

# WVBA FOIA/LEGAL Forum



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# West Virginia's Open Government Proceedings Act

## Overview of W. Va. Code §§ 6-9A-1, *et seq.*

### – What is it?

- Requires that meetings of public agencies and governing bodies be open to the public, with advance notice and detailed recordkeeping
- Subject to specific exceptions

### – Purpose?

- Designed to promote transparency and public participating in government decision-making while balancing the need for confidentiality in certain sensitive matters

# CliffsNotes Approach to the Sunshine Act!

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- West Virginia Code 6-9A1, *et seq.*
- Section 2 - Definitions
- *See* Meetings, Emergency Meetings and Public Agency
- Section 3 - Open Meetings and Notice
- Section 4 – Exceptions – Executive Session, Employment, Revocation of a License, Privacy, Criminal Investigation, and Purchase of Property
- Section 5 – Minutes
- Section 6 – 120 Days to File Complaint
- Section 7 – Criminal Penalties, Attorneys Fees, Frivolous Actions
- Section 8 – No Secret or Written Ballots
- Section 9 – Broadcasting Allowed
- Section 10 – Ethics Commission Can Give Advisory Opinions
- Section 11 – Advisory Opinions Protect Seeking Party
- Section 12 – AG Must Provide Within 30 Days Sunshine Act to New Appointees

# Significant Things For Reporters To Carefully Scrutinize

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- Any vote taken by secret or written ballot
- Minutes which fail to accurately reflect what happened at the meeting
- The underlying validity of an emergency meeting where no real emergency existed, but the meeting was called to circumvent notice requirements
- Evidence of prior discussions which may have taken place as serial discussions where, by phone or in person or by Zoom, members eventually haven't reached a decision, constituting a quorum
- Inadequate public notice
- Vague and confusing agendas or too few copies available
- Failure to properly provide advanced public notice of a meeting's date, time, and location. See the Secretary of State's website five business days in advance, see city clerks, or is taken at Universities or colleges.

# West Virginia's Open Government Proceedings Act

## Exceptions

- Executive Session (closed meetings)
  - Actions requiring executive session listed in W. Va. Code § 6-9A-4
    - E.g., acts of war, personnel matters, grievance against public officers, student discipline
- “Meetings” Not Covered
  - Adjudicatory proceedings (quasi-judicial, administrative, and courts)
  - On-site inspections
  - Political party caucuses
  - Discussions without intent to conduct public business
  - Discussions about logistical or procedural methods for meetings

# FOIA

## Navigating Changes and Challenges

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- Overview of W. Va. Code §§ 29B-1-1, *et seq.*
  - Establishes a broad right for all persons to access public records of public bodies in the state, subject to specific statutory exceptions
  - Applies to nearly all state and local government entities, but exempts certain categories of information and records
    - W. Va. Code § 29B-1-4: trades secrets; personal information; test questions and examination dates; law enforcement records; information protected by other statutes; records relating to security, terrorism, infrastructure, and national security; internal memoranda or letters; and certain records of correctional facilities, utility customer information, etc.

# FOIA

## Navigating Changes and Challenges

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### Overcoming Roadblocks

- Every person has the right to inspect or copy any public record of a public body except as otherwise expressly provided
- Requests must be made to the custodian of record, who must respond within five business days
- Custodian may either (1) provide the records; (2) indicate when and where they may be inspected; or (3) deny the request with written reasons
- Custodian shall provide “reasonable” opportunities for inspection and may make “reasonable rules and regulations necessary for the protection of the records”
- If denied, the requester may seek judicial relief (proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept)

# FOIA

## Navigating Changes and Challenges

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### Alternate Tools & Tactics

- The Original Request
  - Clear, specific, and narrowly tailored
  - Confirm correctly submitted
- Follow-up & Reconsideration
  - Polite follow-up via phone or email
  - Request reconsideration (clarify and narrow scope; justify grounds for request)
  - Elevate to agency head or general counsel, if applicable
  - Maintain a paper trail (track deadlines and responses)
- Assistance from Oversight Bodies/Public Officials
  - WV Secretary of State's office
  - Legislative or Public Official involvement
  - Work with Advocacy Organizations
- Administrative Appeal
  - Be mindful of internal deadlines and requirements

# Bodycam Footage and 911 Calls

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- Who makes the call as to access?
- Prosecuting Attorney, County Commission, Police Agency, or 911 Director?
- Wide Variance among West Virginia counties
- Often law enforcement exception is used as a shield
- Argument that 911 calls are not to “law enforcement”
- Mary Lou Retton DUI arrest in Fairmont was released
- Martinsburg I-81 shooting by State Police
- ACLU obtained bodycam of Huntington Police destroying homeless’ property
- Trend nationally and in West Virginia is to release
- Juries see bodycam on a regular basis
- My best results have been with Prosecuting Attorneys
- Ask before FOIA!
- FOIA database at Secretary of State website is a good first step

# Defamation: Dodging the Bullet

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## Highlights

- Public Figures vs. Private Individuals

- Public

- Clear and convincing evidence that the defamatory statement was made with actual malice (i.e., with knowledge of falsity or with reckless disregard of the truth)

- Private

- Need only show that the defendant was negligent in publishing the false and defamatory statement

# West Virginia Shield Law

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- West Virginia Code § 57-3-10
  - This statute protects you as a journalist from being compelled to disclose confidential sources in any legal proceeding. Only a Court can compel disclosure to prevent death, serious bodily injury, or unjust incarceration
  - Peek-a-Boo Waiver: You may lose your protection if you share your source information with third parties

# Defamation: Dodging the Bullet

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- Third-Party Liability
  - W. Va. Code § 55-7-14
    - Broadcasting stations and its employees are generally not liable for defamatory statements made by others unless plaintiff proves the station/employees failed to exercise due care to prevent publication of the defamatory statement
      - Requires reasonable procedures in place to prevent dissemination of defamatory content
    - In no event, shall a broadcaster or its employees be held liable for any defamatory statement by any legally qualified candidate for public office
  - Online Platforms
    - Federal protection from liability for defamatory statements posted by users

# Concluding Remarks

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Let's play:

*"Stump Dave and Candice!"*