly competitive, became even more critical to the state and region.

JA 381. The lower court was presented with the affidavits of multiple experts, including Dr. Moeser, presenting sworn testimony that enrollment strategies at institutions of higher learning are inherently competitive. *See* JA 189–90 (Moeser Aff.); *see also* JA 172–79 (Alsop Aff.); JA 233–24 (Flaherty Aff.); JA 236–38 (Flaherty Expert Discl.); JA 243 (Dickmeyer Aff.); JA 245–48 (Dickmeyer Expert Discl.). The impact of COVID-19 on the University included not only student enrollment, but faculty and staff retention. *See* JA 176–77. Decisions made by the University Administration such as whether to cut employee pay, how to successfully implement remote

learning, the budget implications of the COVID-19 pandemic and options for addressing them, its implications on enrollment and retention strategies, and how to respond to any outbreaks of the virus upon return to campus all directly impacted the University's ability to compete against other colleges and universities. *See* JA 351–57, 368–72; *see also* JA 423–24.

Other topics at issue relate to the University's COVID-19 response, including a preliminary discussion of several topics that took place during an executive session on June 19, 2020: capital projects, including a new business college; tuition and fees; emergency pay policy; and a conversation with the University's athletic director.

*Deliberative Matters Concerning Capital Projects (Including the New Business College), Tuition and Fees, and the Emergency Pay Policy:* During an executive session on June 19, 2020, the University's Administration briefed the Board's finance committee on its deliberations concerning ongoing capital projects, Fiscal Year 2020 and 2021 budgets, and a special emergency leave pay plan implemented during the pandemic. JA 370–72.

The Administration briefed the committee on the economic feasibility of moving forward with the construction of the new business college and other capital projects in light of the pandemic. The decision had serious consequences, including legal ramifications of postponing or terminating the University's contracts with third-party vendors. JA 371. The pandemic also placed the University's ability to retain high enrollment numbers at risk, thereby requiring the Administration to explore new enrollment and retention strategies for covering anticipated budgetary shortfalls. *Id.* at 371–72. As part of the June 19, 2020 closed session, the Board engaged in a limited discussion of the University's tuition and fees as part of a larger COVID-19 related budgetary discussion. *Id.* at 372. A similar discussion occurred with respect to the University's emergency pay policy, which the Administration planned to ask the Board to extend.

These discussions were all part of the Administration's deliberations over the ongoing pandemic and exempted from West Virginia's open meetings requirements under West Virginia Code § 6-9A-4(b)(9). The discussions also centered on an internal memorandum provided by the Administration to the Board. *See* JA 371–72.

*Conversation with Athletic Director.* These commercial considerations extended to University athletics. On June 19, 2020, the University's athletic director gave a presentation during the closed session of the Board's finance committee to address plans for athletic events during the ongoing pandemic. JA 370. Vice President Alsop testified that it was unknown at this time whether the University's football season could proceed as planned. *Id.* With each home football game representing \$3 to \$6 million in revenue, the University's Athletics Department was facing the prospect of large financial losses if football games were played without fans or not played at all. *Id.* Vice President Alsop presented un rebutted testimony that “[p]remature, public disclosure could adversely affect our media contract and contracts with stadium vendors, as well as ticket sales and athlete retention.” *Id.*

*Social Justice Petition.* The Board also presented un rebutted evidence that its preliminary discussion of social and racial justice issues was commercially sensitive in nature. *See* JA 62. Occurring almost simultaneously with the COVID-19 pandemic, the death of George Floyd and the cultural movement affected “every college and university in the nation.” JA 62. On June 19, 2020, the University Administration briefly consulted with the Board in closed session about its planned response to a petition calling for greater racial equity on campus. JA 177. The petition “implicated [the University's] ability to compete with similar educational institutions.” *Id.* As Vice President Alsop testified, “As the nation reeled from Mr. Floyd's murder, social unrest affected every college and university in the nation. Current and future students, faculty, and staff cared

deeply about how [the University] responds to concerns about racism and diversity.” JA 177. After bringing the petition to the Board’s consideration while in closed session, the Administration concluded its deliberations and publicly announced measures to address the concerns raised in the petition. JA 177–78. Based upon the Board’s un rebutted evidence, the circuit court appropriately ruled that this preliminary discussion involved matters of such a commercially sensitive nature so as to meet the (b)(9) exception.

ii. **Petitioner’s narrow reading of the (b)(9) exception is insupportable.**

The circuit court’s construction of the (b)(9) exception was not overly expansive, as Petitioner claims. First, when contemplating whether the process by which the Administration briefed the Board fits under the (b)(9) exception, the Court must keep in mind that no decisions were made in executive session. The closed session briefings on the University’s COVID-19 response and social justice petition were meant to assist the Administration in its deliberations on managerial decisions. JA 352–53; JA 382; JA 602. Every decision which required a Board vote was made publicly. *See* JA 627 (finding “no Board decisions were made in executive session”).

Petitioner argues that the language “commercial competition” must be read in conjunction with the immediately preceding statutory text, such that a public body may enter executive session to discuss matters of commercial competition only when they involve “the investment of public funds.” Pet. Br. at 27. If the Court declines to adopt this narrow construction, Petitioner argues, “the [WVOGPA] would be rendered completely meaningless.” *Id.*

This argument fails as a matter of simple statutory construction. The text of the statute reads: “the investment of public finds *or* other matters involving commercial competition . . . .” W. Va. Code § 6-9A-4-(b)(9) (emphasis supplied). If the Legislature had intended to endorse Petitioner’s reading of the WVOGPA, it would have adopted the language “the investment of

public funds” or perhaps, “the investment of public funds that involve commercial competition.” This is not what the Legislature did. By including the disjunctive conjunction “or” the Legislature clearly intended to permit executive session in matters that involved the investment of public funds *or* matters that involve commercial competition which if disclosed prematurely, would adversely affect the state. W. Va. Code § 6-9A-4(b)(12).

Further, the lower court’s construction of the (b)(9) exemption does not pose a threat to West Virginia’s open meetings requirements. The statutory text protects against this precise concern by stating that “information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure . . . **only until the commercial competition has been finalized and completed.**” W. Va. Code § 6-9A-4(b)(9). Acknowledging the harm that could be rendered to State interests if matters of commercial competition are prematurely disclosed, the WVOGPA permits discussion of these sensitive matters in closed session only until the matter has been finalized.

The Board made no decision and took no vote on any of these matters while in executive session. Further, the University Administration made its decisions public, in open Board meetings, upon completing its deliberations. For these reasons, this Court should uphold the lower court’s finding that the (b)(9) exception covers the Board’s consideration of preliminary, managerial deliberations over the COVID-19 pandemic (including preliminary discussions of budgets, athletics, tuition and fees, capital projects, and an emergency pay policy) and the social justice petition.

**C. The Lower Court Did Not Abuse its Discretion When it Ruled that Section 6-9A-4(b)(12) Exempts Review of Deliberative Memoranda from the Open Meeting Requirements.**

The lower court correctly found that the (b)(12) exception applies to matters “rendered confidential” or “not considered a public record” within the meaning of the WVFOIA. JA 626–27. The WVOGPA recognizes that if a document is not suitable for public disclosure under the WVFOIA, a public body’s discussion of the same document should not occur in public. W. Va. Code § 6-9A-4(b)(12). Upon a majority vote of all members present, a governing body may enter executive session to discuss a document not considered a “public record” under the WVFOIA. *Id.*

The WVFOIA provides that except for certain well-defined exceptions, the public has a right to inspect or copy any public record of a West Virginia public body. W. Va. Code § 29B-1-3-1(1). A “public record” includes “any writing containing information prepared or received by a public body, the content or context of which, judged either by content or context, relates to the public’s business.” W. Va. Code 29B-1-2(5). The WVFOIA exempts certain documents from disclosure, recognizing that public disclosure of these documents would impede government functioning. *Id.*

“Internal memoranda or letters received or prepared by any public body” are specifically exempt from disclosure under the WVFOIA. W. Va. Code § 29B-1-4(a)(8). This “internal memoranda exemption” “specifically exempts from disclosure only those written internal government communications consisting of advice, opinions and recommendations which reflect a public body’s deliberative, decision-making process; written advice, opinions and recommendations from one public body to another; and written advice, opinions and recommendations to a public body from outside consultants or experts obtained during the public body’s deliberative, decision-making process.” *Daily Gazette Co. v. West Virginia Dev. Office,*

198 W. Va. 563, 575, 482 S.E.2d 180, 192 (1996). The primary purpose of the exemption, also called the “deliberative process exemption,” is to encourage the free exchange of ideas and information within government agencies. *Id.* at 571; *see also United States Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021) (“To encourage candor, which improves agency decisionmaking, the [deliberative process] privilege blunts the chilling effect that accompanies the prospect of disclosure.”).

The deliberative process exemption applies to all public bodies subject to WVFOIA, not just to administrative agency policy making. In *Highland Mining Co. v. West Virginia University School of Medicine*, 235 W. Va. 370, 774 S.E.2d 36 (2015), the Court recognized public bodies are engaged in an immensely diverse range of endeavors related to government service and their internal deliberations will relate to a wide range of topics. The deliberative process exemption covers all these activities, so long as the documents are both pre-decisional and deliberative in the context in which they are prepared or considered. *Id.* at 385. “Pre-decisional” means the documents were “prepared in order to assist a public body decisionmaker in arriving at his or her decision,” *id.* at 383, while deliberative materials are those that “reflect[] the give-and-take of the consultative process, by revealing the manner in which the public body evaluates possible alternatives relevant to the decisional process.” *Id.*

The University’s Administration may assert the internal memoranda exemption to withhold documents revealing its deliberative, decision-making process. *Id.* at 385. Protecting these documents from public view is sound policy, as disclosure could have a “chilling effect on future communications.” *Id.* “Confidentiality of certain documents connected with a public body’s decision-making process ensures frank and open discussion among its employees, which in turn enhances the quality of their decisions.” *Id.* at 386. Where documents are not subject to public

disclosure under the WVFOIA, the WVOGPA permits discussion of the contents of those documents in closed session.

On June 19, 2020, the Board's finance committee entered executive session to discuss an internal, deliberative memorandum provided in advance of the meeting by Vice President Alsop and others. JA 369; *see also* JA 616, Circuit Court Order II at 5. This internal, deliberative memorandum covered information relating to the capital projects, including the business school and budgetary analysis relating to the COVID-19 pandemic, including discussions regarding tuition and fees, enrollment and retention strategies, and the emergency pay policy. JA 369, 372; *see also* JA 616–18, Circuit Court Order II at 5–6.

The memorandum was both pre-decisional and deliberative. JA 626–27 (Circuit Court Order II). It advised the committee on various matters for which the University's Administration was contemplating a decision but had not yet taken action, *see* Syl. Pt. 5, *Highland Mining*, 235 W. Va. at 376, and reflected the Administration's views on matters up for decision while describing competing alternatives for resolution. *See* JA 369. Because the memorandum was decisional, deliberative, and not subject to disclosure under the WVFOIA, the Board's committee appropriately entered executive session to discuss it. W. Va. Code § 6-9A-4(b)(12); JA 626–27 (Circuit Court Order II).

The (b)(12) exception harmonizes the open government law and the WVFOIA, thereby preserving the protections extended to certain public documents. The University's pre-decisional, deliberative memoranda concern day-to-day managerial decisions delegated to the Administration by the Board, and there is no legal requirement that the Administration discuss its decisions publicly (indeed, the University could not operate if the Administration were required to do so). *See* W. Va. Board of Governors Finance and Admin. R. 5.1. The University's practice of briefing

the Board on pre-decisional, deliberative matters fosters better decision-making by the Administration on many issues that are not subject to Board approval.

**D. The WVOGPA Expressly Permits a Public Body to Enter Executive Session to Receive the Counsel of Its Attorney.**

Petitioner offers both a substantive and procedural challenge to the Board's assertion of attorney-client privilege. First, Petitioner argues that the lower court erred by upholding the Board's decision to enter executive session to receive the legal guidance of its attorney. Second, Petitioner claims that the lower court failed to follow proper procedure in considering whether the communication at issue was, in fact, privileged. Both arguments lack merit.

The WVOGPA expressly exempts matters falling under the attorney-client privilege from its open meeting requirements. *See* W. Va. Code § 6-9A-4(b)(12); Syl. Pt. 1, *Peters*, 209 W. Va. at 97, 543 S.E.2d at 654. The attorney-client privilege applies where (1) both parties contemplate that an attorney-client relationship exists, (2) the client is seeking advice from the attorney in her capacity as a legal advisor, and (3) the communication between attorney and client is intended to be confidential. *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 484 S.E.2d 199, 209 (W. Va. 1997) (citation omitted).

There is no question that the Board's communication with its General Counsel was privileged. First, an existing attorney-client relationship exists between the Board and the University's General Counsel. JA 372-73; 520-21. Second, the Board, through its Committee, sought legal advice from the University's General Counsel concerning the content of the updated Title IX regulations and her recommendations for implementing the regulations at the University. JA 372-73; 520-21. Third, the Board's discussions with its attorney were intended to remain confidential, as evidenced by the fact that the discussion took place in executive session. *See* JA 520-23; JA 654 (Circuit Court Order II at IV.B.). The Board did not close this meeting "merely

because an agency attorney [was] a participant.” *See* W. Va. Code § 6-9A-4(b)(11). To the contrary, its decision to close a portion of its meeting to receive regulatory updates and legal counsel from its attorney fits squarely within the WVOGPA’s exemption.

Neither the Board nor the court below committed any procedural misstep in considering Ms. Taylor’s privileged communication. *Peters* directs:

When a public body closes an open meeting on the basis that the matters to be discussed in that meeting are exempt from the Act as a result of the attorney-client privilege and that claim is challenged, the circuit court should review *in camera* whether the communications do indeed fall within that privilege.

205 W. Va. 481, 489–90, 519 S.E.2d 179, 187–88. Here, it was not clear that Petitioner challenged the Board’s assertion of privilege until March 2022, when Petitioner filed a response in opposition to the Board’s supplemental summary judgment motion. *See* JA 472–74. The Board responded by submitting the testimony of the University’s General Counsel, Stephanie Taylor, for *in camera* review by the circuit court. JA 507–11; JA 520–23. Vice President Alsop also submitted an affidavit speaking to the privileged nature of the discussion. JA 517–18. The circuit court reviewed the materials submitted for review *in camera* before upholding the Board’s claim of privilege and ruling against Petitioner. JA 507–11; JA 520–23.

The circuit court’s findings did not rest on any “bare claim” of privilege. *Peters*, 205 W. Va. at 490, 519 S.E.2d at 188. Rather, in accordance with *Peters*, the lower court privately examined the substance of Ms. Taylor’s communications, found that the attorney-client privilege applied, and found the Board did not violate the WVOGPA. This Court should reject Petitioner’s challenge to the Board’s claim of attorney-client privilege as grounds for closing its June 19, 2020 committee meeting.

**E. The Board’s June 19, 2020 Meeting Agenda Provided Notice of All Topics to be Discussed in Executive Session.**

**i. The Board’s agenda was sufficiently descriptive.**

The WVOGPA directs “[e]ach governing body [to] 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.**” W. Va. Code § 6-9A-3 (emphasis added). Petitioner argued below that the Board violated this statute by “fail[ing] to place the public on notice” that the six topics identified by Elmer Coppoolse in a public statement were to be discussed in closed session.

Following the closed portion of the Board’s joint finance committee meeting on June 19, 2020, Board member Elmer Coppoolse summarized the private discussion when the Board convened its regular meeting later in the day. During that summary, Mr. Coppoolse indicated that the following topics were discussed during executive session:

1. “[A] talk with the [University’s] athletic director about the ‘outlook for this upcoming season,’”
2. The business college,
3. Emergency pay policy,
4. Federal Title IX regulations,
5. Tuition and fees, and
6. Capital projects.

*See* JA 369–70; JA 644 (Circuit Court Order II at 3).

Contrary to the circuit court’s finding, the Board’s public agenda gave adequate notice of each item for closed session discussion, including those referenced by Mr. Coppoolse in his statement. In the event this Court finds that the agenda was insufficient, it should side with the lower court in determining that this was no more than a *de minimis* violation and does not warrant an award of fees.

To begin, it is worth remembering how these six topics came to be at issue in Petitioner’s lawsuit. They were mentioned in an impromptu statement by Mr. Coppoolse following the closed portion of the meeting. JA 614, Circuit Court Order II at ¶ I.8. The way Mr. Coppoolse chose to characterize each of those discussion topics does not bind the Board.

In any event, Petitioner is wrong that the Board did not list the topics on its public agenda. *See* Pet. Br. 17. Each of the six discussion items described by Mr. Coppoolse fits squarely into an agenda item listed on the Committee’s June 19, 2020 public agenda. *See id.* This table, supported by the unrebutted testimony of Vice President Alsop, demonstrates how each of these topics is described in the agenda:

<b><u>Mr. Coppoolse’s Comment</u></b>	<b><u>Corresponding Agenda Item</u></b>
“[A] talk with the [University’s] athletic director about the ‘outlook for this upcoming season’”	Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic.
“The business college”	Matters relating to improvements to, or potential contractual relationships regarding facilities, infrastructure, and real property; and  Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic.
“Emergency pay policy”	Deliberative matters regarding Fiscal Year 2020 and 2021 budgets, including current year retention and enrollment; and  Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic.
“Federal Title IX regulations”	Potential strategic initiatives relating to academic health sciences priorities, corporate collaboration, and legislative and regulatory matters.
“Tuition and fees”	Deliberative matters regarding Fiscal Year 2020 and 2021 budgets, including current year retention and enrollment; and

<u>Mr. Coppoolse’s Comment</u>	<u>Corresponding Agenda Item</u>
	Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic.
“Capital Projects”	Matters relating to improvements to, or potential contractual relationships regarding facilities, infrastructure, and real property; and  Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic.

The Board did not make any final decision in executive session while discussing these topics. *See* JA 646, 657 (Circuit Order II at 5, 16). These were preliminary discussion items only; any decisions made by the Board in relation to these topics were later discussed, vetted, and decided in public. *See id.*

Petitioner’s demand for greater transparency in the Board’s June 19, 2020, agenda ignores the legitimate concerns recognized by WVOGPA in carrying out all aspects of Government business in public. Petitioner queries, for example, why the discussion with the University’s athletic director was required to be confidential. Pet. Br. 16. As Vice President Alsop testified, there was a legitimate and significant concern that collegiate sports at the University could not safely take place in the fall of 2020. JA 370–72. Premature disclosure of these sensitive commercial concerns could have dramatic negative impacts on the University. *See id.* The agenda appropriately covered these topics by acknowledging the discussion would include “Confidential . . . deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic.” JA 349.

Petitioner relies on the West Virginia Supreme Court’s memorandum decision in *Capriotti*, but this case does not mandate a ruling in the Gazette’s favor. *See Capriotti v. Jefferson Cty. Planning Comm’n*, No. 13-1243, 2015 WL 869318 (W. Va. Feb. 26, 2015). In *Capriotti*, a majority

of the justices held that a local planning commission did not follow the WVOGPA's meeting notice requirement when it entered executive session to discuss protracted litigation and a settlement agreement with a local developer. The commission's meeting agenda item advised the public that it would enter executive session to discuss "Reports from Legal Counsel and legal advice to P[lanning] C[omission]." *Id.* at \*5. The Court found the agenda's generic reference to "legal advice" did not satisfy the WVOGPA's agenda notice provision. *Id.* Instead, the agenda item should have mentioned the particular litigation or proposed settlement under consideration. *Id.*

This case is distinguishable from *Capriotti*. The Board's agenda issued in advance of the June 19, 2020, meeting sufficiently described all issues taken up in executive session. The discussion of whether the University's football season could proceed as planned, for example, was a "deliberative matter[] relating to West Virginia University's ongoing response to the COVID-19 pandemic." *See* JA 349. The agenda expressly tied these deliberative matters under consideration to the ongoing pandemic. *See id.*; *see also* JA 370. Further specificity is not required by the WVOGPA and would have undermined the Board's legitimate interest in confidentiality. Justice Robin Davis recognized this interest in *Capriotti*. Writing in dissent, Justice Davis reasoned that there was no violation of the meeting notice provision because executive session was plainly appropriate (the public body held a closed session to confer with its attorney over a settlement which was not yet subject to disclosure) and inclusion of more detailed information on the public agenda would "contravene the express exemptions" of the WVOGPA. 2015 WL 869318, at \*10.

The same is true here. As the lower court ruled, the joint finance committee was justified in entering executive session to deliberate matters of a commercially sensitive nature related to the University's response to the COVID-19 pandemic. JA 624–25 (Circuit Court Order II at 13–14). Detailed discussion of these matters on the public agenda is inconsistent with the Act, which

acknowledges the need for their protection and private discussion. The Board does not receive any benefit from deliberating in private if the agenda for that executive session must disclose all of the details of the matters to be discussed in executive session. *See Capriotti*, 2015 WL 869318, at \*10 (Davis, J., dissenting). This Court should find that the Board’s agenda, which *did* identify each of the six items at issue here, met the requirements of the WVOGPA by informing the public of the purpose for the executive session without revealing the detailed content of the communications themselves.

The Ethics Commission Advisory Opinions cited in Petitioner’s brief do not dictate a different result. These opinions establish that a meeting agenda must identify each discussion item “in language that will reasonably place the public on notice of the item to be discussed.” *See* Ethics Comm. Advisory Opinion No. 2009-04 at 4. In Opinion No. 2008-17, the Ethics Commission was asked to render an opinion on whether the meeting agenda of the Jefferson County Ambulance Authority met the requirements of the WVOGPA by including a listing for “executive session, unresolved personnel issues.” The Authority proposed to convene an executive session to discuss personnel issues – two pending employee grievances – and resolve the issues while in executive session. When the Ethics Commission counseled that the agenda description required more detail, it did so because the Authority proposed to make its decisions on the employee grievances while in closed session. The Commission also addressed a new matter that arose during the executive session and was not listed on the public agenda. The Commission counseled that “[w]hen a new matter arises in the course of a meeting, . . . any official action or decision **must** be deferred until a subsequent meeting when the matter has been properly included on the meeting agenda.” The Commission did not direct the Authority not to discuss the new matter

in executive session, only to list it on the agenda when a decision was made. The Board did nothing to run afoul of this guidance.

Advisory Opinion 2009-02 is also distinguishable. There, the Commission emphasized that “[m]atters requiring official action by a governing body should be stated on the agenda in a manner that makes the public aware of the particular matters to be dealt with at a meeting.” In Opinion 2009-02, a county health board considered whether to combine certain employment positions for budgetary reasons. Because combining the positions and furloughing employees would require official action, the Committee advised that the agenda items required greater specificity. That is not the case here—the matters presented to the Board on June 19, 2020 were the Administration’s preliminary deliberations over managerial tasks delegated by the Board. The Board took no official action in executive session.

- ii. **The circuit court appropriately found that any deficiency in the June 19, 2020 meeting agenda was de minimis and did not justify an award of fees.**

Even if the Board’s June 19, 2020 meeting agenda required greater specificity, the Court should find—like the lower court below—that this was nothing more than a de minimis or technical violation of the WVOGPA. The substance of the challenged communications appropriately took place in executive session. *See* JA 623, Circuit Court Order 12 (finding “that this [agenda] violation does not require that any actions taken at the June 19, 2020, meeting be invalidated”).

Petitioner argues that “[t]he West Virginia Supreme Court has never issued a decision . . . concluding that the failure to comply with [the WVOGPA’s] notice requirements somehow can be ignored by labeling the violation as merely being ‘technical.’” Pet. Br. 18. Petitioner is wrong that a violation of the WVOGPA necessarily warrants an award of relief. Rather, such relief is

discretionary under the WVOGPA. *See* W. Va. Code § 6-9A-7(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 . . .”) (emphasis added). In *Capriotti*, the Court noted that “[t]he remedies provided in [the WVOGPA] are left to the discretion of the circuit court. Despite finding a violation of the WVOGPA’s notice provision, *Capriotti* remanded the action “to determine the remedy, *if any*, the circuit court may deem appropriate.” *Capriotti* at \*9 (emphasis added). Further as discussed below, fees are not an appropriate remedy where the court finds “that the position of the public agency was substantially justified.”

For these reasons, it would be inappropriate for this Court to usurp the role of the circuit court and mandate an award of fees for any violation of the WVOGPA’s agenda notice provision.

**F. It is Not the Province of this Court to Award Attorney’s Fees.**

As its final assignment of error, Petitioner asks this Court to award fees. If the Court determines that the Board ran afoul of the WVOGPA in any respect – and it should not – the task of fashioning the appropriate remedy lies with the circuit court. *See Capriotti*, 2015 WL 869318 at \*9. The WVOGPA provides that a governing body *may* be liable for fees if it is adjudged to have conducted a meeting in violation of the provisions of the WVOGPA. W. Va. Code § 6-9A-7(b). In the event the Court overturns the circuit court’s decisions below, remand would be appropriate to determine if any remedy should lie in this case.

**V. CONCLUSION**

For these reasons, the Court should find the Board committed no substantive violation of West Virginia’s open meetings law, affirm the judgment of the lower court, and dismiss Petitioner’s appeal.

Dated: October 12, 2023

West Virginia University Board of  
Governors, Defendant Below, Respondent.

By Counsel,

/s/ Natalie B. Atkinson

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Charleston Gazette-Mail d/b/a  
HD Media, LLC,

Plaintiff Below, Petitioner,

v.

Appeal No. 23-ICA-248

West Virginia University Board of Governors,

Defendant Below, Respondent.

**CERTIFICATE OF SERVICE**

I, Natalie B. Atkinson, counsel for Defendant, West Virginia University Board of Governors, hereby certify that I served the foregoing ***BRIEF OF RESPONDENT WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS*** has been served this 12<sup>th</sup> day of October, 2023, was served electronically on all counsel of record using the File and Serve Xpress.

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