

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 24-412

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HD MEDIA COMPANY, LLC d/b/a CHARLESTON GAZETTE-MAIL,

Petitioner, Plaintiff below,

v.

**WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS,**

Respondent, Defendant below.

PETITIONER'S REPLY BRIEF

APPEAL FROM THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

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I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court:

In its brief, despite the fact that the Circuit Court of Monongalia County and the West Virginia Intermediate Court of Appeals (WVICA) concluded Respondent West Virginia University Board of Governors had violated the notice provision under the West Virginia Open Governmental Proceedings Act (WVOGPA), Respondent refuses to concede, acknowledge or learn from this violation. Furthermore, Respondent seeks to persuade this Court to affirm the unsupported and unprecedented final orders issued by the circuit court and the WVICA nullifying the clear intent and substance of the WVOGPA.

Petitioner HD Media, LLC d/b/a Charleston Gazette-Mail respectfully submits the WVICA's decision affirming the summary judgment orders challenged in this appeal have to be reversed to be consistent with well established West Virginia case law as well as the Legislature's clearly stated intent that "it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions." Fundamentally, the WVICA and the circuit court based their rulings on an overly expansive interpretation of the WVOGPA's limited exceptions to a public meeting rather than applying them in the narrow fashion mandated by the Legislature and as demonstrated by decisions from this Court.

II. Respondent's violation of the notice provision of the WVOGPA is not a "minor issue" and requires a sanction, including injunctive relief to deter future violations

"With respect to **the one minor issue** where Petitioner was successful (the alleged notice violation), Petitioner was denied relief." (Emphasis added). (**BRIEF OF RESPONDENT** at 31). Providing the public with adequate notice identifying what topics will be discussed in an upcoming public meeting of a governing body as mandated by the WVOGPA is not a "minor issue" as dismissively described by Respondent, but rather is a fundamental cornerstone of open government. Failing to comply with this notice requirement is a major violation of the WVOGPA and requires sanctions to prevent future violations. Treating Respondent's action as having no consequences encourages Respondent and public bodies to continue to treat the WVOGPA's essential notice requirement with contempt. This Court must make clear that, in the future, there must be consequences for public bodies that choose to violate the Act's notice requirements.

The notice provision in W.Va.Code §6-9A-3(d), provides, "Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public

and news media.” As found by the circuit court and affirmed by the WVICA, Respondent’s June 19, 2020 Meeting Agenda violated this statute because it failed to place the public on notice of what topics were going to be discussed and, therefore, this inadequate notice violated the WVOGPA. As the circuit court stated, “the ... items were generic descriptions insufficient to provide enough information to adequately place the public ... on notice of the particular items [to be discussed].” (JA at 623).

In its brief, although Respondent acknowledges the circuit court and the WVICA concluded that Respondent failed to provide the notice required by the WVOGPA prior to the June 19, 2020 meeting, Respondent does not concede this violation. (**BRIEF OF RESPONDENT** at 30). So despite the fact that two different courts reached the same decision regarding the woefully inadequate notice provided by Respondent, Respondent still takes the position that it did nothing wrong.

Even more concerning is the fact that Respondent does not attempt to argue how the general language used in the Meeting Agenda notice somehow informed the public that Respondent would be addressing the school’s budget, the business college, emergency pay policy, federal Title IX regulations, tuition and fees, capital projects, and a talk with the athletic director about the outlook for the upcoming season.¹ The danger in Respondent’s cavalier approach to this notice requirement

¹Here is the general, uninformative, and nonspecific Meeting Agenda filed prior to the June 19, 2020 meeting:

(a) Deliberative matters regarding Fiscal Year 2020 and 2021 budgets, including current year retention and enrollment;

(b) Matters relating to improvements to, or potential contractual relationships regarding facilities, infrastructure, and real property;

(c) Potential strategic initiatives relating to academic health

as well as the WVICA’S failure to fully appreciate the significance of this violation is that Respondent and other West Virginia public bodies will continue providing similarly worded, unlawful notices in the future. Should this Court embrace Respondent’s and the lower Court’s perspective that violations of the notice mandate are inconsequential, this precedent will negate the core WVOGPA notice requirement.

The initial critical step in the process of fostering open government mandated by the WVOGPA is for the governing body to provide adequate notice prior to an upcoming meeting explaining what topics would be discussed. With this adequate notice, any member of the public interested in the topics listed in the notice can decide to attend the meeting and view the discussions. As WVICA Judge Thomas E. Scarr explained, “[I]f the notice does not include a specific and adequately detailed description of the topics and issues to be discussed at the meeting, it is impossible for members of the public to discern if something will be discussed at the meeting about which they have an interest, and possibly have something to contribute to the discussion. **Without adequate notice, they are prevented, in the first instance, from making an informed decision whether to attend the meeting, thereby undermining the fundamental purpose and goals of the WVOGPA.**” (Emphasis added). *HD Media Company, LLC d/b/a Charleston Gazette-Mail v. West Virginia University Board of Governors*, 2024 WL 3007228 at *15 (No. 23-ICA-248, 6/14/2024). (JA at 771).

sciences priorities, corporate collaboration, and legislative and regulatory matters; and,

(d) Confidential legal, personnel, and deliberative matters relating to West Virginia University’s ongoing response to the COVID-19 pandemic. (JA at 15).

Simply stating that Respondent would be discussing “improvements to, or potential contractual relationships regarding facilities, infrastructure, and real property” lacks the necessary detail that any member of the public would need in deciding whether or not to view or attend this meeting. This undisputed violation of the WVOGPA warrants the issuance of the injunctive relief sought by Petitioner under W.Va.Code §6-9A-6. There no language in the WVOGPA nor has this Court ever held that a violation of the WVOGPA simply can be ignored without imposing any sanction or remedy. Such a holding from this Court under these facts would establish a troublesome precedent that would lead to the public being much less informed about the topics to be addressed by governing bodies.

Entering an order against Respondent enjoining it from failing to comply with the notice provision of the WVOGPA would set a precedent and would have the effect of forcing Respondent and all West Virginia public bodies to recognize that the notice for the June 19, 2020 meeting was inadequate. Such an order would have to be entered by the circuit court following the reversal and remand from this Court. After such an injunction order is in place, Respondent no longer would dismiss the importance of adequate notice in the future. One may assume that thence forth Respondent would provide adequate notice. Additionally, awarding attorneys’ fees to Petitioner based upon this violation would provide additional incentive for Respondent and all public bodies to comply with the law.²

²Respondent suggests that Petitioner’s efforts to appeal the underlying rulings to this Court are “frivolous and harassing” and should result in attorneys’ fees being awarded to Respondent rather than to Petitioner. (**BRIEF OF RESPONDENT** at 31). First, only this Court has subject matter jurisdiction over this appeal, so Petitioner simply is following the procedures adopted by this Court. Second, this case raises novel issues never before addressed by this Court under the WVOGPA and should result in this Court drafting new syllabus points addressing the “commercial competition” exception to the WVOGPA as well as explaining whether the internal memorandum exemption under the WVFOIA should be incorporated in some limited fashion into the WVOGPA. Petitioner

III. The WVICA's expansive view of the "commercial competition" exception effectively would eviscerate the WVOGPA if accepted by this Court

Respondent devotes several pages in its brief attempting to justify the WVICA's extraordinarily broad definition of the "commercial competition" exception in the WVOGPA under W.Va.Code §6-9A-4(b)(9). (**BRIEF OF RESPONDENT** at 17-24). It is easy to understand why Respondent wants this interpretation to be adopted by this Court. If this Court accepts Respondent's argument, it will be almost impossible to identify any Respondent executive session topic that would not be covered by such an expansive "commercial competition" interpretation.

As noted in *Peters v. County Commission of Wood County (Peters I)*, 205 W.Va. 481, 489, 519 S.E.2d 179, 187 (1999), the recognition of any exception to the WVOGPA must be "narrowly drawn so as to not abrogate the spirit and purpose of the Act." Similarly, in interpreting the West Virginia Freedom of Information Act (WVFOIA), this Court narrowly construes its exemptions:

This Court has made clear that the eight exemptions described in *W. Va.Code*, 29B-1-4 [1977], are to be strictly construed, while WVFOIA's disclosure provisions are to be liberally construed:

‘The disclosure provision of this State's Freedom of Information Act, *W.Va.Code*, 29B-1-1 *et seq.*, as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed. *W.Va.Code*, 29B-1-1.’ Syl. Pt. 4, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985).

Syl. pt. 5, *Queen v. West Virginia University Hospitals*, 179 W.Va. 95, 365 S.E.2d 375 (1987).

Daily Gazette Co., Inc. v. West Virginia Development Office, 198 W.Va. 563, 569-70, 482 S.E.2d 180, 186-87 (1996).

respectfully submits there is nothing "frivolous and harassing" about this appeal, which seeks to uphold the Legislature's intent for the public to have access to the deliberations of governing bodies prior to final decisions being reached.

Respondent would have this Court adopt its radical view of the WVOGPA, where Respondent (1) provides inadequate notice to the public regarding an upcoming meeting; (2) goes into executive session to discuss many issues outside of the public's view; and then (3) after the meeting if someone raises an issue under the WVOGPA, Respondent simply provides an explanation, after the fact, asserting why the topics discussed in secret simply were none of the public's business because the "commercial competition" exception covers everything. To test this hypothesis, the Court should ask Respondent to identify **any** topic Respondent either has discussed or may discuss in the future that would not be covered by its expansive interpretation of "commercial competition."

Respondent and the WVICA fail to pay any deference to the Legislature's specific clearly stated goal: "The people in delegating authority **do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed** so that they may retain control over the instruments of government created by them." (Emphasis added). W.Va.Code §6-9A-1. Respondent asks this Court to defer to decisions to deliberate in secret five consecutive meetings, denying:

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

* * *

Open government allows the public to educate itself about government decisionmaking through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government. W.Va.Code §6-9A-1.

Respondent claims full compliance with the WVOGPA simply by asserting the discussions in executive session could all be connected, in some way, to some sort of commercial competition with other universities. This extraordinarily broad interpretation of the “commercial competition” exception exemplifies the proverbial “exception that consumes the rule.” It also contradicts the Legislature’s clearly stated goal in enacting the WVOGPA, is contrary to the statute’s mandate of public access to open government, and is not supported by any court decision in the country. This Court historically has issued decisions strongly supporting the transparency goal of the WVOGPA and the WVFOIA. Respondent’s interpretation of the commercial competition exception should be emphatically rejected. West Virginia’s lower courts should be instructed to construe the commercial competition exception narrowly and interpret the WVOGPA’s mandate that **“it is in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions.”** W.Va.Code §6-9A-1.

IV. The WVICA’s assertion that WVFOIA internal memorandum exemption is subsumed into the WVOGPA is unprecedented, too broadly applied, and must be rejected

Respondent correctly notes that subsequent to the decisions in *Peters I* and *Peters II*, the Legislature amended the WVOGPA and added subsection 12 to W.Va.Code §6-9A-4(b), which provides an exemption under the WVFOIA as follows:

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

Petitioner respectfully submits this statutory amendment is limited, applying only to matters that are “not considered a public record” under the WVFOIA. A document that is exempt under the WVFOIA first has to meet the broad definition of public record **before** the exemption is applicable.

Furthermore, simply because a public record may be exempt under the WVFOIA does not render the document “confidential.” It simply means such document is not required to be produced in response to a WVFOIA request.

Instead of focusing on the reference to “public record” in subsection (12), the circuit court and the WVICA erroneously construed this amended provision to have incorporated the WVFOIA’s internal memorandum exemption into the WVOGPA. This interpretation, which has never before been made by this Court, fails to narrowly apply this exception, and is much broader than the manner in which this exemption is applied under the WVFOIA.

For example, in Syllabus Point 3 of *Highland Mining Co. v. West Virginia University School of Medicine*, 235 W.Va. 370, 774 S.E.2d 36 (2015), this Court identified the specific requirements for applying this exemption under WVFOIA as well as the circumstances where this exemption is inapplicable:

3. “W.Va.Code, [§ 29B–1–4(a)(8)], which exempts from disclosure ‘internal memoranda or letters received or prepared by any public body’ 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. **W.Va.Code, [§ 29B–1–4(a)(8)] does not exempt from disclosure written communications between a public body and private persons or entities where such communications do not consist of advice, opinions or recommendations to the public body from outside consultants or experts obtained during the public body's deliberative, decision-making process.**” Syl. Pt. 4, *Daily Gazette Co. v. W.Va. Dev. Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996). (Emphasis added).

Even if this Court were to decide that the WVFOIA internal memorandum is subsumed into the WVOGPA, W.Va.Code §6-9A-4(b)(12), must be narrowly defined to be consistent with the open meeting mandate of the WVOGPA.

This Court has limited this WVFOIA exemption to predecisional “advice, opinions and recommendations.” Thus, discussion of any other information included in the internal memorandum should be made in an open meeting and not in the secrecy of an executive session. Additionally, as further explained in Syllabus Point 3, this exemption does not preclude disclosure of “written communications between a public body and private persons or entities where such communications do not consist of advice, opinions or recommendations to the public body from outside consultants or experts obtained during the public body's deliberative, decision-making process.”

This Court has placed significant limitations on the use of the internal memorandum exemption to block public disclosure of public records under the WVFOIA. Should the Court decide to incorporate this WVFOIA exemption into the WVOGPA, the exception should be narrowly tailored and similarly limited to guarantee, to the greatest extent possible, the public’s access to the deliberations of governing bodies consistent with the Legislature’s clearly stated goal of open public access to meetings of all governing bodies.

V. Discovery is not required for a litigant to prevail under the WVOGPA

Throughout its brief, Respondent criticizes Petitioner’s deliberate decision not to conduct any discovery in this case. Respondent magnifies this criticism by lauding its own efforts to conduct some discovery and to retain expert witnesses, one of whom actually is employed by West Virginia University while the other had been the Chair and a member of Respondent.

As the West Virginia Attorney General explains in THE WEST VIRGINIA OPEN GOVERNMENTAL MEETINGS ACT, the WVOGPA is intended to be enforced by anyone: “Any citizen may bring a legal action in the circuit court of the county where the public agency regularly meets to enforce the provisions of the Act.”³ Every citizen has the legal right to challenge whether

³This online guide created by the West Virginia Attorney General pursuant to W.Va.Code § 6-9A-12, <https://ago.wv.gov/publicresources/Documents/2017-3->

a governing body has complied with its statutory obligation to provide proper notice of a public meeting and to provide open public access to the meeting to any interested person. Neither the guidelines provided by the Attorney General nor any provision in the WVOGPA requires a litigant to engage in written and deposition discovery in order to prevail in an enforcement action.

Petitioner could have deposed all members of Respondent in an effort to obtain their recollections of everything that was said during the many executive sessions at issue. In these depositions, these members would have been required to provide their complete recollections of the matters discussed in executive session because the Legislature did not provide any evidentiary privilege in the WVOGPA. In Syllabus Point 4 of *State ex rel. Marshall County Commission v. Carter*, 225 W.Va. 68, 689 S.E.2d 796 (2010), the Court held:

The provision of the Open Governmental Proceedings Act, W.Va.Code §§ 6–9A–1 to 6–9A–12, that recognizes a specific and limited right of governing bodies to meet in an executive session which is closed to the public is not intended to prevent the legitimate discovery in a civil action of matters discussed in an executive session which are not otherwise privileged.

However, the purpose of an enforcement action filed under the WVOGPA is not to attempt to learn, after the fact, what was discussed by the governing body when it illegally convened in executive session. Rather, the primary goal of this and most civil actions filed pursuant to the WVOGPA is to require the governing body to perform its statutory duty to hold open meetings and limit its use of executive sessions to discuss those few issues where a narrow exception applies. Ideally, an enforcement action under the WVOGPA should be resolved quickly as a matter of law to advance the right of citizens to the to attend, observe and participate in open meeting of West Virginia public bodies.

Prolonged litigation over the failure of a governing body to abide by the WVOGPA defeats the purposes of this law and frustrates the Legislature's clear intent to have enforcement actions move expeditiously. That is why a citizen has only 120 days after a governing body has violated the WVOGPA to file an enforcement action. W.Va.Code §6-9A-6. However, as demonstrated by this case, Petitioner's efforts to avoid complicating the record with discovery requests, depositions, and expert witnesses nevertheless has resulted in the parties to this action still litigating over illegal hearings that occurred in 2020.

VI. Subject matter jurisdiction cannot be waived

Petitioner raised the question as to the WVICA's lack of jurisdiction in an appeal involving a request for extraordinary relief because Rule 1 of the West Virginia Rules of Appellate Procedure limits the subject matter jurisdiction of such appeals to this Court. Respondent asserts in passing that somehow Petitioner waived this issue by failing to raise this jurisdictional issue with the WVICA, which lacked subject matter jurisdiction in the first place.

As noted in the original appeal, Petitioner did file its appeal first with this Court, but was advised by the Clerk to file this appeal with the WVICA. Rather than simply ignore this directive, Petitioner went forward with the appeal despite the clear language in Rule 1 that only this Court has jurisdiction over appeals involving requests for extraordinary relief. Subject matter jurisdiction must exist as a matter of law and cannot be waived. "We have stated categorically that '[s]ubject matter jurisdiction may never be waived.' *Dishman v. Jarrell*, 165 W.Va. 709, 712, 271 S.E.2d 348, 350 (1980) (citing *West Virginia Secondary School Activities Comm'n v. Wagner*, 143 W.Va. 508, 102 S.E.2d 901 (1958))." *State ex rel. Baden and Robeson Corp. v. Hill*, 208 W.Va.163, 168, 539 S.E.2d 106, 111 (2000).

Because these appellate rules are so new and other litigants in the future similarly may be faced with appealing a final order in a case where extraordinary remedies are sought, a ruling on

whether the WVICA has appellate jurisdiction over appeals of extraordinary remedies will provide clarification as to this Court's application of Rule 1.

VII. Conclusion

For the foregoing reasons, Petitioner HD Media, LLC d/b/a Charleston Gazette-Mail respectfully moves this Court to grant Rule 20 oral argument and after hearing these arguments, to issue a Justice written decision reversing the WVICA's final decision, explaining in new Syllabus Points that the trial court and the WVICA erred in expansively reading the narrow exceptions to the WVOGPA, and remanding this case to the trial court to address the imposition of injunctive relief and an award of attorneys' fees and costs to Petitioner. Furthermore, Petitioner seeks such other relief as this Court deems appropriate.

**HD MEDIA COMPANY, LLC d/b/a
CHARLESTON GAZETTE-MAIL,** Petitioner,
Plaintiff below,

–By Counsel–

/s/ Lonnie C. Simmons

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CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, counsel for Plaintiff hereby certify that a copy of **PETITIONER'S REPLY BRIEF** has been served this 21st day of January, 2025, was served electronically on all counsel of record using the File and Serve Xpress.

/s/ Lonnie C. Simmons

Lonnie C. Simmons (W.Va. Bar # 3406)