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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 24-412 – *HD Media, LLC d/b/a Charleston Gazette-Mail v. West Virginia University Board of Governors*

TRUMP, Justice, concurring in part and dissenting in part, joined by Justice Flanigan:

I concur in the majority's conclusions that the Board violated the West Virginia Open Governmental Proceedings Act ("Open Meetings Act") when it discussed social justice issues in executive session. Relatedly, I concur in the majority's decision to remand this case for consideration of an award of attorney fees to HD Media based on that violation. I also concur with the majority that the circuit court's review of the Board's assertion of attorney-client privilege did not require live testimony. I respectfully dissent, however, from the majority's conclusion that the Board established the applicability of the commercial competition exception to the University's response to the COVID-19 pandemic, its budgets, its discussions with the athletic director, the business college and capital projects, its emergency pay policy, and tuition and fees. I further dissent from the affirmance of the denial of attorney fees for the Board's violation of the Act's notice requirements.

The majority's analysis gives dispositive effect to the Board's characterization of its discussions and to the fact that the Board's evidence was unrebutted. But the question is not whether the Board's senior administrator adequately described the University's financial concerns or whether HD Media produced an affidavit disputing that description. The question is whether the facts established by the

Board satisfy the statutory requirements for excluding the public from a meeting. I would find that they do not. The majority's approach effectively equates matters that may affect a public institution's finances with matters "involving commercial competition." Those are not interchangeable concepts. If they were, the exception would reach a substantial portion of the ordinary business of every public college or university.

The Open Meetings Act establishes openness as the rule and secrecy as the exception. The starting point is the Legislature's declaration of policy in West Virginia Code § 6-9A-1. As the majority recognizes, public agencies "exist for the singular purpose of representing citizens of this state in governmental affairs[.]" *Id.* The majority opinion correctly notes that "[t]he primary object in construing a statute is to give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975). While sometimes the meaning of statutory text and the intent of the Legislature can be difficult to discern, the Open Meetings Act presents no such problems. The Legislature declared within the Act that citizens "do not yield their sovereignty to the governmental agencies that serve them" and 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." W. Va. Code § 6-9A-1. Rather, "[t]he people insist on remaining informed so that they may retain control over the instruments of government created by them." *Id.* These are express statements of the policy the Legislature intended the Act to implement. They inform the proper

starting point when determining whether a public body may exclude the public from its deliberations. The Open Meetings Act is one of the most consequential statutory enactments our State has adopted in an effort to promote the public's right to know what its government is doing and specifically for what purpose public funds are expended. The Act implements fundamental constitutional provisions of our State; the people are sovereign and officials their servants, who "should be loathe to exclude their sovereigns from any substantive deliberations. *McComas v. Board of Education of Fayette County*, 197 W. Va. 188, 197, 475 S.E.2d 280, 289 (1996).

Section 3 of the Open Meetings Act carries the above-quoted policy into operative law: "Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, *all* meetings of *any* governing body *shall* be open to the public." W. Va. Code § 6-9A-3(a) (emphasis added). The statute does not say that meetings generally should be open, subject to whatever exceptions a public agency considers reasonable or expedient. It says that all meetings shall be open, subject to exceptions expressly provided by law. And even when an exception applies, an executive session is permissive, not mandatory: "a public agency *may* hold an executive session[.]" W. Va. Code § 6-9A-4(b) (emphasis added).

Our decision in *McComas* leaves no doubt about how courts are to approach this legislative directive. This Court explained that the fundamental purpose

of an open meetings law is to ensure the public's right to be fully informed about the conduct of governmental business. *Id.* at 197, 475 S.E.2d at 289. We instructed courts to accord the Act an expansive reading to accomplish its far-reaching goals because a narrow reading would frustrate legislative intent and negate the statute's purpose. *Id.* We also recognized that courts must employ a common sense approach focused on whether excluding the public from a particular meeting would undermine the Act's fundamental purposes. *Id.* at 191, 475 S.E.2d at 283, syl. pt. 4.

That approach does not permit a governing body to substitute its assessment of administrative convenience for the Legislature's policy judgment. It also does not permit a court to enlarge an exception because a public body identifies a practical reason it would prefer to deliberate outside public view. The Legislature recognized that public officials sometimes need to discuss matters privately to conduct public business effectively. It accommodated those needs through specific exceptions. But it did not allow those exceptions to displace the rule. The exceptions must therefore be construed narrowly, so that they do not consume the rule they were intended to qualify. *See Peters v. County Commission of Wood County*, 205 W. Va. 481, 489, 519 S.E.2d 179, 187 (1999), *superseded, in part, by statute on other grounds as stated in Capriotti v. Jefferson County Planning Commission*, No. 13-1243, 2015 WL 869318, at *4 (W. Va. 2015) (memorandum decision) (recognizing that exceptions must be narrowly drawn so as not to abrogate the spirit and purpose of the Act); *Teets v. Miller*, 237 W. Va. 473, 485, 788 S.E.2d 1, 13 (2016) (Benjamin, J., concurring in part and

dissenting in part) (recognizing that the Act's limited exceptions have been narrowly construed and enforced). The majority missed an opportunity to elevate to a syllabus point the commonsense principle, embraced by the vast majority of states, that exceptions to the Open Meetings Act must be narrowly construed in keeping with the Act's express policy favoring open government. *See id.*; *see also Fisher v. Maricopa County Stadium District*, 912 P.2d 1345, 1352 (Ariz. Ct. App. 1995) (collecting cases). This principle, of course, comports with our longstanding rule that the public access provisions of West Virginia's Freedom of Information Act must be liberally construed and its exemptions strictly construed. Syl. Pt. 5, *Queen v. West Virginia University Hospitals, Inc.*, 179 W. Va. 95, 365 S.E.2d 375 (1987) (citation omitted).

I. The Board Did Not Establish the Applicability of the Commercial Competition Exception.

West Virginia Code § 6-9A-4(b)(9) permits a public agency, following the statutorily prescribed procedures, to hold an executive session "[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 majority correctly observes that the phrase "other matters" is not limited to matters involving the investment of public funds. But that observation does not resolve the question. The Legislature did not authorize executive sessions to discuss any matter that might affect a public agency's finances. It

authorized executive sessions to discuss "other matters involving commercial competition" when public disclosure might adversely affect the State's or a political subdivision's financial or other interests. *Id.*

I agree with Chief Judge Scarr's analysis of the commercial competition exception, and I would adopt his reasoning and conclusion on this issue. *See HD Media Company, LLC d/b/a Charleston Gazette-Mail v. West Virginia University Board of Governors*, 251 W. Va. 249, 267-274, 912 S.E.2d 12, 30-37 (W. Va. Ct. App. 2024) (Scarr, C.J., concurring in part and dissenting in part). I expand on his well reasoned analysis only to reinforce that the statutory language requires more than a generalized possibility of competitive harm. The commercial competition exception concerns identifiable, specific competitive transactions occurring in the present, not the ordinary business of operating a public institution or the nebulous proposition that all colleges and universities compete with one another for, among other things, students, faculty, and funding. *See Moore v. Hope Natural Gas Co.*, 76 W. Va. 649, 652, 86 S.E. 564, 566 (explaining that use of a present participle "denotes [the] immediate present, and only occasionally implies future events or occurrences."); *Labrador v. Idaho State Board of Education*, 560 P.3d 553, 558 (Idaho 2024) (holding that the exception requires "a present state of competition[,]" not merely the governing body's belief it is or might be in competition with others); *State ex rel. Oitzinger v. City of Marinette*, 19 N.W.3d 663, 676 (Wis. Ct. App. 2025) (observing that "speculation about the possibility of the need for future negotiations does not provide a basis to close a

meeting").

Further, the word "commercial" must be given effect. Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999) (holding that "significance and effect" must be given to "every section, clause, word, [and] part of a statute"). The exception requires a matter involving competition of a commercial nature; it does not encompass every policy choice, operational concern, or institutional decision that may have financial consequences. The statutory requirement that disclosure "might adversely affect" a financial or other interest is an additional condition, not a substitute for the requirement that the matter involve commercial competition. Otherwise, the phrase "involving commercial competition" would do no work. Nearly every significant decision made by a public university or college can affect its financial interests in some way. Other courts considering analogous exceptions have rejected arguments that a public body's general economic or financial interests form a sufficient basis for closing its deliberations. *See State ex rel. Citizens for Responsible Development v. City of Milton*, 731 N.W.2d 640, 645 (Wis. Ct. App. 2007) (holding that a municipality's desire to protect its economic development and negotiating interests did not justify closing all discussions concerning a proposed industrial development, although portions revealing actual negotiation strategies could be closed); *Columbia Riverkeeper v. Port of Vancouver USA*, 395 P.3d 1031, 1033 (2017) (narrowly construing an exception permitting closed discussion of the minimum price for the sale or lease of public property and rejecting the public body's attempt to

extend the exception to a general discussion of the factors bearing on the determination of that price). Similarly, our Legislature did not intend that the mere potential of financial consequences would bring a matter within the commercial competition exception, or the statute would have so provided.

The structure of the exception reinforces this conclusion. It identifies particular activities—purchasing, selling, or leasing property, advance construction planning, and investing public funds—and then includes "other matters involving commercial competition." The listed activities provide context for the kind of commercial competition contemplated. The exception is directed to identifiable matters in which premature disclosure could impair a competitive position or undertaking of a public agency or governing body, not to the general competition inherent in operating a public institution of higher education. A public university does, of course, compete for students, faculty, research funding, athletic revenue, and institutional recognition. But that general competitive environment is ongoing and has no readily identifiable endpoint; it does not convert every discussion of enrollment, personnel, budgets, academic programs, or institutional policy into a matter that may be discussed out of the view of the public under the guise that it constitutes commercial competition. The exception's proviso confirms that the Legislature contemplated commercial competition that can be finalized and completed. Information relied on during deliberations concerning commercial competition remains exempt from the Act's disclosure requirements "only until the commercial competition has been finalized and

completed." W. Va. Code § 6-9A-4(b)(9). That language cannot be reconciled with the majority's passive affirmance of the Board's conception of effectively perpetual competition, under which routine operations may be decided behind closed doors because they relate in some way to the University's continuing efforts to attract students, retain employees, generate revenue, or manage finances.[1] The majority's conclusion produces a peculiar result: the more ubiquitous a public institution's general competitive environment, the greater its ability to conduct its ordinary business behind closed doors. Such an expansive application is incompatible with the Act's express mandate that all meetings of a governing body be open to the public.

I do not suggest that a public college or university can never invoke the commercial competition exception. A specific negotiation with a prospective employee, a proposed research partnership, a particular economic development project, or a specific contemplated contractual arrangement may present a legitimate basis for an executive session if the governing body or public agency establishes the required

[1] During oral argument, counsel for the Board characterized the University as "a billion dollar business." That depiction, however, fails to acknowledge the substantial public funding WVU receives through legislative appropriations. According to WVU's own financial materials, in fiscal year 2024, the University received nearly $500 million in State appropriations, including approximately $200 million in regular appropriations and an additional $282 million in surplus appropriations. While I, along with many others, would agree that these appropriations constitute a wise allocation of the State's public resources and an important investment in higher education and the future of our State, the public is entitled to observe how the Board determines the expenditure of these substantial public funds.

connection to existing commercial competition and the potential adverse effect of disclosure. A specific recruitment negotiation may likewise qualify where premature disclosure would impair an identifiable competitive undertaking.[2] But the institution's general interest in attracting students, faculty, and funding is not the same as a specific recruitment negotiation; an ongoing effort to generate revenue is not the same as a specific contemplated transaction; and a policy discussion that may influence public perception is not, without more, a matter involving commercial competition. The majority's opinion does not maintain that distinction. Instead, it repeatedly relies on the Board's assertion that the discussed topics generally affected WVU's financial health, involved financial concerns, or could affect revenue. That evidence may establish that the topics were important to the University and had financial implications. It does not establish that each topic involved commercial competition within the meaning of the statute.

A. The University's COVID-19 response and budgets

The majority affirms summary judgment on the University's response to the COVID-19 pandemic and its budgets because Mr. Alsop testified that the pandemic affected virtually every aspect of the University's operations. Students were sent home, instruction moved online, contracts could not be fulfilled, construction and research

[2] Indeed, it is the competitive nature of recruiting and hiring college and university presidents that necessitates a limited period of confidentiality surrounding the search process for those officers. *See* W. Va. Code R. §§ 133-5-2.4; 135-5-2.4.

projects were delayed, and decisions about when to return students to campus affected the University's financial health. He further testified that "every line item of the University's budget was in question" and that anticipated shortfalls required consideration of paid-leave changes, employee furloughs, and debt restructuring. While these assertions demonstrate the extraordinary financial and operational consequences of the pandemic, they do not establish commercial competition. Indeed, on its face, this testimony does not establish a legal basis for closing the Board's public meetings and going into executive session. It is axiomatic, and it is clear under the Open Meetings Act, that the Board's discussion of its budget and its consideration of actions with respect to its budget are public matters. I would hold the same to be true with respect to the Board's discussion of the COVID-19 pandemic and its consideration of responses to the pandemic.[3] The Board did not identify a particular competitive transaction, negotiation, or undertaking that was the subject of the discussions from which the public was excluded. The description also did not explain how disclosure of the Board's deliberations about the University's pandemic response or budget might adversely affect a specific competitive position. The fact that a decision about reopening campus could affect enrollment or revenue does not make the discussion itself a matter

[3] For instance, parents of WVU students who are contemplating signing a lease for an apartment or a dormitory room have the right to know if the Board is having discussions about transitioning all University classes to online instruction. These parents could potentially save thousands of dollars by having their students complete online classes from home. In the same fashion, Morgantown landlords have the right to know about these discussions so they can plan accordingly. The Act protects the public's opportunity to observe the Board's discussions about these important matters.

involving commercial competition. The same is true of discussions about budget shortfalls, possible furloughs, paid leave, and debt restructuring. Those are consequential matters of public university and college administration. Their financial significance does not place them within the statutory exception.

The majority reasons that HD Media offered no affidavits or other evidence to rebut Mr. Alsop's testimony and invokes syllabus point 2 of *Guthrie v. Northwestern Mutual Life Insurance Co.*, 158 W. Va. 1, 208 S.E.2d 60 (1974). But this reasoning mistakes the nature of the dispute. HD Media did not need to dispute that the pandemic affected WVU's finances. It challenged whether the assertions made in the affidavits brought the Board's closed discussions within the statutory exception. That is a question of law and statutory application, not a disputed question of fact. Even accepting the Board's factual assertions as true, those assertions did not establish that the discussions involved a particular matter of commercial competition or that debating them in public might adversely the University's financial or other interests. The Board therefore was not entitled to judgment as a matter of law.

The majority's approach is especially troubling because the affidavit describes financial consequences at a high level of generality. If the possibility that a public agency's or governing body's finances could be affected by disclosure were enough, they could close discussions about virtually anything: any response to a major event, any subject involving an annual budget, or any policy with an operational or

financial component. That is not a narrow construction of the exception, and thus is violative of the Act.

B. Discussions with the athletic director

The majority next affirms the executive session discussion with the athletic director concerning the "outlook for this upcoming season." The majority relies on a supplemental affidavit stating that, at the time, the University did not know whether the football season could proceed and that home football games generated between $3 million and $6 million per game. This is precisely the kind of general business that the Act requires to be discussed in the open. According to the affidavit, premature disclosure could have affected media contracts, stadium vendor contracts, ticket sales, and athlete retention. This evidence identifies general, potential financial consequences, but it still does not identify what specific competitive matter the Board was considering. The Board did not establish that the discussion concerned negotiations over a particular media contract, a specific vendor agreement, a given ticket sale arrangement, or the recruitment or retention of an identified student-athlete or coach. The affidavit instead lists categories of University revenue and asserts that disclosure could affect them. Under any reading of the Act, that is not enough to show that the Board was considering a matter involving commercial competition and therefore is not sufficient to establish a lawful basis for closing its meeting.

To be sure, a particular negotiation involving media rights, a vendor, or

an athlete's recruitment could fall within the exception. But under the law, the Board had the burden to establish that the discussion actually involved such a matter. The general importance of football revenue to the athletic department does not transform a briefing about the outlook for an upcoming season into a qualifying exception to the Act's requirement of openness.

C. The business college and capital projects

The majority also treats the discussions concerning the business college and capital projects as qualifying because they related to ongoing construction, the economic feasibility of continuing projects during the pandemic, and whether WVU should continue its contracts with third-party vendors. The majority characterizes Mr. Alsop's testimony on these subjects as "dispositive." It is not.

The statute expressly permits an executive session to consider "advance construction planning." W. Va. Code § 6-9A-9(b)(9). But the Board's evidence, as recounted by the majority, described ongoing projects, including construction of Reynolds Hall, the design of which had already been approved and the construction of which was underway; public funds were already being expended. The discussion concerned whether to continue with those projects and existing vendor contracts in light of the pandemic. The Board did not identify a pending purchase, sale, lease, or other contract; a particular competitive procurement; a negotiation with a vendor; or advance construction planning the open discussion of which would have placed the University

at a competitive disadvantage. The fact that a project involves construction does not make every subsequent discussion about its costs or continuation "advance construction planning." The reference generally to "contracts with third-party vendors"—language that is not in the statute—is also insufficient to establish applicability of the exception. The Board did not identify the existing contracts, describe any ongoing negotiations, or explain how disclosure of the Board's discussion would adversely affect an existing competitive position. A public agency or governing body cannot satisfy its burden merely by invoking the existence of contracts generally and contending that the contracts carry financial implications. The relevant question is what the Board discussed and why public disclosure of that discussion might harm an identifiable commercial interest. The evidence, as described by the majority, does not answer that question.

D. Emergency pay policy

The majority's treatment of the emergency pay policy illustrates the breadth of its approach. Mr. Alsop testified that the subject was part of a broader discussion of the pandemic and its budgetary effects. The Board had previously approved a special emergency leave-with-pay plan for faculty and staff, and the discussion concerned whether to extend that plan through the fall of 2020. Nothing in that description involves commercial competition within the meaning of the Act. The extension of an employee leave-with-pay policy may affect a public body's expenditures and budget, but the statute does not authorize an executive session

whenever a public agency discusses a policy that may increase or reduce its costs. Indeed, openness should be the rule, not the exception, when public agencies and governing bodies consider budgetary matters. The Board identified no existing competitive transaction, negotiation, or undertaking that would be harmed by an open discussion. The majority's reliance on the policy's relationship to the pandemic and speculative financial concerns does not supply the missing and essential statutory element.

E. Tuition and fees

Finally, the majority affirms the executive session discussion of tuition and fees because the Board described it as limited and related to ongoing enrollment and retention strategies, which were part of the University's broader COVID-19 budget discussions. The majority also emphasizes that the University's budget and tuition-and-fee schedules were later discussed and approved in an open, public session. Pointing this out is at least tacit recognition by the majority that such discussions are required under the Act to be had in an open meeting. Certainly tuition, fees, enrollment, retention, and the budget are financially important to the University—as they are to the citizens of this State. But the Board failed to establish that public discussion of these broad subjects might adversely affect a particular competitive interest. The general desire to attract and retain students is a continuing institutional objective, not an identifiable competitive undertaking that permits the Board to deliberate in secret whenever tuition or fees are discussed. The subsequent public discussion and approval

do not cure an otherwise unlawful executive session. *See Gannett Satellite Information Network, Inc. v. Chillicothe City School District Board of Education*, 534 N.E.2d 1239, 1242 (Ohio Ct. App. 1988) ("A violation of the [Open Meetings Act] cannot be 'cured' by subsequent open meetings if the public body initially discussed matters in executive session that should have been discussed before the public."). The Act protects the public's opportunity to observe the deliberative process, not merely the final vote. A public body cannot deliberate privately on a matter that must be discussed openly and then satisfy the Act by presenting or approving the resulting decision in public. The majority's reliance on the later public discussions therefore does not answer whether the earlier executive session discussion was authorized.

II. The Board's Affidavits Did Not Establish the Exception as a Matter of Law.

The majority repeatedly emphasizes that Mr. Alsop's testimony was "unrebutted," describes it as dispositive, and faults HD Media for failing to submit affidavits or other evidence. That refrain obscures the threshold question: whether the Board's evidence, even if accepted in full, established applicability of the statutory exception. The burden of establishing the applicability of an exception to the Open Meetings Act rests with the public agency invoking it. That allocation follows from the Act's text and purpose. The Legislature made open meetings the rule and permitted closure only when an enumerated exception applies. A public agency seeking to close its meeting to the public must demonstrate that its conduct falls within the exception. The burden does not shift to the citizen who wants to attend merely because that citizen,

the party challenging the closure, did not have access to the closed deliberations or did not retain an expert to contradict the agency's evidence.

The majority's reliance on *Guthrie* does not resolve this issue. *Guthrie* states the familiar Rule 56 principle that a party resisting summary judgment must present evidence when the moving party has shown there is no genuine issue of material fact. Syl. Pt. 2, *Guthrie*, 158 W. Va. at 1, 208 S.E.2d at 61. But that principle presupposes that the moving party has first shown entitlement to judgment as a matter of law. Here, the Board's affidavits described the University's financial circumstances and a senior administrator's view of the potential consequences of disclosure. Whether those circumstances constituted "matters involving commercial competition" is not a fact that becomes established by an absence of contrary testimony. It is a question of law and statutory application for the court alone to decide.

Under Rule 56, affidavits submitted by a party supporting a motion for summary judgment, if unrebutted, may be considered by the court for the purpose of establishing material facts. There is no concomitant obligation for the non-moving party to rebut legal conclusions contained in such affidavit. Rule 56 does not permit a court to consider legal conclusions as facts. But establishing that "there is no genuine issue as to any material fact," is only the first part of the inquiry. W. Va. R. Civ. P. 56(a). Drafted in the conjunctive, the Rule next requires the court to determine whether "the movant is entitled to judgment *as a matter of law*." *Id.* (emphasis added); Syl. Pt. 1,

Floyd v. Equitable Life Assurance Society, 164 W. Va. 661, 264 S.E.2d 648 (1980) (same). Determining whether a party should be awarded summary judgment is purely a question of law, and drawing legal conclusions is solely the responsibility of the court. *Fitzwater v. Spangler*, 150 W. Va. 474, 478, 147 S.E.2d 294, 296 (1966) ("Perhaps the most fundamental rule of our system of jurisprudence is that questions of fact are to be determined by a jury and questions of law by a court."). The determination for the court is not simply whether one party submitted materials supporting its factual positions and the other did not. Rather, the court must determine whether, in light of the materials submitted and the parties' legal arguments, the moving party is entitled to judgment as a matter of law. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58 n.7, 459 S.E.2d 329, 335 n.7 (1995) (recognizing that summary judgment is mandatory only when the moving party's uncontroverted proof establishes entitlement to judgment as a matter of law). The absence of disputed facts, standing alone, does not establish that entitlement. *See Peltzman v. Beachner*, 900 S.W.2d 677, 678 (Mo. Ct. App. 1995) (holding that summary judgment may be denied even when the nonmoving party submits no affidavit or response if judgment would be inappropriate as a matter of law). In this case, the courts at all levels, including the majority of this Court, have erroneously made the existence of an affidavit dispositive simply because the opposing party did not submit a competing affidavit. Here, because the meetings were held behind closed doors, HD Media had no independent access to the facts necessary to construct a counter affidavit. The majority nonetheless sanctions the circuit court's tacit finding that HD Media's inability to dispute the Board's proffered facts is somehow dispositive as to the legal

conclusion to be drawn from those facts. The circuit court's and the majority's reasoning here is circular: they fault HD Media for failing to produce evidence about discussions from which it was excluded, then rely on that evidentiary absence to accept the Board's characterization of those discussions and its argued legal conclusions as falling within a statutory exception. Rule 56 also does not shift to the party seeking public access the agency's obligation and burden to establish the applicability of an exception to the Open Meetings Act on which the agency relies. The Board was required to make that showing in the first instance. An affidavit may establish the facts it recounts; it does not relieve the court of deciding the legal issue of whether those facts satisfy the statute.

Indeed, the majority's reasoning risks imposing an impossible burden on citizens seeking enforcement of the Open Meetings Act. The public is excluded from the very discussions at issue. The agency controls the information about what was discussed and why it believes disclosure would be harmful. This does not comport with the United States Supreme Court's observation that "[t]he history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). If the agency may satisfy its burden through a generalized affidavit asserting that there might be financial consequences attending some of the subjects discussed behind closed doors, and the challenger—a citizen who did not yield sovereignty to the governing body that serves him or her—must then produce contrary evidence about the substance and consequences of a discussion that he or she was not

permitted to observe, the statutory presumption of openness is turned on its head.

This is not to say that affidavits are categorically inadequate or that a public agency must always produce live testimony. The majority correctly affirmed the lower courts on this issue. The question is whether the proffered evidence establishes the elements of the particular exception. An affidavit may provide facts sufficient to do so. But an administrator's conclusory characterization of a topic as commercially competitive, coupled with a description of its general financial importance, does not establish that the topic falls within the statutory exception. The Board's evidence must be measured against the statutory requirements, not treated as dispositive because HD Media was not able to rebut it or because, in general and conclusory fashion, the Board claimed that the subjects of its discussions were matters involving commercial competition.

The majority also notes that HD Media deliberately did not retain experts contending that the circuit court had authority to decide questions of law. On this point, HD Media had it right. Syl. Pt. 10, in part, *France v. Southern Equipment Co.*, 225 W. Va. 1, 689 W. Va. 1 (2010) ("As a general rule, an expert witness may not testify as to questions of law[.] It is the role of the trial judge to determine, interpret and apply the law applicable to the case."). Expert testimony was not necessary to explain the meaning of commercial competition or to establish that the Board's evidence failed to satisfy the statutory standard; these are questions of law to be determined by the courts.

The Board's burden was not to show that an "expert" believed its discussions were commercially sensitive; it was to establish facts bringing each discussion within the statutory exception. The majority's repeated reliance on an administrator's "unrebutted testimony" does not relieve the Court of its obligation to determine as a matter of law whether the facts established by the testimony are sufficient to close the meeting to the public under a specific statutory exception.

III. HD Media Is Entitled to Attorney Fees.

Although I concur with the majority's decision to remand for consideration of fees with regard to the violation associated with the social justice issues, I dissent from its decision to affirm the denial of attorney fees for the Board's violation of the Act's notice requirements. The majority acknowledges that the June 19, 2020, agenda did not adequately identify the subjects to be discussed. The circuit court found that the agenda used generic descriptions that were insufficient to place the public and media on notice of the particular matters that the Board intended to discuss. The majority nevertheless concludes that the Board's position was substantially justified because it believed the agenda adequately identified the issues and could correlate the topics later described by a Board member with general agenda items. The post hoc ergo propter hoc nature of the majority's analysis defies logic: the Board's ability to connect the subjects discussed to generic agenda descriptions after the fact does not establish that the Board was "substantially justified" in believing its agenda provided sufficient notice in the first instance.

The notice requirements of the Open Meetings Act serve an essential purpose. The public cannot meaningfully exercise its right to attend governmental proceedings if it does not receive adequate notice of the business to be considered. An agenda that fails to identify the subjects to be discussed deprives the public of the opportunity to make an informed decision about whether to attend and observe those proceedings. The circuit court's finding established an actual violation of the Act, not a harmless departure from a technical requirement. The Board's belief and contention that its agenda was adequate does not cure that violation.

West Virginia Code § 6-9A-7(b) provides that a public agency adjudged to have conducted a meeting in violation of the Act "may be liable" for fees and expenses incurred by a prevailing party in litigating the violation, "unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust." Good faith is not an independent exception to the fee provision. Although it may inform the substantial justification inquiry, it does not resolve it. The circuit court was required to assess the Board's position under the statutory criteria. The majority concludes that the circuit court's finding that the Board believed it had adequately identified the issues was "tantamount" to a finding that the Board's position was substantially justified. But a subjective belief that an agenda is adequate is not the same as an objectively reasonable position that is substantially justified. The circuit court found that the agenda's generic

descriptions did not provide sufficient notice of the particular subjects to be discussed. The Board's ability after the fact to correlate those subjects with broad agenda categories does not establish that members of the public could have made the same connection before the meeting—when it actually mattered. The notice requirement must be assessed from the perspective of the citizen seeing and reviewing the agenda, not from the perspective of agency officials who already know what they intend to discuss.

The majority's reasoning also conflates the Board's justification for entering executive session with its justification for providing inadequate notice of the subjects to be discussed. Those are separate questions. Even if the Board reasonably believed that certain subjects qualified for executive session, that belief would not establish that its agenda adequately notified the public of the business to be considered. The Board's substantive defenses to HD Media's claims do not, without more, substantially justify its failure to comply with the separate notice requirements. The fact that the statute uses the word "may" also does not end the inquiry. I recognize that any fee award is discretionary. But that discretion must be exercised by applying the statutory criteria. The majority's reliance on the circuit court's general finding about the Board's belief effectively permits good faith, without more, to serve as a substitute for substantial justification. That approach gives insufficient effect to the Legislature's express provision for an award of fees when a public agency violates the Act. The majority also relies on *Capriotti v. Jefferson County Planning Commission*, No. 13-

1243, 2015 WL 869318 (W. Va. Feb. 26, 2015) (memorandum decision), which recognizes that a violation of the Open Meetings Act does not necessarily require invalidation of governmental action taken during or following an improperly conducted meeting. But whether governmental action must be invalidated is distinct from whether a prevailing party should receive fees for establishing a violation of the Act. The availability of one remedy does not resolve the propriety of another.

HD Media was required to litigate to establish that the Board violated the statutory notice requirements. That violation independently deprived the public of adequate notice of the Board's business. HD Media's success on other issues does not diminish the importance of enforcing the notice requirements. I would reverse the denial of attorney fees and remand for the circuit court, applying the statutory standards, to determine the reasonable fees and expenses incurred by HD Media in establishing the notice violation.

The Open Meetings Act is not an impediment to government. It is the Legislature's recognition that government exists to serve the people and that public access to governmental proceedings is essential to that relationship. The Act codifies the notion that openness serves the interests not only of the citizens, who are sovereign, but also of their government by facilitating better government. Public bodies may discuss particular matters outside the view of the public if those matters fall within a limited, clearly defined statutory exception. But a public agency cannot convert

ordinary governmental business into confidential deliberations merely by showing that the subject has potential financial implications or that disclosure might affect it in some generalized way. That is not what the Act permits. The majority's affirmance of the Board's application of the commercial competition exception permits precisely that result. It gives insufficient effect to the statutory requirement of commercial competition and places too little weight on the public's right to observe the deliberations of its government. Thus it deprives both the citizens and their government of the benefit that each might have from the sunshine.

Accordingly, I respectfully concur in part and dissent in part. I am authorized to state that Justice Flanigan joins me in this separate opinion.