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TAKING OUT THE CONTEXT: A CRITICAL ANALYSIS OF ASSOCIATED PRESS V. CANTERBURY

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I. INTRODUCTION

At its core, participatory . . . [government] decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry . . . [on] these responsibilities when government is secret.¹

On November 12, 2009, the Supreme Court of Appeals of West Virginia decided Associated Press v. Canterbury.² After the decision, legal correspondent Douglas Lee noted:

Absent context, the West Virginia Supreme Court of Appeals’ recent decision in Associated Press v. Canterbury is unremarkable. A judge’s personal e-mails to a private citizen are not “public records” under West Virginia’s Freedom of Information Act, the court held, because they do not involve the judge’s “official duties, responsibilities or obligations.”

Fair enough. . . .

Sometimes, however, context is important. Let’s say, for example, that the [judge] sending the e-mails is a justice on the state’s highest court. And that the [private citizen] is a powerful corporate executive with whom the justice recently shared several meals during a vacation in Monte Carlo. And that the executive’s company recently had been hit with a $50 million verdict. And that the verdict was on appeal. And that the justice sending the e-mail would turn out to be the deciding vote in a 3–2 decision overturning the verdict.

Is it possible the e-mails now involve the justice’s duties, responsibilities or obligations?³

¹ REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, TAPPING OFFICIALS’ SECRETS i (Rebecca Daugherty & Robert Howe eds., 1989) [hereinafter REPORTERS COMMITTEE].
² 688 S.E.2d 317 (W. Va. 2009).
A majority of the justices on the Supreme Court of Appeals of West Virginia didn't think so. A decision that members of one editorial board described as "leav[ing] a sour taste in [their] mouth[s]," the Supreme Court of Appeals of West Virginia considered whether the personal e-mails of a judge where public records under the West Virginia Freedom of Information Act (WVFOIA or "the Act"). The court held that, in making this determination, a court is restricted to considering only the content, and not the context, of the writing. In arriving at this decision, the court failed to fully develop and apply the statutory definition of a "public record," relied unnecessarily on law from other states, and ignored the clear intent and purpose of the WVFOIA by narrowly construing its definition of "public records."

This Note examines West Virginia law regarding access to public records, analyzes the decision in Associated Press and its impact on WVFOIA requests, and proposes legislation to nullify the impact of this decision. Part II of this Note discusses the development of public records law in West Virginia and the pre-Associated Press state of WVFOIA case law. Part III discusses the majority and dissenting opinions in Associated Press. Part IV analyzes and critiques the court's decision in Associated Press. Part V looks at possible future implications of the court's holdings in Associated Press. Finally, Part VI proposes an amendment to the WVFOIA that will nullify the decision in Associated Press.

II. THE LAW

In order to appreciate how far out of line the decision in Associated Press is with West Virginia's practice of granting its citizens open access to the dealings of the government, it is necessary to understand the history, development, and extent of the common law right of access to public records that West Virginians enjoyed even before the passage of the WVFOIA. At the same time, an analysis of the Act and the cases interpreting it show how contrary the decision is to the intent and purpose of the WVFOIA.

A. Common Law and Statutory Rights of Access to Public Records

Even in the years prior to passage of the WVFOIA, West Virginia seemed to have, in comparison with other states, well-defined laws concerning

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4 See Associated Press, 688 S.E.2d 317.
6 See Associated Press, 688 S.E.2d 317.
7 See id.
public records. Before the Act, citizens relied upon the traditional common law right of access to such public records. As one commentator points out, "the common law right retains considerable importance since it not only gives citizens a right to inspect public records, but also imposes a duty on government officials to create and maintain written records reflecting activities of government." West Virginians also relied upon numerous statutes which required the creation of records specifically deemed to be public.

In 1953, West Virginia University Journalism Professor Donovan H. Bond conducted research of the West Virginia Code to determine the level of access to public records granted to the press. His research showed that "[d]isregarding legislative proceedings[,] . . . the Code indicates that in virtually all other instances statutes have been intended to make public the affairs of state, county and municipal governments." These "public access" statutes, in an attempt "to make mandatory the publication of . . . materials which might be subject to popular suspicion if not to actual fraudulent practices[,]" required the disclosure of personal expenditures by individuals on state business. Further, annual itemized statements of the salaries and expenses of the director and members of the Board of Unemployment Compensation, the traveling expenses of the director of public assistance, and the travel vouchers of the commissioner of motor vehicles were all statutorily required to be created and made public. Other statutes, requiring municipal civil service commissions, the State Court of Claims, the Department of Motor Vehicles, and miner's examining boards to create public records of their activities, gave the public comprehensive and wide-ranging access to government documents. Even records of unemployment compensation and dog registrations were required by statute to be made public. Moreover, the West Virginia Code made it "a misdemeanor for any public officer to . . . 'wilfully secrete any public record from any person having the right to inspect the same.'"

In regard to public access to court records, prior to passage of the WVFOIA, the West Virginia Code mandated that the "records and papers of

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9 Id.
10 Id. at 10.
11 See Bond, supra note 8.
12 Id. at 10.
13 Id. at 9.
14 Id. at 9–10.
15 Id. at 10–11.
16 Id. at 11.
17 See Bond, supra note 8.
every court shall be open to inspection of any person.\textsuperscript{19} The Supreme Court of Appeals, however, qualified this right of access by requiring "both that the requester have a legally recognizable 'interest' in the records, and that the information be sought for a 'useful and legitimate purpose.'\textsuperscript{20}

\textbf{B. The West Virginia Freedom of Information Act}

On April 1, 1977, the West Virginia Legislature passed the West Virginia Freedom of Information Act.\textsuperscript{21} Although the bill expanded West Virginians' common law right of access to public records,\textsuperscript{22} the passage of the WVFOIA was met with little fanfare.\textsuperscript{23} In fact, although it had "editorialized[d] in favor of the bill,\textsuperscript{24} the Charleston Gazette-Mail noted its passage in a simple one-line write up.\textsuperscript{25}

The WVFOIA gives every person the right to inspect or copy any public record and establishes the procedures to be followed when requesting such information.\textsuperscript{26} The Act establishes what an individual must do in order to request

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} REPORTERS COMMITTEE, \textit{supra} note 1, at 2 (citing State v. Harrison, 43 S.E.2d 214, 218 (W. Va. 1947)).


\textsuperscript{22} REPORTERS COMMITTEE, \textit{supra} note 1, at 2 (noting that the traditional common law right, which was the primary basis for access to public records prior to the WVFOIA, was more restrictive than the Act).


\textsuperscript{24} \textit{Id.} In an editorial published Feb. 27, 1977, the Gazette praised those legislators who supported the proposed WVFOIA: "Bravo for the legislators who are lining up behind this bill . . . . As bureaucracy grows in self-perpetuating empires, it's time somebody decreed that the people shouldn't be kept in the dark by the bureaucrats they're supporting." \textit{Id.} (quoting Editorial, No Room for Darkness, THE CHARLESTON GAZETTE, Feb. 27, 1977, at 2D).

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} W. VA. CODE § 29B-1-3 (2007): Inspection and copying

\(1\) Every person has a right to inspect or copy any public record of a public body in this state, except as otherwise expressly provided by section four of this article.

\(2\) A request to inspect or copy any public record of a public body shall be made directly to the custodian of such public record.

\(3\) The custodian of any public records, unless otherwise expressly provided by statute, shall furnish proper and reasonable opportunities for inspection and examination of the records in his or her office and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them. The custodian of the records may make reasonable rules and regulations necessary for the protection of the records and to prevent interference with the regular discharge of his or her duties. If the records requested exist in magnetic, electronic or computer form, the custodian of the records shall make such copies available on magnetic or electronic media, if so requested.
information, mandates procedures and timelines a custodian of requested information must follow in response to information requests from individuals, and allows agencies to charge requesters a fee to reimburse the cost of reproducing the information requested. The access, however, is not without limits, and the Act lays out the type of information that, although public, is not subject to disclosure. Furthermore, the Act establishes judicial remedies available to a person whose information request is denied and allows for punishment of record custodians who willfully violate the Act.

(4) All requests for information must state with reasonable specificity the information sought. The custodian, upon demand for records made under this statute, shall as soon as is practicable but within a maximum of five days not including Saturdays, Sundays or legal holidays:
   (a) Furnish copies of the requested information;
   (b) Advise the person making the request of the time and place at which he or she may inspect and copy the materials; or
   (c) Deny the request stating in writing the reasons for such denial.
   Such a denial shall indicate that the responsibility of the custodian of any public records or public body to produce the requested records or documents is at an end, and shall afford the person requesting them the opportunity to institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.
   (5) The public body may establish fees reasonably calculated to reimburse it for its actual cost in making reproductions of such records.

27 § 29B-1-3(2), (4).
28 § 29B-1-3(3)-(4).
29 § 29B-1-3(5).
31 W. VA. CODE § 29B-1-5:
   Enforcement
   (1) Any person denied the right to inspect the public record of a public body may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.
   (2) In any suit filed under subsection one of this section, the court has jurisdiction to enjoin the custodian or public body from withholding records and to order the production of any records improperly withheld from the person seeking disclosure. The court shall determine the matter de novo and the burden is on the public body to sustain its action. The court, on its own motion, may view the documents in controversy in camera before reaching a decision. Any custodian of any public records of the public body found to be in non-compliance with the order of the court to produce the documents or disclose the information sought, may be punished as being in contempt of court.
   (3) Except as to causes of greater importance, proceedings arising under subsection one of this section shall be assigned for hearing and trial at the earliest practicable date.

32 § 29B-1-6:
   Violation of article; penalties
In West Virginia, many times it is difficult to determine the legislature's intent in passing a bill because "most traditional forms of legislative history are not preserved."\(^{33}\) In fact, no recorded legislative history exists for the Act.\(^{34}\) However, we know for certain that when the Act was passed, its purpose was to facilitate public access to information held by government officials\(^{35}\) because the legislature included a declaration of policy in the Act itself.\(^{36}\) The legislature declared that it is "the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of the government and the official acts of those who represent it as public officials and employees."\(^{37}\) The legislature further noted that it was for the people, and not the government, to decide what is good for the people to know.\(^{38}\) Furthermore, the legislature directed that the courts liberally construe the provisions of the Act in order to carry out its stated policy.\(^{39}\)

C. The Court's History of Interpreting the WVFOIA

After its passage, Professor Alfred S. Neely noted that "[w]hether the policies of openness in government and access to public records reflected in the West Virginia Freedom of Information Act will be realized or frustrated depends primarily upon how the statute is approached and viewed by the courts and the public bodies."\(^{40}\) At the time, although the Act had been in effect for five years,\(^{41}\) the Supreme Court of Appeals had yet to consider any cases involving the Act.\(^{42}\) For over a quarter century, the Act remained basically the same,

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Any custodian of any public records who willfully violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than two hundred dollars nor more than one thousand dollars, or be imprisoned in the county jail for not more than twenty days, or, in the discretion of the court, by both fine and imprisonment.

\(^{33}\) ALFRED S. NEELY, IV, ADMINISTRATIVE LAW IN WEST VIRGINIA 536 (Michie Co. ed., 1982).

\(^{34}\) REPORTERS COMMITTEE, supra note 1, at 4 ("The Freedom of Information Act's declaration of policy . . . is the only existing indication of the legislative intent underlying the statute. There is no recorded legislative history . . . ").

\(^{35}\) See W. VA. CODE § 29B-1-1 (2007).

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id. ("The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.").

\(^{39}\) Id.

\(^{40}\) NEELY, supra note 33, at 569.

\(^{41}\) While the Act had been in effect for five years when Neely's book was published, Neely notes in the text that, at the time he was actually writing, the Act had been in effect for four years. NEELY, supra note 33, at 569.

\(^{42}\) Id. at 569–70.
and most efforts to add amendments weakening its disclosure mandates failed.\textsuperscript{43} Consequently, as Professor Neely predicted,\textsuperscript{44} the success of the Act has mostly been realized by how it has been interpreted by the Supreme Court of Appeals, which generally "has affirmed the public's right to know and ordered that exemptions to that right are extremely limited."\textsuperscript{45}

Beginning in "the mid-1980s, a progressive court led by Justices Darrell McGraw, Thomas McHugh, and Thomas Miller wrote two key rulings" which made the court's philosophy of granting almost unfettered public access to public records clear.\textsuperscript{46} In \textit{Hechler v. Casey}, the court reiterated the legislature's mandate that the disclosure provisions of the Act are to be liberally construed and established that categories of documents exempt from disclosure must be narrowly construed.\textsuperscript{47} Two years later, in \textit{Queen v. West Virginia University Hospitals, Inc.},\textsuperscript{48} the court showed how far it was willing to push the liberal construction provisions of the Act when, citing "the statutory requirement that [it] liberally construe the provisions of the West Virginia Freedom of Information Act."\textsuperscript{49} It held that West Virginia University Hospitals, Inc. was covered by the WVFOIA and its records were subject to disclosure.\textsuperscript{50} Furthermore, the court held that a party who wishes to withhold a document from disclosure has the burden of proving why the document is exempt from the general disclosure requirement of the Act.\textsuperscript{51} Additionally, during the mid 1980s, the court issued a series of rulings that applied the Act to three important sets of records,\textsuperscript{52} thereby opening them up to public scrutiny.\textsuperscript{53}

Hence, by the end of the 1980s, the court, through its interpretations of the Act, was clearly helping to realize the policies of open government and

\textsuperscript{43} Ward, \textit{supra} note 23.
\textsuperscript{44} Neely, \textit{supra} note 33, at 569 ("Whether the policies of openness in government and access to public records reflected in the West Virginia Freedom of Information Act will be realized or frustrated depends primarily upon how the statute is approached and viewed by the courts and public bodies.").
\textsuperscript{45} Ward, \textit{supra} note 23.
\textsuperscript{46} \textit{Id}.
\textsuperscript{47} 333 S.E.2d 799, 808 (W. Va. 1985) ("[L]iberal construction of the State FOIA and the concomitant strict construction of the exemptions thereto are of fundamental importance in deciding any case involving construction of this statute.").
\textsuperscript{48} 365 S.E.2d 375 (W. Va. 1987).
\textsuperscript{49} \textit{Id.} at 382.
\textsuperscript{50} \textit{Id.} at 375.
\textsuperscript{51} \textit{Id}.
\textsuperscript{53} Ward, \textit{supra} note 23.
access to public information stated in the Act. The court, however, did not always rule on the side of public disclosure.54 The legislature also acted to curtail disclosure by adding categories of information that were exempt from the Act.55 To wit, the Act as originally passed had only eight categories of information that were specifically exempt from disclosure.56 By the time of this writing the number of specifically exempt categories of information had grown to nineteen.57 Nevertheless, by the 1990s, the court, when deciding FOIA cases, had "generally shown a willingness to liberally interpret these statutes and to identify additional sources for public access to official information."58 For example, at the end of the decade, the court significantly narrowed the section 29B-1-4 exemption for internal memos of public bodies and required government agencies to provide requesters with a list of withheld documents anytime a request is denied.59

Thus, by the end of the millennium, the court recognized at least three basic principles with regard to WVFOIA cases: (1) that by specifically mandating that the provisions of the Act be liberally construed, the legislature had directed the courts to make decisions in favor of disclosure,60 (2) that the exemptions in the Act be strictly and narrowly construed,61 and (3) that a government official who wished to withhold documents had the burden of proving why those documents were exempt from disclosure.62

As noted above, the purpose of the WVFOIA is to allow the public access to official information and public records held by governmental agencies, to create a judicially enforceable public right to secure such information, and to open the workings of government to the public.63 The public's access, however,

55 See, e.g., W. VA. CODE § 29B-1-4 (2009).
57 W. VA. CODE § 29B-1-4 (2009). During the West Virginia Legislature's 2010 Regular Session, an amendment adding another exempted category was introduced in the West Virginia Senate and was referred to the Senate Judiciary Committee. The bill, however, was never reported out of committee. See S. 126, 79th Leg., 2d Reg. Sess. (W. Va. 2010) (exempting from disclosure certain information pertaining to prisons).
58 Ward, supra note 23.
60 See Sattler v. Holliday, 318 S.E.2d 50, 52 (W. Va. 1984) ("We have been admonished to make decisions in favor of disclosure.").
61 Hechler, 333 S.E.2d at 808.
62 Queen, 365 S.E.2d at 383.
is not unfettered; “[i]f a ‘public record of a public body’ is not in question, there is no need to inquire further into rights of public access under the Act because there are none.”\(^\text{64}\) Therefore, the Act’s definitions of “public body” and “public record” determine what the public has a right to see.

Under the WVFOIA, a “public record” is defined as “any writing containing information relating to the conduct of the public’s business, prepared, owned and retained by a public body.”\(^\text{65}\) This provision constitutes a liberal definition of a “public record” in that it applies to any record which contains information relating to the conduct of the public's business, without the additional requirement that the record is kept “as required by law” or “pursuant to law,” as provided by the more restrictive freedom of information statutes in some of the other states.\(^\text{66}\)

In his book, Administrative Law in West Virginia, Professor Neely noted that a question of whether a writing “is one ‘containing information relating to the conduct of the public’s business’ should present little difficulty” for the courts.\(^\text{67}\) He suggested that a sensible reading of the statutory definition “would allow only personal and private writings of government officials entirely unrelated to governmental duties to be excluded, as not pertaining to the public’s business.”\(^\text{68}\) Similarly, as the authors of the Open Government Guide: West Virginia noted,

The requirement that the writing contain “information relating to the conduct of the public’s business” is one of the easiest to understand and apply. As the state Supreme Court held in Withrow this broad definition includes documents that contain a mixture of “official” and “personal” information regarding a public officer or body: [If the] document contains information “relating to the conduct of the public's business,” [it] is . . . a “public record” under the State FOIA.\(^\text{69}\)

The Guide goes on to discuss how the court in Withrow noted that “[t]he term ‘public record’ should not be manipulated to expand the exemptions to the

\(^{64}\) Neely, supra note 33, at 539.

\(^{65}\) § 29B-1-2(4).


\(^{67}\) Neely, supra note 33, at 541.

\(^{68}\) Id. at 541 (emphasis added).

\(^{69}\) McGinley & Weise, supra note 66.
State FOIA; instead, the burden of proof is upon the public body to show that one (or more) of the express exemptions applies to certain material in the document.\textsuperscript{70} Neely also noted that, even though the Act's exceptions already exempted some otherwise public information from disclosure, he feared that the portion of the "public record" definition that read "containing information relating to the conduct of the public's business" might be interpreted by the courts in a way that would create further exemptions.\textsuperscript{71} Over fifteen years later, Neely's fear has been realized in the Supreme Court of Appeals' recent decision in \textit{Associated Press v. Canterbury}.\textsuperscript{72}

III. THE OPINION

A. The Procedural History

On November 21, 2007, the Supreme Court of Appeals, in a 3–2 decision, reversed a $50 million verdict against Massey Energy Company.\textsuperscript{73} In December 2007, the losing party in that case, Hugh M. Caperton, filed a Petition for Rehearing\textsuperscript{74} and in January 2008, also filed a Motion to Disqualify Justice Elliot Maynard.\textsuperscript{75} As part of the Motion to Disqualify, Caperton included pictures of Justice Maynard and Don Blankenship, Chief Executive Officer of Massey Energy Company, together in Monte Carlo, Monaco, during a period

\textsuperscript{70} \textit{Id.} (quoting \textit{W. Va. Dev. Office}, 521 S.E.2d 543). It is interesting to compare the similarities between the \textit{Open Government Guide}'s discussion of this aspect of the "public records" definition with the discussion of this same subject in Neely's \textit{Administrative Law in West Virginia},

The second question of whether a "writing" is one "containing information relating to the conduct of the public's business" should present little difficulty if addressed with an eye to the fact that various matters, private or confidential, are within the jurisdiction of a public body, and exempted from disclosure under other provisions. Such matters may still pertain to the public's business and not be available to the public. The fear is that this aspect of the definition might be interpreted to create new exemptions. A sensible reading would allow only personal and private writings of government officials entirely unrelated to governmental duties to be excluded, as not pertaining to the public's business.

NEELY, \textit{supra} note 33, at 541.

\textsuperscript{71} NEELY, \textit{supra} note 33, at 541. "The [] question of whether a 'writing' is one 'containing information relating to the conduct of the public's business' should present little difficulty . . . . The fear is that this aspect of the definition might be interpreted to create new exemptions." \textit{Id.}

\textsuperscript{72} See \textit{Canterbury}, 688 S.E.2d 317.


\textsuperscript{74} Associated Press v. Canterbury, No. 08-C-835, at 2 (Cir. Ct. Kanawha County Sept. 16, 2008). This source is on file with the author.

\textsuperscript{75} \textit{Id.} at 2.
when Caperton v. A.T. Massey Coal Co. was pending before the Supreme Court of Appeals. Justice Maynard subsequently recused himself from the case.

It was against this background that the Associated Press (AP) began its quest for information regarding the communications between these two men that would become the subject of the cases discussed in this Note. On January 16, 2008, while Caperton's Motion to Disqualify was still pending, the AP filed a FOIA request with the Administrative Director of the Supreme Court of Appeals, Steven D. Canterbury, seeking all e-mails, phone records, visitor logs, and comparable records of Justice Maynard for the periods of (1) June and July 2006, (2) May 2007, (3) October and November 2007, and (4) January 2008. The request was denied. On January 23, 2008, the AP requested that Canterbury reconsider. The request was again denied. Subsequently, on February 29, 2008, the AP filed a second, more specific, FOIA request. The request sought all communications from the period of January 1, 2006 through February 2008 between Justice Maynard, his clerks, or any of his administrative employees, and Don Blankenship, Brenda Magann, any employee or agent of Don Blankenship or Massey Energy, or anyone acting on behalf of Don Blankenship. This request was also denied. On April 29, 2008, the AP filed an action seeking disclosure of the requested information pursuant to WVFOIA.

At an evidentiary hearing held by the trial court on June 25, 2008, Mr. Canterbury disclosed the existence of documents "meeting the description in the AP's FOIA request." The trial court ordered Mr. Canterbury to produce the documents. The trial court subsequently found that there were thirteen documents that met the description in the AP's FOIA request: the documents consisted of e-mail communications sent by Justice Maynard to Don Blankenship. After an in camera review of the documents, the trial court found that five of the e-mails relating to Justice Maynard's re-election campaign were public records under the WVFOIA's definition and ordered their disclosure. The trial court noted that, under the WVFOIA, a public record is one containing any informa-

76 Id.
77 Id.
78 Id.
79 Id. at 3.
80 Canterbury, Civil Action No. 08-C-835, at 3.
81 Id.
82 Id.
83 Id.
84 Id.
85 Id.
86 Canterbury, Civil Action No. 08-C-835, at 3.
87 Id.
88 Id. at 4.
89 Id. at 13.
tion related to the conduct of the public’s business. The court, however, lacked any definition of “the public’s business.”90 Thus, the court turned to the policy of the Act, reasoning that if its purpose was to disclose information that allowed the people to “retain control over the instruments of government they have created,” then, because the people retain control over public officials through re-elections, disclosing communications that related to Justice Maynard’s re-election was in line with the policy of the Act.91 As to the other eight e-mails, the court found that “[i]n no way [did they] contain information related to the ‘affairs of government’, Justice Maynard’s ‘official acts’ as a state officer, or the conduct of the public’s business.”92 Therefore, the court reasoned, under the WVFOIA definition, the e-mails were not public records and therefore did not need to be disclosed.93 The court, however, added a caveat by noting that “[b]ecause the information contained within the [eight excluded] e-mail communications would have shed light on the extent of Justice Maynard’s relationship with Don Blankenship and whether or not that relationship may have affected or influenced Justice Maynard’s decision-making in Massey cases, the public would have been entitled to that information” had Justice Maynard not recused himself from Caperton v. A.T. Massey Coal Co.94

The AP appealed to the Supreme Court of Appeals, alleging that the trial court erred in determining that eight of the thirteen e-mails were not public records and, thus, not required to be disclosed pursuant to AP’s FOIA request.95 Not surprisingly, Mr. Canterbury cross-appealed, alleging that the trial court erred in determining that five of the e-mails were public records that must be disclosed pursuant to the WVFOIA.96

B. The Facts

The majority opinion in Associated Press presents what it describes as the “rather simple and straightforward” facts of the case.97 The majority’s entire factual background consists of the following:

On February 29, 2008, the AP submitted a FOIA request to Mr. Canterbury. The FOIA request sought all records reflecting communication between Justice Elliot E. Maynard and Donald L. Blankenship during the period beginning January 1, 2006

90 Id. at 10.
91 Id. at 13 (quoting W. VA. CODE § 29B-1-1 (2009)).
92 Canterbury, Civil Action No. 08-C-835, at 13.
93 Id.
94 Id. at 13 n.9.
95 Associated Press, 688 S.E.2d at 320.
96 Id.
97 Id.
through February 2008. Mr. Canterbury denied the AP’s request on the ground that such communication was not subject to disclosure under FOIA.98

The court also relegated some other important facts to footnotes: (1) Mr. Blankenship’s role as CEO of Massey Energy, (2) the results of Justice Maynard’s re-election bid, and (3) that the AP had also requested any communications between Blankenship and members of Maynard’s staff.99

The court’s willingness to gloss over of the facts is the first troubling aspect of this case. As the dissent notes, “[i]n order to better understand the issues before this Court . . . a more thorough description of the factual background of this case is needed.”100 At its core, this case is about deciding whether context matters. The majority decided that, in determining whether a communication is public and thus subject to FOIA, content alone is relevant.101 Moreover, the court foists this decision upon the public without providing the factual background of the case which is “essential to a meaningful examination of [the legal issue before the Court],”102 and which would illustrate “the important role that the context of a communication can play in determining whether a writing contains information that relates to the conduct of the public’s business.”103

Although the majority tells us, albeit in a footnote, that Mr. Blankenship is the CEO of Massey Energy,104 that fact alone is not sufficient to explain why his e-mails to Justice Maynard have any relation to the conduct of the public’s business. The majority neglected to include the fact that, during the entire period of time covered by the AP’s request and the entire period of time during which the disputed communications were sent, Massey Energy Company, the company led by Mr. Blankenship who then served as Chairman and CEO, had a significant interest in litigation pending before the court on which Justice Maynard sat.105 In fact, during the period covered by the AP’s request, a divided court, with Justice Maynard voting in the 3–2 majority, reversed a $50 million

98 Id. at 320–21. The communications that Mr. Canterbury refused to disclose, which were at issue in this case, were thirteen e-mails between Justice Maynard and Mr. Blankenship. The e-mails had been sent over a two-year period of time, from January 2006 through November 2007. Id. at 337 (Workman, J., dissenting).
99 Id. at 320–21 nn. 4–6.
100 Associated Press, 688 S.E.2d at 336 (Workman, J., dissenting).
101 Id.
102 Id. at 337.
103 Id. at 336.
104 Id. at 320 n.5 (majority opinion).
105 The AP request covered January 2006 to February 2008. Id. at 320. The appeal in Caperton v. A.T. Massey Coal Co., Inc. was filed with the West Virginia Supreme Court of Appeals on October 24, 2006. 679 S.E.2d at 233 n.20. The case was originally decided on November 21, 2007. See Caperton, 2007 WL 4150960.
verdict against Massey.\textsuperscript{106} Thus, the \textit{Associated Press} majority failed to present any of the facts which would illustrate why the AP or the public would have an interest in these communications.

C. \textit{The Majority}

In \textit{Associated Press}, the court articulated four holdings. First, the court held that a trial court, pursuant to section 29B-1-5(2),\textsuperscript{107} may sua sponte order an in camera review of disputed records to determine whether the records are subject to disclosure.\textsuperscript{108} The court went on to note that, in the present case, because "the trial court articulated a valid reason for needing to actually review the e-mails, we find that the trial court did not abuse its discretion in requiring Mr. Canterbury to produce the e-mails for an in camera review."\textsuperscript{109} Second, the court held that the definition of a "writing" contained in the WVFOIA\textsuperscript{110} encompasses e-mail communications.\textsuperscript{111} Third, the court held that "[u]nder the clear language of [WVFOIA's] 'public record' definition, a personal e-mail communication by a public official or a public employee, which does not relate to the conduct of the public's business, is not a public record subject to disclosure under FOIA."\textsuperscript{112} Fourth, the court held that a trial court's determination of whether personal e-mail communication by a public official or employee is a public record, subject to disclosure under the West Virginia Freedom of Information Act is restricted to an analysis of the content of the e-mail

\textsuperscript{106} See \textit{Caperton}, 679 S.E.2d 223.

\textsuperscript{107} The statute provides, in relevant part, that "[i]n any suit filed under [FOIA], the court has jurisdiction to . . . order the production of any records improperly withheld from the person seeking disclosure . . . . The court, on its own motion, may view the documents before reaching a decision . . . ." \textit{W. Va. Code} § 29B-1-5(2) (2009).

\textsuperscript{108} \textit{Associated Press}, 688 S.E.2d at 323 ("[W]e now hold that, in a proceeding seeking disclosure of public records under the [WVFOIA], a trial court may \textit{sua sponte} order the production of the records withheld and hold an \textit{in camera} review of the records in order to decide whether any of the records are subject to disclosure under the Act.") (citations omitted). The court, however, did caution that a trial court should avoid resorting "to \textit{in camera review} 'as a matter of course.'" \textit{Id.} (quoting United America Fin. Inc. v. Potter, 531 F.Supp.2d 29, 40 n.3 (D.D.C. 2008)).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} The statute defines a "writing" as "any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics." \textit{W. Va. Code} § 29B-1-2(5) (2009).

\textsuperscript{111} \textit{Associated Press}, 688 S.E.2d at 324 ("It is clear from FOIA's definition of 'writing', and we so hold, that the definition of a 'writing' contained in W. Va. Code § 29B-1-2(5) of the West Virginia Freedom of Information Act includes an e-mail communication.") (citations omitted).

and does not extend to a context-driven analysis because of public interest in the record.\textsuperscript{113}

Finally, the majority suggested that “[i]f FOIA’s definition of a public record is to include an examination of the record’s context by virtue of the public’s interest in the record, the Legislature must add such language to that definition.”\textsuperscript{114}

D. The Dissent

As the lone dissenting justice, Justice Workman concurred in part and dissented in part from the court’s decision. Justice Workman wholly concurred with the majority on its first two holdings.\textsuperscript{115} She agreed with the majority that “[a] trial court may conduct an in camera review of records subject to a [WVFOIA] request . . . .”\textsuperscript{116} Justice Workman also agreed with the majority’s holding that an e-mail is a “writing” subject to disclosure under the WVFOIA.\textsuperscript{117} Further, Justice Workman agreed with the majority that a personal e-mail communication of a public official that does not relate to the conduct of the public’s business is not a public record under the WVFOIA definition.\textsuperscript{118} Nevertheless, she disagreed with the majority’s conclusions that the e-mails at issue were “purely personal” and did not relate to conduct of the public’s business.\textsuperscript{119} Additionally, Justice Workman disagreed with the majority’s holding “that a determination of whether an e-mail communication is a public record subject to FOIA disclosure is restricted to an analysis of the content of the writing and that such analysis cannot be context-driven.”\textsuperscript{120}

IV. Analysis and Critique of the Majority’s Holdings

The court’s decision in Associated Press is a poor holding because the court failed to fully develop and apply the definition used to determine what constitutes a public record subject to disclosure under the WVFOIA. Further, the court unnecessarily relied on dissimilar cases from other jurisdictions to arrive at its holding. Moreover, the narrow construction used by the court to arrive at its holding ignored the unambiguous legislative purpose of the Act and abrogated a clear statutory mandate of the legislature to broadly construe the terms of the Act.

\textsuperscript{113} Syl. pt. 4, \textit{id.} at 320 (citations omitted).
\textsuperscript{114} \textit{Id.} at 335.
\textsuperscript{115} \textit{Associated Press}, 688 S.E.2d at 336 (Workman, J., dissenting).
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.}
The court’s holdings regarding the trial court’s authority to hold an in camera review of records and the inclusion of e-mail communications within the WVFOIA definition of a “writing” are clearly correct. Its other holdings, however, are erroneous.

Although the court correctly held that a public record is “any writing containing information relating to the conduct of the public’s business, prepared, owned and retained by a public body,”121 the court failed to fully analyze the “relating to” aspect of this definition in reaching its conclusion that the communications in this case were not related to the conduct of the public’s business. Had the court correctly applied the “relating to” portion of the definition, it would have been difficult for the court to conclude that the e-mails were not public records.

The court’s holding that a trial court is limited to considering the content of a communication when determining if a document is a public record is misguided for a number of reasons. First, the court reached this holding because it reasoned that doing so would make WVFOIA jurisprudence consistent with the majority of other states and with federal law.122 The court is correct that this holding brings West Virginia’s FOIA jurisprudence in line with the majority; however, WVFOIA’s jurisprudence is now similar to a majority of states that have FOIA statutes that are decidedly dissimilar to that of West Virginia and which use much narrower definitions of “public records” than that of West Virginia’s statute.123 Second, given the broad conception and purpose of the Act,124 the court’s belief that it is somehow restricted from considering context in its determination is bewildering. Third, the majority’s narrow content-only analysis is contrary to the Legislature’s expressly stated intent.125 This, combined with the well-know legislative directive mandating liberal construction, implies that the majority “‘substitute[d] its own judgment for that of the legislature and significantly [rewrote] the statute.”126

A. The Majority Opinion Fails to Develop and Apply the Statutory Definition to Determine if the E-mails are “Public Records”

In its opinion, the majority fails to fully develop all the elements of the statutory definition of a “public record” and fails to properly apply the definition it does develop. Instead, the court only partially develops the definition and

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122 Id. at 330–31.
123 See discussion infra Part VI. B.
124 See Associated Press, 688 S.E.2d at 334–35. But see W. VA. CODE § 29B-1-1.
125 Id.
126 Associated Press, 688 S.E.2d at 335 (quoting Dunlap v. Friedman’s, Inc., 582 S.E.2d 841, 845 (W. Va. 2003)).
then, instead of applying the definition to the facts of the present case, looks to "analogous" cases outside of West Virginia for an answer.

1. The Majority Fails to Fully Develop all the Elements of the Statutory Definition of a "Public Record"

The court correctly states the WVFOIA definition of a public record as "any writing containing information relating to the conduct of the public's business, prepared, owned and retained by the public body." The court then discerns the meaning of the word "writing" and determines that, as used in the statute, it encompasses e-mail communications. Next, the court examines the meaning of the term "the public's business" as used in the definition. The court, borrowing from Illinois, Missouri, and Connecticut case law, determines that "the public's business" encompasses the official duties, responsibilities, or obligations of a particular body. Finally, the court arrives at its ultimate conclusion that, under the WVFOIA definition, "an e-mail communication or other writing is a public record only if it relates to the conduct of the public's business, i.e., the official duties, responsibilities, or obligations of a particular public body." The court, however, fails to further define "relating to" as used in this final definition.

Had the court attempted to further discern the meaning of "relating to" it would not have had to look very far to find its definition. In the 1993 case, Contractors Association of West Virginia v. West Virginia Department of Public Safety, the court decided an issue which "hinge[d] on what the legislature meant by the phrase 'relating to' in [a statute]." In that case, the court noted that "[t]he ordinary meaning of 'relating to' is that there is a connection between two subjects." The court further explained that, as defined in Black's Law Dictionary, "relate" means "[t]o stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." Therefore, the complete definition of a public record in the present case should have read: an e-mail communication or other writing is a public record only if it

127 Id. at 324.
128 Id.
129 Id. at 325.
130 Id.
132 Id. at 369.
133 Id.
134 Id. (quoting Black's Law Dictionary 1158 (5th ed. 1979)). The definition of "relate" remained the same in one subsequent edition of Black's Law Dictionary. Black's Law Dictionary 1288 (6th ed. 1990). However, the definition of "relate" was dropped from subsequent editions. See Black's Law Dictionary 1291 (7th ed. 1999); Black's Law Dictionary 1314 (8th ed. 2004); Black's Law Dictionary 1401 (9th ed. 2009).
stands in some relation to, has a bearing on, or concerns the official duties, responsibilities or obligations of a particular public body.

2. The Majority Fails to Rigorously Apply the Definition to the Facts of the Case

Whatever definition the court came up with, it seemingly would not have made a difference to the ultimate holding. After fleshing out its definition of a "public record," the court failed to rigorously apply it to the facts of the present case. Immediately after establishing the proper definition of a "public record" under the WVFOIA, instead of determining if the communications in the present case fit that definition, the court proceeded to analyze how courts in other jurisdictions have ruled on these types of communications. It was not until after the court analyzed decisions from other jurisdictions with dissimilar FOIA statutes that the court looked at the e-mails in the case before it.

And then, after using almost ten complete pages of its opinion to analyze and describe cases from other jurisdictions, the court devoted only five sentences to analyzing whether the e-mail communications from the present case actually fit the statutory definition of a "public record" under WVFOIA. The court, in a conclusory manner, announced:

None of the e-mail’s contents involved the official duties, responsibilities or obligations of Justice Maynard as a duly-elected member of this Court. Twelve of the e-mails simply provided the URL links to privately-operated internet websites that carried news articles Justice Maynard believed Mr. Blankenship would be interested in reading. All twelve of the news articles were written by private entities and were already in the public domain. The thirteenth e-mail did nothing more than provide Mr. Blankenship with the agenda for a meeting being held by a private organization. Consequently, logic dictates that we conclude that not one of the thirteen e-mails was related in any manner to either the conduct of the public business, or to the official duties, responsibilities or obligation of the particular public body, which was in this instance, Justice Maynard.

That is the extent of the analysis the court devoted to applying the WVFOIA definition to the facts of the present case. Instead of explaining how the communications between a sitting justice of the Supreme Court of Appeals

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135 See Associated Press, 688 S.E.2d at 325–34.
136 Id. at 333.
137 Id.
and the CEO of a litigant before that court in no way have a bearing on that justice's official duties, responsibilities or obligations, the court simply concluded that none of the e-mails were related in any manner to the conduct of the public's business. As one reporter noted, "[the majority] made out like [it] was just making sure that 'a grocery list written by a government employee while at work, a communication to schedule a family dinner, or a child's report card stored in a desk drawer in a government employee's office' would not be subject to FOIA disclosure." But these e-mails were not so innocuous, and besides failing to conduct any analysis regarding how the communications did or did not have a bearing on any of Justice Maynard's duties, the court misstated what was contained in those communications.

At least two commentators have pointed out that, in reaching its conclusion that none of the e-mails' contents were related to the conduct of the public's business, the majority mischaracterized their contents. The majority classified twelve of the e-mails as "simply provid[ing] URL links to privately-operated Internet websites that carried news articles." However, as one reporter noted, "[t]his description is not accurate;" the links were to the website of a Huntington, West Virginia, law firm of one of Maynard's opponents in the Democratic judicial election primary. Furthermore, at least one e-mail criticized the firm for claiming that a fire that killed two miners at a mine, Aracoma Mine No. 1, which was operated by Blankenship's company, could have been prevented. The majority also failed to note that, at the time the e-mail was sent, "a civil case filed by the two Aracoma widows against [Blankenship's company] Massey and against Blankenship personally was pending in Logan

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138 At the time the e-mails in question were sent, Don Blankenship's company, Massey, was appealing the case of Harman Mining v. Massey to the West Virginia Supreme Court of Appeals. Id. at 337 (Workman, J., dissenting). In fact, as Charleston Gazette reporter Ken Ward, Jr. pointed out, "it's also worth noting that Maynard wrote [one of the e-mails at issue in Associated Press] at 1:01 a.m. on Thursday, Oct. 11, 2007. That was just hours after the Supreme Court—including Maynard—heard its first argument in the Harman Mining v. Massey case." Ken Ward, Jr., Will Maynard-Blankenship Ruling Erode W.Va. FOLIA?, SUSTAINED OUTRAGE, A GAZETTE WATCHDOG BLOG (Nov. 17, 2009, 2:33 PM), http://blogs.wvgazette.com/watchdog/ (follow "November 2009" hyperlink; then follow "Older Entries" hyperlink) [hereinafter Ward Posting].

139 Ward Posting, supra note 138.

140 Ward Posting, supra note 138 (quoting Associated Press, 688 S.E.2d at 325).

141 See Ken Ward, Jr., Breaking News: Rulings in Massey, AP FOIA Cases, COAL TATTOO, A CHARLESTON GAZETTE BLOG (Nov. 12, 2009), http://blogs.wvgazette.com/coaltattoo/2009/11/12/breaking-news-rulings-in-harman-ap-foia-cases/ [hereinafter COAL TATTOO BLOG COMMENT]. In a Nov. 12, 2009, 6:24 pm comment to this blog post, Ward, Jr. cuts and pastes an Associated Press Dispatch by Tom Breen in its entirety. In this dispatch, Breen notes that the "Davis' opinion says that twelve of the e-mails 'simply provided URL links to privately-operated Internet Web sites that carried news articles,' while the thirteenth was an 'agenda for a meeting being held by a private organization.'" A printed copy of this blog post and the comment containing the dispatch are also on file with the author.

142 COAL TATTOO BLOG COMMENT, supra note 141.

143 Id.
County Circuit Court, with a possibility that it would end up in [front] of Maynard and the Supreme Court."  

If the court had properly applied the full WVFOIA definition to the e-mails in the present case it would certainly have found that the communications had a bearing on the official duties, responsibilities, or obligations of Justice Maynard. By simple example, according to the West Virginia Code of Judicial Conduct, judges should, inter alia, (1) avoid the appearance of impropriety in all of his or her activities and (2) perform the duties of judicial office impartially. Hence, a judge’s impartiality or, more succinctly, a judge’s duty to remain impartial and to avoid any appearance of partiality, can be considered an official duty, responsibility, or obligation. Therefore, anything that had a bearing on that impartiality would, under the WVFOIA definition, “relate to the conduct of the public’s business.” Surely numerous ex parte communications between a justice and the CEO of a litigant before the court, some which took place only hours after the justice heard the CEO’s company’s case, have a bearing on the impartiality of a judge. Consequently, because the e-mails have a bearing on an official duty of a public body, a justice’s duty to remain impartial, they “relate to the conduct of the public’s business” and are “public records” under the WVFOIA definition.

This is the type of analysis one would expect to find in the opinion. Such an analysis would lead, undoubtedly, to the classification of the e-mails as public records subject to disclosure under FOIA. The dissent notes:

The majority in our case, however, performs no such factual analysis nor does it discuss the appropriate analytical framework for determining whether a writing relates to the conduct of the public’s business. Instead they simply make a conclusory statement that all the e-mails at issue in the instant case are personal in nature, without attempting to discuss whether an e-mail between a sitting Supreme Court Justice and the CEO of a corporate litigant with a pending case worth over $50 million . . .

144 Ward Posting, supra note 138.
145 See W. VA. CODE OF JUDICIAL CONDUCT, CANON 2 (1994), available at http://www.state.wv.us/WVSCA/JIC/codejc.htm (last visited Sep. 15, 2010) ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.").
146 Even if the emails were classified as public records, they would not necessarily be disclosed, as they could fall under the “[i]nformation of a personal nature” exemption. See W. VA. CODE § 29B-1-4(a)(2) (2007 & Supp. 2010). The court would then conduct a balancing test between the individual’s right to privacy and the extent or value of the public’s interest in disclosure of the communication. Id. See also Manns v. Charleston Police Dept., 550 S.E.2d 598, 603–04 (W. Va. 2001) (laying out a five factor test for unreasonable invasion of privacy).
has any ... demonstrable connection to the conduct of the public’s business.\footnote{147}

\section{B. The Court Unnecessarily Relies on Inapposite Case Law from Other Jurisdictions with Dissimilar FOIA Statutes}

As pointed out in the previous section, because a clear and workable definition of a “public record” exists under the WVFOIA, the court did not need to resort to case law from outside jurisdictions for guidance. Instead, the court could have rigorously applied the established definition to the facts of the case before it. Nevertheless, even if the court needed to rely on foreign case law, the cases the court cited in support of its conclusion are distinguishable from the instant case.

First, in each of the cases to which the court cited, the deciding court performed a “lengthy fact-specific discussion as to why the documents at issue are determined to be purely personal in nature, and thus exempt from disclosure under that state’s FOIA.”\footnote{148} Second, the cases cited by the court are from jurisdictions with FOIA statutes that define a public record much narrower than WVFOIA. The court has previously noted that, when compared to the more restrictive freedom of information statutes of other states, section 29B-1-2 constitutes a liberal definition of a “public record.”\footnote{149} Moreover, the circuit court noted that “[m]ost of the statutes analyzed in the cases [from other states] employ more restrictive language in defining ‘public record’ and are of limited value to an analysis of West Virginia law.”\footnote{150}

By way of example, the majority relies on cases from, inter alia, Arizona,\footnote{151} Florida,\footnote{152} Ohio,\footnote{153} and Colorado.\footnote{154} These cases, however, are not analogous to the present case. In contrast to the WVFOIA’s broad definition of a “public record,” Arizona’s open record statute does not even contain a definition of a public record,\footnote{155} Florida’s statute narrowly defines public records, including

\footnote{147} Associated Press, 688 S.E.2d at 338–39 (Workman, J., dissenting).
\footnote{148} Id. at 333 (majority opinion).
\footnote{149} Withrow, 350 S.E.2d at 742–43.
\footnote{151} Associated Press, 688 S.E.2d at 325 (citing Griffiss v. Pinal County, 156 P.3d 418 (Ariz. 2007)).
\footnote{152} Id. at 326 (citing State v. City of Clearwater, 863 So.2d 149 (Fla. 2003)).
\footnote{153} Id. at 328 (citing Wilson-Simmons v. Lake County Sheriff’s Dept., 693 N.E.2d 789 (Ohio 1998)).
\footnote{154} Id. at 326 (citing Denver Publ’g Co. v. Bd. of County Comm’rs, 121 P.3d 190 (Colo. 2005)).
\footnote{155} ARIZ. REV. STAT. ANN. § 39-121 (West 2006). Even though no explicit definition is provided in the statute for public records, the statute states that the definition is to be derived from the context of the statute itself.
only documents "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency[,]"\(^{156}\) as opposed to the broad definition of WVFOIA which covers all records "relating to the conduct of the public's business."\(^{157}\) Similarly, in contrast to the broad scope of the WVFOIA definition, the Ohio statute, which requires disclosure of "records," narrowly defines the term "records" as those papers that "document the organization, functions, policies, decisions, procedures, operations, or other activities of the office."\(^{158}\) Finally, the narrow definition of the Colorado statute requiring that, to be considered a public record, the correspondence of an elected official have a demonstrable connection to the exercise of functions required or authorized by law or administrative rule or involve the receipt or expenditure of public funds\(^{159}\) is nowhere near comparable to the broad definition of WVFOIA.

C. The Court's Narrow Construction of the Definition of a Public Record is Contrary to Court Precedent and the Legislative Intent and Purpose of the WVFOIA

The court's narrow construction of the definition of a public record and its restriction on consideration of content only when determining if a record is public contradicts the court's prior holding in Ogden v. Williamstown,\(^ {160}\) abrogates a clear legislative mandate dictating broad construction of the terms of FOIA, and ignores the intent and purpose of the Act.

1. The Court's Refusal to Adopt a Context-Driven Analysis in Determining if a Communication is a Public Record is Contrary to its own Precedent

In Associated Press, the majority refused to allow the context of a communication to be considered when determining if that communication is a "public record" under the WVFOIA.\(^ {161}\) Instead, the court adopted a "content-only" consideration. The court stated that, although context can be considered in deciding whether to disclose "writings that are, in fact, public records,"\(^ {162}\) it "[has] never held that a context-driven analysis is appropriate for deciding whether a personal document should be deemed a public record in the first in-

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\(^{156}\) FLA. STAT. ANN. § 119.011(12) (West 2008).


\(^{158}\) OHIO REV. CODE ANN. § 149.011(G) (West 2006).

\(^{159}\) COLO. REV. STAT. ANN. § 24-72-202(6)(a)(II) (West 2008).

\(^{160}\) Syl. pt. 1, 453 S.E.2d 631 (W. Va. 1994) (holding that an incident report not comprising an ongoing law enforcement investigation was a public record requiring a right of access under WVFOIA).

\(^{161}\) Associated Press, 688 S.E.2d at 334–35.

\(^{162}\) Id. at 335 n.18.
stance."\textsuperscript{163} However, in its decision in \textit{Ogden},\textsuperscript{164} the court distinctly considered the contextual factors of the "significance of keeping the public informed on matters of general welfare"\textsuperscript{165} and the public's "interest in receiving information about criminal activity within the community"\textsuperscript{166} when determining if police reports were public records. In that case, the majority began its determination of whether the police reports were public records by noting that, under the WVFOIA, "a liberal interpretation should be given to the definition of 'public record.'"\textsuperscript{167} The court then went on to make its determination:

In this case, given the significance of keeping the public informed on matters of general welfare, we find that police incident reports are 'public records' as defined by W. VA. CODE 29B-1-2. As a rule, statutes enacted for the public good are to be interpreted in the public's favor. The public has an interest in receiving information about criminal activity within the community... There is no doubt that the report in question is a 'public record' within the contemplation of the West Virginia FOIA.\textsuperscript{168}

Furthermore, there is no doubt that these context specific inquiries were being considered while determining if, in fact, these were "public records," because the court goes on to make a further determination regarding whether the records are subject to disclosure or fall under an exemption.\textsuperscript{169}

2. The Court's Narrow Construction Abrogates the Act's Clear Legislative Mandate Requiring a Broad Construction of Its Terms

When the West Virginia legislature passed the WVFOIA, it made clear that the policy behind the Act was the disclosure to citizens of "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."\textsuperscript{170} The legislature also made it clear that the provisions of the WVFOIA are to be liberally con-

\textsuperscript{163} \textit{Id.}
\textsuperscript{164} 453 S.E.2d at 634.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.} ("Although we find that the incident report at issue is a 'public record,' disclosure is still not required if the requested record falls within one of the exceptions to the West Virginia Freedom of Information Act.").
\textsuperscript{170} W. VA. CODE § 29B-1-1 (1977).
strued with the view of carrying out the legislature’s declared policy.\footnote{Id.} Furthermore, the court has repeatedly held that the disclosure provisions of WVFOIA are to be liberally construed.\footnote{\textit{Hechler}, 333 S.E.2d at 808; \textit{Ogden}, 453 S.E.2d at 633; \textit{W. Va. Dev. Office}, 482 S.E.2d at 191; \textit{In re Charleston Gazette FOIA Request}, 671 S.E.2d 776, 778 (W. Va. 2008).} The “public record” definition contained in section 29B-1-2 is a disclosure provision.\footnote{\textit{Withrow}, 350 S.E.2d at 742 (quoting Syl. pt. 4, \textit{Hechler}, 333 S.E.2d 799).} Thus, it should liberally construed.

As the dissent noted, the legislature’s directive should not be taken lightly.\footnote{\textit{Hechler}, 333 S.E.2d at 808.} Moreover, the court has emphasized its importance by noting that “[t]his liberal construction of the State FOIA . . . [is] of fundamental importance in deciding any case involving construction of this statute.”\footnote{\textit{Hechler}, 333 S.E.2d at 808.} However, “despite this clear directive . . . the majority construes the definition of ‘public record’ narrowly, not liberally, by holding that a court’s consideration of whether a particular writing is a public record is confined to the literal content of that document.”\footnote{\textit{Reporters Committee}, \textit{supra} note 1 at 1.} 

3. The Court’s Restrictive Content-Only Determination of Whether a Particular Document is a “Public Record” Undermines the Purpose of the Act

The court’s narrow construction of the definition of “public record” in \textit{Associated Press} was not only contrary to the clear legislative intent of the Act, but it also ignored the purpose of the Act. As one commentator has noted, the WVFOIA begins with an emphatic and unequivocal declaration that the people of West Virginia demand an open government\footnote{\textit{Reporters Committee}, \textit{supra} note 1 at 1–2 (quoting \textit{Hechler}, 333 S.E.2d at 810) (emphasis added).} and the court has stated that “[t]he general policy of [the FOIA] act is to allow as many public records as possible to be available to the public.”\footnote{\textit{AT&T Commc’ns. of W. Va., Inc. v. Pub. Serv. Comm’n of W. Va.}, 423 S.E.2d 859, 862 (W. Va. 1992).} Further, the court has exhorted lower courts “to remember that ‘the fullest responsible disclosure, not confidentiality, is the dominant objective’ of these statutes.”\footnote{\textit{Reporters Committee}, \textit{supra} note 1 at 1–2 (quoting \textit{Hechler}, 333 S.E.2d at 810) (emphasis added).}

It is difficult to see how the decision in \textit{Associated Press}, which narrowly construes the definition of a “public record” and confines the determination of whether a document is a “public record” to a consideration of content only, squares with the liberal purpose of the Act.
V. Future Repercussions of the Decision in Associated Press v. Canterbury

Determining the future repercussions of the decision in Associated Press is difficult. It is clear, however, that the court’s restrictive content-only determination of whether a particular document is a “public record” can only result in less public access to the “full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.”

In Withrow, the court cautioned that “[t]he term ‘public record’ should not be manipulated to expand the exemptions to the State FOIA.” That is exactly what happened in the present case. As the dissent notes, “[t]wo ways in which a consideration of ‘context’ is not only relevant, but necessary, to a FOIA determination immediately come to mind: (1) where the meaning of a writing is not apparent on its face and (2) when the context in which a document is written can provide, in and of itself, information relating to the conduct of the public’s business.” Any document created by a public body which falls into one of the above categories is now not subject to the WVFOIA and, thus, effectively exempt from disclosure.

VI. The Legislature Must Amend WVFOIA to Nullify the Decision of the Court in Associated Press v. Canterbury

In order to avoid the possible repercussions discussed in the above section, an amendment to the West Virginia Freedom of Information Act is necessary. Although Justice Workman did not agree with much of what the majority said in its opinion, she did agree with the majority on one point: the legislature needs to amend the WVFOIA.

Although, the majority was incorrect in asserting that an amendment to the statute is needed before the court’s examination of a record can include context, a legislative amendment is now necessary to nullify the holding of Associated Press.

181 Withrow, 350 S.E.2d at 744.
182 Associated Press, 688 S.E.2d at 340 (Workman, J., dissenting).
183 Id. at 340–41. An example of this type may be the proverbial grocery list the majority was so afraid would be subjected to a FOIA request. A simple grocery list written by a public official would never be considered a “public record”, even if written while at work, if the context was that it was the groceries for a family meal; if, however, the context were an official dinner reception paid for with public monies, that same grocery list relates to the conduct of the public’s business and is a “public record.”
184 Id. at 341. An example of this type may be where a lucrative state contract is awarded to a certain contractor by a public official, the two are friends and there are a large number of personal e-mails between the two; the exchange of e-mails shows that the two are friends and that information, in and of itself, relates to the conduct of the public’s business because the official’s friendship may have had a bearing on whom he awarded the state contract.
As Justice Workman noted, the legislature must act "to clarify that the context in which [a] communication was made may also be considered" when determining if the communication is a "public record."^185

Fortunately, the Legislature was listening. On February 15, 2009, a bill was introduced in the West Virginia House of Delegates to redefine the term "public record" as used in the WVFOIA.^186 The bill would have amended section 29B-1-2(4) to allow for the consideration of both content and context in determining whether a document was a "public record." Under the proposed bill, the amended definition of a "public record" would have read as follows: "'[p]ublic record' includes any writing containing information prepared or received by a public body, the content or context of which, judged either by its content or context relates to the conduct of the public's business."^187

VII. CONCLUSION

In Associated Press v. Canterbury, the court improperly relied on case law from outside of West Virginia, contradicted its own precedent, abrogated a clear legislative mandate, and ignored the policy underlying the West Virginia Freedom of Information Act. In doing so, it arrived at a holding that was contrary to the clear and emphatically stated purpose of the Act: to open the workings of government to the public by allowing persons to access public records held by government agencies so that the electorate may be informed and retain control.^188

Some legislators recognized the deleterious effect this holding would have on the public's access to information and acted to nullify this decision. These legislators introduced a bill amending the definition of a "public record" under the West Virginia Freedom of Information Act. Unfortunately, the proposed bill died in committee. At this time, it is unclear whether the sponsors of this bill will reintroduce it during the next session. I urge them to do so and exhort the legislators in both chambers to pass the bill.

Many years ago, Professor Neely noted that "the Legislature may be called upon to assure the realization of [FOIA's] intent through amendment and refinement of the Act."^189 That time has arrived. The legislature must amend the statute to ensure that "the policies of openness in government and access to pub-

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185 Id. at 343.
186 See H.B. 4500, 79th Leg., 2d Reg. Sess. (W. Va. 2009). The bill is entitled, "A Bill to amend and reenact §29B-1-2 of the Code of West Virginia, 1931, as amended, relating to redefining the term 'public record' as it is used in the Freedom of Information Act." Id.
187 Id. Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added. "Public record" includes any writing containing information prepared or received by a public body, the content or context of which, judged either by its content or context relates to the conduct of the public's business. Id.
189 Neely, supra note 33, at 569.
lic records reflected in the [WVFOIA] will be realized.”190 As Justice Workman noted in her dissent, “[t]his legislative change is sorely needed if our State is to continue developing a vivacious body of law regarding the right of the public to full information.”191

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190 Id.
191 Associated Press, 688 S.E.2d at 343 (Workman, J., dissenting).

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