WEST VIRGINIA

State Auditor's Office

GLEN B. GAINER III, STATE AUDITOR

2008 State Licensing Board Handbook

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Disclaimer

This handbook is intended as a general reference work giving state licensing boards an accurate overview of the responsibilities imposed on them by law. It should not, however, take the place of legal counsel. Your own counsel can best advise you as to an appropriate course of action when applying the general principles stated in this handbook to individual factual situations.

The discussion of the requirements of the West Virginia Code is for informational purposes only and should not be taken as legal advice or as a substitute for the actual statutory language. You should consult the full text of the statute in order to fully understand specific legal requirements.

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THE IMPORTANT REASON FOR BOARDS

The purpose of licensure of individuals to practice a profession or engage in an occupation is to protect the public. West Virginia Code §30-1-1a.

Protection of the public is accomplished by requiring individuals to meet certain qualifications before they may be issued a license to engage in a particular profession or occupation and by regulating individuals once they obtain a license to ensure that they are practicing in a competent manner according to accepted standards of conduct.

LEGAL REQUIREMENTS

State licensing boards and commissions must operate according to provisions set forth in statutory law, regulatory law, the West Virginia Constitution, the United States Constitution, and the decisions and rulings of courts of law.

Some of the statutory requirements governing licensing boards are found in Chapter 30 of the West Virginia Code. Chapter 30 of the Code is subdivided into Articles, some of which are general in their application (Articles 1 and 1A), and the remainder of which are specific and apply only to a certain profession, occupation or activity (Articles 2 through 40).

Articles 1 and 1A of Chapter 30 are Articles of **general** application and cover all Chapter 30 licensing boards. In many instances, the provisions of Articles 1 and 1A override conflicting provisions that are set forth in Articles 2 through 40 which govern specific professions. For example, it is common to see the following language in Article 1: "Notwithstanding any other provision of law to the contrary . . . ." This language dictates that if there is a conflicting provision of law in an Article governing a specific profession or occupation, then the language of Article 1 controls.

Many Chapter 30 boards and other government agencies have the authority to promulgate rules. These rules are promulgated through the legislative rule-making process and often have the force and effect of law. Chapter 30 boards are required to abide by their own rules. In addition, other government agencies may have rules that are applicable to the activities of the Chapter 30 boards.

Both the West Virginia Constitution and the United States Constitution create rights and duties that may be applicable to the actions of Chapter 30 licensing boards in the exercise of their regulatory authority. For example, the West Virginia Constitution and the United States Constitution guarantee citizens due process of law before they may be deprived of life, liberty or property. Our courts have held that once an individual holds a license to practice a profession or occupation, they have a property right in their license. Therefore, in order to take action against a license, a licensing board must give a licensee due process of law. Due process of law, at its most fundamental level, includes notice and an opportunity to be heard. Chapter 30 contains numerous statutory provisions which effectively implement the constitutional right of due process and other constitutional rights.

Courts of law in both the federal and state judicial systems are charged with the responsibility to enforce the law, apply the law, and declare what the law is in legal controversies that are brought before them. As a result, there is a body of court decisions and rulings that constitute legal precedent which Chapter 30 boards must follow.

The interplay between statutory law, regulatory law, constitutional provisions and court precedent can be complicated. Therefore, Chapter 30 boards are encouraged to consult legal counsel in applying and enforcing the law.

HOW BOARDS FIT INTO STATE GOVERNMENT

Chapter 30 boards are part of the executive branch of government. Under our constitutional separation of powers, governmental responsibilities are divided between the Judicial, the Legislative and the Executive branches of government. Each branch has a role to serve in licensing. It is important to understand their respective responsibilities.

Inasmuch as reference will be made throughout this text to the other officers and agencies of State government, a simple enumeration of duties will be supplied here.

Judicial The Judicial Branch decides legal controversies concerning actions that Chapter 30 boards may take in regulating their respective professions and occupations; decides the applicability, interpretation and constitutionality of the laws; and, enforces lawful orders of the boards.

Legislative The Legislative Branch sets state policy through the passage of legislation and approval of rules that pertain to the regulation of professions and occupations. Through the office of the Legislative Auditor, the Legislature reviews the general performance of boards.

Executive The Governor is the chief executive officer of the State, but he is not the only executive officer. Under West Virginia's Constitution, executive responsibilities are divided among several officers of government. Some of the executive officers that are created under our Constitution and with whom the Chapter 30 boards may interact include:

The Governor, who appoints members of the boards and commissions.

The State Treasurer, who is the custodian of all State funds and is responsible for cash management;

The State Attorney General, who is legal counsel for state boards and commissions;

The State Auditor, who must approve disbursement of public funds and provide an orientation for licensing board members;

The Secretary of State, with whom the boards must file their rules during the rule-making process and who maintains the State Register in which notices of public meetings must be lodged.

Chapter 30 boards do not fall under the auspices of a cabinet secretary or a state agency head appointed by the Governor. Therefore, Chapter 30 boards operate autonomously within the executive branch subject to the checks and balances provided by other executive branch agencies and officers, the legislative branch and the judicial branch.

Chapter 30 boards may also interact with other executive branch agencies, such as the Ethics Commission, the agency that enforces state ethics laws and provides opinions on the application of the Open

Governmental Proceedings Act; the Human Rights Commission, the agency that enforces state anti-discrimination law against employers and places of public accommodation; the Public Employees Grievance Board, the agency that hears and adjudicates grievances filed by state employees; the Purchasing Division, the agency that regulates the purchase of goods and services by state agencies; the Board of Risk and Insurance Management, the agency that provides and administers the state's insurance policy; and, others.

OPERATION

Many of the operational functions of Chapter 30 boards are controlled by law Some of the important operational matters which are addressed by State law include the following items.

Location: Chapter 30 boards are required to publicize their addresses and telephone numbers in the Charleston area telephone directory, even if the board office is in another city. West Virginia Code § 30-1-12(c).

In 2004, the Circuit Court of Kanawha County issued a decision that it was a violation of the West Virginia Constitution, which requires the seat of government to be in Charleston, for the State Lottery Commission to move its offices to Putnam County. The Circuit Court decision was appealed to the West Virginia Supreme Court. But, the Supreme Court unanimously refused to hear the appeal and let the Circuit Court decision stand. A fair reading of the Circuit Court decision supports the conclusion that state agencies, such as the Chapter 30 boards, have to locate their offices in the seat of government at Charleston. However, because the Lottery Commission was the only state agency defendant in the Circuit Court case and the Supreme Court refused to hear the appeal, the issue remains a gray one. Future litigation may definitively resolve the question.

Meetings Chapter 30 boards are required to hold open public meetings and give notice of their time, date and location in accordance with the West Virginia Open Governmental Proceedings Act. West Virginia Code §§ 6-9A-1 *et seq*.

Information Chapter 30 boards are required to provide information upon request, to the extent required by the Freedom of Information Act. West Virginia Code §§ 29B-1-1 *et seq*.

Rules Chapter 30 boards are required to adopt rules which govern their proceedings and which carry out the provisions of each board's statutory authority. Such rules cannot conflict with statutory law, nor can they exceed the scope of the board's rule-making authority. All rules must be promulgated in accordance with the procedures set forth in the rule-making provisions of the Administrative Procedures Act. West Virginia Code §§ 29A-3-1 *et seq*.

Records Chapter 30 boards are required to keep a record of their proceedings and a register of all applicants for licensure, licenses issued, license renewals, and disciplinary actions against licensees. West Virginia Code § 30-1-12(a). The Open Governmental Proceedings Act requires that boards keep minutes of their meetings. West Virginia Code § 6-9A-5. The contested case provisions of the Administrative Procedures Act require that all testimony and evidence introduced at an administrative hearing before a board be recorded. West Virginia Code § 29A-5-1(a).

Reports Chapter 30 boards are required to file operational and fiscal reports each year with the Governor, the Legislature, and the Secretary of State. West Virginia Code § 30-1-12(b).

Complaints Chapter 30 boards are required to receive, investigate and resolve complaints against licensees. West Virginia Code 30-1-5(c).

Money Chapter 30 boards may set licensure fees through the rule-making process. West Virginia Code § 30-1-6(c). Chapter 30 boards may also levy fines and assess administrative costs against licensees who have been found to have committed misconduct. West Virginia Code § 30-1-8(a). Every board is required to receive and account for the monies that it derives from its operations. West Virginia Code § 30-1-10(a).

Audit

Chapter 30 boards must submit to performance evaluations and/or financial audits conducted by the Legislative Auditor. West Virginia Code §§ 30-1-10(b) and 4-2-1 *et seq*.

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OATH

The law provides that each board member must take the Constitutional oath to uphold both the state and federal Constitutions and to properly discharge his or her duties. This is sometimes done ceremoniously, but it is usually accomplished very informally. When the oath is taken, a certificate must be filed to that effect with the Secretary of State. West Virginia Code § 30-1-2 provides:

> **Every person appointed as a member of any board referred to in this article, before proceeding to exercise the authority or discharge the duties of the office, shall take the oath prescribed by section 5 of Article IV of the state constitution, and shall file the certificate thereof with the secretary of state.**

Article IV, § 5 of the West Virginia Constitution states:

> **Every person elected or appointed to any office, before proceeding to exercise the authority, or discharge the duties thereof, shall make oath or affirmation that he will support the Constitution of the United States and the Constitution of this State, and that he will faithfully discharge the duties of his said office to the best of his skill and judgment; and no other oath, declaration, or test shall be required as a qualification, unless herein otherwise provided.**

The oath may be taken before any person having the authority to administer oaths, (West Virginia Code § 6-1-4), and must be taken after the board member is appointed, (West Virginia Code § 6-1-5). The oath must be taken before the member can exercise any board duties (West Virginia Code § 6-1-7). Certification of the oath must be filed in the office of the Secretary of State (West Virginia Code § 6-1-6).

MEMBERS

Ethical Conduct.

THE WEST VIRGINIA GOVERNMENTAL ETHICS ACT

The West Virginia Governmental Ethics Act, West Virginia Code §§ 6B-1-1 *et seq.*, is intended to preserve public confidence in the integrity of democratic government by insuring that all public officials who exercise the powers of their offices do so free of undue influence, favoritism or threat. It imposes restrictions intended to eliminate use of a public office for personal gain beyond the lawful emoluments of the position. The Act applies to all public servants, including employees and members of licensing boards and commissions.

THE WEST VIRGINIA ETHICS COMMISSION

The West Virginia Governmental Ethics Act is administered by the West Virginia Ethics Commission. The Ethics Commission is responsible for educating and advising public servants and for enforcing the Act. The primary responsibility of the Commission is to handle, in a confidential manner, questions from those covered by the Act. Most questions can be handled by the staff over the telephone. Any written request for advice, made in letter form, will be considered by the Commission at a regular monthly meeting. The Commission makes its decisions in the form of written "Advisory Opinions".

Corrupt intent is not a necessary element for violations of the Ethics Act. Any public officer, including members and staff of Chapter 30 boards, must scrutinize his or her situation when anything of insignificant value, such as gifts, favors or awards, is offered by a regulated person. Any situation that raises questions about possible conflicts of interest should also be considered in light of the Ethics Act.

A person acting in good faith reliance on an “Advisory Opinion” of the Ethics Commission has an absolute defense to any criminal prosecution for violations of the Ethics Act.

Some boards have additional rules of ethical or professional conduct specific

to the profession regulated. Most often, these rules are adopted by the board and are incorporated in legislative rules.

MINIMUM ETHICAL STANDARDS ESTABLISHED BY THE ACT:

PRIVATE GAIN

The basic principle underlying the standards or code of conduct created by the Ethics Act is that those in public service should use their positions for the public benefit and not for their own private gain or the private gain of another. West Virginia Code § 6B-2-5. For example:

- You may not use your agency's supplies or equipment for personal incidental projects or activities except for activities that constitute incidental or de minimus use.
- Public employees and full-time appointed officials may not work on personal projects or activities during work hours for which they are paid by their employer.
- You may not use subordinates to work on your personal projects or activities during work hours or compel them to do so on their own time.

GIFTS

You may not solicit a gift unless it is for a charitable purpose from which you and your immediate family members derive no direct personal benefit.

You may not solicit a subordinate for any gift - not even a gift for a charitable purpose. West Virginia Code § 6B-2-5(c).

The Ethics Act's prohibition against solicitation of gifts does not apply to solicitation of political contributions. However, West Virginia Code § 3-8-12(l) dealing with regulation and control of elections provides "No person shall solicit any [political] contribution from any nonelective salaried employee of the state government or of any of its subdivisions."

You may not accept gifts from lobbyists, or from "Interested persons", unless it fits into one of the following exceptions;

- meals and beverages
- ceremonial gifts or awards which have insignificant monetary value
- unsolicited gifts of nominal value or trivial items of informational value
- reasonable expenses for food, travel and lodging for a meeting at which an official or employee participates in a panel or has a speaking engagement ["nominal value" has been defined by the Ethics Commission as gifts with a monetary value of $25.00 or less]
- gifts of tickets or free admission extended to a public official or public employee to attend charitable, cultural or political events, if the purpose of such gift or admission is a courtesy or ceremony customarily extended to the office
- gifts that are purely private and personal in nature
- gifts from relatives by blood or marriage, or a member of the same household
- reasonable honoraria [check the Ethics Commission's rules at 158 W. Va. C.S.R. 7 § 2]
- lawful political contributions

"Interested persons" are those who do or seek to do business with, are regulated by, or are otherwise financially interested in the activities of your board or commission.

SELLING TO SUBORDINATES

Although they may choose to buy from you, you may not personally solicit [in person, by phone, or personal letter] private business from subordinates you direct, supervise or control. Solicitations directed to the public at large or for property of a kind you are not regularly engaged in selling are permitted.

PRIVATE INTERESTS IN PUBLIC CONTRACTS, PURCHASES & SALES

The Ethics Act says that no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control. However, an elected

or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest is defined in the West Virginia Code as 1) an interest which does not exceed $1,000.00 in the profits or benefits of the public contract or contracts in a calendar year; 2) an interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than $5,000.00.

Part-time appointed officials may avoid the prohibition by recusing themselves from considering and acting on such matters.

For a public official's or public employee's recusal to be effective, it is necessary for the official or employee to refrain from participating in the review or evaluation of the contract; to recuse himself or herself from deciding or evaluating the contract; and, to fully disclose the extent of his or her interest in the contract.

SOME RESTRICTIONS APPLY BOTH DURING AND AFTER GOVERNMENT SERVICE

Confidential Information: You may not, during or after government service, knowingly and improperly disclose confidential information acquired through your public position or use it to further personal interests of yourself or another person. West Virginia Code § 6B-2-5(e)

Prohibited Representation: The Act requires you to obtain your agency's consent before you represent a client in a matter in which you are or were substantially involved on behalf of the agency. This applies both during and after your government service. The prohibition applies only to those matters in which you were personally involved in a decision making, advisory, or staff support capacity. West Virginia Code § 6B-2-5(f).

Limitation on Practice: Certain public servants are prohibited from representing persons before their agency (1) while they are with the agency, and (2) for one year after leaving the agency. The prohibition applies only to elected and appointed public officials and full-time staff attorneys and accountants in agencies authorized to hear contested cases or make regulations. This prohibition applies to representation in contested cases, regulation filings, license or permit applications, rate-making proceedings and to lobbying to influence the expenditure of public funds. The Ethics Commission can grant an exemption from the one year prohibition. West Virginia Code § 6B-2-5(g)(5).

LICENSING AND RATE-MAKING PROCEEDINGS

You may not take official action, except ministerial action, in a license or rate-making matter affecting an entity in which you, or the members of your immediate family, own or control more than a ten percent interest. West Virginia Code § 6B-2-5(k). A ministerial action means an action or function performed by an individual under a given state of facts in a prescribed manner in accordance with a mandate of legal authority, without regard to, or without the exercise of, the individual's own judgment as to the propriety of the action being taken. West Virginia Code § 6B-1-3(g).

EMPLOYMENT BY REGULATED PERSONS AND VENDORS

No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:

(a) had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months;

(b) has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working;

(c) is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor, including, but not limited to: drafting bid specifications or requests for proposals; recommending selection of the vendor; conducting inspections or investigations; approving legal or technical guidance on the formation, implementation or execution of the contract; or

taking other nonministerial action which may affect the financial interests of the vendor.

The Ethics Commission can grant an exemption from this prohibition.

Full-time public officials and full-time public employees may not take personal regulatory action on matters affecting a person by whom they are employed or with whom they are seeking employment or have an agreement concerning future employment.

Full-time public officials and full-time public employees may not personally participate in a decision, approval, disapproval, recommendation, rendering advice, investigation, inspection or other substantial exercise of non-ministerial administrative discretion involving a vendor with whom they are seeking employment or has an agreement concerning future employment.

Full-time public officials and full-time public employees may not accept private compensation for providing information or services that they are required to provide in carrying out his or public job responsibilities.

VOTING

Public officials may not vote on a matter in which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. "Business with which they are associated" means a business which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

If a public official is employed by a financial institution and his or her primary responsibilities include consumer and commercial lending, the public official may not vote on a matter which directly affects the financial interests of a customer of the financial institution if the public official is directly involved in approving a loan request from the person or business appearing before the governmental body or if the public official has been directly involved in approving a loan for that person or business within the past twelve months. Provided that this limitation only applies if the total amount of the loan or loans exceeds fifteen thousand dollars.

Public officials may not vote on a personnel matter involving the public official's spouse or relative.

Public officials may not vote on the appropriation of public monies or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by the nonprofit.

COMPLAINTS CONCERNING VIOLATIONS OF THE ACT

The Ethics Commission has sole responsibility for investigating and resolving violations of the Ethics Act. Any citizen who is aware of a violation of the Act may make a written complaint with the Commission. The Executive Director of the Ethics Commission may refer complaints to the Ethics Commission Review Board for a determination as to whether or not the allegations, if taken as true, constitute a violation of the Ethics Act. If the complaint is not deemed to be sufficient to constitute a violation of the Ethics Act, the Review Board may dismiss it. If the complaint is found to be sufficient, then it may be opened for investigation. After an investigation is completed, if the Review Board finds probable cause to believe that a person has violated the Ethics Act, then the matter may proceed to hearing before the Ethics Commission or a hearing examiner.

If it is found by evidence beyond a reasonable doubt that a person has violated the Ethics Act, he or she may be publicly reprimanded; ordered to cease and desist; ordered to pay restitution; fined up to $5,000.00 per violation; ordered to reimburse the Commission for costs. The Ethics Commission may also recommend to the appropriate government body that the person be terminated from employment or removed from office.

If the Ethics Commission finds, by clear and convincing evidence, that a complaint has been knowingly filed with untrue information or has been filed in reckless disregard of the truth or falsity of the information, then the Commission shall award costs to the persons against whom the complaint was made; order that the complainant reimburse the person against whom the complaint was made for attorney fees; and, order the complainant to reimburse the Commission for its costs.

Questions regarding the West Virginia Ethics Act may be directed to: West Virginia Ethics Commission, 210 Brooks Street, Charleston West Virginia 25301. (304) 558-0664, Fax (304) 558-2169.

Board Members' Compensation and Expenses

Members of licensing boards receive compensation up to the amount paid to members of the Legislature for their Interim duties. West Virginia Code § 30-1-11(a). That amount is currently $150.00 per day, not to exceed $4,500.00 in any calendar year. West Virginia Code § 4-2A-5.

Travel expenses are limited to the rate which is established by the State Travel Management Office.

Members of boards or commissions attending the orientation provided by the State Auditor may be reimbursed for necessary and actual expenses "as long as the member attends the complete orientation session". West Virginia Code § 30-1-2a(h).

When Board Members Have Other State Employment

Issues with the compensation and travel reimbursement arise when state employees also serve on boards and commissions. In all cases, the ethical standard is that officers and employees of the state may not benefit from their positions beyond their legal compensation. In other words, state employees who serve on boards and commissions may not "double dip". West Virginia Code § 6B-2-5(m).

In some cases, statutory law provides that a state officer, by virtue of his or her position, will also serve on a particular board. In that case, the Ethics Commission has ruled by advisory opinion that a state official drawing a state salary cannot also receive per diem compensation for service on a board or commission.

Liability

Generally speaking, board members, in the course of the performance of duties which fall within the scope of their legal authority, are covered under the State's insurance administered by the West Virginia Board of Risk and Insurance Management (BRIM). Boards and commissions must pay premiums in the amount determined by BRIM to maintain their insurance

coverage. BRIM falls under the auspices of the Secretary of the Department of Administration. BRIM's offices are maintained at 90 MacCorkle Avenue, S.W., Suite 203, South Charleston, West Virginia 25303. The telephone number is (304) 766-2646, 1-800-345-4669, Fax (304) 766-2653.

There are some statutory exceptions to the liability protection provided by the State's insurance. For example, if an agency contracts for or purchases commodities contrary to the provisions of the State purchasing laws, the head of the spending unit shall be personally liable for the costs of such purchase or contract. West Virginia Code § 5A-3-17.

If a board or commission which operates from appropriated funds (contrasted to special revenues, i.e., fees) incurs a liability against those funds which cannot be paid out of current appropriations, a member of a state board or commission shall be personally liable for any debt unlawfully incurred or for any payment unlawfully made". West Virginia Code § 12-3-17. Only a few boards receive appropriated funds.

No member of a peer review committee or a professional standards review committee of a state or local professional organization, including, but not limited to, committees established to review the practices of doctors of chiropractic, doctors of veterinary medicine, doctors of medicine, doctors of dentistry, attorneys-at-law, real estate brokers, architects, professional engineers, certified public accountants, public accountants or registered nurses shall be deemed liable to any person for any action taken or recommendation made within the scope of the functions of the committee, if the committee member acts without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to him after reasonable effort to obtain the facts of the matter as to which such action is taken or recommendation is made. West Virginia Code § 30-1-16.

Lay Members

At least one lay member is required to be appointed to every health professional licensing board. West Virginia Code § 30-1-4a**.**

Orientation (West Virginia Code § 30-1-2a)

After the first day of April and not later than the first day of December of each year, the State Auditor shall provide at least one orientation session on relevant state law and rules governing state boards and commissions.

The chair and chief financial officer of boards and commissions created after June 11, 1999 are required to attend an orientation session designed to inform the boards and commissions of the duties and requirements imposed by state law and rules. The orientation session must occur at the earliest possible date following the creation of the board or commission.

The orientation sessions are open to any member of a new or existing board and expense reimbursement is authorized for this activity.

Ex officio members who are elected or appointed State officers, or employees, and members of boards that have purely advisory functions are exempt from this requirement.

Duty to Report Violations

Every person licensed or registered by a board has a duty to report to the board which licenses or registers him or her a known or observed violation of the board laws or rules by any other person licensed or registered by the same board, and shall do so in a timely manner. West Virginia Code § 30-1-5(b).

Removal of Board Members

Most boards have provisions in their respective statutes that set forth the reasons that a board member may be removed from office by the governor. Generally speaking, the reasons listed in the statutes fall into the categories of “neglect of duty”, “incompetency”, or “official misconduct”.

OFFICERS

President and Secretary

Every board must elect annually a president and a secretary. The president and secretary must be elected from the board's current membership. Exceptions are made for three boards to elect a secretary from outside their membership. Those excepted boards are the board of law examiners, the board examiners for nurses, and the board of dental examiners. West Virginia Code § 30-1-3(a).

The president and the secretary of each board are authorized to administer oaths to witnesses who may provide testimony before their respective boards. West Virginia Code § 30-1-5(a).

Term of Office

The officers of each board serve terms of one year but continue in their offices until successors are elected. West Virginia Code § 30-1-3(a).

Registration of Officers

The officers of each board must be registered annually with the Governor, the Secretary of Administration, the Legislative Auditor, and the Secretary of State. West Virginia Code § 30-1-3(b).

LEGAL COUNSEL

An assistant attorney general is assigned as legal counsel to many of the boards and commissions. Assignment of counsel is subject to change. If you have any questions about your assigned legal counsel, please call Kelli D. Talbott, Deputy Attorney General, at (304) 558-2021.

CHAPTER THREE

DUTIES AND POWERS

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LICENSING AND REGISTRATION

Applications. Applicants for license or registration must apply in writing to the board enclosing the authorized examination fee. West Virginia Code § 30-1-6(a).

Deadlines. Deadlines for applications may be established by rule which may be no less than ten days nor more than ninety days prior to the date of the examination. The Social Security number of the applicant must be recorded on the application. West Virginia Code § 30-1-6(b) and (d).

Register. Every board must keep a register of all applicants for license or registration, showing for each one the date of the application, name, age, educational or other qualifications, place of residence, whether an examination was required, whether the applicant was rejected or a certificate or license or registration was granted, the date of this action, the license or registration number, all renewals of the license or registration, if required, and any suspension or revocation thereof. This information is open to public inspection at all reasonable times. West Virginia Code § 30-1-12(a).

Examination. Examination of applicants for licensure or registration must occur no less than annually. West Virginia Code § 30-1-5(a).

Roster. A roster of the names of all persons licensed or registered by a board and practicing in the state must be maintained by the secretary of each board. The roster must contain names in alphabetical order and must also be arranged by the cities or counties in which the licensees' offices are located. West Virginia Code § 30-1-13.

Issuance of Licenses and Registration. Every license or certificate of registration issued by each board shall bear a serial or license number, the full name of the applicant, the date of issuance, the date of expiration, and the seal of the board. It shall be signed by the board's president and secretary or executive secretary. No license or certificate of registration granted or issued may be assigned. West Virginia Code § 30-1-7.

Denial. Any person denied a license or registration who believes the denial was in violation of the state licensing laws shall be entitled to a hearing on the action in the same manner as hearings for revocation or suspension of licenses or registration. West Virginia Code § 30-1-8(h).

Investigation of complaints. Every board has a duty to investigate and resolve complaints. To carry out this mandate, boards are authorized to conduct investigations, hire investigators, and issue subpoenas. Within six months of receipt of a complaint being filed, a board must send a status report to the party filing the complaint by certified mail, return receipt requested. Within one year of the status report's return receipt date, the board must issue a final ruling on the matter, unless the complainant and the board agree in writing to extend the time for the final ruling. West Virginia Code § 30-1-5(b) and (c).

Handling of complaints. Every board is required to have rules specifying the procedures by which they will handle and process complaints that they receive. West Virginia Code § 30-1-8(k).

Discipline of licensee. Notwithstanding any provision of law that may be found in an individual board's statutes to the contrary, no license can be suspended, revoked or otherwise disciplined by a board without a prior hearing. The only two exceptions to this requirement are: 1) the suspension of a license prior to hearing if a board has determined that the continuation of the licensee's practice constitutes an immediate danger to the public; and, 2) the suspension of a license prior to hearing when a board cannot locate a licensee within sixty days of a complaint being filed against a licensee. If, after due diligence a board cannot located a licensee within thirty days after the suspension, the board may revoke the license without holding a hearing. West Virginia Code § 30-1-8(e). "Immediate danger" suspensions and "inability to locate a licensee" suspensions and/or revocations are fraught with legal pitfalls and due process concerns. Therefore, boards are encouraged to consult with legal counsel before invoking this authority.

In all proceedings for the discipline of a licensee, a statement of the charges and notice of the time and place of the hearing must be served on the person at least thirty days prior to the hearing. The licensee may appear with witnesses and be heard in person, by counsel or both. The board may take oral or written proof, for or against the accused. West Virginia Code § 30-1-8(f).

Specific grounds for disciplinary action are usually enumerated in a particular board's separate licensing statute. In addition, general provisions applicable to all boards authorize suspension or revocation of a license for conviction of a felony or for engaging in conduct amounting to professional negligence or

"a willful departure from accepted standards of professional conduct". Boards may delineate by rule what conduct, practices or acts constitute professional negligence, willful departure from accepted standards of professional conduct, or which may render an individual unqualified or unfit for licensure, registration or other authorization to practice. West Virginia Code § 30-1-8(a).

Hearings. A stenographic report of each proceeding on the denial, suspension or revocation of a license or registration must be made at the expense of the board and a transcript retained in its files. The board is also required to make a written report of its findings which become part of the record of the matter. West Virginia Code § 30-1-8(i).

Upon hearing the matter, if the board finds that the charges are true, it may suspend or revoke the license or registration and take from the accused all rights and privileges acquired thereby. West Virginia Code 30-1-8(f).

Informal disposition may also be made by the board in any contested case by stipulation, agreed settlement, consent order or default. Further, the board may suspend its decision and place a violating licensee on probation. West Virginia Code 30-1-8(g).

At the conclusion of a hearing, in the event that a person has been found to have violated a board's practice act, a board may levy fines not to exceed one thousand dollars per day per violation. Boards may also assess administrative costs. West Virginia Code § 30-1-8(a). Fines that are collected must be deposited in the state treasury's general revenue fund. Costs that are collected must be deposited in the individual board's special revenue account. Boards should strive to levy fines in a reasonable, fair and even-handed manner. Fines levied should be commensurate with the offense committed and should bear some rational relationship with the offense committed.

Appeal. After an administrative hearing, an applicant who has been refused a license or a licensee whose license has been disciplined may appeal any adverse decision to the Circuit Court of the county in which the applicant or licensee resides. The appeal must be filed within thirty days after the decision of the board. It is important that every board serve their administrative decisions upon applicants or licensees by certified mail, return receipt, to have a record of the day on which the person receives the decision. Either party may appeal an adverse decision by the Circuit Court to the West Virginia Supreme Court of Appeals. West Virginia Code § 30-1-9.

Injunctive Relief. Every board has the authority to seek injunctions in the appropriate Circuit Court to prevent individuals from violating their relevant laws and rules. West Virginia Code § 30-1-5(e)**.** In most instances, seeking relief from a Circuit Court is the only civil law method that a board has to seek to stop the unlicensed practice of a profession or occupation.

Default on child support. Pursuant to West Virginia Code § 48-15-303, licensing authorities are required to have a license applicant certify that he or she does not have a child support obligation; that the applicant does have such an obligation but the arrearage amount does not equal or exceed the amount of child support payable for six months; or, that the applicant is not the subject of a child-support related subpoena or warrant. Pursuant to West Virginia Supreme Court precedent, boards may not suspend any license for child support deficiencies unless certain conditions are met and a Circuit Court directly orders the action. Before a board can act, a Circuit Court must hold a hearing and must order that a board may take action relative to the license.

OTHER DUTIES

Rules. Boards are generally authorized to make rules necessary to regulate their proceedings; to carry out the purposes of their law; and, to enforce the provisions of the licensing law applicable to them. West Virginia Code § 30-1-4. Those rules must not be inconsistent with State law and must be adopted as provided by the State Administrative Procedures Act. West Virginia Code §§ 29A-1-1 *et seq*.

Meetings. Board meetings must be open to the public and publicized as required by the State Open Governmental Proceedings Act West Virginia Code § 6-9A-3.

Each board must promulgate rules setting forth the process by which the date, time, place and agenda of all regularly scheduled meetings and special meetings are made available, in advance, to the public and news media. West Virginia Code § 6-9A-3.

Office Location. Boards are required to ensure that they have an address and telephone listing in the State government section of the Charleston area telephone directory. Boards are encouraged to regularly consider other ways to promote public access to the board. West Virginia Code § 30-1-12(c).

Continuing Education. Each board is required to establish continuing education requirements as a prerequisite to license renewal. Criteria appropriate to the discipline shall be developed which must include, at a minimum, course content, course approval, hours required and reporting periods. West Virginia Code § 30-1-7a(a).

Reports. Prior to January 1 of each year, the board shall submit to the Governor and the Legislature a report of its transactions for the preceding two years, an itemized statement of its receipts and disbursements for that period, a full list of the names of all persons licensed or registered by it during that period, statistical reports by county of practice, by specialty if appropriate to the particular profession and a list of any complaints which were filed against persons licensed by the board, including any action taken by the board regarding those complaints. The report shall be certified by the president and the secretary of the board and a copy of that report shall be filed with the Secretary of State and the legislative librarian. West Virginia Code § 30-1-12(b)**.**

Records. Every board shall keep a record of its proceedings and a register of all applicants for licensure or registration. This record must show the date of the application, name, age, educational and other qualifications, place of residence, whether an examination was required, whether the applicant was rejected or a certificate of licensure or registration was granted, the date of this action, the license or registration number, all renewals of the license or registration, if required, and any suspension or revocation thereof. This information must be open to the public at all reasonable times. West Virginia Code § 30-1-12(a).

Records Management. Board records must be maintained in accordance with State law. The agency responsible for offering rules and techniques for the creation, utilization, maintenance, retention, preservation and disposal of records is the Records Management Office in the Office of Technology of the Department of Administration. West Virginia Code § 5A-8-5.

The law defines “records” as all documents, books, papers, photographs, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business. West Virginia Code § 5A-8-3.

POWERS

Fees. Boards are empowered and obligated to set fees for licensing or registration which "shall be sufficient to enable boards to carry out effectively their responsibilities of licensure or registration and discipline of individuals subject to their authority". The fees must be set by legislative rule and notice of any fee changes must be given to the members affected at the time it is filed with the Secretary of State. West Virginia Code § 30-1-6(c).

Boards are authorized to adopt rules to waive the fees of persons serving in the armed forces of the United States during the period of their service and to retain that person in good standing without payment. West Virginia Code § 30-1-14.

Personnel. The employees of most boards are not subject to the Division of Personnel rules, commonly referred to as "civil service" rules. Historically, most board positions have been designated "classified-exempt". If a board has "classified" positions that are subject to civil service rules, then the Division of Personnel's rules on posting and filling vacant positions must be followed.

Investigatory Powers. Boards are authorized to compel the attendance of witnesses at meetings, issue subpoenas, conduct investigations and hire an investigator, take testimony and other evidence concerning any matter within its jurisdiction. The president and secretary of the board are authorized to administer oaths for these purposes. West Virginia Code § 30-1-5(b).

Adopt a Seal. Boards are expected to adopt a seal which will be affixed to all licenses or registrations. West Virginia Code § 30-1-4.

CHAPTER FOUR

BOARD OPERATIONS

CONTENTS

MEETINGS

The meetings of all government agencies are governed by the Open Governmental Proceedings Act, West Virginia Code §§ 6-9A-1 *et seq*. The Appendix to this handbook contains a publication issued by the Office of The Attorney General which contains extensive information about the requirements of the Open Governmental Proceedings Act.

RULES

Boards are generally authorized to make rules necessary to regulate their proceedings; to carry out the purposes of their law; and, to enforce the provisions of the licensing law applicable to them. West Virginia Code § 30-1-4. Those rules must not be inconsistent with State law and must be adopted as provided by the State Administrative Procedures Act. West Virginia Code §§ 29A-1-1 *et seq*.

There are three types of rules that may be promulgated pursuant to the State Administrative Procedures Act: 1) legislative, interpretive, and procedural. Depending upon the type of the rule, the promulgation process will vary.

Legislative Rule. A "legislative rule" includes:

> **every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies the basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule.**
>
> West Virginia Code § 29A-1-2(d).

A legislative rule has no legal force or effect until it is authorized by the Legislature, unless it is promulgated as an emergency rule. A legislative rule, is only an agency proposal until the legislature approves it.

Procedural Rule. Any rule which establishes rules of procedure, practice or evidence for dealings with or before an agency, including forms prescribed by an agency, is a procedural rule. Procedural rules do not require prior Legislative approval. West Virginia Code §§ 29A-1-2(g), 29A-3-3, 29A-3-8.

Interpretive Rule. Any rule adopted, independent of any delegation of legislative power, which is intended to provide information or guidance to the public regarding the board's interpretations, policy or opinions on the law enforced and administered by it, and not intended to be determinative of any issue affecting private rights, privileges or interests is an interpretive rule. West Virginia Code § 29A-1-2(c).

Interpretive rules do not create rights but merely clarify an existing statute or regulation. Because they only clarify existing law, interpretive rules need not go through the legislative authorization process.

Process for Adoption of Rules. To implement, that is, to place in effect, a legislative rule, a procedural rule, or an interpretive rule, an agency must file a notice of the proposed rule in the State Register maintained by the Secretary of State. West Virginia Code §§ 29A-3-4 and 29A-3-9.

The process for adoption of rules is rather detailed and must be carefully followed to achieve the board's goal. The steps are summarized as follows and detailed directions are set out to explain the process further.

Step 1. Recognition of the need for a Rule.
Step 2. Drafting the Rule.
Step 3. Approval of the Board
Step 4 Format the Proposed Rule Properly.
Step 5. File Proposed Rule and notice with Secretary of State and with the Legislative Rule Making Review Committee.
Step 6. Public hearing or comment period.
Step 7 Response to public hearing or comments.
Step 8 Filing of Board Adopted Procedural or Interpretive Rule.
- Step 8A Filing of Board Approved Legislative Rule.
- Step 8B Legislative Committee consideration.
- Step 8C Complying with Committee recommendations.
- Step 8D Authorization bill prepared for the Legislative Session.
- Step 8E Approval of bill by the Legislature & Governor.

Step 9 Final Filing with the Secretary of State.
Step 10 Proof reading by the Board.

Step 1. RECOGNITION OF NEED - The process starts when the board recognizes the need for filing a new rule, amending an existing rule or revoking an existing rule or part of a rule. This need may be based on changes in State statute, federal law or regulation, a judicial order, a request by interested groups or citizens, board investigation of a problem, etc.

Step 2. DRAFTING - At the outset the board should determine whether the proposed rule will be classified as legislative, procedural or interpretive as defined by State law. The board may reclassify a procedural or interpretive rule as a legislative rule, but a legislative rule cannot become a procedural or interpretive rule.

During the process of drafting a rule, a board should seek information on content from numerous sources, i.e., staff investigations, interest groups, other State rules, other State agencies, court rulings, scientific or association publications, the board's legal counsel from the Attorney General's Office, etc. It is during the drafting stage when many problems, interests and jurisdictional conflicts can be dealt with preventing greater problems from arising during public hearings or legislative review.

Step 3. APPROVAL OF THE BOARD – Boards must approve all rules by a majority vote of the board at a public meeting held in accordance with the Open Governmental Proceedings Act.

Step 4. FORMAT THE PROPOSED RULE PROPERLY- The final draft of the proposed rule must follow the format established by the Secretary of State found in 153 W. Va. C.S.R. 6, *Standard Size and Format for Rules and Procedures for Publication of the State Register or Parts of the State Register.*

The board must include as Section 1 a "general" section. Within the "general" section there must be the following subsections -- "scope", "authority", "filing date", effective date" and if necessary a provision for "repeal of a former rule". During the time the legislative rule is proposed, the "filing date" and the "effective date" shall be blank. If the board is amending an existing rule, the new language must be underlined and the language to be deleted must be stricken through, but clearly legible. If the board is proposing major changes to an existing rule, it may decide to repeal the existing rule and replace the rule as a new rule. If so, underlining and strike-throughs are not required.

But, a provision must be placed in the GENERAL section of the proposed rule. This should only be done if the agency is proposing major changes to the rule.

Step 5. FILE PROPOSED RULE AND NOTICE WITH SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. The board shall file its proposed rule with the Secretary of State for a public hearing and/or comment period. A single copy of the following documents must be included and arranged in the following sequence when filing:

- Either Form 1 or Form 2, *Notice of Public Hearing and/or Comment Period,* signed on the bottom line.
- *Approval of Filing* by the board.
- A brief summary of the proposed Rule.
- A statement of circumstances which require this Rule.
- A fiscal note, with name of contact person and telephone number
- The Proposed Rule with numbered pages.
- A copy of any relevant federal statutes or regulations, if applicable. This is not required for Procedural or Interpretive Rule.

The board should decide whether it will hold a public hearing and/or a comment period for the Proposed Rule. The proper notice must contain the time, date and place of the public hearing and/or where the written comments may be mailed. The public hearing and/or comment period notice must be filed in the Secretary of State's office not less than thirty (30) days nor more than sixty (60) days before the date of the public hearing and/or end of the comment period. The notice must contain the Rule title and an authorized signature for filing notice.

If the Proposed Rule is a Legislative Rule, the board should file one complete set of the Proposed Rule with the Legislative Rule Making Review Committee after it is stamped as filed by the Secretary of State. Additional information may be requested by the Committee following a preliminary staff review.

Filing with the Legislative Rule Making Review Committee is not required for Procedural or Interpretive Rules.

Even though the Code only requires the notice of Public Hearing and/or Comment Period to be filed with the Secretary of State for inclusion in the State Register and grants to each agency discretion to publish the Notice as a Class I legal advertisement, the following additional dissemination is prudent:

- Capitol News Service
- Interested or affected state and local agencies
- Interested or affected federal agencies
- Interested or affected associations
- Interested or affected individuals, legislators and the Governor's Office

Step 6. PUBLIC HEARING OR COMMENT PERIOD - The conduct of the public hearing is under the discretion of the board as to the procedure that best ensures the receipt of comments. However, the manner in which comments are received and the conduct of the hearing should be partially determined by the needs of the board and the information required by the West Virginia Administrative Procedures Act for legislative review and State Register filing.

Step 7. RESPONSE TO PUBLIC HEARING OR COMMENTS - The board should review all comments received to determine possible changes in the Proposed Rule. No comments can be reviewed or accepted after the close of the public hearing and comment period. When the board has decided on changes in the Proposed Rule, it can become a “Board Approved Rule”.

ALTERNATE STEPS; 8 or 8A

Step 8. FILING A BOARD ADOPTED PROCEDURAL OR INTERPRETIVE RULE - Before the board files a Board Adopted Procedural or Interpretive Rule with the Secretary of State, the board must approve the rule by a vote in a public meeting. This must be done within six months of the public hearing or close of the comment period, or the rule will be deemed withdrawn.

Amendments can be made to a Procedural or Interpretive Rule after a public hearing and do not require an additional hearing but the amendment cannot change the main purpose of the Rule.

Step 8A. FILING A BOARD APPROVED LEGISLATIVE RULE.
Before filing the Board Approved Rule with the Secretary of State and the Legislative Rule Making Review Committee, the board must approve the rule by a vote in a public meeting. Filing must be done within ninety (90) days following the public hearing or close of the comment period, or the Rule will be deemed withdrawn (unless a specific exemption is granted by Legislative Rule Making Review Committee).

This filing is a two-step procedure. The board must first file all documents with the Secretary of State's office. After properly filing with the Secretary of State and getting them date-stamped, the board is required to file the documents with the Legislative Rule Making Review Committee.

Be sure to perform this step accurately and completely. One copy of the following documents must be filed in the following sequence with the Secretary of State:

- Form 3, *Notice of agency approval of a proposed rule and filing with the Legislative Rule Making Review Committee*, signed at the bottom.
- Approval of Filing by the board.
- Complete the Legislative Rule Making Review Committee *Questionnaire*, with name of contact person, clearly printed, address and telephone number.
- A brief summary of board Approved Rule.
- A statement of circumstances which require this rule.
- A fiscal note.
- The board Approved Rule, with numbered pages.
- If a public hearing was held, a transcript of the hearing and names of all who attended.
- Comments received, both written and oral with a response to the comments.
- Amendments made to the proposed rule as a result of comments or other information received.
- Reasons for the amendments.

The following documents are required to be included when filing a Board Approved Rule with the Legislative Rule Making Review Committee:

- Fifteen (15) copies of the document package filed with the Secretary of State's office.
- Any other information required by the Legislative Committee rules.

- Additional information may be requested by the Committee following preliminary staff review.

A Board Approved Legislative Rule will be placed on the Legislative Rule Making Review Committee agenda following completion of staff analysis. It is therefore necessary that a Board Approved Rule be filed early enough for this work to be accomplished. The board will be notified of the date of the meeting at which the Board Approved Rule will be placed on the agenda. During the course of staff analysis it may be necessary to meet with Committee staff. A copy of the staff analysis will be sent to the board and a written response to the analysis by the board may be filed with the Legislative Rule Making Review Committee or responses may be delivered orally before the Committee. When filing with the Legislative Rule Making Review Committee, complete all documents and do not omit any.

The text of the Board Approved Rule filed with the Secretary of State and with Legislative Rule Making Review Committee must be identical - word for word, comma for comma. Failure to ensure this may result in the Legislative Rule Making Review Committee's authorization of a Rule different from the agency Approved Rule in the Secretary of State's Office. The Legislature may authorize a rule that is not filed with the Secretary of State and therefore not legally in existence.

Remember that this is the filing of a Board Approved Rule and not the Final Filing of the Rule. The Rule is still only Board Approved and must be further approved by the Legislature.

Step 8B. LEGISLATIVE COMMITTEE CONSIDERATION - Board chairpersons or executive secretaries should be present at all meetings at which their Board Approved Rules are on the agenda. Support staff may also attend the meetings to aid the board chairperson or executive secretary. Be prepared to:

- Explain the need for the rule.
- Explain the general content of the rule.
- Respond to questions of the committee members.
- Respond to staff analysis, etc.

The Committee review shall also include those areas enumerated in Code §29A-3-11(b). Seven items of consideration are suggested for Legislative consideration.

The Committee may hold a public hearing on the proposed rules, delay action until later, recommend changes to be made by the board prior to Committee action at a later meeting or take action upon the Rule. After the review the Committee will recommend one of the following to the Legislature:

1. Authorize the promulgation of the legislative rule, or
2. Authorize the promulgation of part of the legislative rule, or
3. Authorize the promulgation of the legislative rule with certain amendments, or
4. Recommend that the proposed rule be withdrawn.

The Committee shall immediately file a notice of which action occurs in the State Register and with the board proposing the Legislative Rule. When the recommendation is other than approval of the proposed Legislative Rule, a statement of the reasons for such recommendation will be stated in the notice filed in the State Register and with the board.

Step 8C. COMPLYING WITH COMMITTEE RECOMMENDATIONS. In the event the Legislative Rule Making Review Committee (LRMR) authorizes the agency to promulgate the Legislative Rule as originally filed, the board is not required to file any documents with the Secretary of State's office. The Committee will submit the proposed Legislative Rule to the Legislature in its Board Approved form. If the board or the Committee decides to make changes or modifications to the Board Approved Legislative Rule, the board should consult with Committee staff on the preparation of such modifications. Again, before the board complies with the recommendations of LRMR Committee, the board must approve the rule by a vote in a public meeting. Within 10 days after the meeting of the LRMR Committee, the board must file with the Secretary of State and the LRMR Committee the following:

- Form 4, *Notice of Rule Modification of Proposed Rule*.
- Approval of Filing by the board.
- The Board Approved Legislative Rule with modifications.
- Ten copies of the foregoing documents as filed with the Secretary of State's office (and with the LRMR Committee).

If the Committee recommends that the Rule be withdrawn, the board may

comply by submitting a letter stating that the Board Approved Rule will be or is withdrawn with proper signatures to the Secretary of State's office for publication in the State Register.

Step 8D. AUTHORIZATION BILL PREPARED FOR LEGISLATURE
The LRMR Committee then drafts a Bill of Authorization including a copy of the proposed Legislative Rule to be introduced prior to the 20th day of the Legislative Session. A notice of the submission to the Legislature will be filed in the State Register by the LRMR Committee prior to the 20th day of the Session.

Step 8E. APPROVAL OF BILL BY LEGISLATURE AND GOVERNOR.
Bills of Authorization are treated like other bills and go through the usual enactment process. The agency may contact Committee staff or the Secretary of State to determine the status of any particular Bill of Authorization during the Session.

Step 9. FINAL FILING WITH SECRETARY OF STATE

For PROCEDURAL AND INTERPRETIVE RULES.
The following documents must be filed with the Secretary of State in the following order:

- Form 5, *Notice of Agency Adoption of a Procedural or Interpretive Rule ...* signed at the bottom with the effective date filled in. This must be at least 30 days but not more than 60 days after the final filing.
- Approval of Filing by the board.
- The Board Adopted Rule, with numbered pages.
- Documents from a public hearing or comments, including:
  If a public hearing was held, a transcript of the hearing and names of all who attended.
- Comments received, both written and oral with a response to the comments.
- Amendments made to the proposed rule as a result of comments or other information received.
- Reasons for the amendments.

For LEGISLATIVE RULES.
The documents required to Final File a Legislative Rule are:

- Form 6, *Notice of Final Filing and Adoption*,
- Approval of Filing by the board,
- Promulgation history of the proposed rule,
- The effective date of the legislative rule, if the Legislature has not established the effective date in the Bill of Authorization.

The board has up to 60 days following the Governor's signature of the Bill of Authorization to Final File the Legislative Rule with the Secretary of State's office. The board may set the effective date of the Legislative Rule up to 90 days from the date the Legislative Rules are Final Filed with the Secretary of State.

FOR PROCEDURAL, INTERPRETIVE AND LEGISLATIVE RULES -
The board must submit the Rule on a 3 ½" disk, in a WordPerfect compatible format, to the Secretary of State's office. The disk copy must be a clean copy, with all underlining and strike-throughs removed. The text of the computer-filed rule must be identical - word for word, comma for comma as the hard copy authorized by the Legislature or Adopted by the Board. Please state on the disk the format the rule is in and the title under which it is filed.

Step 10. PROOF READING BY THE BOARD- The Final Rule, as produced by the Secretary of State, will be sent to the board for review and proofing. The board may have up to ten (10) working days to review the Final Rule and return any corrections or a statement of confirmation. Following confirmation or corrections, as the case may be, the Secretary of State shall submit to the agency a final version of the Rule for their records. 153 W. Va. C.S.R. 6, §10.8.b.

These ten (10) steps comprise Legislative Rule-Making. If any deviation from these procedures is intended, please contact the LRMR Committee staff or the Secretary of State's office for guidance on specific cases.

Emergency Rule. An Emergency Rule is not a type of rule, rather, it is the condition of a Legislative Rule. Only Legislative Rules can be Emergency Rules. The emergency designation only allows the Rule to be effective until it is approved by the Legislature. It does not allow any of the steps in the rule making process to be omitted. Emergency rules remain valid up to fifteen (15) months from filing.

A Legislative Rule may be filed as an Emergency Rule only if it is necessary -

(1) for the immediate preservation of the public peace, health, safety or welfare;
(2) to comply with time limitations established by State law or by a federal statute or regulation; or
(3) to prevent substantial harm to the public interest.
West Virginia Code § 29A-3-15(f).

The Secretary of State's Office is required by West Virginia Code § 29A-3-15 to review all emergency rules to determine: that the scope of statutory authority has not been exceeded; that there exists a justified emergency; that the agency has complied with procedures.

The Secretary of State has forty-two (42) days from the date the rule is filed as an emergency to make this determination. The Secretary of State's determination is reviewable by the West Virginia Supreme Court of Appeals.

The Secretary of State may solicit additional information, conduct a public hearing, meet with the agency or take other actions to acquire information needed to reach a decision to approve or disapprove an emergency rule.

The Secretary of State strongly urges agencies to at least conduct a public hearing and/or comment period on a proposed rule before considering filing a proposed rule as an emergency.

An Emergency Rule will become effective upon the approval of the Secretary of State or on the forty-second (42nd) day following filing, whichever occurs first. West Virginia Code § 29A-3-15.

The LRMR Committee may review emergency rules and may recommend to the board, the Legislature or the Secretary of State any action it considers proper.

Summary

This information is not intended as a substitute for reliance on the West Virginia Code, but is intended to assist the board with its compliance. The Administrative Procedures Act is the source of the suggestions and interpretations provided above and should be consulted during the entire Rule-Making process.

The Secretary of State's office understands the complexity of Rule-Making and is pleased to help by responding to questions. Contact Ms. Judy Cooper, Director, Administrative Law Division, Secretary of State, at (304) 558-6000.

FREEDOM OF INFORMATION

Purpose. The State law concerning public records, known as the Freedom of Information Act, was enacted for the express purpose of providing full and complete information to all persons about the workings of government and the acts of those who represent them as public officials and employees. Its provisions must be liberally construed to carry out that purpose. West Virginia Code §§ 29B-1-1 *et seq*.

Scope. The Freedom of Information Act applies to all State, County and Municipal officers, governing bodies, agencies, departments, boards and commissions, and any other bodies created or primarily funded by State or local authority, unless their enabling statute specifically exempts them from its provisions. The records covered by the Freedom of Information Act include virtually all documents and information retained by a public body, regardless of their form. West Virginia Code § 29B-1-2.

Request. Records are available to every person for inspection or copying when there has been a request made to the custodian, and when they are not specifically exempted from disclosure. There is no statutory requirement that the request be in writing; however, whenever possible, a written request is advisable in order to avoid misunderstandings regarding the timing and scope of the request and to ensure that the information sought is stated, “with reasonable specificity”. West Virginia Code § 29B-1-3.

Response. The custodian must respond within five working days by either granting the request, giving written reasons for its denial, or by specifying a time and place where such record may be examined and copied. Citizens may be charged a reasonable fee for the costs of copying. West Virginia Code § 29B-1-3(5).

Exemptions. While the scope of the Act is expansive and its coverage liberally construed, it does provide specific exemptions from disclosure. These exemptions are strictly construed because the intent of the Act is disclosure and anything less than a narrow construction of exemptions would operate to defeat this intent. The exemptions set out in the law are:

1. Trade secrets and the like which would give the user an opportunity to obtain a business advantage over competitors;
2. Information of a personal nature, if disclosure would constitute an unreasonable invasion of privacy;
3. Test questions and scoring sheets and the like;
4. Law enforcement records that deal with detection and investigation of crime;
5. Other information specifically exempted by some other law;
6. Records of historic materials and sites or gifts with restrictions attached which could irreparably damage a donated manuscript, etc.;
7. Information pertaining to the operation of a financial institution, except those required to be published;
8. Internal memoranda or letters received or prepared by any public body.
9. Records assembled, prepared or maintained to prevent, mitigate or respond to terrorist acts or the threat of terrorist acts, the public disclosure of which threatens the public safety or the public health;
10. Those portions of documents containing specific or unique vulnerability assessments or specific or unique response plans, data, databases and inventories of goods or materials collected or assembled to respond to terrorist acts; and communication codes or deployment plans of law enforcement or emergency response personnel;
11. Specific intelligence information and specific investigative records dealing with terrorist acts or the threat of a terrorist act shared by and between federal and international law-enforcement agencies, state and local law enforcement and other agencies within the Department of Military Affairs and Public Safety;
12. National security records classified under federal executive order and not subject to public disclosure under federal law other records related to national security briefings to assist state and local government with domestic preparedness for acts of terrorism;
13. Computing, telecommunications and network security records, passwords, security codes or programs used to respond to or plan against acts of terrorism which may be the subject of a terrorist act;
14. Security or disaster recovery plans, risk assessments, tests or the results of those tests;

15. Architectural or infrastructure designs, maps or other records that show the location or layout of the facilities where computing, telecommunications or network infrastructure used to plan against or respond to terrorism are located or planned to be located.
16. Codes for facility security systems; or codes for secure applications for such facilities;
17. Specific engineering plans and descriptions of existing public utility plants and equipment; and
18. Customer proprietary network information of other telecommunications carriers, equipment manufacturers and individual customers, consistent with 47 U.S.C. § 222.

The exact wording of the law should be consulted and legal advice obtained before relying on an exemption from disclosure. West Virginia Code § 29B-1-4.

Enforcement. Any person denied the right to inspect a public record of a public body may sue that body in Circuit Court for injunctive or declaratory relief pursuant to the Freedom of Information Act. The burden is on the public body to prove to the satisfaction of the Court that the records sought are exempt from disclosure. West Virginia Code § 29B-1-5.

Counsel fees and costs. If successful, the person bringing the suit may recover attorney fees and court costs from the public body that denied them access to the records. West Virginia Code § 29B-1- 7.

Penalties. Any custodian of a public record who willfully violates the Act is guilty of a misdemeanor, and upon conviction may be fined from $200.00 to $1,000.00 or imprisoned in the county jail for up to twenty days, or both. West Virginia Code § 29B-1-6.

CHAPTER FIVE

FINANCIAL MATTERS

CONTENTS

LIMITATION OF THIS CHAPTER

This Chapter does not address how to process the various forms which are required by the several State departments and agencies through their rules and regulations. Valuable seminars are conducted frequently for this purpose which staff persons should be encouraged to attend by their board.

COLLECTING AND HANDLING MONEY

Setting Fees. Boards are required to set fees sufficient to carry out their responsibilities. The fees must be approved by the Legislature through the Rule-Making process. The Code provides:

> **Boards may set by rule fees relating to the licensing or registering of individuals, which shall be sufficient to enable the boards to carry out effectively their responsibilities of licensure or registration and discipline of individuals subject to their authority: Provided, That when any board proposes to promulgate a rule regarding fees for licensing or registration, that board shall notify its membership of the proposed rule by mailing a copy of the proposed rule to the membership at the time that the proposed rule is filed with the secretary of state for publication in the state register in accordance with section five, article three, chapter twenty-nine-a of this code.**
>
> West Virginia Code § 30-1-6(c).

Waiver of Fees. The Legislature has determined that licensure or registration fees of some persons may be waived or "remitted" while the person is in the military service if the board so chooses and a board rule so provides. West Virginia Code § 30-1-14.

Secretary to Receive and Account. The secretary of the board is responsible for receiving and accounting for all money the board received by way of fees or fines.

> **The secretary of every board referred to in this chapter shall receive and account for all money which it derives pursuant to the provisions of this chapter which are applicable to it. With the exception of money received as fines, each board shall pay all money which is collected**

> **into a separate special fund of the state treasury which has been established for each board. This money shall be used exclusively by each board for purposes of administration and enforcement of its duties pursuant to this chapter. Any money received as fines shall be deposited into the general revenue fund of the state treasury. When the special fund of any board accumulates to an amount which exceeds twice the annual budget of the board or ten thousand dollars, whichever is greater, the excess amount shall be transferred by the state treasurer to the state general revenue fund.**
>
> West Virginia Code § 30-1-10(a).

Deposit of License Fees and Fines. Every board is required to maintain identified funds in its name with the West Virginia State Treasurer. The board shall deposit all monies received in its ordinary course of business into those accounts. By State law, all funds received must be deposited with the State Treasurer within 24 hours. West Virginia Code § 12-2-2(a).

In the event that a board chooses to fine a licensee as part of its disciplinary action, according to West Virginia Code § 30-1-10(a) that money must be deposited in the General Revenue Fund of the State of West Virginia. Fines may only be spent from the General Revenues by specific appropriation of the Legislature. They are not otherwise at the disposal of the board.

Other Code Provisions. Persons having financial duties with any board or commission should become familiar with the provisions of Chapter 14 of the West Virginia Code, CLAIMS DUE AND AGAINST THE STATE. Those provisions are extensive and are beyond the scope of this manual.

BUDGET

Budget Requests. Requests to expend funds collected by boards or commissions must be approved in advance by the Governor (through the Cabinet Secretary of the Department of Revenue and the Budget Office) and the Legislature. The State Code provides:

> **The spending officer of each spending unit ... shall, on or before the first day of September of each year, submit to the secretary a request for appropriations for the fiscal year next ensuing....**
>
> West Virginia Code § 11B-2-3.

The request must indicate the kinds and amounts of revenue which the board expects to collect for the next year as well as the amounts collected for the preceding year. Thus a budget request encompasses three years; the one past, the one in progress, and the one which will commence the next July 1. Expenditures must be tracked for the same three periods. Justification and explanations must be provided. West Virginia Code 11B-2-4.

Governor's Request. When the Legislature convenes, the Governor submits his request to the Legislature for its approval of the expenditures. Care must be taken to ascertain whether this request anticipates the availability of Special Revenue funds generated by increased fees and remember that fees must be approved by the Legislative Rule-Making process.

Legislative Action. After hearings by the Finance Committees of both houses of the Legislature, the separate budget bills are passed then reconciled by a Conference Committee and finally sent to the Governor for approval or line item veto.

Expenditure Schedules. Assuming legislative and gubernatorial approval, the board will be authorized to expend its collected licensing and registration fees according to the approved budget and an Expenditure Schedule which must be filed with the Secretary of the Department of Revenue and a copy thereof filed with the Legislative Auditor. West Virginia Code § 11B-2-12.

EXPENDITURE OF FUNDS

Use of Fees. Boards are authorized to use the license and registration fees its collects "exclusively for purposes of administration and enforcement of its duties ...". Since lobbying and public relations activities are not part of any board's "duties", such expenditures are not legal. West Virginia Code § 30-1-10(a). The use of funds is subject to audit during the payment process by the State Auditor and, after disbursement, by the Legislative Auditor. West Virginia Code § 30-1-10(b).

Travel Expenses. Reimbursement of authorized travel for board members must be in a manner consistent with guidelines of the Travel Management Office of the Department of Administration. West Virginia Code § 30-1-11(b).

Board Compensation. The Code states:

> **Each member of every board . . . is entitled to receive compensation for attending official meetings or engaging in official duties not to exceed the amount paid to members of the Legislature for their interim duties as recommended by the Citizens Legislative Compensation Commission and authorized by law. A board member may not receive compensation for travel days that are not on the same day as the official meeting or official duties.**
>
> West Virginia Code § 30-1-11(a).

PAYMENTS TO VENDORS

Payments made to vendors processed through the State Auditor's Office on behalf of the State of West Virginia are typically paid one (1) of three (3) ways; by the traditional warrant, ACH, or the State Purchasing Card.

The State of West Virginia Purchasing Card (P-Card) Program was created and implemented in 1996 by West Virginia Code, §12-3-10a, and is governed by Legislative Rule, 155 CSR 7. The State Auditor's Office Purchasing Card Division serves as the Program Administrator for the P-Card Program.

The P-Card is the preferred method of payment and provides the most efficient and effective method of payment for expenditures incurred by Spending Units as outlined by the P-Card Policies and Procedures. The P-

Card effectively decreases expenses and cuts program costs by offering increased control and monitoring of payments while reducing the time and paperwork associated with the use of purchase orders.

The P-Card Policies and Procedures Manual, which can be found on the State Auditor's Office web-site located at www.wvsao.gov, establishes minimum standards for the use of the State of West Virginia P-Card. P-Cards are issued at the request of the board P-Card coordinator upon completion of designated training. Individual transaction limits and credit limits shall be determined by each board P-Card coordinator upon approval by the State Auditor's Office P-Card Division.

It is the board's coordinator's and cardholder's responsibility to be knowledgeable of and to follow all P-Card policies and procedures, as well as all applicable purchasing laws and guidelines.

Each board is required to develop and document appropriate internal control procedures to ensure that P-Card usage is consistent with the P-Card Policies and Procedures Manual, and to develop guidelines for distribution to cardholders. Sufficient internal controls must be in place to ensure compliance with P-Card Policies and Procedures and documentation of these controls must be submitted in writing to the State Auditor's Office P-Card Division. In those cases where it is determined that internal controls are not adequate, the State Auditor's Office P-Card Division has the authority to request policy improvements and/or place card restrictions on the board until such controls are established, documented, and implemented.

Each board's chief financial officer or individual acting in that capacity for the board shall serve as the head board's P-Card coordinator. Each board's chief financial officer is responsible for the administration of the P-Card Program within their board.

Upon designation by the board's chief financial officer, a board must receive training, education, and certification designed and approved by the State Auditor's Office P-Card Division within thirty (30) days of assuming the duties of the position.

A written report of P-Card transactions including the vendor, description of good or service and total transaction amount must regularly be provided to

board members to be approved or ratified at regularly scheduled meetings. A copy of the report, as well as the minutes of the meeting, must be available for review by the State Auditor's Office P-Card Division with the reconciliation documentation.

Leasing. A board does not have the prerogative of negotiating its own leases. Leases of space and land are managed by the Leasing Section, General Services Division, Department of Administration.

Contracts. Competitive bidding is the foundation of public purchasing in the State of West Virginia. This process provides for a determination of the best buy for needed products or services. There are two levels of purchasing authority, depending upon the dollar value of the purchase. Some purchases may be made directly by the board. Others must be made through the Purchasing Division of the State Department of Administration. This Division was created and its duties are enumerated in the State Code. The pertinent statute provides:

> **There is hereby created the purchasing division of the department of administration for the purpose of establishing centralized offices to provide purchasing, travel and leasing services to the various state agencies ... The provisions of this article shall apply to all of the spending units of state government, except as otherwise provided by this article or by law ....**
>
> West Virginia Code § 5A-3-1.

The Purchasing Division operates pursuant to Legislative Rules and Regulations which serve as an explanation and clarification of operational procedures for the purchase of products and services. These Rules and Regulations are found in 148 W. Va. C.S.R. 1. In addition, the Purchasing Division also issues the Purchasing Procedures Handbook which can found on the Internet at the following address - www.state.wv.us/admin/purchase/Handbook/default.htm. The Purchasing Procedures Handbook provides expanded, specific guidance on the purchasing processes and requirements of the State of West Virginia.

Boards have delegated purchasing authority to make purchases estimated to cost $25,000.00 or less. Depending upon the estimated cost, the board must solicit bids from at least three responsible bidders.

Purchases of $2,500 or less; use the State Purchasing Card for most purchases (*See earlier mentioned P-Card Policies and Procedures Manual for some exclusions*)

Purchases of $2,501 to $5,000; three verbal bids are required.

Purchases of $5,001 to $25,000; three written bids are required.

Purchases over $25,000; bids or proposals must be solicited by the Purchasing Division of the State Department of Administration. This is accomplished by using Requests for Quotations (RFQ) or Requests for Proposals (RFP). The Purchasing Division is the central purchasing agency for products and services required by all State agencies. All requests or requisitions expected to exceed $25,000 must be processed through the Purchasing Division, which has authority to make, amend, or repeal regulations set forth to comply with State law. The Purchasing Director may make specific exemptions in particular purchases if it is in the best interest of the State of West Virginia. In addition, the Purchasing Division has the responsibility for the standardization of products and services purchased, and may adopt standard specifications to apply to all purchases, unless specifically exempt.

The purchasing process has incorporated a practical philosophy of Best Value Purchasing in order to achieve more expedient and cost-efficient acquisitions. Best Value Purchasing is often used to provide the award of a contract which is most advantageous to the buyer based on evaluating and comparing all pertinent factors in addition to cost so that the overall combination that best serves the State's interest is chosen. This method is often used to acquire services where the specifications or scope of work may not be well-defined and/or cost is not the sole factor in determining the award.

A Request for Proposal (RFP) is used to solicit proposals from potential bidders, taking into consideration the vendor's ability, resources, experience and proposed methods to furnish the required services. RFP's must have a minimum estimated value of $250,000.00, which has been established to eliminate a time-consuming process for low dollar purchases. All procurement under $250,000.00 must use another purchasing method such as Request for Quotation (RFQ). All RFP's follow a standard format defined by the Purchasing Division and are evaluated by the criteria established in the

proposal. A committee of at least three persons knowledgeable in the service to be acquired are trained in the process and evaluate all proposals and recommend an award which is submitted to the Purchasing Division for approval.

Vehicles. A Fleet Management Office is maintained to provide transportation services to all executive branch agencies of State government - with certain exceptions. This is required by State law in West Virginia Code §§ 5A-3-48 through 50. The purpose of the program is to consolidate services and reduce expenditures.

Vehicles are purchased by the Fleet Management Office and leased to boards and other agencies. The lease rates allow the using board to participate in the Automotive Rentals, Inc. (ARI) Vehicle Maintenance Program which provides close monitoring of maintenance expenses and assures that State vehicles receive quality repairs from authorized service facilities. It also facilitates centralized reporting for the legislative and executive branches.

Terms of the vehicle lease include;

- The vehicle should be leased as long as the work environment requires its use;
- The rates will be evaluated each fiscal year and adjusted accordingly;
- The using board (lessee) is responsible for operating expenses, damages, abuse, accidents, neglect, maintenance and cleaning as well as payment of parking and driving violations; and
- All travel must be for official State business.
- Additional requirements are:
    - Seat belts must be worn;
    - Speed limits must be obeyed;
    - No smoking or intake of alcohol or illegal drugs; and
    - All drivers must have a current, valid West Virginia driver's license.

PROPERTY

Inventory Management. Boards are responsible for all property in its possession, regardless of its nature (removable or fixed), origin or acquisition cost. The Purchasing Division of the Department of Administration has established a threshold value of $1,000 and a useful life of one year or more for reporting property. However, firearms, regardless of cost and all computers (including laptops and central processing units (CPU) with an acquisition cost of $500 or more are considered to be reportable property. Property meeting this criteria must be documented in the WVFIMS Fixed Asset System. A board may choose to include property worth less than $1000 in its inventory system.

All equipment valued at more than $1000, along with any other equipment with a value of less than a $1,000 which meets the definition of "reportable property" is required to be identified with a numbered tag and placed into the WVFIMS Fixed Assets System. Boards are responsible for obtaining and placing the proper tags on all equipment under their jurisdiction.

The head of every department of state government must, by July 15 of each year, file with the Director of the Purchasing Division a certificate that all personal property in its possession as of the close of the last fiscal year was properly entered into the WVFIMS Fixed Assets System in accordance with policy and the WVFIMS Fixed Assets Training Manual. This certification is kept on file at the Purchasing Division and is a public record. The automated system contains the acquisition date and cost, an item description, serial number, make and model, manufacturer, asset type and any other elements deemed necessary by the Purchasing Director. West Virginia Code § 5A-3-35.

The Purchasing Division of the Department of Administration has the responsibility for reviewing and verifying a board's inventory and implementing guidelines to maintain control over their State-owned property. West Virginia Code § 5A-3-34.

Surplus Property. All State property which is no longer needed by the owning board, must be disposed of through the Surplus Property unit of the Purchasing Division. This applies to all property, even that costing less than $1,000. The board may:

- Deliver property to the Surplus Property unit;
- Request the Surplus Property unit to pick up the property;
- Request sale on site;
- Request vendor trade-in;
- Sell for scrap; and
- Send to landfill.

The Surplus Property Unit must approve all methods of disposition. The unit sells up to one and a half million dollars worth of property each year and pays its operating costs entirely from a portion of the sale proceeds.

The surplus property program offers eligible public agencies and certain non-profit organizations an opportunity to receive property that is no longer needed by a State agency or the federal government. The program combats the problem of property deterioration due to improper storage or misuse and, thus, prolongs the utilization of government property. Thousands of organizations have obtained good, usable property at a substantially reduced price through this program.

The surplus property program and its management are provided by State law in West Virginia Code §§ 5A-3-43 through 46.

Property acquired through the State Surplus Property Program must only be used by the eligible acquiring agency and is subject to restrictions on its disposal by that agency. Personal use of such property is strictly prohibited.

AUDIT & REVIEW

Financial Accounting and Reporting. Financial reporting and accounting is the responsibility of a section of the Finance Division of the Department of Administration. A comptroller heads the Financial Reporting and Accounting section. That section maintains the centralized accounting system of the State. That system provides for “adequate internal controls, accounting

procedures, recording income collections, systems operation procedures and manuals, and periodic and annual general purpose financial statements, as well as provides for the daily exchange of needed information among users." West Virginia Code § 5A-2-24.

Legislative Post Audit. A post audit is defined by West Virginia Code § 4-2-2 as an audit or review of governmental finances after they have been expended. The scope of a post audit includes audit or review of transactions pertaining to the financial operations of the various agencies of government on the State level, with verification of State revenues at the source and audit of expenditures all the way through the work to the recipient or beneficiary of the service.

The post audit is performed by the Post Audit Division of the Legislative Auditor's Office. As the title indicates, this is a Legislative branch organization, as distinguished from the State Auditor whose office is a constitutional part of the Executive branch of government. The Post Audit Division of the Legislative Auditor's office is responsible for performing the following duties:

- Conduct post audits of the revenues and expenditures of the spending units of the state government, at least once every two years, if practicable;
- Reports any misapplication of state funds or erroneous, extravagant or unlawful expenditures by any spending unit; and,
- Ascertains facts and makes recommendations to the Legislature concerning post audit findings.

Some agencies must be audited annually but currently none of those are Licensing or Registration Boards.

The Legislative Post Audit Division reports its findings and recommendations to the Legislative Post Audit Committee of the Legislature. This committee is comprised of the Senate President, House Speaker, Senate Finance Chairman, House Finance Chairman, Senate Minority Leader and House Minority Leader. The President and Speaker serve as Co-Chairs of the Committee. A member of the Legislature may request in writing to the Co-Chairs of the Committee that an audit be done.

Performance Evaluation under the Sunset Law. Agencies of State government are subject to periodic review to determine whether they should remain in operation. This is pursuant to West Virginia Code §§ 4-10-1 *et seq*. Before their scheduled "sunset" date, an evaluation is made for the guidance of the Legislature. The Performance Evaluation and Research Division (PERD), a division of the Office of the Legislative Auditor, conducts this performance audit or evaluation of boards, commissions and agencies of State government. It considers questions of how well the board is performing its duties and it can involve the finances of the board. Not all licensing boards are currently on the "Sunset schedule" but are added from time to time to reflect a concern of the Legislature.

When a "Sunset" audit or evaluation is to be performed, boards are notified. An entrance conference is arranged with the chair or executive director of the board. General questions are addressed, the process is explained and the auditor assigned to conduct the work requests certain documents to begin the process. Many times the first documentation requested are the minutes of the board meetings, annual reports, and complaints filed, including the disposition of the same for a three year period. Following the completion of fieldwork, a draft report is written and shared with the representatives of the board for its review. Any factual or interpretive errors are corrected immediately. There are occasions when the auditors and the board members agree to disagree. The board then has an opportunity to write an official response to the audit report, which is published as an appendix to the report.

The report is then presented orally to the Joint Committee on Government Operations, an Interim Committee comprised of five senators, five house members and five citizen members appointed by the Governor. During the presentation, the agency is given an opportunity to make an oral response to the report and answer Legislators' questions. The Joint Committee votes to receive the report, at which time it becomes available to the public and the news media. The Joint Committee also votes to extend the board for one to six years, depending on the problems found. That vote is presented during the next Regular Session to the full Legislature in a bill.

At the beginning of the January Session of the Legislature reports are presented again to the standing committees on Government Organization of each house and copies are provided to each member of the Legislature.

All of the reports contain recommendations regarding questions answered in the report. If the committee agrees with these recommendations, the board is asked to comply and a follow-up is scheduled for the next year. Most problems found are easily fixed and are problems arising out of not knowing certain rules of government operations.

WEST VIRGINIA CODE

Excerpts

(not all chapters, articles or sections are included)

always check for amendments since this printing

CHAPTER 3. ELECTIONS

Article 8. Regulation and Control of Elections.

§ 3-8-12. Additional acts forbidden; circulation of written matter; newspaper advertising; solicitation of contributions; intimidation and coercion of employees; promise of employment or other benefits; limitations on contributions; public contractors; penalty.

(a) No person shall publish, issue or circulate, or cause to be published, issued or circulated, any anonymous letter, circular, placard, or other publication tending to influence voting at any election.

(b) No owner, publisher, editor or employee of a newspaper or other periodical shall insert, either in its advertising or reading columns, any matter, paid for or to be paid for, which tends to influence the voting at any election, unless directly designating it as a paid advertisement and stating the name of the person authorizing its publication and the candidate in whose behalf it is published.

(c) No person shall, in any room or building occupied for the discharge of official duties by any officer or employee of the state or a political subdivision thereof, solicit orally or by written communication delivered therein, or in any other manner, any contribution of money or other thing of value for any party or political purpose, from any postmaster or any other officer or employee of the federal government, or officer or employee of the state, or a political subdivision thereof. No officer, agent, clerk or employee of the federal government, or of this state, or any political subdivision thereof, who may have charge or control of any building, office or room, occupied for any official purpose, shall knowingly permit any person to enter the same for the purpose of therein soliciting or receiving any political assessments from, or delivering or giving written solicitations for, or any notice of, any political assessments to, any officer or employee of the state, or a political subdivision thereof.

(d) Except as provided in section eight [§ 3-8-8] of this article, no person entering into any contract with the state or its subdivisions, or any department or agency thereof, either for rendition of personal services or furnishing any material, supplies or equipment or selling any land or building to the state, or its subdivisions, or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land or building is to be made, in whole or in part, from public funds shall, during the period of negotiation for or performance under such contract or furnishing of materials, supplies, equipment, land or buildings, directly or indirectly, make any contribution to any political party, committee or candidate for public office or to any person for political purposes or use; nor shall any person or firm solicit any contributions for any such purpose during any such period.

(e) No person shall, directly or indirectly, promise any employment, position, work, compensation or other benefit provided for, or made possible, in whole or in part, by act of the Legislature, to any person as consideration, favor or reward for any political activity for the support of or opposition to any candidate, or any political party in any election.

(f) No person shall, directly or indirectly, make any contribution in excess of the value of one thousand dollars in connection with any campaign for nomination or election to or on behalf of any statewide or national elective office, or in excess of the value of one thousand dollars, in connection with any other campaign for nomination or election to or on behalf of any other elective office in the state or any of its subdivisions, or in connection with or on behalf of any committee or other organization or person engaged in furthering, advancing or advocating the nomination or election of any candidate for any such office.

(g) (1) Notwithstanding the provisions of subsection (f) of this section to the contrary, the aggregate contributions made to a state party executive committee shall be permitted only pursuant to the limitations imposed by the provisions of this subsection.

(2) No person shall, directly or indirectly, make contributions to a state party executive committee which, in the aggregate, exceed the value of one thousand dollars in any calendar year.

(h) The limitations on contributions contained in this section do not apply to transfers between and among a state party executive committee or a state party's legislative caucus political committee from national committees of the same political party: Provided, That transfers permitted herein shall not exceed fifty thousand dollars in the aggregate in any calendar year to any such state party executive committee or state party legislative caucus political committee: Provided, however, That such moneys transferred shall only be used for voter registration and get-out-the-vote activities of the state committees.

(i) No person shall solicit any contribution from any nonelective salaried employee of the state government or of any of its subdivisions or coerce or intimidate any such employee into making such contribution. No person shall coerce or intimidate any nonsalaried employee of the state government or any of its subdivisions into engaging in any form of political activity. The provisions hereof shall not be construed to prevent any such employee from making such a contribution or from engaging in political activity voluntarily, without coercion, intimidation or solicitation.

(j) No person shall solicit a contribution from any other person without informing such other person at the time of such solicitation of the amount of any commission, remuneration or other compensation that the solicitor or any other person will receive or expect to receive as a direct result of such contribution being successfully collected. Nothing in this subsection shall be construed to apply to solicitations of contributions made by any person serving as an unpaid volunteer.

(k) No person shall place any letter, circular, flyer, advertisement, election paraphernalia, solicitation material or other printed or published item tending to influence voting at any election in a roadside receptacle unless it is: (1) Approved for placement into a roadside receptacle by the

business or entity owning the receptacle; and (2) contains a written acknowledgment of such approval. This subdivision does not apply to any printed material contained in a newspaper or periodical published or distributed by the owner of the receptacle. The term "roadside receptacle" means any container placed by newspaper or periodical business or entity to facilitate home or personal delivery of a designated newspaper or periodical to its customers.

(1) Any person violating any provision of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one thousand dollars, or confined in jail for not more than one year, or, in the discretion of the court, be subject to both such fine and confinement.

CHAPTER 4. THE LEGISLATURE

Article 2: Legislative Auditor; Powers; Functions; Duties; Compensation

§ 4-2-2. Definitions.

For the purposes of this article: "Committee" means the joint committee on government and finance of the Senate and House of Delegates.

"Full performance evaluation" means to determine for an agency whether or not the agency is operating in an efficient and effective manner and to determine whether or not there is a demonstrable need for the continuation of the agency, pursuant to the provisions of section ten [§ 4-10-10], article ten of this chapter.

"Post audit" is the audit or review of governmental finances after they have been completed. The scope of a post audit includes audit or review of transactions pertaining to the financial operations of the various agencies of government on the state level, with verification of state revenues at the source and audit of expenditures all the way through the work to the recipient or beneficiary of the service.

"Preliminary performance review" means to determine for an agency whether or not the agency is performing in an efficient and effective manner and to determine whether or not there is a demonstrable need for the continuation of the agency pursuant to the provisions of section eleven [§ 4-10-11], article ten of this chapter.

"Spending unit" means any department, agency, board, commission, officer, authority, subdivision or institution of the state government for or to which an appropriation has been made, or is to be made by the Legislature.

Article 2A. Compensation for and Expenses of Members of the Legislature

§ 4-2A-5. Interim compensation for members.

In addition to the basic and any additional compensation provided for in sections two, three and four [§§ 4-2A-2, 4-2A-3 and 4-2A-4] of this article, each member shall receive interim compensation of one hundred dollars per day for each day actually engaged in the performance of interim duties as a member of any interim committee between regular sessions of the Legislature:

Provided, That the total additional interim compensation payable to any member and his replacement, if any, on a committee or commission under the provisions of this section shall not exceed the sum of three thousand dollars per calendar year.

§ **4-2A-6. Travel expenses.**

Each member of the Legislature shall be entitled to be reimbursed, upon submission of an expense voucher, for expenses incurred incident to travel in the performance of his or her duties as a member of the Legislature or any committee of the Legislature, whether such committee is operating under general law or resolution, including, but not limited to, attendance at party caucuses held in advance of the date of the assembly of the Legislature in regular session in odd-numbered years for the purpose of selecting candidates for officers of the two houses, at a rate equal to that paid by the travel management office of the department of administration for the most direct usually traveled route, if travel is by private automobile, or for actual transportation costs for direct route travel, if travel is by public carrier, or for any combination of such means of transportation actually used, plus the cost of necessary taxi or limousine service, tolls and parking fees in connection therewith, but during any regular, extension of regular or extraordinary session, travel expenses shall not be paid to any member for more than one round trip to and from the seat of government and to and from his or her place of residence for each week of any such session.

In addition to the above travel expense, the president of the Senate and the speaker of the House of Delegates shall be entitled to be reimbursed as provided above, upon submission of an expense voucher, for expenses incurred incident to travel for up to a maximum of eighty days per calendar year in connection with their visits to the capitol building for business which is related to their duties as presiding officers of the respective houses of the Legislature, but which takes place when the Legislature is not in regular, extension of regular or extraordinary session and interim committees are not meeting.

The rate paid for mileage pursuant to this section may change from time to time in accordance with changes in the reimbursement rates established by the travel management office, or its successor agency.

§ **4-10-2. Legislative findings.**

The Legislature finds that state governmental actions have produced substantial increases in the number of agencies and programs, proliferation of rules and regulations, and that the agencies and programs often have developed without sufficient legislative oversight, regulatory accountability or an effective system of checks and balances; that agencies and programs have been created without demonstrable evidence that their benefits to the public clearly justify their creation; that once established, agencies and programs tend to acquire permanent status, often without regard for the condition that gave rise to their establishment; that the personnel of such agencies and programs often are beyond the effective control of elected officials, and efforts to encourage modernization or even to review performance typically have proven difficult at best; that too often, agencies and programs acquire a combination of autonomy and authority inconsistent with democratic principles and acquire a capacity for self-perpetuation incompatible with principles of accountability; and that by establishing a system for the termination, continuation or reestablishment of such agencies and programs following thorough review of their operation and performance, the position of the Legislature to evaluate the need for the continued existence of agencies and programs will be enhanced.

CHAPTER 5A. DEPARTMENT OF ADMINISTRATION

Article 2. Finance Division

§ 5A-2-3. Requests for appropriations; copies to legislative auditor.
The spending officer of each spending unit, other than the legislative and the judicial branches of state government, shall, on or before the first day of September of each year, submit to the secretary a request for appropriations for the fiscal year next ensuing. On or before the same date, the spending officer shall also transmit two copies of such request to the legislative auditor for the use of the finance committees of the Legislature.

If the spending officer of any spending unit fails to transmit to the legislative auditor two copies of the request for appropriations within the time specified in this section, the legislative auditor shall notify the secretary, auditor and treasurer of such failure, and thereafter no funds appropriated to such spending unit shall be encumbered or expended until the spending officer thereof has transmitted such copies to the legislative auditor.

If a spending officer submits to the secretary an amendment to the request for appropriations, two copies of such amendment shall forthwith be transmitted to the legislative auditor.

Notwithstanding any provision in this section to the contrary, the state superintendent of schools shall, on or before the fifteenth day of December of each year, submit to the secretary a request for appropriations for the fiscal year next ensuing for state aid to schools and two copies of such request to the legislative auditor for the use of the finance committees of the Legislature. The request for appropriation shall be accompanied with copies of certified enrollment and employee lists from all county superintendents for the current school year. If certified enrollment and employee lists are not available to the state superintendent from any of the county school boards, the state superintendent shall notify those school boards and no funds shall be expended for salary or compensation to their county superintendent until the certified lists of enrollment and employees are submitted.

§ 5A-2-4. Contents of requests.
A request for an appropriation for a spending unit shall specify and itemize in written form:

(1) A statement showing the amount and kinds of revenue and receipts collected for use of the spending agency during the next preceding fiscal year and anticipated collections for the fiscal year next ensuing;

(2) A statement by purposes and objects of the amount of appropriations requested for the spending unit without deducting the amount of anticipated collections of special revenue, federal funds or other receipts;

(3) A statement showing the actual expenditures of the spending unit for the preceding year and estimated expenditures for the current fiscal year itemized by purposes and objects, including those from regular and supplementary appropriations, federal funds, private contributions, transfers, allotments from an emergency or contingent fund and any other expenditures made by

or for the spending unit;

(4) A statement showing the number, classification and compensation of persons employed by the spending unit distinguishing between regular, special and casual employees during the preceding fiscal year and during. the current fiscal year. The statement shall show the personnel requirements in similar form for the ensuing fiscal year for which appropriations are requested;

(5) A statement showing in detail the purposes for which increased amounts of appropriations, if any, are requested, and giving a justification statement for the expenditure of the increased amount. A construction or other improvement request shall show in detail the kind and scope of construction or improvement requested;

(6) A statement of money claims against the state arising out of the activities of the spending unit; and

(7) Such other information as the secretary may request.

§ 5A-2-12. Submission of expenditure schedules; contents; submission of information on unpaid obligations; copies to legislative auditor.

Prior to the beginning of each fiscal year, the spending officer of a spending unit shall submit to the secretary a detailed expenditure schedule for the ensuing fiscal year. The schedule shall be submitted in such form and at such time as the secretary may require.

The schedule shall show:
(1) A proposed monthly rate of expenditure for amounts appropriated for personal services;

(2) Each and every position budgeted under personal services for the next ensuing fiscal year, with the monthly salary or compensation of each such position;

(3) A proposed quarterly rate of expenditure for amounts appropriated for employee benefits, current expenses, equipment and repairs and alterations classified by a uniform system of accounting as called for in section twenty five [5A-2-25] of this article for each item of every appropriation;

(4) A proposed yearly plan of expenditure for amounts appropriated for buildings and lands; and

(5) A proposed quarterly plan of receipts itemized by type of revenue.

The secretary may accept a differently itemized expenditure schedule from a spending unit to which the above itemizations are not applicable.

The secretary shall consult with and assist spending officers in the preparation of expenditure schedules.

Within fifteen days after the end of each month of the fiscal year, the head of every spending unit shall certify to the legislative auditor the status of obligations and payments of the spending unit for amounts of employee benefits, including, but not limited to, obligations and payments for

social security withholding and employer matching, public employees insurance premiums and public employees retirement and teachers retirement systems.
When a spending officer submits an expenditure schedule to the secretary as required by this section, the spending officer shall at the same time transmit a copy thereof to the legislative auditor and the joint committee on government and finance or its designee. If a spending officer of a spending unit fails to transmit such copy to the legislative auditor on or before the beginning of the fiscal year, the legislative auditor shall notify the secretary, auditor and treasurer of such failure, and thereafter no funds appropriated to such spending unit shall be encumbered or expended until the spending officer thereof has transmitted such copy to the legislative auditor.

§ 5A-2-24. Management accounting.

It is the intent of this section to establish a centralized accounting system for the offices of the auditor, treasurer, board of investments, secretary of administration and each spending unit of state government to provide more accurate and timely financial data and increase public accountability.

Notwithstanding any provision of this code to the contrary, the secretary shall develop and implement a new centralized accounting system for the planning, reporting and control of state expenditures in accordance with generally accepted accounting principles to be used by the auditor, treasurer, board of investments, secretary and all spending units. The accounting system shall provide for adequate internal controls, accounting procedures, recording income collections, systems operation procedures and manuals, and periodic and annual general purpose financial statements, as well as provide for the daily exchange of needed information among users.

The financial statements shall be audited annually by outside independent certified public accountants, who shall also issue an annual report on federal funds in compliance with federal requirements.

The secretary shall implement the centralized accounting system no later than the thirty-first day of December, one thousand nine hundred ninety three, and, after approval of the system by the governor, shall require its use by all spending units. The auditor, treasurer, board of investments, secretary and every spending unit shall maintain their computer systems and data files in a standard format in conformity with the requirements of the centralized accounting system. Any system changes must be approved in advance of such change by the secretary. The auditor, treasurer, board of investments and secretary shall provide on-line interactive access to the daily records maintained by their offices.

Article 3. Purchasing Division

§ 5A-3-1. Division created; purpose; director; applicability of article; continuation.
There is hereby created the purchasing division of the department of administration for the purpose of establishing centralized offices to provide purchasing, travel and leasing services to the various state agencies.

No person shall be appointed director of the purchasing division unless that person is, at the time of appointment, a graduate of an accredited college or university and shall have spent a minimum of ten of the fifteen years immediately preceding his or her appointment employed in an executive capacity in purchasing for any unit of government or for any business, commercial or

industrial enterprise.

The provisions of this article shall apply to all of the spending units of state government, except as is otherwise provided by this article or by law: Provided, That the provisions of this article shall not apply to the legislative branch unless otherwise provided or the Legislature or either house thereof requests the director to render specific services under the provisions of this chapter, nor to purchases of stock made by the alcohol beverage control commissioner, nor to purchases of textbooks for the state board of education.

Pursuant to the provisions of article ten [{ 4-10-1 et seq.], chapter four of this code, the purchasing division within the department of administration shall continue to exist until the first day of July, two thousand one.

§ 5A-3-17. Purchases or contracts violating article void; personal liability.
If a spending unit purchases or contracts for commodities contrary to the provisions of this article or the rules and regulations made thereunder, such purchase or contract shall be void and of no effect. The head of such spending unit shall be personally liable for the costs of such purchase or contract, and, if already paid out of state funds, the amount thereof may be recovered in the name of the state in an appropriate action instituted therefor.

§ **5A-3-34. Authority over inventories and property.**
The director shall, under the direction and supervision of the secretary, have full authority over inventories and property.

§ **5A-3-35. Submission of annual inventories.**
The head of every spending unit of state government shall, on or before the fifteenth day of July of each year, file with the director an inventory of all real and personal property, and of all equipment, supplies and commodities in its possession as of the close of the last fiscal year, as directed by the director.

§ 5A-3-38. Leases for space to be made in accordance with article; exception.
Notwithstanding any other provision of this code, no department, agency or institution of state government shall lease, or offer to lease, as lessee, any grounds, buildings, office or other space except in accordance with this article: Provided, That the provisions of this article except as to office space shall not apply in any respect whatever to the division of highways of the department of transportation.

§ 5A-3-39. Leasing of space by secretary; delegation of authority.
The secretary is authorized to lease, in the name of the state, any grounds, buildings, office or other space required by any department, agency or institution of state government: Provided, That the, secretary may expressly delegate, in writing, the authority granted to him by this article to the appropriate department, agency or institution of state government when the rental and other costs to the state do not exceed the sum specified by regulation in any one fiscal year or when necessary to meet bona fide emergencies arising from unforeseen causes.

§ 5A-3-40. Selection of grounds, etc.; acquisition by contract or lease; long-term leases; requiring approval of secretary for permanent changes.
The secretary shall have sole authority to select and to acquire by contract or lease, in the name of the state, all grounds, buildings, office space or other space, the rental of which is necessarily

required by any spending unit, upon a certificate from the chief executive officer or his designee of said spending unit that the grounds, buildings, office space or other space requested is necessarily required for the proper function of said spending unit, that the spending unit will be responsible for all rent and other necessary payments in connection with the contract or lease and that satisfactory grounds, buildings, office space or other space is not available on grounds and in buildings now owned or leased by the state. The secretary shall, before executing any rental contract or lease, determine the fair rental value for the rental of the requested grounds, buildings, office space or other space, in the condition in which they exist, and shall contract for or lease said premises at a price not to exceed the fair rental value thereof.

The secretary is hereby authorized to enter into long-term agreements for buildings, land and space for periods longer than one fiscal year: Provided, That such long-term lease agreements shall not be for periods in excess of forty years, except that the secretary may, in the case of the adjutant general's department, enter into lease agreements for a term of fifty years or a specific term of more than fifty years so as to comply with federal regulatory requirements, and shall contain, in substance, all the following provisions: (1) That the department of administration, as lessee, shall have the right to cancel the lease without further obligation on the part of the lessee upon giving thirty days' written notice to the lessor, such notice being given at least thirty days prior to the last day of the succeeding month; (2) that the lease shall be considered canceled without further obligation on the part of the lessee if the state Legislature or the federal government should fail to appropriate sufficient funds therefor or should otherwise act to impair the lease or cause it to be canceled; and (3) that the lease shall be considered renewed for each ensuing fiscal year during the term of the lease unless it is canceled by the department of administration before the end of the then current fiscal year.

A spending unit which is granted any grounds, buildings, office space or other space leased in accordance with this section may not order or make permanent changes of any type thereto, unless the secretary has first determined that the change is necessary for the proper, efficient and economically sound operation of the spending unit. For purposes of this section, a "permanent change" means any addition, alteration, improvement, remodeling, repair or other change involving the expenditure of state funds for the installation of any tangible thing which cannot be economically removed from the grounds, buildings, office space or other space when vacated by the spending unit.

§ 5A-3-41. Leases and other instruments for space signed by secretary or director; approval as to form; filing

Leases and other instruments for grounds, buildings, office or other space shall be signed by the secretary or director in the name of the state. They shall be approved as to form by the attorney general. A lease or other instrument for grounds, buildings, office or other space that contains a term, including any options, of more than six months for its fulfillment shall be filed with the state auditor.

§ 5A-3-42. Leasing for space rules and regulations.

The secretary shall have the power and authority to promulgate such rules and regulations as he may deem necessary to carry out the provisions of sections thirty-eight, thirty-nine, forty and forty-one [§§ 5A-3-38 to 5A-3-41] of this article.

§ 5A-3-43. State agency for surplus property created.

There is hereby established within the purchasing division and under the supervision of the

director of the purchasing division the state agency for surplus property.

§ 5A-3-44. Authority and duties of state agency for surplus property.

(a) The state agency for surplus property is hereby authorized and empowered (1) to acquire from the United States of America such property, including equipment, materials, books or other supplies under the control of any department or agency of the United States of America as may be usable and necessary for educational, fire protection and prevention, rescue, or public health purposes, including research; (2) to warehouse property acquired; and (3) to distribute the property to tax-supported medical institutions, hospitals, clinics, fire departments, rescue squads, health centers, school systems, schools, colleges and universities within the state, and to other nonprofit medical institutions, hospitals, clinics, volunteer fire departments, volunteer rescue squads, health centers, schools, colleges and universities within the state which have been held exempt from taxation under the Internal Revenue Code of 1986, as amended.

(b) For the purpose of executing its authority under this article, the state agency for surplus property is authorized and empowered to adopt, amend or rescind rules and regulations as may be deemed necessary, and take other action necessary and suitable in the administration of this article, including the enactment and promulgation of rules and regulations necessary to bring this article and its administration into conformity with any federal statutes or rules and regulations promulgated under federal statutes for the acquisition and disposition of surplus property.

(c) The state agency for surplus property is authorized and empowered to appoint advisory boards or committees necessary to the end that this article and the rules and regulations promulgated hereunder conform with federal statutes and rules and regulations promulgated under federal statutes for the acquisition and disposition of surplus property.

(d) The state agency for surplus property is authorized and empowered to take action, make expenditures and enter into contracts, agreements and undertakings for and in the name of the state, require reports, and make investigations as may be required by law or regulation of the United States of America in connection with the receipt, warehousing and distribution of property received by the state agency for surplus property from the United States of America.

(e) The state agency for surplus property is authorized and empowered to act as a clearinghouse of information for the public and private nonprofit institutions and agencies referred to in subsection (a) of this section, to locate property available for acquisition from the United States of America, to ascertain the terms and conditions under which the property may be obtained, to receive requests from the abovementioned institutions and agencies and to transmit to them all available information in reference to the property, and to aid and assist the institutions and agencies in every way possible in the consummation or acquisition of transactions hereunder.

(f) The state agency for surplus property shall cooperate to the fullest extent consistent with the provisions of this article, with the departments or agencies of the United States of America and shall make reports in the form and containing the information the United States of America or any of its departments or agencies may from time to time require, and it shall comply with the laws of the United States of America and the rules and regulations of any of the departments or agencies of the United States of America governing the allocation, transfer, use or accounting for property donable or donated to the state.

§ 5A-3-45. Disposition of Surplus State Property; Semiannual report; Application of Proceeds from Sale.

The agency shall have the exclusive power and authority to make disposition of commodities or expendable commodities now owned or in the future acquired by the state when any such commodities are or become obsolete or unusable or are not being used or should be replaced.

The agency shall determine what commodities or expendable commodities should be disposed of and shall make such disposition in the manner which will be most advantageous to the state, either by transferring the particular commodities or expendable commodities between departments, by selling such commodities to county commissions, county boards of education, municipalities, public service districts, county building commissions, airport authorities, parks and recreation commissions, nonprofit domestic corporations qualified as tax exempt under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, and volunteer fire departments in this state, when such volunteer fire departments have been held exempt from taxation under section 501(c) of the United States Internal Revenue Code, by trading in such commodities as a part payment on the purchase of new commodities, or by sale thereof to the highest bidder by means of public auctions or seated bids, after having first advertised the time, terms and place of such sale as a Class 11 legal advertisement in compliance with the provisions of' article three [§ 59-3-1 et seq.], chapter fifty-nine of this code, and the publication area for such publication shall be the county wherein the sale is to be conducted. The sale may also be advertised in such other advertising media as the agency may deem advisable. The agency may sell to the highest bidder or to any one or more of the highest bidders, if there is more than one, or, if the best interest of the state will be served, reject all bids.

Upon the transfer of commodities or expendable commodities between departments, or upon the sale thereof to an eligible organization described above, the agency shall set the price to be paid by the receiving eligible organization, with due consideration given to current market prices.

The agency may sell expendable, obsolete or unused motor vehicles owned by the state to an eligible organization, other than volunteer fire departments. In addition, the agency may sell expendable, obsolete or unused motor vehicles owned by the state with a gross weight in excess of four thousand pounds to an eligible volunteer fire department. The agency, with due consideration given to current market prices, shall set the price to be paid by the receiving eligible organization, for motor vehicles sold pursuant to this provision: Provided, That the sale price of any motor vehicle sold to an eligible organization shall not be less than the "average loan" value, as published in the most recent available eastern edition of the National Automobile Dealer's Association (N.A.D.A.) Official Used Car Guide, if such a value is available, unless the fair market value of the vehicle is less than the N.A.D.A. "average loan" value, in which case the vehicle may be sold for less than the "average loan" value. Such fair market value must be based on a thorough inspection of the vehicle by an employee of the agency who shall consider the mileage of the vehicle, and the condition of the body, engine and tires as indicators of its fair market value. If no such value is available, the agency shall set the price to be paid by the receiving eligible organization with due consideration given to current market prices. The duly authorized representative of such eligible organization, for whom such motor vehicle or other similar surplus equipment is purchased or otherwise obtained, shall cause ownership and proper title thereto to be vested only in the official , name of the authorized governing body for whom the purchase or transfer wall made. Such ownership or title, or both, shall remain in the possession of that governing body and be nontransferable for a period of not less than one year from the date of such purchase or transfer. Resale or transfer of ownership of such motor vehicle or equipment prior to an elapsed period of one year may be made only by reason of certified unserviceability.

The agency shall report to the legislative auditor, semiannually, all sales of commodities or expendable commodities made during the preceding six months to eligible organizations. The report shall include a description of the commodities sold, the price paid by the eligible organization, which received the commodities; and the report shall show to whom each commodity was sold.

The proceeds of such sales or transfers shall be deposited in the state treasury to the credit on a pro rata basis of the fund or funds out of which the purchase of the particular commodities or expendable commodities was made: Provided, That the agency may charge and assess fees reasonably related to the costs of care and handling with respect to the transfer, warehousing, sale and distribution of state property disposed of or sold pursuant to the provisions of this section.

§ 5A-3-46. Warehousing, transfer, etc., charges.

Any charges made or fees assessed by the state agency for surplus property for the acquisition, warehousing, distribution or transfer of any property acquired by donation from the United States of America for educational purposes or public health purposes, including research, shall be limited to those reasonably related to the costs of care and handling in respect to its acquisition, receipts, warehousing, distribution or transfer by the state agency for surplus property. All charges designated herein shall be used by the state agency for surplus property to defray the general operating expenses of the state agency for surplus property.

§ 5A-3-47. Department of agriculture and other agencies exempted.

Notwithstanding any provisions or limitations of this article, the state department of agriculture and any other state departments or agencies hereafter so designated are authorized and empowered to distribute food, food stamps, surplus commodities and agricultural products under contracts and agreements with the federal government or any of its departments or agencies, and the state department of agriculture and any other state departments or agencies hereafter so designated are authorized and empowered to adopt rules and regulations in order to conform with federal requirements and standards for such distribution and also for the proper distribution of such food, food stamps, commodities and agricultural products. To the extent set forth in this section, the provisions of this article shall not apply to the state department of agriculture and any other state departments or agencies hereafter so designated for the purposes set forth in this section.

§ 5A-3-48. Travel rules; exceptions.

The secretary of administration shall promulgate rules relating to the ownership, purchase, use, storage, maintenance and repair of all motor vehicles and aircraft owned by the state of West Virginia and in the possession of any department, institution or agency thereof: Provided, That the provisions of sections forty-eight through fifty-three [§§ 5A-3-48 to 5A-3-53] of this article shall not apply to the division of highways of the department of transportation, the division of public safety [West Virginia state police] of the department of military affairs and public safety, the division of natural resources, the division of forestry, the department of agriculture and the higher education governing boards and their institutions: Provided, however, That the higher education governing boards and their institutions shall report annually to the secretary of education and the arts and the legislative oversight commission on education accountability in a form and manner as required by the secretary of education and the arts. Such report shall include at least the following: The number of vehicles purchased and the purchase price, the number of donated vehicles, and the cost of lease agreements on leased vehicles.

If in the judgment of the secretary of administration, economy or convenience indicate the

expediency thereof, the secretary may require all vehicles and the aircraft subject to regulation by this article, or such of them as he or she may designate, to be kept in such garages, and other places of storage, and to be made available in such manner and under such terms for the official use of such departments, institutions, agencies, officers, agents and employees of the state as the secretary may designate by any such rule as he or she may from time to time promulgate. The secretary also has the authority to administer the travel regulations promulgated by the governor in accordance with section eleven [§ 12-3-11], article three, chapter twelve of this code, unless otherwise determined by the governor.

Provisions of this section relating to the governing boards of higher education and the institutions under their jurisdiction shall expire on the first day of July, two thousand one, unless the continuation thereof is authorized by the legislative oversight commission on education accountability.

§ 5A-3-49. Central motor pool for state-owned vehicles and aircraft.
The secretary may create a central motor pool, which pool shall be maintained by the purchasing division of the department of administration, subject to such rules and regulations as the secretary may from time to time promulgate. Said division shall be responsible for the storage, maintenance, and repairs of all vehicles and aircraft assigned to it.

§ 5A-3-50. Acquiring and disposing of vehicles and aircraft.
The secretary shall be empowered to purchase new vehicles and aircraft and dispose of old vehicles and aircraft as is practical from time to time.

§ 5A-3-51. Maintenance and service to vehicles and aircraft.
The secretary may utilize any building or land owned by the state, any department, institution or agency thereof, for the storing, garaging, and repairing of such motor vehicles and aircraft. The secretary shall provide for the employment of personnel needed to manage said motor pool and to repair and service such vehicles and aircraft and for the purchase of gasoline, oil, and other supplies for use in connection therewith, and may utilize the facilities, services and employees of any department, institution or agency of the state to effectuate the purposes thereof.

§ 5A-3-52. Special fund for travel management created.
There is hereby created a special fund in the state treasury, out of which all costs and expenses incurred pursuant to this section shall be paid. All allocations of costs and charges for operating, repairing and servicing motor vehicles and aircraft made against any institution, agency or department shall be paid into such special fund by said department or agency. All funds so paid or transferred into this special fund are hereby appropriated for the purposes of this section and shall be paid out as the secretary may designate; said funds to be transferred to include all appropriations for the acquisition, maintenance, repair and operation of motor vehicles and aircraft and for personnel.

§ 5A-3-53. Enforcement of travel management regulations.
If any state officer, agent or employee fails to comply with any rule or regulation of the secretary made pursuant to section forty-eight (§ 5A-3-48) of this article, the state auditor shall, upon order of the secretary, refuse to issue any warrant or warrants on account of expenses incurred, or to be incurred, in the purchase, operation, maintenance, or repairs of any motor vehicle or aircraft now or to be in the possession or under the control of such officer, agent or employee. The secretary may take possession of any state-owned vehicle or aircraft and transfer it to the central motor pool or to make such other disposition thereof as the secretary may direct.
§ **5A-8-5. State records administrator.**

The secretary of the department of administration is hereby designated the state records administrator, hereinafter called the administrator. The administrator shall establish and administer in the department of administration of the executive branch of state government a records management program, which will apply efficient and economical management methods to the creation, utilization, maintenance and retention, preservation and disposal of state records; and shall establish and maintain a program for the selection and preservation of essential state records and shall advise and assist in the establishment of programs for the selection and preservation of essential local records.

§ **5A-8-17. Disposal of records.**

Except as provided in section seven-a [§ 57-1-7a], article one, chapter fifty-seven of this code, no record shall be destroyed or otherwise disposed of by any agency of the state, unless it is determined by the administrator and the director of the section of archives and history of the division of culture and history that the record has no further administrative, legal, fiscal, research or historical value. In the event the administrator is of the opinion that the record has no further administrative, legal, fiscal, research or historical value, the administrator shall, prior thereto, give written notice of the administrator's intention to direct the destruction or other disposal of the record to the director. Upon the written request of the director, given to the administrator within ten days of receipt of said notice, the administrator shall direct the retention of the record for a period of thirty days. In the event the director falls to retrieve the original document from the administrator or the administrator's designee within the thirty day period, the administrator may direct the destruction or other disposal of the original without further notice to the director.

CHAPTER 6. GENERAL PROVISIONS RESPECTING OFFICERS.

Article 1. Oaths of Office

§ **6-1-3. Other officers.**

Except as provided in sections one and two [§§ 6-1-1 and 6-1-2] of this article, every person elected or appointed to any office in this state, before proceeding to exercise the authority or discharge the duties of such office, shall take the oath or affirmation prescribed in section five of article four of the constitution of this state; but this section shall not be construed to require any executor, administrator, trustee, guardian, curator, committee, special commissioner, election officer, registration officer, or person authorized to celebrate the rites of matrimony, to take any oath other than that otherwise required of him by law.

§ 6-1-4. Before whom taken.

Any oath of office may be taken in this state before any court of record or before any person having at the time authority to administer oaths. Any person residing out of this state, who shall be appointed to any office, agency or service to be performed out of this state, may take the oath required of him before any person authorized to administer oaths in the jurisdiction in which such person resides or in which the duties of the office, agency or service are to be performed.

§ 6-1-5. When taken.

The oaths required by section three [§ 6-1-31 of this article shall be taken after the person shall have been elected or appointed to the office, and before the date of the beginning of the term, if a regular term; but if to fill a vacancy, within ten days from the date of the election or appointment, and in any event before entering into or discharging any of the duties of the office.

§ 6-1-6. Where certificates of oaths filed and recorded; destruction of originals.

Certificates of the oaths of all magisterial district and county officers, and judges of courts of limited jurisdiction within any county, shall be filed, recorded and preserved in the office of the clerk of the county court [county commission] of the county. Certificates of the oaths of members of boards or education and school officers of any district or independent school district shall be filed, recorded and preserved in the office of the secretary of such board, and certified copies thereof filed and recorded in the office of the clerk of the county court [county commission] of the county of such district. Certificates of the oaths of all municipal officers shall be filed, recorded and preserved in the office of the clerk or recorder of such municipality, or other officer created or acting in lieu of such clerk or recorder, and certified copies thereof filed and recorded in the office of the clerk of the county court [county commission] of the county in which such municipality is situated. Certificates of the official oaths of the members of the state Senate and House of Delegates shall be filed and recorded as provided in section sixteen of article six of the constitution of this state. Certificates of the oaths of all other officers shall be filed and preserved in the office of the secretary of state.

At any time after the expiration of the term of office for which the oath was taken, the original certificate or certified copy thereof, but not the record, may be destroyed, unless further preservation thereof shall be required by the order of some court, in which event the same may be destroyed when the preservation thereof is no longer required. It shall be the duty of every person who takes an oath of office to procure and file in the proper office the certified copies of his certificate of oath as provided in this section.

§ 6-1-7. Acting before taking oath.

No person elected or appointed to any office, civil or military, shall enter into the office, exercise any of the authority or discharge any of the duties pertaining thereto, or receive any compensation therefor, before taking the oath of office: Provided, That this section shall not apply to members of the Legislature of this state.

Article 6. Removal of Officers

§ 6-6-1. Definitions.

The term "neglect of duty," or the term "official misconduct," as used in this article, shall include the willful waste of public funds by any officer or officers, or the appointment by him or them of an incompetent or disqualified person to any office or position and the retention of such person in office, or in the position to which he was appointed after such incompetency or disqualification is made to appear, when it is in the power of such officer to remove such incompetent or disqualified person. The term "incompetence," as used in this article, shall include the wasting or misappropriation of public funds by any officer, habitual drunkenness, habitual addiction to the use of narcotic drugs, adultery, neglect of duty, or gross immorality, on the part of any officer. The term "incompetent person," as used in this section, shall include any appointee or employee of any officer or officers, including county court [county commission], municipal bodies or officers, and boards of education, who willfully wastes or misappropriates public funds, or who is guilty of habitual drunkenness, habitual addiction to the use of narcotic drugs, adultery, neglect of duty or gross immorality.

§ 6-6-4. Removal by governor of appointee.
Any person who has been, or may hereafter be appointed by the governor to any office or position of trust under the laws of this state, whether his tenure of office is fixed by law or not, may be removed by the governor at his will and pleasure. In removing such officer, appointee, or employee, it shall not be necessary for the governor to assign any cause for such removal.

ARTICLE 9A. OPEN GOVERNMENTAL PROCEEDINGS.

§ 6-9A-1. Declaration of legislative policy.
The legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for proceedings of public agencies to be conducted openly, with only a few clearly define exceptions. The Legislature hereby further finds and declares that the citizens of the this state do not yield their sovereignty to the governmental agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government created by them.

Open government allows the public to educate itself about government decision-making through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government.

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

Accordingly, the benefits of openness inure to both the public affected by governmental decision making and the decision makers themselves. The Legislature finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advise [sic] and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decision making.

§ 6-9A-2. Definitions.
As used in this article:
(1) "Decision" means any determination, action, vote or final disposition of a motion, proposal, resolution, order, ordinance or measure on which a vote of the governing body is required at any meeting at which a quorum is present.

(2) "Executive session" means any meeting or part of a meeting of a governing body which is closed to the public.

(3) "Governing body" means the members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

(4) "Meeting" means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

(A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding;

(B) Any on-site inspection of any project or program;

(C) Any political party caucus;

(D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is not intention for the discussion to lead to an official action; or

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

(5)."Official action" means action which is taken by virtue of power granted by law, ordinance, policy, rule, or by virtue of the office held.

(6) "Public agency" means any administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power. The term "public agency" does not include courts created by article eight of the West Virginia Constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.

(7) "Quorum" means the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.

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§ 6-9A-3. Proceedings to be open; public notice of meetings.

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. Any governing body may make and enforce Reasonable rules for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend. This article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised: *Provided*, That persons who desire to address the governing body may not be required to register to address the body more than fifteen minutes prior to time the scheduled meeting is to commence.

Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media, except in the event of an emergency requiring immediate official action.

Each governing body of the executive branch of the state shall file a notice of any meeting with the secretary of state for publication in the state register. Each notice shall state the date time, place and purpose of the meeting, Each notice shall be filed in a manner to allow each notice to appear in the state register at least five days prior to the date of the meeting.

In the event of an emergency requiring immediate official action, any governing body of the executive branch of the state may file an emergency meeting notice at any time prior to the meeting. The emergency meeting notice shall state the date, time, place and purpose of the meeting and the facts and circumstances of the emergency.

Upon petition by any adversely affected party any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section.

§ 6-9A-4. Exceptions.

(a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for the holding of the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:
(1) To consider acts of war, threatened attack from a foreign power, civil insurrection or riot;

(2) To consider:

(A) Matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee unless the public officer or employee or prospective public officer or employee requests an
open meeting; or

(B) For the purpose of conducting a bearing on a complaint, charge or grievance against a public officer or employee, unless the public officer or employee requests an open meeting. General personnel policy issues may not be discussed or considered in a closed meeting. Final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation o an individual shall be taken in an open meeting,

(3) To decide upon disciplining, suspension or expulsion of any student in any public school or any public college or university, unless the student requests an open meeting;

(4) To issue, effect, deny, suspend or revoke a- license, certificate or registration under the laws of this state or any political subdivision, unless the person seeking the license, certificate or registration or whose license, certificate or registration was denied, suspended or revoked requests an open meeting;

(5) To consider the physical or mental health of any person, unless the person requests an open meeting;

(6) To discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy such as any records, data, reports, recommendations or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances,

(7) To plan or consider an official investigation or matter relating to crime prevention or law enforcement;

(8) To develop security personnel or devices,

(9) To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision: *Provided,* That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: *Provided,* however, That information not subject to release pursuant to the West Virginia freedom of information act does not become subject to disclosure as a result of executive session,

(10) To avoid the premature disclosure of an honorary degree, scholarship, prize or similar award,

(11) Nothing in this article pen-nits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant. If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded,

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

§ 6-9A-5. Minutes.

Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

(1) The date, time and place of the meeting

(2) The name of each member of the governing body present and absent;

(3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and

(4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

§ 6-9A-6. Enforcement by injunctions; actions in violation of article voidable; voidability of bond issues.

The circuit court in the county where the public agency regularly meets has jurisdiction to enforce this article upon civil action commenced by any citizen of this state within one hundred twenty days after the action complained of was taken or the decision complained of was made. Where the action seeks injunctive relief, no bond may be required unless the petition appears to be without merit or made with the sole intent of harassing or delaying or avoiding return by the governing body.

The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation this article. An injunction may also order that subsequent actions be taken or decisions be made in conformity with the provisions of this article: Provided, That no bond issue that has been passed or approved by any governing body in this state may be annulled under this section if notice of the meeting at which the bond issue was finally considered was given at least ten days prior to the meeting by a Class I legal advertisement published in accordance with the provisions of article three, chapter fifty-nine of this code in a qualified newspaper having a general circulation in the geographic area represented by that governing body.

In addition to or in conjunction with any other acts or - omissions which may be determined to be in violation of this Act, it is - a violation of this Act for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.

Any order which compels compliance or enjoins noncompliance with the provisions of this article, or which annuls a decision made in violation of this article shall include findings of fact and conclusions of law and shall be recorded in the minutes of the governing body.

§ 6-9A-7. Violation of article; criminal penalties; attorney fees and expenses in civil actions.

(a) Any person who is a member of a public or governmental body required to conduct open meetings in compliance with the provisions of this article and who willfully and knowingly violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars: *Provided,* That a person who is convicted of a second or subsequent offense under this subsection is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars.

(b) A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article may be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, 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.

(c) Where the court, upon denying the relief sought by the complaining person in the action, finds that the action was frivolous or commenced with the primary intent of harassing the governing body or any member thereof or, in the absence of good faith, of delaying any meetings or decisions of the governing body, the court may require the complaining person to pay the governing body's necessary attorney fees and expenses.

§ 6-9A-8. Acting by reference; written ballots.

(a) Except as otherwise expressly provided by law, the members of a public agency may not deliberate, vote, or otherwise take official action upon any matter by reference to a letter, number or other designation or other secret device or method, which may render it difficult for persons attending a meeting of the public agency to understand what is being deliberated, voted or acted upon. However, this subsection does not prohibit a public agency from deliberating, voting or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted or acted upon, are available for public inspection at the meeting.

(b) A public agency may not vote by secret or written ballot.

§ 6-9A-9. Broadcasting or recording meetings.
(a) Except as otherwise provided in this section, any radio or television station is entitled to broadcast all or any part of a meeting required to be open.

(b) A public agency may regulate the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting, so as to prevent undue interference with the meeting. The public agency shall allow the equipment to be placed Within the meeting room in such a way as to permit its . Mended use, and the ordinary use of the equipment may no be declared to constitute undue interference: *Provided,* That if the public agency, in good faith, determines that the size of the meeting room is such that all the members of the public present and the equipment and personnel necessary for broadcasting, photographing, filming and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public agency, acting in good faith and consistent with the purposes of this article, may require the pooling of the equipment and the personnel operating it.

§ 6-9A-10 Open-governmental meetings committee.
The West Virginia ethics commission, pursuant to subsection (j) section one, article two, chapter six-b of this code, shall appoint from the membership of the commission a subcommittee of three persons designated as the West Virginia ethics commission committee on open governmental meetings. The chairman shall designate one of the persons to chair the committee. In addition to the three members of the committee, two additional members of the commission .shall be designated to serve as alternate members of the committee.

The chairman of the committee or the executive director shall call meetings of the committee to act on requests for advisory opinions interpreting the West Virginia open government meetings act. Advisory opinions shall be issued in a timely manner, not to exceed thirty days.

§ 6-9A-11. Request for advisory opinion, maintaining confidentiality.
(a) Any governing body or member thereof subject to the provisions of this article may seek advice and information from the executive director of the West Virginia ethics commission or request in writing an advisory opinion from the West Virginia ethics commission committee on open governmental meetings as to whether an action or proposed action violates the provisions of this article. The executive director may render oral advice and information upon request. The .committee shall respond in writing and in an expeditious manner to a request for an advisory opinion. The opinion shall be binding on the parties requesting the opinion.

(b) Any governing body or member thereof that seeks an advisory opinion and acts in good faith reliance on the opinion has an absolute defense to any civil suit or criminal prosecution for a .action taken in good faith reliance on the opinion unless the committee was willfully an

intentionally misinformed as to the facts by the body or its representative.

(c) The committee and commission may take appropriate action to protect from disclosure information which is properly shielded by an exception provided for in section four of this article.

§ 6-9A-12. Duty of attorney general, secretary of state, clerks of the county ,commissions and city clerks or recorders.

It is the duly of the attorney general to compile the statutory and case law pertaining to this article and to prepare appropriate summaries and interpretations for the purpose of informing all public officials subject to this article of the requirements of this article. It is the duty of the secretary of state, the clerks of the county commissions, joint clerks of the county commissions and circuit courts, if any, and the city clerks or recorders of the municipalities of the state to provide a copy of the material compiled by the attorney general to all elected public officials within their respective jurisdictions. The clerks or recorders will make the material available to appointed public officials. Likewise, it is their respective duties to provide a copy or summary to any newly appointed or elected person within thirty days of the elected or appointed official taking the oath of office or an appointed person's start of term.

ARTICLE 10. EMPLOYMENT OF WIFE BY STATE OFFICIAL OR EMPLOYEE.

§ 6-10-1. Employment of wife at public expense prohibited.

The employment of his wife at public expense by any official or employee of the state is expressly prohibited.

ARTICLE 13. PREFERENCE RATING OF VETERANS ON WRITTEN EXAMINATION ON NONPARTISAN MERIT BASIS.

§ 6-13-1. Preference rating of veterans on written examinations for positions in state departments filled under nonpartisan merit system.

For positions in any agency as defined in section four [§ 5F-1-4], article one, chapter five-f of this code or any other political subdivision of this state in which positions are filled under civil service or any job classification system, a preference of five points in- addition to the regular numerical score received on examination shall be awarded to all veterans having qualified for appointment by making a minimum passing grade; and to all veterans awarded the purple heart, or having a compensable service-connected disability, as established by any proper veterans' bureau or department of the federal government, an additional five points shall be allowed.

For the purpose of this article, a person is defined as a "veteran" if he or she fulfills the requirements of one of the following subsections:

(a) Served on active duty anytime between the seventh day of December, one thousand nine hundred forty-one, and the first day of July, one thousand nine hundred fifty-five. However, any person who was a reservist called to active duty between the first day of February, one thousand nine hundred fifty-five, and the fourteenth day of October, one thousand nine hundred seventy-six, must meet condition (b) stated below;

(b) Served on active duty anytime between the second day of July, one thousand nine hundred fifty-five, and the fourteenth day of October, one thousand nine hundred seventy-six, or a reservist called to active duty between the first day of February, one thousand nine hundred fifty-

five, and the fourteenth day of October, one thousand nine hundred seventy-six, and who served for more than one hundred eighty days;

(c) Entered on active duty between the fifteenth day of October, one thousand nine hundred seventy-six, and the seventh day of September, one thousand nine hundred eighty, or a reservist who entered on active duty between the fifteenth day of October, one thousand nine hundred seventy-six, and the thirteenth day of October, one thousand nine hundred eighty-two, and received a campaign badge or expeditionary medal or is a disabled veteran; or

(d) Enlisted in the armed forces after the seventh day of September, one thousand nine hundred eighty, or entered active duty other than by enlistment on or after the 'fourteenth day of October, one thousand nine hundred eighty-two; and
(1) Completed twenty-four months of continuous active duty or the full period called or ordered to active duty, or was discharged under 10 U.S.C. 1171, or for hardship under 10 U.S.C. 1173, and received or was entitled to receive a campaign badge or expeditionary medal; or

(2) Is a disabled veteran.

To receive veteran preference, separation from active duty must have been under honorable conditions. This includes honorable and general discharges. A clemency discharge does not meet the requirements of the Veteran Preference Act. Active duty for training in the military reserve and national guard programs is not considered active duty for purposes of veteran preference.

These awards shall be made for the benefit and preference in appointment of all veterans who have heretofore or who shall hereafter take examinations, but shall not operate to the detriment of any person heretofore appointed to a position in a department or agency.

CHAPTER 6B. PUBLIC OFFICERS AND EMPLOYEES; ETHICS; CONFLICTS OF INTEREST; FINANCIAL DISCLOSURE.

Article 1. Short Title: Legislative Findings, Purposes and Intent; Construction and Application of Chapter; Severability.

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§ 6B-1-3. Definitions.

As used in this chapter, unless the context in which used clearly requires otherwise:

(a) "Compensation" means money, thing of value or financial benefit. The term "compensation" does not include reimbursement for actual reasonable and necessary. expenses incurred in the performance of one's official duties.

(b) "Employee" means any person in the service of another under any contract of hire, whether express or implied, oral or written, where the employer or an agent of the employer or a public official has the right or power to control and direct such person in the material details of how work is to be performed and who is not responsible for the making of policy nor for recommending official action.

(c) "Ethics commission", "commission on ethics" or "commission" means the West Virginia ethics commission.

(d) "Immediate family", with respect to an individual, means a spouse residing in the individual's household and any dependent child or children and dependent parent or parents.

(e) “Ministerial functions” means actions or functions performed by an individual under a given state of facts in a prescribed manner in accordance with a mandate of legal authority, without regard to, or without the exercise of, such individual’s own judgment as to the propriety of the action being taken.

(f) "Person" means an individual, corporation, business entity, labor union, association, firm, partnership, limited partnership, committee, club or other organization or group of persons, irrespective of the denomination given such organization or group.

(g) "Political contribution" means and has the same definition as is given that term under the provisions of article eight [§ 3-8-1 et seq.], chapter three of this code.

(h) "Public employee" means any full-time or part-time employee of any governmental body or any political subdivision thereof, including county school boards.

(i) "Public official" means any person who is elected or appointed and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to (i) contracting for, or procurement of, goods or services, (ii) administering or monitoring grants or subsidies, (iii) planning or zoning, (iv) inspecting, licensing, regulating or auditing any person, or (v) any other activity where the official action has an economic impact of greater than a *de minimis* nature on the interest or interests of any person.

Article 2. West Virginia Ethics Commission; Powers and Duties; Disclosure of Financial Interest by Public Officials and Employees; Appearances Before Public Agencies.

§ 6B-2-1. West Virginia ethics commission created; members; appointment, term of office and oath; compensation and reimbursement for expenses; meetings and quorum.

(a) There is hereby created the West Virginia ethics commission, consisting of twelve members, no more than seven of whom shall be members of the same political party. The members of the commission shall be appointed by the governor with the advice and consent of the Senate. Within thirty days of the effective date of this section, the governor shall make the initial appointments to the commission. No person may be appointed to the commission or continue to serve as a member of the commission who holds elected or appointed office under the government of the United States, the state of West Virginia or any of its political subdivisions, or who is a candidate for any of such offices, or who is otherwise subject to the provisions of this chapter other than by reason of his or her appointment to or service on the commission. A member may contribute to a political campaign, but no member shall hold any political party office or participate in a campaign relating to a referendum or other ballot issue.

(b) At least two members of the commission shall have served as a member of the West Virginia Legislature; at least two members of the commission shall have been employed in a full-time elected or appointed office in state government; at least one member shall have served as an elected official in a county or municipal government or on a county school board; at least one member shall have been employed full time as a county or municipal officer or employee; and at least two members shall have served part time as a member or director of a state, county or municipal board, commission or public service district and at least four members shall be selected from the public at large. No more than four members of the commission shall reside in the same

congressional district.

(c) Of the initial appointments made to the commission, two shall be for a term ending one year after the effective date of this section, two for a term ending two years after the effective date of this section, two for a term ending three years after the effective date of this section, three for a term ending four years after the effective date of this section and three shall be for terms ending five years after the effective date of this section. Thereafter, terms of office shall be for five years, each term ending on the same day of the same month of the year as did the term which it succeeds. Each member shall hold office from the date of his or her appointment until the end of the term for which he or she was appointed or until his or her successor qualifies for office. When a vacancy occurs as a result of death, resignation or removal in the membership of this commission, it shall be filled by appointment within thirty days of the vacancy for the unexpired portion of the term in the same manner as original appointments. No member shall serve more than two consecutive full or partial terms and no person may be reappointed to the commission until at least two years have elapsed after the completion of a second successive term.

(d) Each member of the commission shall take and subscribe to the oath or affirmation required pursuant to section 5, article IV of the constitution of West Virginia. A member may be removed by the governor for substantial neglect of duty, gross misconduct in office or violation of this chapter, after written notice and opportunity for reply.

(e) The commission shall meet within thirty days of the initial appointments to the commission at a time and place to be determined by the governor, who shall designate a member to preside at that meeting until a chairman is elected. At its first meeting, the commission shall elect a chairman and such other officers as are necessary. The commission shall within ninety days after its first meeting adopt rules for its procedures.

(f) Seven members of the commission shall constitute a quorum, except that when the commission is sitting as a hearing board pursuant to section four [§ 6B-2-4] of this article, then five members shall constitute a quorum. Except as may be otherwise provided in this article, a majority of the total membership shall be necessary to act at all times.

(g) Members of the commission shall receive the same compensation and expense reimbursement as is paid to members of the Legislature for their interim duties as recommended by the citizens legislative compensation commission and authorized by law for each day or portion thereof engaged in the discharge of official duties.

(h) The commission shall appoint an executive director to assist the commission in carrying out its functions in accordance with commission rules and regulations and with applicable law. Said executive director shall be paid such salary as may be fixed by the commission or as otherwise provided by law. The commission shall appoint and discharge counsel and employees and shall fix the compensation of employees and prescribe their duties. Counsel to the commission shall advise the commission on all legal matters and on the instruction of the commission may commence such civil actions as may be appropriate: Provided, That no counsel shall both advise the commission and act in a representative capacity in any proceeding.

(i) The commission may delegate authority to the chairman or executive director to act in the name of the commission between meetings of the commission, except that the commission shall not delegate the power to hold hearings and determine violations to the chairman or executive director.

(j) The chairman shall have the authority to designate subcommittees of three persons, no more than two of whom may be members of the same political party. Said subcommittees shall be investigative panels which shall have the powers and duties set forth hereinafter in this article.

(k) The principal office of the commission shall be in the seat of government but it or its designated subcommittees may meet and exercise its power at any other place in the state. Meetings of the commission shall be public unless such meetings or hearings are required to be private in conformity with the provisions of this chapter relating to confidentiality, except that the commission shall exclude the public from attendance at discussions of commission personnel, planned or ongoing litigation and planned or ongoing investigations.

(l) Meetings of the commission shall be upon the call of the chairman and shall be conducted by the personal attendance of the commission members and no meeting shall be conducted by telephonic or other electronic conferencing, nor shall any member be allowed to vote by proxy: Provided, That telephone conferencing and voting may be held for the purpose of approving or rejecting any proposed advisory opinions prepared by the commission, or for voting on issues involving the administrative functions of the commission. Meetings held by telephone conferencing shall require notice to members in the same manner as meetings to be personally attended, shall be electronically recorded and the recordings shall be made a permanent part of the commission records. Members shall not be compensated for meetings other than those personally attended.

§ 6B-2-2. Same General powers and duties.

(a) The commission shall promulgate rules and regulations to carry out the purposes of this article within six months of the effective date of this section. Such rules and regulations shall be legislative rules subject to legislative rule-making review and subject to the provisions of the administrative procedures act.

(b) The commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of books, papers, records or other evidence needed for the performance of the commission's duties or exercise of its powers, including its duties and powers of investigation.

(c) The commission shall, in addition to its other duties:

(1) Prescribe forms for reports, statements, notices, and other documents required by law;

(2) Prepare and publish manuals and guides explaining the duties of individuals covered by this law; and giving instructions and public information materials to facilitate compliance with, and enforcement of, this act; and

(3) Provide assistance to agencies, officials and employees in administering the provisions of this act.

(d) The commission may:

(1) Prepare reports and studies to advance the purpose of the law;

(2) Contract for any services which cannot satisfactorily be performed by its employees;

(3) Request the attorney general to provide legal advice without charge to the commission, and the attorney general shall comply with the request;

(4) Employ additional legal counsel; and

(5) Request appropriate agencies of state government to provide such professional assistance as it may require in the discharge of its duties: Provided, That any agency providing such assistance

other than the attorney general shall be reimbursed by the West Virginia ethics commission the cost of such assistance.

§ 6B-2-3. Advisory opinions; enforcement; applicability; legislative review; rulemaking.

A person subject to the provisions of this chapter may make application in writing to the ethics commission for an advisory opinion on whether an action or proposed action violates the provisions of this chapter or the provisions of section fifteen [§ 61-10-15], article ten, chapter sixty-one of this code and would thereby expose the person to sanctions by the commission or criminal prosecution. The commission shall respond within thirty days from the receipt of the request by issuing an advisory opinion on the matter raised in the request. All advisory opinions shall be published and indexed in the code of state rules by the secretary of state: Provided, That before an advisory opinion is made public, any material which may identify the person who is the subject of the opinion shall, to the fullest extent possible, be deleted and the identity of the person shall not be revealed. A person subject to the provisions of this chapter may rely upon the published guidelines or an advisory opinion of the commission, and any person acting in good faith reliance on any such guide line or opinion shall be immune from the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon any such opinion or guideline in regard to the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code.

§ 6B-2-5. Ethical standards for elected and appointed officials and public employees.

(a) *Persons subject to section. - The* provisions of this section apply to all elected and appointed public officials and public employees, whether full or part time, in state, county, municipal governments and their respective boards, agencies, departments and commissions and in any other regional or local governmental agency, including county school boards.

(b) *Use of public office for private gain. -*

(1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

(2) The Legislature, in enacting this subsection (b), relating to the use of public office or public employment for private gain, recognizes that there may be certain public officials or public employees who bring to their respective offices or employment their own unique personal prestige which is based upon their intelligence, education, experience, skills and abilities, or other personal gifts or traits. In many cases, these persons bring a personal prestige to their office or employment which inures to the benefit of the state and its citizens. Such persons may, in fact, be sought by the state to serve in their office or employment because, through their unusual gifts or traits, they bring stature and recognition to their office or employment and to the state itself. While the office or employment held or to be held by such persons may have its own inherent prestige, it would be unfair to such individuals and against the best interests of the citizens of this

state to deny such persons the right to hold public office or be publicly employed on the grounds that they would, in addition to the emoluments of their office or employment, be in a position to benefit financially from the personal prestige which otherwise inheres to them. Accordingly, the commission is directed, by legislative rule, to establish categories of such public officials and public employees, identifying them generally by the office or employment held, and offering persons who fit within such categories the opportunity to apply for an exemption from the application of the provisions of this subsection. Such exemptions may be granted by the commission, on a case-by-case basis, when it is shown that:

(A) The public office held or the public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state;

(B) the office held or the employment engaged in is such that it normally or specifically requires a person who possesses personal prestige; and

(C) the person's employment contract or letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment

(c) Gifts. -

(1) A public official or public employee may not, solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family: Provided, That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or employee of the state and whose position as such is subordinate to the soliciting official or employee: Provided, however, That nothing herein shall prohibit a candidate for public office from soliciting a lawful political contribution. No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:

(A) Is doing or seeking to do business of any kind with his or her agency;

(B) Is engaged in activities which are regulated or controlled by his or her agency; or

(C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his official duties.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, a person who is a public official or public employee may accept a gift described in this subdivision, and there shall be a presumption that the receipt of such gift does not impair the impartiality and independent judgment of the person. This presumption may be rebutted only by direct objective evidence that the gift did impair the impartiality and independent judgment of the person or that the person knew or had reason to know that the gift was offered with the intent to impair his or her impartiality and independent judgment. The provisions of subdivision (1) of this subsection do not apply to:

(A) Meals and beverages;

(B) Ceremonial gifts or awards which have insignificant monetary value;

(C) Unsolicited gifts of nominal value or trivial items of informational value;

(D) Reasonable expenses for food, travel and lodging of the official or employee for a meeting at which the official or employee participates in a panel or speaking engagement at the meeting;

(E) Gifts of tickets or free admission extended to a public official or public employee to attend charitable, cultural or political events, if the purpose of such gift or admission is a courtesy or ceremony customarily extended to the office;

(F) Gifts that are purely private and personal in nature; or

(G) Gifts from relatives by blood or marriage, or a member of the same household.

(3) The commission shall, through legislative rule promulgated pursuant to chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code, establish guidelines for the acceptance of a reasonable honorarium by public officials and elected officials. The rule promulgated shall be consistent with this section. Any elected public official may accept an honorarium only when:
(1) That official is a part-time elected public official;

(2) the fee is not related to the official's public position or duties;

(3) the fee is for services provided by the public official that are related to the public official's regular, nonpublic trade, profession, occupation, hobby or avocation; and (4) the honorarium is not provided in exchange for any promise or action on the part of the public official.

(4) Nothing in this section shall be construed so as to prohibit the giving of a lawful political contribution as defined by law.

(5) The governor or his designee may, in the name of the state of West Virginia, accept and receive gifts from any public or private source. Any such gift so obtained shall become the property of the state and shall, within thirty days of the receipt thereof, be registered with the commission and the division of culture and history.

(d) *Interests in public contracts.* -
(1) In addition to the provisions of section fifteen [§ 61-10-15], article ten, chapter sixty-one of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which such official or employee may have direct authority to enter into, or over which he or she may have control: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body: Provided, however, That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body, or prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

(2) In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this subsection is:

(A) An interest:

(i) Not exceeding ten percent of the partnership or the outstanding shares of a corporation; or

(ii) Not exceeding thirty thousand dollars interest in the profits or benefits of the contract; or

(B) An interest as a creditor:

(i) Not exceeding ten percent of the total indebtedness of a business; or

(ii) Not exceeding thirty thousand dollars interest in the profits or benefits of the contract.

(3) Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of' a quorum In a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other

governmental agency, the affected governmental body or agency may make written application to the ethics commission for an exemption from subdivisions (1) and (2) of this subsection.

(e) *Confidential information.* - No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

(f) Prohibited representation. - No present or former elected or appointed public official or public employee shall, during or after his or her public employment or service, represent a client or act in a representative capacity with or without compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other particular matter involving a specific party or parties which arose during his or her period of public service or employment and in which lie or she personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation. A staff attorney, accountant or other professional employee who has represented a government, agency in a particular matter shall not thereafter represent another client in the same or substantially related matter in which that ' client's interests are materially adverse to the interests of the government agency, without the consent of the government agency: Provided, That this prohibition on representation shall not apply when the client was not directly involved in the particular matter in which such professional employee represented the government agency, but was involved only as a member of a class. The provisions of this subsection shall not apply to legislators who were in office and legislative staff who were employed at the time it originally became effective on the first day of July, one thousand nine hundred eighty-nine, and those who have since become legislators or legislative staff and those who shall serve hereafter as legislators or legislative staff.

(g) *Limitation on practice before a board, agency, commission or department.* - (1) No elected or appointed public official and no full-time staff attorney or accountant shall, during his or her public service or public employment or for a period of six months after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate regulations, appear in a representative capacity before the governmental entity in which he or she serves or served or is or was employed in the following matters:

(A) A contested case involving an administrative sanction, action or refusal to act;
(B) To support or oppose a proposed regulation;
(C) To support or contest the issuance or denial of a license or permit;
(D) A rate-making proceeding; and
(E) To influence the expenditure of public funds.

(2) As used in this subsection, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person: Provided, That nothing contained in this subsection shall prohibit, during any period, a former public official or employee from being retained by or employed to represent, assist, or act in a representative capacity on behalf of the public agency by which he or she was employed or in which he or she served. Nothing in this subsection shall be construed to prevent a former public official or employee from representing another state, county, municipal or other governmental entity before the governmental entity in which he or she served or was employed within six months after the termination of his or her employment or service in the entity.

(3) A present or former public official or employee may appear at any time in a representative capacity before the Legislature, a county commission, city or town council or county school board in relation to the consideration of a statute, budget, ordinance, rule, resolution or

enactment.

(4) Members and former members of the Legislature and professional employees and former professional employees of the Legislature shall be permitted to appear in a representative capacity on behalf of clients before any governmental agency of' the state, or of county or municipal governments including county school boards.

(5) An elected or appointed public official, full-time staff attorney or accountant who would be adversely affected by the provisions of this subsection may apply to the ethics commission for an exemption from the six months prohibition against appearing in a representative capacity, when the person's education and experience is such that the prohibition would, for all practical purposes, deprive the person of the ability to earn a livelihood in this state outside of the governmental agency. The ethics commission shall by legislative rule establish general guidelines or standards for granting an exemption or reducing the time period, but shall decide each application on a case-by-case basis.

(h) *Employment by regulated persons.* -
(1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to sell or lease real or personal property to any person who:

(A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or

(B) Has a matter before the agency to which he or she is working or a subordinate is known by him or her to be working.

(2) Within the meaning of this section, the term "employment" includes professional services and other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor; “seek employment" includes responding to unsolicited offers of employment as well as any direct or indirect contact with a potential employer relating to the availability or conditions of employment in furtherance of obtaining employment; and "subordinate" includes only those agency personnel over whom the public servant has supervisory responsibility

(3) A full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the ethics commission for an exemption from the prohibition contained in subsection (1). The ethics commission shall by legislative rule establish general guidelines or standards for granting an exemption, but shall decide each application on a case-by-case basis.

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(4) A full-time public official or full-time public employee may not take personal regulatory action on a matter affecting a person by whom he or she is employed or with whom he or she is seeking employment or has an agreement concerning future employment.

(5) A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

(i) *Members of the Legislature required to vote.* - Members of the Legislature who have asked to be excused from voting or who have made inquiry as to whether they should be excused from voting on a particular matter and who are required by the presiding officer of the House of Delegates or Senate of West Virginia to vote under the rules of the particular house shall not be guilty of any violation of ethics under the provisions of this section for a vote so cast.

0) *Limitations on participation in licensing and rate-making proceedings.* No public official or employee may participate within the scope of his or her duties as a public official or employee, except through ministerial functions as defined in section three [§ 6B-1-31] article on(, of this chapter, in any license or rate-making proceeding that directly affects the license or rates of any person, partnership, trust, business trust, corporation or association in which the public official or employee or his or her immediate family owns or controls more than ten percent. No public official or public employee may participate within the scope of his or her duties as a public official or public employee, except through ministerial functions as defined in. section three, article one of this chapter, in any license or rate-making proceeding that directly affects the license or rates of any person to whom the public official or public employee or his or her immediate family, or a partnership, trust, business trust, corporation or association of which the public official or employee, or his or her immediate family, owns or controls more than ten percent, has sold goods or services totaling more than one thousand dollars during the preceding year, unless the public official or public employee has filed a written statement acknowledging such sale with the public agency and the statement is entered in any public record of the agency's proceedings. This subsection shall not be construed to require the disclosure of clients of attorneys or of patients or clients of persons licensed pursuant to articles three, eight, fourteen, fourteen-a, fifteen, sixteen, twenty, twenty-one or thirty-one [§ 30-3-1 et seq., § 30-8-1 et seq., § 30-14-1 et seq., § 30-14A-1 et seq., § 30-15-1 et seq., § 30-16-1 et seq., § 30-20-1 et seq., § 30-21-1 et seq., or § 30-31-1 et seq.] chapter thirty of this code.

(k) Certain expenses prohibited. - No public official or public employee shall knowingly request or accept from any governmental entity compensation or reimbursement for any expenses actually paid by a lobbyist and required by the provisions of this chapter to be reported, or actually paid by any other person.

(l) Any person who is employed as a member of the faculty or staff of a public institution of higher education and who is engaged in teaching, research, consulting or publication activities in his or her field of expertise with public or private entities and thereby derives private benefits from such activities shall be exempt from the prohibitions contained in subsections (b), (c) and (d) of this section when the activity is approved as a part of an employment contract with the governing board of such institution or has been approved by the employees' department supervisor or the president of the institution by which the faculty or staff member is employed.

(m) Except as provided in this section, a person who is a public official or public employee may not solicit private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise or control. A person who is a public official or public employee may solicit private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise or control when:

(A) The solicitation is a general solicitation directed to the public at large through the mailing or other means of distribution of a letter, pamphlet, handbill, circular or other written or printed media; or

(B) The solicitation is limited to the posting of a notice in a communal work area; or

(C) The solicitation is for the sale of property of a kind that the person is not regularly engaged in selling; or

(D) The solicitation is made at the location of a private business owned or operated by the person to which the subordinate public official or public employee has come on his or her own initiative.

.(n) The commission by legislative rule promulgated in accordance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code may define further exemptions from this section as necessary or appropriate.

§ 6C-1-3. Discriminatory and retaliatory actions against whistle-blowers prohibited.

(a) No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

(b) No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.

CHAPTER 12. PUBLIC MONEYS AND SECURITIES.

Article 2. Payment and Deposit of Taxes and Other Amounts Due the State or any Political Subdivision.

§ 12-2-2. Itemized record of moneys received for deposit; regulations governing deposits; credit to state fund; exceptions.

(a) All officials and employees of the state authorized by statute to accept moneys due the state of West Virginia shall keep a daily itemized record of moneys so received for deposit in the state treasury and shall deposit within twenty-four hours with the state treasurer all moneys received or collected by them for or on behalf of the state for any purpose whatsoever. The treasurer shall be authorized to review the procedures and methods used by officials and employees authorized to accept moneys due the state and change such procedures and methods If he or she determines it to be in the best interest of the state: Provided, That the treasurer shall not be authorized to review or amend the procedures by which the department of tax and revenue accepts moneys due the state. The treasurer shall propose rules, in accordance with the provisions of article three [§ 29A-3-1 et seq.], chapter twenty-nine-a of this code governing the procedure for deposits.

The official or employee making such deposits with the treasurer shall prepare deposit lists in the manner and upon report forms as may be prescribed by the treasurer. Certified or receipted copies shall be immediately forwarded by the state treasurer to the state auditor and to the secretary of administration. The original of the deposit report shall become a part of the treasurer's permanent record.

(b) All moneys received by the state from appropriations made by the Congress of the United

States shall be recorded in special fund accounts, in the state treasury apart from the general revenues of the state, and shall be expended in accordance with the provisions of article eleven [§ 4-11-1 et seq.], chapter four of' this code. All moneys, other than federal funds, defined in section two [§ 4-11-21, article eleven, chapter four of this code, shall be credited to the state fund and treated by the auditor and treasurer as part of the general revenue of the state except the following funds which shall be recorded in separate accounts:

(1) All funds excluded by the provisions of section six [§ 4-11-6], article eleven, chapter four of this code;

(2) All funds derived from the sale of farm and dairy products from farms operated by any agency f the state government other than the farm management commission;

[remainder of section 2 is omitted]

Article 3. Appropriations, Expenditures and Deductions.

§ 12-3-17. Liabilities incurred by state boards, commissions, officers or employees which cannot be paid out of current appropriations.
Except as provided in this section, it shall be unlawful for any state board, commission, officer or employee: (1) To incur any liability during any fiscal year which cannot be paid out of the then current appropriation for such year or out of funds received from an emergency appropriation; or (2) to authorize or to pay any account or bill incurred during any fiscal year out of the appropriation for the following year: Provided, That nothing contained herein shall prohibit entering into a contract or lease for buildings, land and space, the cost of which exceeds the current year's appropriation, even though the amount is not available during the then current year, if the aggregate cost does not exceed the amount then authorized by the Legislature. Nothing contained herein shall repeal the provisions of the general law relating to the expiration of appropriations for buildings and land.

Any member of a state board or commission or any officer or employee violating any provision of this section shall be personally liable for any debt unlawfully incurred or for any payment unlawfully made.

CHAPTER 29. MISCELLANEOUS BOARDS AND OFFICERS.

Article 6. Civil Service Commission [State Personnel Board]

§ **29-6-1. General purpose.**
The general purpose of this article is to attract to the service of this state personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation and welfare of its civil employees, and other incidents of state employment. All appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness, except as hereinafter specified. All employment positions not in the classified service, with the exception of the board of regents [abolished], are included in a classification plan known as classified-exempt service.

CHAPTER 29A STATE ADMINISTRATIVE PROCEDURES ACT

Article 1. Definitions and Application of Chapter.

§ 29A-1-2. Definitions of terms used in this chapter.

For the purposes of this chapter:

(a) "Agency" means any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches;

(b) "Contested case" means a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and does not include rule making;

(c) "Interpretive rule" means every rule, as defined in subsection (i) of this section, adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established the conditions for the exercise of discretionary power as herein provided. However, an interpretive rule is admissible for the purpose of showing that the prior conduct of a person was based on good faith reliance on such rule. The admission of such rule in no way affects any legislative or judicial determination regarding the prospective effect of such rule. Where any provision of this code lawfully commits any decision or determination of fact or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions;

(d) "Legislative rule" means every rule, as defined in subsection (i) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule. Unless lawfully promulgated as an emergency rule, a legislative rule is only a proposal by the agency and has no legal force or effect until promulgated by specific authorization of the legislature. Except where otherwise specifically provided in this code, legislative rule does not include (A) findings or determinations of fact made or reported by an agency, including any such findings and determinations as are required to be made by any agency as a condition precedent to proposal of a rule to the legislature; (B) declaratory rulings issued by an agency pursuant to the provisions of section one [§ 29A-4-1], article four of this chapter; (C) orders, as defined in subdivision (e) of this section; or (D) executive orders or proclamations by the governor issued solely in the exercise of executive power, including executive orders issued in the event of a public disaster or emergency;

(e) "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive or declaratory in form) by any agency of any matter other than rule making;

(f) "Person" includes individuals, partnerships, corporations, associations or public or private organizations of any character;

(g) "Procedural rule" means every rule, as defined in subsection (i) of this section, which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency;

(h) "Proposed rule" is a legislative rule, interpretive rule, or a procedural rule which has not become effective pursuant to the provisions of this chapter or law authorizing its promulgation;

(i) "Rule" includes every regulation, standard or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, affecting private rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations relating solely to the internal management of the agency, nor regulations of which notice is customarily given to the public by markers or signs, nor mere instructions. Every rule shall be classified as "legislative rule," "interpretive rule" or "procedural rule," all as defined in this section, and shall be effective only as provided in this chapter;

(J) "Rule making" means the process for the formulation, amendment or repeal of a rule as provided in this chapter.

Article 3. Rule Making.

§ 29A-3-1. Rules to be promulgated only in accordance with this article.

In addition to other rule-making requirements imposed by law and except to the extent specifically exempted by the provisions of this chapter or other applicable law, and except as provided for in article three-a [§ 29A-3A-1 et seq.] of this chapter, every rule and regulation (including any amendment of or rule to repeal any other rule) shall be promulgated by an agency only in accordance with this article and shall be and remain effective only to the extent that it has been or is promulgated in accordance with this article.

§ 29A-3-1a. Filing proposed amendments to an existing rule.

(a) Rules promulgated to amend existing rules may be filed on a section by section basis without having to refile in the state register all of the other sections of an existing series numbered rule: Provided, That such filing shall list, by proper citation, those sections, not amended, which are directly affected by those sections amended: Provided, however, That amendments so filed shall be accompanied by a note of explanation as to the effect of such amendment and its relation to the existing rules.

(b) Rules promulgated to amend existing rules and filed as an emergency rule may be filed on a section by section basis without having to refile in the state register all of the other sections of an existing series numbered rule: Provided, That such filing shall list, by proper citation, those sections not amended, which are directly affected by those sections amended.

§ 29A-3-2. Limitations on authority to exercise rule-making power.

(a) Except when, and to the extent, that this chapter or any other provision of law now or hereafter made expressly exempts an agency, or a particular grant of the rule-making power, from the provisions of this article, every grant of rule-making authority to an executive or

administrative officer, office or agency, heretofore provided, shall be construed and applied to be effective only:

(1) If heretofore lawfully exercised in accordance with the prior provisions of this chapter and the resulting rule has not been revoked or invalidated by the provisions hereof or by the agency, or

(2) If exercised in accordance with the provisions hereof.

(b) No executive or administrative agency shall be deemed to have power and authority to promulgate a legislative rule without compliance with this article unless: (1) the provision of this code, heretofore or hereafter enacted, granting such power and authority, expressly exempts its exercise from legislative rule-making review prior to promulgation or (2) the grant of such power and authority is exempted from the application of this chapter by the express provisions of this chapter. To the extent any such grant of power and authority, not so exempt, shall be deemed to exceed the limits and provisions of this article, such power and authority to promulgate legislative rules is hereby revoked.

§ 29A-3-3. Rules of procedure required.

In addition to other rule-making requirements imposed by law:

(a) Each agency shall adopt procedural rules governing the formal and informal procedures prescribed or authorized by this chapter. Procedural rules shall include rules of practice before the agency, together with forms and instructions.

(b) To assist interested persons dealing with it, each agency shall, so far as considered practicable, supplement its rules with descriptive statements of its procedures.

§ 29A-3-4. Filing of proposed procedural rules and interpretive rules.

(a) When an agency proposes a procedural rule or an interpretive rule, the agency shall file in the state register a notice of its action, including the text of the rule as proposed.

(b) All proposed rules filed under subsection (a) of this section shall have a fiscal note attached itemizing the cost of implementing the rules as they relate to this state and to persons affected by the rules and regulations. Such fiscal note shall include all information included in a fiscal note for either house of the Legislature and a statement of the economic impact of the rule on the state or its residents. The objectives of the rules shall be clearly and separately stated in the fiscal note by the agency issuing the proposed rules. No procedural or interpretive rule shall be void or voidable by virtue of noncompliance with this subsection.

§ 29A-3-5. Notice of proposed rule making.

When an agency proposes to promulgate a rule other than an emergency rule, it shall file with the secretary of state, for publication in the state register, a notice of its action, including therein any request for the submission of evidence to be presented on any factual determinations or inquiries required by law to promulgate such rule. At the time of filing the notice of its action, the agency shall also file with the secretary of state a copy of the full text of the rule proposed, and a fiscal note as defined in subsection (b), section four [§ 29A-34(b)] of this article. If the agency is considering alternative draft proposals, it may also file with the secretary of state the full text of such draft proposals.

The notice shall fix a date, time and place for the receipt of public comment in the form of oral statements, written statements and documents bearing upon any findings and determinations which are a condition precedent to the final approval by the agency of the proposed rule, and shall contain a general description of the issues to be decided. If no specific findings and

determinations are required as a condition precedent to the final approval by the agency of the approved rule, the notice shall fix a date, time and place for the receipt of general public comment on the proposed rule. To comply with the public comment provisions of this section, the agency may hold a public hearing or schedule a public comment period for the receipt of written statements and documents, or both.

If findings and determinations are a condition precedent to the promulgation of such rule, then an opportunity for general public comment on the merits of the rule shall be afforded after such findings and determinations are made. In such event, notice of the hearing or of the period for receiving public comment on the proposed rule shall be attached to and filed as a part of the findings and determinations of the agency when filed in the state register.

In any hearing for public comment on the merits of the rule, the agency may limit presentations to written material. The time, date and place fixed in the notice shall constitute the last opportunity to submit any written material relevant to any hearing, all of which may be earlier submitted by filing with the agency. After the public hearing or the close of the public comment period, whichever is later, the agency shall not permit the filing or receipt of, nor shall it consider, any attempted ex parte communications directed to it in the form of additional comment, prior to the submission of its final agency-approved rule to the legislative rule-making review committee pursuant to the provisions of section eleven [§ 29A-3-11] of this article.

The agency may also, at its expense, cause to be published as a Class I legal publication in every county of the state any notice required by this section.

Any citizen or other interested party may appear and be heard at such hearings as are required by this section.

§ 29A-3-6. Filing findings and determinations for rules in state register; evidence deemed public record.

(a) Incident to fixing a date for public comment on a proposed rule, the agency shall promulgate the findings and determinations required as a condition precedent thereto, and state fully and succinctly the reasons therefor and file such findings and determinations in the state register. If the agency amends the proposed rule as a result of the evidence or comment presented pursuant to section five [§ 29A-3-5], such amendment shall be filed with a description of any changes and a statement listing the reasons for the amendment.

(b) The statement of reasons and a transcript of all evidence and public comment received pursuant to notice are public records and shall be carefully preserved by the agency and be open for public inspection and copying for a period of not less than five years from the date of the hearing.

§ 29A-3-7. Notice of hearings.
Notices of hearings required by sections five and six [§§ 29A-3-5 and 29A-3-6] of this article shall be filed in the state register not less than thirty nor more than sixty days before the date of such hearing or the last day specified therein for receiving written material. Any hearing may be continued from time to time and place to place by the agency which shall have the effect of extending the last day for receipt of evidence or public comment. Notice of such continuance shall be promptly filed thereafter in the state register.

§ 29A-3-8. Adoption of procedural and interpretive rules.
A procedural and interpretive rule shall be considered by the agency for adoption not later than six months after the close of public comment and a notice of withdrawal or adoption shall be filed in the state register within that period. Failure to file such notice shall constitute withdrawal and the secretary of state shall note such failure in the state register immediately upon the expiration of the six-month period.

A procedural or interpretive rule may be amended by the agency prior to final adoption without further hearing or public comment. No such amendment may change the main purpose of the rule. If the fiscal implications have changed since the rule was proposed, a new fiscal note shall be attached to the notice of filing. Upon adoption of the rule (including any such amendment) the agency shall file the text of the adopted procedural or interpretive rule with its notice of adoption in the state register and the same shall be effective on the date specified in the rule or thirty days after such filing, whichever is later.

§ 29A-3-9. Proposal of legislative rules.
When an agency proposes a legislative rule, other than an emergency rule, it shall be deemed to be applying to the Legislature for permission, to be granted by law, to promulgate such rule as approved by the agency for submission to the Legislature or as amended and authorized by the Legislature by law.

An agency proposing a legislative rule, other than an emergency rule, after filing the notice of proposed rule-making required by the provisions of section five [§ 29A-3-51 of this article, shall then proceed as in the case of a procedural and interpretive rule to the point of, but not including, final adoption. In lieu of final adoption, the agency shall finally approve the proposed rule, including any amendments, for submission to the Legislature and file such notice of approval in the state register and with the legislative rule-making review committee, within ninety days after the public hearing was held or within ninety days after the end of the public comment period required under section five of this article: Provided, That upon receipt of a written request from an agency, setting forth valid reasons why the agency is unable to file the agency approved rule within the ninety-day time period, the legislative rule-making review committee may grant the agency an extension of time to file the agency approved rule.

Such final agency approval of the rule under this section is deemed to be approval for submission to the Legislature only and does not give any force and effect to the proposed rule. The rule shall have full force and effect only when authority for promulgation of the rule is granted by an act of the Legislature and the rule is promulgated pursuant to the provisions of section thirteen [§ 29A-3-13] of this article.

§ 29A-3-10. Creation of a legislative rule-making review committee.
(a) There is hereby created a joint committee of the Legislature, known as the legislative rule-making review committee, to review all legislative rules of the several agencies and such other rules as the committee deems appropriate. The committee shall be composed of six members of the Senate, appointed by the president of the Senate, and six members of the House of Delegates,

appointed by the speaker of the House of Delegates. In addition, the president of the Senate and the speaker of the House of Delegates shall be ex officio nonvoting members of the committee and shall designate the cochairmen. Not more than four of the voting members of the committee from each house shall be members of the same political party: Provided, That in the event the membership of a political party is less than fifteen percent in the House of Delegates or Senate, then the membership of that political party from the legislative house with less than fifteen percent membership may be one from that house. The members shall serve until their successors shall have been appointed as heretofore provided. Members of the committee shall receive such compensation and expenses as provided in article two-a [§ 4-2A-1 et seq.], chapter four of this code. Such expenses and all other expenses, including those incurred in the employment of legal, technical, investigative, clerical, stenographic, advisory and other personnel shall be paid from an appropriation to be made expressly for the legislative rule-making review committee, but if no such appropriation be made, such expenses shall be paid from the appropriation under "Account No. 103 for Joint Expenses," but no expense of any kind whatever payable under said Account No. 103 for joint expenses shall be incurred unless first approved by the joint committee on government and finance. The committee shall meet at any time, both during sessions of the Legislature and in the interim.

(b) The committee may adopt such rules of procedure as it considers necessary for the submission, presentation and consideration of rules.

§ 29A-3-11. Submission of legislative rules to the legislative rule-making review committee.
(a) When an agency finally approves a proposed legislative rule for submission to the Legislature, pursuant to the provisions of section nine [§ 29A-3-9] of this article, the secretary of the executive department which administers the agency pursuant to the provisions of article two [§ 5F-2-1 et seq.], chapter five-f of this code shall submit to the legislative rule-making review committee at its offices or at a regular meeting of such committee fifteen copies of. (1) The full text of the legislative rule as finally approved by the agency, with new language underlined and with language to be deleted from any existing rule stricken through but clearly legible; (2) a brief summary of the content of the legislative rule and a description and a copy of any existing rule which the agency proposes to amend or repeal; (3) a statement of the circumstances which require the rule; (4) a fiscal note containing all information included in a fiscal note for either house of the Legislature and a statement of the economic impact of the rule on the state or its residents; (5) one copy of any relevant federal statutes or regulations; and (6) any other information which the committee may request or which may be required by law. If the agency is an agency, board or commission which is not administered by an executive department as provided for in article two, chapter five-f of this code, the agency shall submit the final agency-approved rule as required by this subsection.

(b) The committee shall review each proposed legislative rule and, in its discretion, may hold public hearings thereon. Such review shall include, but not be limited to, a determination of:

(1) Whether the agency has exceeded the scope of its statutory authority in approving the proposed legislative rule;

(2) 'Whether the proposed legislative rule is in conformity with the legislative intent of the statute which the rule is intended to implement, extend, apply, interpret or make specific;

(3) Whether the proposed legislative rule conflicts with any other provision of this code or with any other rule adopted by the same or a different agency;

(4) Whether the proposed legislative rule is necessary to fully accomplish the objectives of the

statute under which the rule was proposed for promulgation;

(5) Whether the proposed legislative rule is reasonable, especially as it affects the convenience of the general public or of persons particularly affected by it;

(6) Whether the proposed legislative rule could be made less complex or more readily understandable by the general public; and

(7) Whether the proposed legislative rule was proposed for promulgation in compliance with the requirements of this article and with any requirements imposed by any other provision of this code.

(c) After reviewing the legislative rule the committee shall recommend that the Legislature:

(1) Authorize the promulgation of the legislative rule; or

(2) Authorize the promulgation of part of the legislative rule; or

(3) Authorize the promulgation of the legislative rule with certain amendments; or

(4) Recommend that the proposed rule be withdrawn.

The committee shall file notice of its action in the state register and with the agency proposing the rule: Provided, That when the committee makes the recommendations of subdivision (2), (3) or (4) of this subsection, the notice shall contain a statement of the reasons for such recommendation.

(d) When the committee recommends that a rule be authorized, in whole or in part, by the Legislature, the committee shall instruct its staff or the office of legislative services to draft a bill authorizing the promulgation of all or part of the legislative rule and incorporating such amendments as the committee desires. If the committee recommends that the rule not be authorized, it shall include in its report a draft of a bill authorizing promulgation of the rule together with a recommendation. Any draft bill prepared under this section shall contain a legislative finding that the rule is within the legislative intent of the statute which the rule is intended to implement, extend, apply or interpret and shall be available for any member of the Legislature to introduce to the Legislature.

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(4) Recommend that the proposed rule be withdrawn.
The committee shall file notice of its action in the state register and with the agency proposing the Rule: Provided, That when the committee makes the recommendations of subdivision (2), (3) or (4) of this subsection, the notice shall contain a statement of the reasons for such recommendation.

(d) When the committee recommends that a rule be authorized, in whole or in part, by the Legislature, the committee shall instruct its staff or the office of legislative services to draft a bill authorizing the promulgation of all or part of the legislative rule and incorporating such amendments as the committee desires. If the committee recommends that the rule not be authorized, it shall include in its report a draft of a bill authorizing promulgation of the rule together with a recommendation. Any draft bill prepared under this section shall contain a legislative finding that the rule is within the legislative intent of the statute which the rule is intended to implement, extend, apply or interpret and shall be available for any member of the Legislature to introduce to the Legislature.

§ 29A-3-12. Submission of legislative rules to Legislature.

(a) No later than forty days before the sixtieth day of each regular session of the Legislature, the co-chairmen of the legislative rule-making review committee shall submit to the clerk of the respective houses of the Legislature copies of all proposed legislative rules which have been submitted to and considered by the committee pursuant to the provisions of section eleven [§ 29A-3-11] of this article and which have not been previously submitted to the Legislature for study, together with the recommendations of the committee with respect to such rules, a statement of the reasons for any recommendation that a rule be amended or withdrawn and a statement that a bill authorizing the legislative rule has been drafted by the staff of the committee or by legislative services pursuant to section eleven of this article. The cochairman of the committee may also submit such rules at the direction of the committee at any time before or during a special session in which consideration thereof may be appropriate. The committee may withhold from its report any proposed legislative rule which was submitted to the committee fewer than two hundred twenty-five days before the end of the regular session. The clerk of each house shall submit the report to his or her house at the commencement of the next session.

All bills introduced authorizing the promulgation of a rule may be referred by the speaker of the House of Delegates and by the president of the Senate to appropriate standing committees of the respective houses for further consideration or the matters may be other-wise dealt with as each house or its rules provide. The Legislature may by act authorize the agency to adopt a legislative rule incorporating the entire rule or may authorize the agency to adopt a rule with any amendments which the Legislature shall designate. The clerk of the house originating such act shall forthwith file a copy of any bill of authorization enacted with the secretary of state and with the agency proposing such rule and the clerk of each house may prepare and file a synopsis of legislative action during any session on any proposed rule submitted to the house during such session for which authority to promulgate was not by law provided during such session. In acting upon the separate bills authorizing the promulgation of rules, the Legislature may, by amendment or substitution, combine the separate bills of authorization insofar as the various rules authorized therein are proposed by agencies which are placed under the administration of one of the single separate executive departments identified under the provisions of section two [§ 5F-1-2], article one, chapter five-f of this code or the Legislature may combine the separate bills of authorization by agency or agencies within an executive department. In the case of rules proposed for promulgation by an agency which is not administered by an executive department pursuant to the provisions of article two [§ 5F-2-1 et seq.] of said chapter, the separate bills of authorization for the proposed rules of that agency may, by amendment or substitution, be combined. The foregoing provisions relating to combining separate bills of authorization according to department or agency are not intended to restrict the permissible breadth of bills of authorization and do not preclude the Legislature from otherwise combining various bills of authorization which have a unity of subject matter. Any number of provisions may be included in a bill of authorization, but the single object of the bill shall be to authorize the promulgation of proposed legislative rules.

(b) If the Legislature during its regular session disapproves all or part of any legislative rule which was submitted to it by the legislative rule-making review committee during such session, no agency may thereafter issue any rule or directive or take other action to implement such rule or part thereof unless and until otherwise authorized to do so, except that the agency may resubmit the same or similar proposed rule to the legislative rule-making review committee in accordance with the provisions of section eleven of this article.

(c) Nothing herein shall be construed to prevent the Legislature by law from authorizing, or authorizing and directing, an agency to promulgate legislative rules not proposed by the agency or upon which some procedure specified in this chapter is not yet complete.

(d) Whenever the Legislature is convened by proclamation of the governor, upon his or her own initiative or upon application of the members of the Legislature, or whenever a regular session of the Legislature is extended or convened by the vote or petition of its members, the Legislature may by act enacted during such extraordinary or extended session authorize, in whole or in part, any legislative rule, whether, submitted to the legislative rule-making review committee or not, if legislative action on such rule during such session is a lawful order of business.

(e) As a part of any act that amends chapter sixty-four [§ 64-1-1 et seq.] of this code, authorizing the promulgation of a proposed legislative rule or rules, the Legislature may also provide, by general language or with specificity, for the disapproval of rules not approved or acted upon by the Legislature.

(f) Whenever a date is required by this section to be computed in relation to the end of a regular session of the Legislature, such date shall be computed without regard to any extensions of such session occasioned solely by the proclamation of the governor.

(g) Whenever a date is required to be computed from or is fixed by the first day of a regular session of the Legislature, it shall be computed or fixed in the year one thousand nine hundred eighty-four, and each fourth year thereafter without regard to the second. Wednesday of January of such years.

§ 29A-3-13. Adoption of legislative rules; effective date.

(a) Except as the Legislature may by law otherwise provide, within sixty days after the effective date of an act authorizing promulgation of a legislative rule, the rule shall be promulgated only in conformity with the provisions of law authorizing and directing the promulgation of such rule. In the case of a rule proposed by an agency which is administered by an executive department pursuant to the provisions of article two [§ 5F-2-1 et-seq.], chapter five-f of this code, the secretary of the department shall promulgate the rule as authorized by the Legislature. In the case of an agency which is not subject to administration by the secretary of an executive department, the agency which proposed the rule for promulgation shall promulgate the rule as authorized by the Legislature.

(b) A legislative rule authorized by the Legislature shall become effective thirty days after such filing in the state register, or on the effective date fixed by the authorizing act or if none is fixed by law, such later date not to exceed ninety days, as is fixed by the agency.

(c) The secretary of state shall note in the state register the effective date of an authorized and promulgated legislative rule, and shall promptly publish the duly promulgated rule in a code of state rules maintained by his or her office.

§ 29A-3-14. Withdrawal or modification of proposed rules

(a) Any legislative rule proposed by an agency may be withdrawn by the agency any time before passage of a law authorizing or authorizing and directing its promulgation, but no such action shall be construed to affect the validity, force or effect of a law enacted authorizing or authorizing and directing the promulgation of an authorized legislative rule or exercising compliance with such law. The agency shall file a notice of any such action in the state register.

(b) At any time before a proposed legislative rule has been submitted by the legislative rule-

making review committee to the legislature pursuant to the provisions of section twelve [§ 29A-3-12] of this article, the agency may modify the proposed rule to meet the objections of the committee. The agency shall file in the state register a notice of its modifying action including a copy of the modified rule, but shall not be required to comply with any provisions of this article requiring opportunity for public comment or taking of evidence with respect to such modification. If a legislative rule has been withdrawn, modified and then resubmitted to such committee, the rule shall be considered to have been submitted to such committee on the date of such resubmission.

§ 29A-3-15. Emergency legislative rules; procedure for promulgation; definition.

(a) Any agency with authority to propose legislative rules may, without hearing, find that an emergency exists requiring that emergency rules be promulgated and promulgate the same in accordance with this section. Such emergency rules, together with a statement of the facts and circumstances constituting the emergency, shall be filed with the secretary of state, and a notice of such filing shall be published in the state register. Such emergency rules shall become effective upon the approval of the secretary of state in accordance with section fifteen-a [§ 29A-3-15a] of this article or upon the approval of the attorney general in accordance with section fifteen-b [§29A3-15b] or upon the forty-second day following such filing, whichever occurs first. Such emergency rules may adopt, amend or repeal any legislative rule, but the circumstances constituting the emergency requiring such adoption, amendment or repeal shall be stated with particularity and be subject to de novo review by any court having original jurisdiction of an action challenging their validity. Fourteen copies of the rules and of the required statement shall be filed immediately with the secretary of state and one copy shall be filed immediately with the legislative rule-making review committee.

An emergency rule shall be effective for not more than fifteen months and shall expire earlier if any of the following occurs: .

(1) The secretary of state, acting under the authority provided for in section fifteen-a of this article, or the attorney general, acting under the authority provided for in section fifteen-b of this article, disapproves the emergency rule because: (A) The emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof, (B) an emergency does not exist Justifying the promulgation of the emergency rule; or (C) the emergency rule was not promulgated in compliance with the provisions of this section. An emergency rule may not be disapproved pursuant to the authority granted by paragraphs (A) or (B) of this subdivision on the basis that the secretary of state or the attorney general disagrees with the underlying public policy established by the Legislature in enacting the supporting legislation. An emergency rule which would otherwise be approved as being necessary to comply with a time limitation established by this code or by a federal statute or regulation may not be disapproved pursuant to the authority granted by paragraphs (A) or (B) of this subdivision on the basis that the agency has failed to tile the emergency rule prior to the date fixed by such time limitation. When the supporting statute specifically directs an agency to promulgate an emergency rule, or specifically finds that an emergency exists and directs the promulgation of an emergency rule, the emergency rule may not be disapproved pursuant to the authority granted by paragraph (B) of this subdivision. An emergency rule may not be disapproved on the basis that the Legislature has not specifically directed an agency to promulgate the emergency rule, or has not specifically found that an emergency exists and directed the promulgation of an emergency rule,

(2) The agency has not previously filed and falls to file a notice of public hearing on the proposed rule within thirty days of the date the proposed rule was filed as an emergency rule; in which case the emergency rule expires on the thirty-first day.

(3) The agency has not previously filed and fails to file the proposed rule with the legislative rule-making review committee within ninety days of the date the proposed rule was filed as an emergency rule; in which case the emergency rule expires on the ninety-first day.

(4) The Legislature has authorized or directed promulgation of an authorized legislative rule dealing with substantially the same subject matter since such emergency rule was first promulgated, and in which case the emergency rule expires on the date the authorized rule is made effective.

(5) The Legislature has, by law, disapproved of such emergency rule; in which case the emergency rule expires on the date the law becomes effective.

(b) Any amendment to an emergency rule made by the agency shall be filed in the state register and does not constitute a new emergency rule for the purpose of acquiring additional time or avoiding the expiration dates in subdivision (2), (3), (4) or (5), subsection (a) of this section: Provided, That such emergency amendment shall become effective upon the approval of the secretary of state in accordance with section fifteen-a of this article or upon approval of the attorney general in accordance with section fifteen-b of this article or upon the forty-second day following such filing, whichever occurs first.

(c) Once an emergency rule expires due to the conclusion of fifteen months or due to the effect of subdivision (2), (3), (4) or (5), subsection (a) of this section, the agency may not refile the same or similar rule as an emergency rule.

(d) The provision of this section shall not be used to avoid or evade any provision of this article or any other provisions of this code, including any provisions for legislative review and approval of proposed rules. Any emergency rule promulgated for any such purpose may be contested in a judicial proceeding before a court of competent jurisdiction.

(e) The legislative rule-making review committee may review any emergency rule to determine (1) whether the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof-, (2) whether there exists an emergency justifying the promulgation of such emergency rule; and (3) whether the emergency rule was promulgated in compliance with the requirements and prohibitions contained in this section. The committee may recommend to the agency, the Legislature, or the secretary of state such action as it may deem proper.

(f) For the purposes of this section, an emergency exists when the promulgation of an emergency rule is necessary (1) for the immediate preservation of the public peace, health, safety or welfare, (2) to comply with a time limitation established by this code or by a federal statute or regulation, or (3) to prevent substantial harm to the public interest.

§ 29A-3-15a. Disapproval of emergency rules and amendments to emergency rules by the secretary of state; judicial review.

(a) Upon the filing of an emergency rule or filing of an amendment to an emergency rule by an agency, under the provisions of section fifteen [§ 29A-3-15] of this article, by any agency, except for the secretary of state, the secretary of state shall review such rule or such amendment and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency

rule or such amendment to an emergency rule should be disapproved. An emergency rule filed by the secretary of state shall be reviewed by the attorney general as provided for in section fifteen-b [§ 29A-3-15b] of this article.

(b) The secretary of state shall disapprove an emergency rule or an amendment to an emergency rule if he determines:

(1) That the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof, or

(2) That an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or

(3) That the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of section fifteen of this article.

(c) If the secretary of state determines, based upon the contents of the rule or the supporting information filed by the agency, that the emergency rule should be disapproved, he may disapprove such rule without further investigation, notice or hearing. If, however, the secretary of state concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he
may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(d) If the secretary of state determines, based upon the contents of the amendment to an emergency rule or the supporting information filed by the agency, that the amendment to the emergency rule should be disapproved, he may disapprove such amendment without further investigation, notice or hearing. If, however, the secretary of state concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the amendment should be disapproved, he may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(e) The determination of the secretary of state shall be reviewable by the supreme court of appeals under its original jurisdiction, based upon a petition for a writ of mandamus, prohibition or certiorari, as appropriate. Such proceeding may be instituted by:

(1) The agency which promulgated the emergency rule;

(2) A member of the Legislature; or

(3) Any person whose personal property interests will be significantly affected by the approval or disapproval of the emergency rule by the secretary of state.

§ 29A-3-15b. Disapproval of emergency rules and amendments to emergency rules by the attorney general; judicial review.

(a) Upon the filing of an emergency rule or filing of an amendment to an emergency rule by the secretary of state under the provisions of section fifteen 1§ 29A-3-15] of this article, the attorney general shall review such rule or such amendment and, within forty-two days of such filing, shall

issue a decision as to whether or not such emergency rule or such amendment to an emergency rule should be disapproved.

(b) The attorney general shall disapprove an emergency rule or an amendment to an emergency rule if he determines:

(1) That the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof, or

(2) That an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or

(3) That the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of section fifteen of this article.

(c) If the attorney general determines, based upon the contents of the rule or the supporting information filed by the secretary of state, that the emergency
rule should De disapproved, he may disapprove such rule without further investigation, notice or hearing. If, however, the attorney general concludes that the information submitted by the secretary of state is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he may make further investigation, including, but not limited to, requiring the secretary of state or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(d) If the attorney general determines, based upon the contents of the amendment to an emergency rule or the supporting information filed by the agency, that the amendment to the emergency rule should be disapproved, he may disapprove such amendment without further investigation, notice or hearing. If, however, the attorney general concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the amendment should be disapproved, he may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(e) The determination of the attorney general shall be reviewable by the supreme court of appeals under its original Jurisdiction, based upon a petition for a writ of mandamus, prohibition or certiorari, as appropriate. Such proceeding may be instituted by:

(1) The secretary of state;

(2) A member of the Legislature; or

(3) Any person whose personal property interests will be significantly affected by the approval or disapproval of the emergency rule by the attorney general.

§ 29A-3-16. Legislative review of procedural rules, interpretive rules and existing legislative rules.

The legislative rule-making review committee may review any procedural rules, interpretive rules or existing legislative rules and may make recommendations concerning such rules to the legislature, or to the agency, or to both the legislature and the agency.

§ **29A.3-17. Prior rules.**
Any rule lawfully promulgated prior to the effective date of this chapter [May 11, 19821 shall remain in full force and effect until:

(1) Such rule is expressly made ineffective by the provisions of this chapter, or

(2) Such rule should expire by reason of failure to refile the same as provided in section five [§ 29A-2-5] of article two, or expires pursuant to its own terms and provisions lawfully made before the effective date of this section, or

(3) Such rule is repealed by the lawful act of the agency, in conformity with this chapter, or

(4) Such rule is invalidated by an act of the Legislature or the force and effect of another law.

§ **29A-3-18. Severability of legislative rules.**
Unless there is a provision in a legislative rule specifying that the provisions thereof shall not be severable, the provisions of every legislative rule, whether enacted before or subsequent to the effective date of this section, shall be severable so that if any provision of any rule section or amendment thereto is held to be unconstitutional or void, the remaining provisions of the rule shall remain valid, unless the court finds the valid provisions are so essentially and inseparably connected with, and so dependent upon, the unconstitutional or void provision that the court cannot presume the Legislature would have enacted the remaining valid provisions without the unconstitutional or void one, or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent: Provided, That if any legislative rule has its own severability clause, then that severability clause shall govern and control with respect to that section, in lieu of the provisions of this section. The provisions of this section shall be fully applicable to all future amendments to legislative rules, with like effect as if the provisions of this section were set forth in extenso and every such amendment were reenacted as a part thereof, unless such amendment to the legislative rule contains its own severability clause. (1999).

CHAPTER 29B. FREEDOM OF INFORMATION.

Article 1. Public Records.

§ **29B-1-1. Declaration of policy.**
Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be 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 government and the official acts of those who represent them as public officials and employees. 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. The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.

§ **29B-1-2. Definitions.**
As used in this article:
(1) "Custodian" means the elected or appointed official charged with administering a public body.

(2) "Person" includes any natural person, corporation, partnership, firm or association.

(3) "Public body" means every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other body which is created by state or local authority or which is primarily funded by the state or local authority.

(4) "Public record" includes any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body.

(5) "Writing" includes any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics.

§ **29B-1-3. 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 [{ 29B-1-41 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.

(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.

§ **29B-1-4. Exemptions.**
The following categories of information are specifically exempt from disclosure under the provisions of this article:

(1) Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors;

(2) Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance: Provided, that nothing in this article shall be construed as precluding an individual from inspecting or copying his own personal, medical or similar file;

(3) Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination;

(4) Records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for internal use in matters relating to law enforcement;

(5) Information specifically exempted from disclosure by statute;

(6) Records, archives, documents or manuscripts describing the location of undeveloped historic, prehistoric, archaeological, paleontological and battlefield sites or constituting gifts to any public body upon which the donor has attached restrictions on usage or the handling of which could irreparably damage such record, archive, document or manuscript;

(7) Information contained in or related to examination, operating or condition reports prepared by, or on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions, except those reports which are by law required to be published in newspapers; and

(8) Internal memoranda or letters received or prepared by any public body.
(Eight more Homeland Security exemptions were added with HB-3009, Reg. Session 2003)

§ **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 noncompliance 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 the court considers of greater importance, proceedings arising under subsection one of this section shall be assigned for hearing and trial at the earliest practicable date.

§ **29B-1-6. Violation of article; penalties.**
Any custodian of any public records who shall willfully violate the provisions of this article shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail for not more than ten days, or, in the discretion of the court, by both such fine and imprisonment.

§ **29B-1-7. Attorney fees and costs.**
Any person who is denied access to public records requested pursuant to this article and who successfully brings a suit filed pursuant to section five [§ 29B-1-5] of this article shall be entitled to recover his or her attorney fees and court costs from the public body that denied him or her access to the records

CHAPTER 30. PROFESSIONS AND OCCUPATIONS.

Article 1. General Provisions Applicable to All State Boards of Examination or Registration Referred to in Chapter.

§ 30-1-1. Application of article.
Unless otherwise specifically provided, every board of examination or registration referred to in this chapter shall conform to the requirements prescribed in the following sections of this article.

§ 30-1-1a. Legislative findings and declaration.
The Legislature hereby finds and declares that as a matter of public policy the practice of the professions referred to in this chapter is a privilege and is not a natural right of individuals. The fundamental purpose of licensure and registration is to protect the public, and any license, registration, certificate or other authorization to practice issued pursuant to this chapter is a revocable privilege.

§ 30-1-2. Oath.
Every person appointed as a member of any board referred to in this article, before proceeding to exercise the authority or discharge the duties of the office, shall take the oath prescribed by section 5 of article TV of the state constitution, and shall file the certificate thereof with the secretary of state.

§ 30-1-2a. Required orientation session.
(a) After the first day of April and not later than the thirty-first day of July of each year, the auditor shall provide at least one orientation session on relevant state law and rules governing state boards and commissions. All state agencies shall cooperate with and assist in providing the orientation session if the auditor requests.

(b) After the effective date of this section, all chairs or chief financial officers of state boards and commissions newly created by the Legislature shall attend an orientation session designed to inform the state boards and commissions of the duties and requirements imposed on state boards and commissions by state law and rules. The chair or chief financial officer of the newly created board or commission shall attend an orientation session at the earliest possible date following the creation of the board or commission.

(c) Topics for the orientation session may include, but are not limited to: The official conduct of members, state budgeting and financial procedures, purchasing requirements, open meetings requirements, ethics, rule-making procedures, records management, annual reports and any other topics the auditor determines to be essential in the fulfillment of the duties of the members of state boards and commissions.

(d) The orientation session shall be open to any member of new or existing boards and commissions and each board or commission may approve expense reimbursement for the attendance of one or more of its members. The chair or chief financial officer of each existing board or commission shall attend an orientation session within two years following the effective date of this section.

(e) No later than the tenth day of August of each year, the auditor shall provide to the chairs of the joint standing committee on governmental operations a list of the names of board or commission members attending, together with the names of the boards and commissions represented, the orientation session or sessions offered by the auditor since the previous April first.

(f) The auditor may charge a registration fee for the orientation session to cover the cost of providing the orientation session. The fee may be paid from funds available to a board or commission.

(g) Notwithstanding the member's normal rate of compensation for serving on a board, a member attending the orientation session may be reimbursed for necessary and actual expenses, as long as the member attends the complete orientation session.

(h) Ex officio members who are elected or appointed state officers or employees, and members of boards or commissions that have purely advisory functions with respect to a department or agency of the state, are exempt from the requirements of this section. (1999).

§ 30-1-3. Officers.

(a) Every board referred to in this chapter shall elect annually from its members a president and a secretary who shall hold their offices for one year, but shall continue to hold their offices until their successors are elected. However, the state board of law examiners, the state board of examiners for nurses and the state board of dental examiners may each elect a secretary from outside their membership.

(b) The officers of the boards referred to in this chapter shall register annually with the governor, the secretary of administration, the legislative auditor and the secretary of state.

§ 30-1-4. Official seal; rules and regulations.

Every such board shall adopt an official seal which shall be affixed to all licenses or certificates

of registration issued by it, and shall make such rules and regulations, not inconsistent with law, as are necessary to regulate its proceedings and to carry out the purposes and enforce the provisions of this chapter applicable to such board.

§ 30-1-4a. Lay members of professional boards.

(a) Notwithstanding any provisions of this code to the contrary, the governor shall appoint at least one lay person to represent the interests of the public on every health professional licensing board which is referred to in this chapter. If the total number of members on any of these boards after the appointment of one lay person is an even number, one additional lay person shall be appointed. Lay members shall serve in addition to any other members otherwise provided for by law or rule. Lay members shall be at least eighteen years of age, shall be of good moral character, and shall be competent to represent and safeguard the interests of the public. Each lay member is empowered to participate in and vote on all transactions and business of the board, committee or group to which he or she is appointed.

(b) Any person whose addition to a board as a lay member under the provisions of this section results in the addition of an odd number of lay additions to the board shall serve for a term ending in an odd-numbered year on the date in that year on which terms of the professional members expire. Of the members first appointed, each shall serve for a term ending in the year one thousand nine hundred seventy-nine, and the successor to each of the first members shall serve for a term equal in length to the terms of the other professional members of the board.

(c) Any person whose addition to a board as a lay member under the provisions of this section results in the addition of an even number of lay additions to the board shall serve for a term ending in an even-numbered year on the date in that year on which terms of the professional members expire. Of the members first appointed, each shall serve for a term ending in the year one thousand nine hundred seventy-eight, and the successor to each of the first members shall serve for a term equal in length to the terms of the other professional members of the board.

§ 30-1-5. Meetings; quorum; investigatory powers; duties.

(a) Every board referred to in this chapter shall hold at least one meeting each year, at such time and place as it may prescribe by rule, for the examination of applicants who desire to practice their respective professions or occupations in this state and to transact any other business which may legally come before it. The board may hold additional meetings as may be necessary, which shall be called by the secretary at the direction of the president or upon the written request of any three members. A majority of the members of the board constitutes a quorum for the transaction of its business. The board is authorized to compel the attendance of witnesses, to issue subpoenas, to conduct investigations and hire an investigator, and to take testimony and other evidence concerning any matter within its jurisdiction. The president and secretary of the board are authorized to administer oaths for these purposes.

(b) Every board referred to in this chapter has a duty to investigate and resolve complaints which it receives and shall do so in a timely manner. Every board shall provide public access to the record of the disposition of the complaints which it receives, in accordance with the provisions of chapter twenty-nine-b [§ 29B-1-1 et seq.] of this code. Every board has a duty to report violations of individual practice acts contained in this chapter to the board by which the individual may be licensed, and shall do so in a timely manner upon receiving notice of such violations. Every person licensed or registered by a board has a duty to report to the board which licenses or registers him or her a known or observed violation of the practice act or the board's rules by any other person licensed or registered by the same board, and shall do so in a timely manner. Law-enforcement agencies or their personnel and courts shall report in a timely manner to the appropriate board any violations of individual practice acts by any individual.

(c) Whenever a board referred to in this chapter obtains information that a person subject to its authority has engaged in, is engaging in, or is about to engage in any act which constitutes or will constitute a violation of the provisions of this chapter which are administered and enforced by that board, it may apply to the circuit court for an order enjoining the act. Upon a showing that the person has engaged, is engaging, or is about to engage in any such act, the court shall order an injunction, restraining order or other order as the court may deem appropriate.

§ 30-1-6. Application for license or registration; examination fee.

(a) Every applicant for license or registration under the provisions of this chapter shall apply for such license or registration in writing to the proper board and shall transmit with his or her application an examination fee which the board is authorized to charge for an examination or investigation into the applicant's qualifications to practice.

(b) Each board referred to in this chapter is authorized to establish by rule a deadline for application for examination which shall be no less than ten nor more than ninety days prior to the date of the examination.

(c) Boards may set by rule fees relating to the licensing or registering of individuals, which shall be sufficient to enable the boards to carry out effectively their responsibilities of licensure or registration and discipline of individuals subject to their authority: Provided, That when any board proposes to promulgate a rule regarding fees for licensing or registration, that board shall notify its membership of the proposed rule by mailing a copy of the proposed rule to the membership at the time that the proposed rule is filed with the secretary of state for publication in the state register in accordance with section five [§ 29A-3-5], article three, chapter twenty-nine-a of this code.

(d) In addition to any other information required, the applicant's social security number shall be recorded on the application

.

§ 30-1-7. Contents of license or certificate of registration.

Every license or certificate of registration issued by each board shall bear a serial number, the full name of the applicant, the date of issuance, and the seal of the board. It shall be signed by the board's president and secretary or executive secretary. No license or certificate of registration granted or issued under the provisions of this chapter may be assigned.

§ 30-1-7a. Continuing education.

Each board referred to in this chapter shall establish continuing education requirements as a prerequisite to license renewal. Each board shall develop continuing education criteria appropriate to its discipline, which shall include, but not be limited to, course content, course approval, hours required and reporting periods.

§ **30-1-8. Denial, suspension or revocation of a license or registration; probation; proceedings; effect of suspension or revocation; transcript; report; judicial review.**

(a) Every board referred to in this chapter is authorized to Suspend or revoke the license of any person who has been convicted of a felony or who has been 'found to have engaged in conduct, practices or acts constituting professional negligence or a willful departure from accepted standards of professional conduct. Where any person has been so convicted of a felony or has been found to have engaged in such conduct, practices or acts, every board referred to in this chapter is further authorized to enter into consent decrees, to reprimand, to enter into probation orders, to levy fines not to exceed one thousand dollars per day per violation, or any of these, singly or in combination. Each board is also authorized to assess administrative costs. Any costs

which are assessed shall be placed in the special account of the board, and any fine which is levied shall be deposited in the state treasury's general revenue fund. For purposes of this section, the word "felony" means a felony or crime punishable as a felony under the laws of this state, any other state, or the United States. Every board referred to in this chapter is authorized to promulgate rules in accordance with the provisions of chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code to delineate conduct, practices or acts which, in the judgment of the board, constitute professional negligence, a willful departure from accepted standards of professional conduct or which may render an individual unqualified or unfit for licensure, registration or other authorization to practice.

(b) Notwithstanding any other provision of law to the contrary, no certificate, license, registration or authority issued under the provisions of this chapter may be suspended or revoked without a prior hearing before the board or court which issued the certificate, license, registration or authority. However, this does not apply in cases where a board is authorized to suspend or revoke a certificate, license, registration or authority prior to a bearing if the individual's continuation in practice constitutes an immediate danger to the public.

(c) In all proceedings before a board or court for the suspension or revocation of any certificate, license, registration or authority issued under the provisions of this chapter, a statement of the charges against the holder thereof and a notice of the time and place of hearing shall be served upon the person as a notice is served under section one [§ 56-2-1], article two, chapter fifty-six of this code, at least thirty days prior to the hearing, and he or she may appear with witnesses and be heard in person, by counsel, or both. The board may take oral or written proof, for or against the accused, as it may deem advisable. If upon hearing the board finds that the charges are true, it may suspend or revoke the certificate, license, registration or authority, and suspension or revocation shall take from the person all rights and privileges acquired thereby.

(d) Pursuant to the provisions of section one [{ 29A-5-1], article five, chapter twenty-nine-a of this code, informal disposition may also be made by the board of any contested case by stipulation, agreed settlement, consent order or default. Further, the board may suspend its decision and place a licensee found by the board to be in violation of the applicable practice on probation.

(e) Any person denied a license, certificate, registration or authority who believes the denial was in violation of this article or the article under which the license, certificate, registration or authority is authorized shall be entitled to a hearing on the action denying the license, certificate, registration or authority. Hearings under this subsection shall be in accordance with the provisions for hearings which are set forth in this section.

(f) A stenographic report of each proceeding on the denial, suspension or revocation of a certificate, license, registration or authority shall be made at the expense of the board and a transcript thereof retained in its files. The board shall make a written report of its findings, which shall constitute part of the record.

(g) All proceedings under the provisions of this section are subject to review by the supreme court of appeals.

§ 30-1-9. Review by circuit court and supreme court of board's refusal to issue; suspension or revocation of license or registration.

A person, not an applicant for or holder of a license to practice law, who has been refused a license or registration for any cause other than failure to pass the examination given by the board, or whose certificate, license, registration or authority has been suspended or revoked, may, within thirty days after the decision of the board, present his petition in writing to the circuit court of the county in which such person resides, or to the judge of such court in vacation, praying for the review and reversal of such decision. Before presenting his petition to the court or judge, the petitioner shall mail copies thereof to the president and secretary, respectively, of the board. Upon receipt of such copy the secretary shall forthwith transmit to the clerk of such court the record of the proceeding before the board. The court or judge shall fix a time for the review of said proceeding at his earliest convenience. Notice in writing of the time and place of such hearing shall be given to the president and secretary of the board at least ten days before the date set therefor. The court or judge shall, without a jury, hear and determine the case upon the record of the proceedings before the board. The court or judge may enter an order affirming, revising, or reversing the decision of the board if it appears that the decision was clearly wrong. Prior to the entry of such order, no order shall be made or entered by the court to stay or supersede any suspension, revocation or cancellation of any such certificate, license, registration or authority. The judgment of the circuit court may be reviewed upon appeal in the supreme court of appeals.

§ 30-1-10. Disposition of money fines; legislative audit.

(a) The secretary of every board referred to in this chapter shall receive and account for all money which it derives pursuant to the provisions of this chapter which are applicable to it. With the exception of money received as fines, each board shall pay all money which is collected into a separate special fund of the state treasury which has been established for each board. This money shall be used 'exclusively by each board for purposes of administration and enforcement of its duties pursuant to this chapter. Any money received as fines shall be deposited into the general revenue fund of the state treasury. When the special fund of any board accumulates to an amount which exceeds twice the annual budget of the board or ten thousand dollars, whichever is greater, the excess amount shall be transferred by the state treasurer to the state general revenue fund.

(b) Every licensing board which is authorized by the provisions of this chapter shall be subject to audit by the office of the legislative auditor.

§ 30-1-11. Compensation of members expenses.

Each member of every board which is referred to in this chapter shall receive compensation and expense reimbursement which shall not exceed the amount paid to members of the Legislature for their interim duties as recommended by the citizens legislative compensation commission and authorized by law for each day or portion thereof engaged in the discharge of official duties.

§ 30-1-12. Record of proceedings; register of applicants; certified copies of records prima facie evidence; report to governor and Legislature; public access.

(a) The secretary of every board shall keep a record of its proceedings and a register of all applicants for license or registration, showing for each the date of his or her application, his or her name, age, educational and other qualifications, place of residence, whether an examination was required, whether the applicant was rejected or a certificate of license or registration granted, the date of this action, the license or registration number, all renewals of the license or registration, if required, and any suspension or revocation thereof. The books and register of the board shall be open to public inspection at all reasonable times, and the books and register, or a copy of any part thereof, certified by the secretary and attested by the seal of the board, shall be prima facie evidence of all matters recorded therein.

(b) On or before the first day of January of each year in which the Legislature meets in regular session, the board shall submit to the governor and to the Legislature a report of its transactions for the preceding two years, an itemized statement of its receipts and disbursements for that period, a full list of the names of all persons licensed or registered by it during that period, statistical reports by county of practice, by specialty if appropriate to the particular profession, and a list of any complaints which were filed against persons licensed by the board, including any action taken by the board regarding those complaints. The report shall be certified by the president and the secretary of the board, and a copy of the report shall be filed with the secretary of state.

(c) To promote public access, the secretary of every board shall ensure that the address and telephone number of the board are included every year in the state government listings- of the Charleston area telephone directory. Every board shall regularly evaluate the feasibility of adopting additional methods of providing public access, including, but not limited to, listings in additional telephone directories, toll-free telephone numbers, facsimile and computer-based communications.

{30-1-13. Roster of licensed or registered practitioners.
The secretary of every such board shall also prepare and maintain a complete roster of the names, social security numbers and office addresses of all persons licensed, or registered, and practicing in this state the profession or occupation to which such board relates, arranged alphabetically by name and also by the counties in which their offices are situated. The board may call for and require a registration whenever it deems it necessary or expedient to secure an accurate roster.

§ 30-1-14. Remission of certain fees.
Every board of examination or registration referred to in this chapter is hereby authorized, under such rules and regulations as may be adopted by each board, to remit all annual license or annual registration fees required to be paid by any licensee or registrant under its supervision during such time as such licensee or registrant is serving with the armed forces of the United States of America, and to retain the name of such licensee or registrant in good standing on the roster of said board during said time.

§ 30-1-15. Office of executive secretary of the health profession licensing boards; appointment of executive secretary; duties.
The office of the executive secretary of the health profession licensing boards is hereby created. The health profession licensing boards shall include those boards provided for in articles two-a [repealed], four, five, six, seven, seven-a, eight, ten, fourteen, sixteen, seventeen, twenty, twenty-one, twenty-five and twenty-six [§§ 30-2A-1 et seq., repealed; 30-4-1 et seq., 30-5-1 et seq., 30-6-1 et seq., 30-7-1 et seq., 30-7A-1 et seq., 30-8-1 et seq., 30-10-1 et seq., 30-14-1 et seq., 30-16-1 et seq., 30-17-1 et seq., 30-20-1 et seq., 30-21-1 et seq., 30-25-1 et seq. and 30-26-1 et seq.] of chapter thirty of this code. Notwithstanding any other provision of this code to the contrary, the office space, personnel, records and like business affairs of the health profession licensing boards shall be within the office of the executive secretary of the health profession licensing boards. The secretaries of each of the health profession licensing boards shall coordinate purchasing, record keeping, personnel, use of reporters and like matters under the executive secretary in order to achieve the most efficient and economical fulfillment of their functions. The executive secretary shall be appointed by the director of health and shall report to the director. The executive secretary shall keep the fiscal records and accounts of each of the boards. The executive secretary shall keep the director informed as to the needs of each of the boards. The executive secretary shall coordinate the activities and efforts of the boards with the activities of the health resources advisor council and shall see that the needs for health manpower perceived by the boards are

communicated to- the health resources advisory council. The executive secretary shall keep any statistics and information on health professions, collected by or for the boards and shall make such statistics and information available to the health resources advisory council to aid it in carrying out its responsibilities.

§ 30-1-16. Liability limitations of peer review committees and professional standards review committees.

No member of a peer review committee or a professional standards review committee of a state or local professional organization, including, but not limited to, committees established to review the practices of doctors of chiropractic, doctors of veterinary medicine, doctors of medicine, doctors of dentistry, attorneys-at-law, real estate brokers, architects, professional engineers, certified public accountants, public accountants or registered nurses shall be deemed liable to any person for any action taken or recommendation made within the scope of the functions of the committee, if the committee member acts without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to him after reasonable effort to obtain the facts of the matter as to which such action is taken or recommendation is made.

ARTICLE 1A. PROCEDURE FOR REGULATION OF OCCUPATIONS AND PROFESSIONS.

§ 30-1A-1. Legislative findings.

The Legislature finds that regulation should be imposed on an occupation or profession only when necessary for the protection of public health and safety. The Legislature further finds that establishing a procedure for reviewing the necessity of regulating an occupation or profession prior to enacting laws for such regulation will better enable it to evaluate the need for the regulation and to determine the least restrictive regulatory alternative consistent with public health and safety.

§ 30-1A-2. Required application for regulation of professional or occupational group.

(a) Any professional or occupational group or organization, any individual or any other interested party which proposes the regulation of any unregulated professional or occupational group shall submit an application for regulation to the joint standing committee on government organization no later than the first day of December of any year. The joint standing committee on government organization may only accept an application for regulation of a professional or occupational group when the party submitting an application files with the committee a statement of support for the proposed regulation which has been signed by at least ten residents or citizens of the state of West Virginia who are members of the professional or occupational group for which regulation is being sought.

(b) The completed application shall contain:

(1) A description of the occupational or professional group proposed for regulation, including a list of associations, organizations and other groups currently representing the practitioners in this state, and an estimate of the number of practitioners in each group;

(2) A definition of the problem and the reasons why regulation is deemed necessary;

(3) The reasons why certification, registration, licensure or other type of regulation is being requested and why that regulatory alternative was chosen;

(4) A detailed statement of the fee structure conforming with the statutory requirements of financial autonomy as set out in subsection (c), section six N 30-1-6(c)], article one, chapter thirty of this code;

(5) A detailed statement of the location and manner in which the group plans to maintain records which are accessible to the public as set out in section twelve [§ 30-1-121, article one, chapter thirty of this code;

(6) The benefit to the public that would result from the proposed regulation; and

(7) The cost of the proposed regulation.

§ 30-1A-3. Analysis and evaluation of application.

(a) The joint committee on government organization shall refer the completed application of the professional or occupational group to the performance evaluation and research division of the office of the legislative auditor.

(b) The performance evaluation and research division of the office of the legislative auditor shall conduct an analysis and evaluation of the application. The analysis and evaluation shall be based upon the criteria listed in subsection (c) of this section. The performance evaluation and research division of the office of the legislative auditor shall submit a report, and such supporting materials as may be required, to the joint standing committee on government organization no later than the first day of July following the date the proposal is submitted to the joint standing committee on government organization.

(c) The report shall include evaluation and analysis as to:
(1) Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety or welfare of the public, and whether the potential for the harm is easily recognizable and not remote or dependent upon tenuous argument;

(2) Whether the public needs, and can reasonably be expected to benefit from, an assurance of initial and continuing professional or occupational competence; and

(3) Whether the public can be adequately protected by other means in a more cost-effective manner.

§ 30-1A-4. Public hearing and committee recommendations.

(a) After receiving the required report, the joint standing committee on government organization may conduct public hearings to receive testimony from the public, the governor or his or her designee, the group, organization or individual who submitted the proposal for regulation, and any other interested party,

(b) The joint standing committee on government organization shall report its findings and recommendations to the next regular session of the Legislature.

(c) The report shall include:
(1) Whether regulation of each occupation or profession is necessary for the public health and safety and, if regulation is necessary, recommendations as to what is the least restrictive type of regulation consistent with the public interest; and
(2) Whether regulation would result in the creation of a new agency or board or could be implemented more efficiently through an existing agency or board.

(d) The report may include a recommendation that the occupation or profession be regulated by any of the following mechanisms, in whole or in part:
(1) By practice standards, which may include restrictions established by statute;

(2) By registration, which may include inspections or other enforcement provisions;

(3) By statutory certification, which may include testing or assessment of the practitioner's credential or competency;

(4) By supervision by a licensed practitioner, which may include practice standards, registration or statutory certification;

(5) By licensure by a new or existing agency or board, which may include restrictions of the scope of practice, minimum competency, education, testing, registration, certification, inspection or enforcement.

§ 30-1A-5. Re-application requirements.
If the joint standing committee on government organization approves an application for regulation of a professional or occupational group, but the legislation incorporating its recommendations does not become law in the year in which it is first introduced, the applicants for regulation may introduce legislation during each of the two successive regular sessions without having to make reapplication.

APPENDIX

THE WEST VIRGINIA OPEN GOVERNMENTAL PROCEEDINGS ACT

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

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A SUMMARY OF THE LAW ON OPEN GOVERNMENTAL PROCEEDINGS (THE OPEN MEETINGS OR "SUNSHINE" ACT)

INTENT:

The State statute on Open Governmental Proceedings, sometimes called the Open Meetings or "Sunshine" Act, was enacted to ensure that the proceedings of all public agencies are conducted in an open and public manner, so that the people may be informed about the actions of their governments and retain control over them.

SCOPE:

The Act applies to all State, county and municipal administrative or legislative units of government, including their departments, agencies, committees, boards and commissions. It does not apply to the courts. Meetings of the governing bodies of all public agencies must be open to the public, unless a specific statutory exception applies. Each governing body may adopt reasonable rules for attendance of the public at its meetings, but no one may be required to register to speak more than fifteen minutes before a scheduled meeting.

Every public agency is required to give advance notice to the public and news media of the date, time, place and agenda of all regular meetings and the date, time, place and purpose of all special meetings, except in the case of an emergency requiring immediate action. Public agencies must keep written minutes of all meetings, and must make them available to the public within a reasonable time after the meeting. These minutes must include all measures proposed and the results of all votes taken. Voting by secret or written ballot is prohibited.

Any radio or television station is entitled to broadcast all or any part of an open meeting. The public agency may reasonably control the placement and use of cameras and other equipment so as not to unduly interfere with the meeting.

EXCEPTIONS:

While the scope of the Act is expansive, it does provide specific exceptions for which a governing body of a public agency may hold an executive session, which is a meeting that is not open to the public. The exceptions are set forth in W. Va. Code § 6-9A-4 (1999), at pages 7 and 8 herein.

A governing body of a public agency may hold an executive session (closed meeting) during a regular, special or emergency meeting, only after the presiding officer publicly identifies the specific exception under the Act for having a closed meeting, and a majority of the members present votes to hold an executive session. No decisions can be made during an executive session, but minutes may be taken.

ENFORCEMENT:

Any citizen may bring a legal action in the circuit court of the county where the public agency regularly meets to enforce the provisions of the Act. The court may order the public agency to comply with the Act, and may enjoin or set aside any action taken or decision made in violation of the Act if a petition is filed within one hundred twenty (120) days after the action was taken or the decision was made. If a governing body of a public agency is found to be in violation of the Act, the public agency may be ordered to pay the complaining person's attorney fees and expenses incurred in successfully litigating the issue.

PENALTIES:

Any member of a public or governmental body who willfully and knowingly violates the Act is guilty of a misdemeanor, and upon conviction may be fined up to $500.00. A second or subsequent conviction for violating the Act can result in a fine of between $100.00 and $1,000.00.

OPINIONS:

The Open Governmental Meetings Committee of the West Virginia Ethics Commission may give advisory opinions interpreting the Open Meetings Act to any governing body or member thereof who is subject to the Act. Such opinions are binding on the parties requesting them, and provide an absolute defense to any civil suit or criminal prosecution for any action taken in good faith reliance on the opinion, unless the Committee was willfully and intentionally misinformed as to the facts by the requesting party. The opinions also provide an absolute defense to others who rely upon them in taking actions under substantially the same circumstances.

PUBLIC NOTICE OF MEETINGS IN THE STATE REGISTER:

West Virginia Code § 6-9A-3 (1999) requires that each governing body of the State executive branch file a notice of any meeting with the Secretary of State for publication in the West Virginia Register.

Each notice shall state the time, place and purpose of the meeting, and must be filed in a manner to allow each notice to appear in the State Register at least five (5) days prior to the date of the meeting, except in cases of an emergency. (Generally the Register is published on Friday, making the fifth day fall on Wednesday.)

When an agency has not met the requirements of the Open Governmental Proceedings Act, asterisks appear beside the meeting notice for that agency in the Register, and a footnote at the bottom of the page indicates that the notice does not comply with the Act.

Pursuant to W. Va. Code § 29A-2-4 (1982), every paper filed in the State Register is a public record provable and admissible as evidence in a court of law. The Secretary of State's Office is required by W. Va. Code § 29A-2-7 (1997) to "offer to the public convenient and efficient access to copies of the state register or parts thereof desired by the citizens."

INFORMATION:

The Attorney General is required to compile a summary of the statutory and case law interpreting the Open Meetings Act for the purpose of informing all public officials of the requirements of the Act. This material will be provided to the Secretary of State, county clerks, municipal clerks and recorders for distribution to all elected and appointed officials within their jurisdictions.

STATUTE

OPEN GOVERNMENTAL PROCEEDINGS.

§ 6-9A-1. Declaration of legislative policy.

The Legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions. The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government created by them.

Open government allows the public to educate itself about government decision-making through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government.

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

Accordingly, the benefits of openness inure to both the public affected by governmental decision-making and the decision makers themselves. The Legislature finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decision-making. (1975, c. 177; 1999, c. 208.)

§ 6-9A-2. Definitions.

As used in this article:

(1) "Decision" means any determination, action, vote or final disposition of a motion, proposal, resolution, order, ordinance or measure on which a vote of the governing body is required at any meeting at which a quorum is present.

(2) "Executive session" means any meeting or part of a meeting of a governing body which is closed to the public.

(3) "Governing body" means the members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

(4)"Meeting" means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

(A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding;

(B) Any on-site inspection of any project or program;

(C) Any political party caucus;

(D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

(5) "Official action" means action which is taken by virtue of power granted by law, ordinance, policy, rule, or by virtue of the office held.

(6) "Public agency" means any administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency

or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power. The term "public agency" does not include courts created by article eight of the West Virginia constitution or the system of family law masters created by article four [§§ 48A-4-1 *et seq*.], chapter forty-eight-a of this code.

(7) "Quorum" means the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio. (1975, c. 177; 1978, c. 85; 1993, c. 29; 1999, c. 208.)

§ 6-9A-3. Proceedings to be open; public notice of meetings.

Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four [§ 6-9A-4] of this article, all meetings of any governing body shall be open to the public. Any governing body may make and enforce reasonable rules for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend. This article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised: *Provided,* That persons who desire to address the governing body may not be required to register to address the body more than fifteen minutes prior to time the scheduled meeting is to commence.

Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media, except in the event of an emergency requiring immediate official action.

Each governing body of the executive branch of the state shall file a notice of any meeting with the secretary of state for publication in the state register. Each notice shall state the date, time, place and purpose of the meeting. Each notice shall be filed in a manner to allow each notice to appear in the state register at least five days prior to the date of the meeting.

In the event of an emergency requiring immediate official action, any governing body of the executive branch of the state may file an emergency meeting notice at any time prior to the meeting. The emergency meeting notice shall state the date, time, place and purpose of the meeting and the facts and circumstances of the emergency.

Upon petition by any adversely affected party any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section. (1975, c. 177; 1978, c. 85; 1987, c. 98; 1999, c. 208.)

§ 6-9A-4. Exceptions.

(a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:

(1) To consider acts of war, threatened attack from a foreign power, civil insurrection or riot;

(2) To consider:

(A) Matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee unless the public officer or employee or prospective public officer or employee requests an open meeting; or

(B) For the purpose of conducting a hearing on a complaint, charge or grievance against a public officer or employee, unless the public officer or employee requests an open meeting. General personnel policy issues may not be discussed or considered in a closed meeting. Final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting;

(3) To decide upon disciplining, suspension or expulsion of any student in any public school or public college or university, unless the student requests an open meeting;

(4) To issue, effect, deny, suspend or revoke a license, certificate or registration under the laws of this state or any political subdivision, unless the person seeking the license, certificate or registration or whose license, certificate or registration was denied, suspended or revoked requests an open meeting;

(5) To consider the physical or mental health of any person, unless the person requests an open meeting;

(6) To discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy such as any records, data, reports, recommendations or

other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances;

(7) To plan or consider an official investigation or matter relating to crime prevention or law enforcement;

(8) To develop security personnel or devices;

(9) To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision: *Provided,* That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed. *Provided,* However, that information not subject to release pursuant to the West Virginia freedom of information act does not become subject to disclosure as a result of executive session;

(10) To avoid the premature disclosure of an honorary degree, scholarship, prize or similar award;

(11) Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant. If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded;

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act as set forth in article one [§§ 29B-1-1 *et seq*.], chapter twenty-nine-b of this code. (1975, c. 177; 1978, c. 85; 1999, c. 208.)

§ 6-9A-5. Minutes.

Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four [§ 6-9A-4] of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

(1) The date, time and place of the meeting;

(2) The name of each member of the governing body present and absent;

(3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and

(4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name. (1975, c. 177; 1978, c. 85; 1999, c. 208.)

§ 6-9A-6. Enforcement by injunctions; actions in violation of article voidable; voidability of bond issues.

The circuit court in the county where the public agency regularly meets has jurisdiction to enforce this article upon civil action commenced by any citizen of this state within one hundred twenty days after the action complained of was taken or the decision complained of was made. Where the action seeks injunctive relief, no bond may be required unless the petition appears to be without merit or made with the sole intent of harassing or delaying or avoiding return by the governing body.

The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation [of] this article. An injunction may also order that subsequent actions be taken or decisions be made in conformity with the provisions of this article: *Provided*, That no bond issue that has been passed or approved by any governing body in this state may be annulled under this section if notice of the meeting at which the bond issue was finally considered was given at least ten days prior to the meeting by a Class I legal advertisement published in accordance with the provisions of article three [§§ 59-3-1 *et seq*.], chapter fifty-nine of this code in a qualified newspaper having a general circulation in the geographic area represented by that governing body.

In addition to or in conjunction with any other acts or omissions which may be determined to be in violation of this act, it is a violation of this Act for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.

Any order which compels compliance or enjoins noncompliance with the provisions of this article, or which annuls a decision made in violation of this article shall include findings of fact and conclusions of law and shall be recorded in the minutes of the governing body. (1975, c. 177; 1978, c. 85; 1979, c. 85; 1993, c. 29; 1999, c. 208.)

§ 6-9A-7. Violation of article; criminal penalties; attorney fees and expenses in civil actions.

(a) Any person who is a member of a public or governmental body required to conduct open meetings in compliance with the provisions of this article and who willfully and knowingly violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars: *Provided,* That a person who is convicted of a second or subsequent offense under this subsection is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars.

(b) A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article may be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, 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.

(c) Where the court, upon denying the relief sought by the complaining person in the action, finds that the action was frivolous or commenced with the primary intent of harassing the governing body or any member thereof or, in the absence of good faith, of delaying any meetings or decisions of the governing body, the court may require the complaining person to pay the governing body's necessary attorney fees and expenses. (1978, c. 85; 1999, c. 208.)

§ 6-9A-8. Acting by reference; written ballots.

(a) Except as otherwise expressly provided by law, the members of a public agency may not deliberate, vote, or otherwise take official action upon any matter by reference to a letter, number or other designation or other secret device or method, which may render it difficult for persons attending a meeting of the public agency to understand what is being deliberated, voted or acted upon. However, this subsection does not prohibit a public agency from deliberating, voting or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted or acted upon, are available for public inspection at the meeting.

(b) A public agency may not vote by secret or written ballot. (1999, c. 208.)

§ 6-9A-9. Broadcasting or recording meetings.

(a) Except as otherwise provided in this section, any radio or television station is entitled to broadcast all or any part of a meeting required to be open.

(b) A public agency may regulate the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting, so as to prevent undue interference with the meeting. The public agency shall allow the equipment to be placed within the meeting room in such a way as to permit its intended use, and the ordinary use of the equipment may not be declared to constitute undue interference: *Provided,* That if the public agency, in good faith, determines that the size of the meeting room is such that all the members of the public present and the equipment and personnel necessary for broadcasting, photographing, filming and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public agency, acting in good faith and consistent with the purposes of this article, may require the pooling of the equipment and the personnel operating it. (1999, c. 208.)

§ 6-9A-10. Open governmental meetings committee.

The West Virginia ethics commission, pursuant to subsection (j), section one [§ 6B-2-1(j)], article two, chapter six-b of this code, shall appoint from the membership of the commission a subcommittee of three persons designated as the West Virginia ethics commission committee on open governmental meetings. The chairman shall designate one of the persons to chair the committee. In addition to the three members of the committee, two additional members of the commission shall be designated to serve as alternate members of the committee.

The chairman of the committee or the executive director shall call meetings of the committee to act on requests for advisory opinions interpreting the West Virginia open government meetings act. Advisory opinions shall be issued in a timely manner, not to exceed thirty days. (1999, c. 208.)

§ 6-9A-11. Request for advisory opinion; maintaining confidentiality.

(a) Any governing body or member thereof subject to the provisions of this article may seek advice and information from the executive director of the West Virginia Ethics Commission or request in writing an advisory opinion from the West Virginia Ethics Commission Committee on Open Governmental Meetings as to whether an action or proposed action violates the provisions of this article. The executive director may render oral advice and information upon request. The committee shall respond in writing and in an expeditious manner to a request for an advisory opinion. The opinion is binding on the parties requesting the opinion.

(b) Any governing body or member thereof that seeks an advisory opinion and acts in good faith reliance on the opinion has an absolute defense to any civil suit or criminal prosecution for any action taken in good faith reliance on the opinion unless the committee was willfully and intentionally misinformed as to the facts by the body or its representative.

(c) A governing body or member thereof that acts in good faith reliance on a written advisory opinion sought by another person or governing body has an absolute defense to any civil suit or criminal prosecution for any action taken based upon a written opinion of the West Virginia ethics commission committee, as long as underlying facts and circumstances surrounding the action were the same or substantially the same as those being addressed by the written opinion.

(d) The committee and commission may take appropriate action to protect from disclosure information which is properly shielded by an exception provided in section four [§ 6-9A-4] of this article. (1999, c. 208; 2006 c.___, eff. 6/9/06.)

§ 6-9A-12. Duty of attorney general, secretary of state, clerks of the county commissions and city clerks or recorders.

It is the duty of the attorney general to compile the statutory and case law pertaining to this article and to prepare appropriate summaries and interpretations for the purpose of informing all public officials subject to this article of the requirements of this article. It is the duty of the secretary of state, the clerks of the county commissions, joint clerks of the county commissions and circuit courts, if any, and the city clerks or recorders of the municipalities of the state to provide a copy of the material compiled by the attorney general to all elected public officials within their respective jurisdictions. The clerks or recorders will make the material available to appointed public officials. Likewise, it is their respective duties to provide a copy or summary to any newly appointed or elected person within thirty days of the elected or appointed official taking the oath of office or an appointed person's start of term. (1999, c. 208.)

INTERPRETATIONS OF THE ACT

When posed with an Open Governmental Proceedings Act (Open Meetings Act) question, three initial inquiries must be made to determine if a governmental proceeding is required to be open under the Act. These questions are:

1. Is the entity a governing body of a **public agency** as defined by the Open Meetings Act?

2. Is the governing body's gathering a **meeting** as defined by the Open Meetings Act?

3. Is there a specific **statutory exception** to the Open Meetings Act?

The answers to these questions may be found in the Act or in the statute of the public agency involved. If a meeting of the governing body of a public agency is involved, and it is not covered by a specific statutory exception to the provisions of the Open Meetings Act, then the meeting must be open to the public.

The following West Virginia Supreme Court of Appeals decisions and Attorney General's Opinions have defined more specifically the governmental proceedings which must be open to the public under the Open Meetings Act. Although an Opinion of the Attorney General does not have the force of law, it is the official opinion of the State's chief legal officer as to how the West Virginia Supreme Court would rule should the same issue be before the Court.

PUBLIC AGENCY:

The definition of a "public agency" [formerly "public *body*"] in the Open Meetings Act includes any administrative or legislative unit of the State or of any county, board of education or municipality. It does not include the judiciary. W. Va. Code § 6-9A-2(6) (1999). "Governing body" means two or more members of any public agency having authority to make decisions or recommendations on policy or administration. W. Va. Code § 6-9A-2(3) (1999).

The members of a **board of education** constitute a "governing body" subject to the Sunshine Law's requirements. *McComas v. Board of Education of Fayette County*, 197 W. Va. 188, 194, 475 S.E.2d 280, 286 (1996).

In *Appalachian Power Company v. Public Service Commission*, 162 W. Va. 839, 253 S.E.2d 377 (1979), the parties stipulated that the West Virginia **Public Service Commission** is a "public body" [now "public agency"] as defined by the Act, and that any two of the three commissioners constituted its "governing body." The Supreme Court of Appeals did not disagree.

The Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1 *et seq.*, applies only to governmental entities and to persons holding public positions. It does not apply to meetings of **political party executive committees**. 58 Op. Att'y Gen. 28 (October 10, 1978).

A **county commission**, when acting as a **board of canvassers** for elections pursuant to W. Va. Code § 3-6-9, is both a "governing body" and a "public body" [now "public agency"] within the meaning of the Open Meetings Act. 59 Op. Att'y Gen. 34 (October 20, 1980).

The **West Virginia Human Rights Commission** is a "public body" [now "public agency"] within the meaning of the Open Meetings Act, and the nine members thereof constitute its "governing body" under the Act. Any five members of the Commission constitute a quorum for the transaction of business, and minutes of its meetings shall be kept by its secretary pursuant to W. Va. Code § 5-11-6. Op. Att'y Gen. (July 17, 1986).

Some statutes specifically apply the provisions of the Open Meetings Act to proceedings which otherwise might not be considered to fall within its coverage. For example, W. Va. Code § 18B-12-3(3) (1989) provides that meetings of the directors of nonstock, nonprofit higher education research corporations are subject to the provisions of W. Va. Code § 6-9A-3. In addition, W. Va. Code § 16-5G-3 (1999) requires that meetings of the governing bodies of all hospitals owned or operated by nonprofit corporations, nonprofit associations or local governmental units be open to the public, in much the same manner as required of public agencies under the Open Meetings Act.

MEETING:

A "meeting" is defined by the Act as "the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in official action." It does not include adjudicatory decision-making in quasi-judicial, administrative or court of claims proceedings; on-site inspections of a project or program; political party caucuses; discussions among members of a governing body on issues of public interest in a social, educational, training, informal, ceremonial or similar setting where there is no intention for the discussion to lead to official action; or discussions on logistical and procedural methods to schedule and regulate a meeting. W. Va. Code § 6-9A-2(4) (1999). Unless otherwise provided, a simple majority of the constituent membership of a governing body constitutes a quorum. W. Va. Code § 6-9A-2(7) (1999).

In *Appalachian Power Company v. Public Service Commission*, 162 W. Va. 839, 253 S.E.2d 377 (1979), the Supreme Court construed the definition of the term "meeting" in W. Va. Code § 6-9A-2(4) (1978) to mean "a convening of a governing body of a public body if the convening is for the purpose of making a decision or deliberating toward a decision, and if some statute or rule **requires a quorum** as a prerequisite to convening." 162 W. Va.

at 844, 253 S.E.2d at 381. The Court reasoned that the provisions of W. Va. Code § 6-9A-2(4), coupled with the requirement in W. Va. Code § 6-9A-5 (1978) that written minutes be prepared of all actions taken, clearly contemplates that a "meeting" under the Act must have sufficient members of the governing body present to be capable of transacting business.

The Court in *Appalachian Power Company* observed that although the Public Service Commission statutes provide for several types of hearings, there is no quorum requirement for hearings, nor are members of the Commission even required to attend or conduct hearings. The Court found that the term "meeting" was clearly not applicable to Commission hearings conducted by staff alone, and that the Open Meetings Act applies to **Public Service Commission hearings** only when two or more commissioners convene and conduct the hearing. Under the same analysis, the Court held that the Act does not apply to consultations of Public Service Commissioners with staff members, deliberations by commissioners, or the process of individual commissioners making a decision.

The Supreme Court in the *Appalachian Power Company* case also found that **adjudicatory sessions** of the Public Service Commission were excepted from the operation of the Open Meetings Act by the definition of "meeting" in W. Va. Code § 6-9A-2(4), which states that the term does not include "[a]ny meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding[.]" The Court determined that proceedings of the Public Service Commission are quasi-judicial in nature because they have many of the characteristics of a judicial proceeding, including notice, presentation of evidence, the making of a record, examination of witnesses under oath and the exercise of subpoena power, and that any final decision reached as a result of such proceedings is an adjudicatory decision. Therefore, the Court held that the Open Meetings Act does not apply to assemblages of the Public Service Commissioners held for the purposes of discussing their individual decisions, concurring and rendering a final decision or judgment.

In *McComas v. Board of Educ. of Fayette County*, 197 W. Va. 188, 475 S.E.2d 280 (1996), four members of the Fayette County Board of Education met privately on a Sunday afternoon at the Board's office with the Superintendent of Fayette County Schools and two associate superintendents to ask questions regarding the proposed closure of Gauley Bridge High School and Falls View Elementary School. The next day, at a public meeting, the Board of Education voted to close both schools following little discussion. Three taxpayers and residents of Fayette County brought suit to block this decision, and the Fayette County Circuit Court voided the vote taken at the public hearing in favor of the school closings and consolidation plan, holding that the Board of Education had violated the Sunshine Law. The West Virginia Supreme Court affirmed this decision, holding, in Syllabus Point 5 of *McComas*: "A **planned meeting among a quorum** of a school board to gather, review or discuss information relevant to an issue before the board must be public, and if it is not, its conduct violates the Open Governmental Proceedings Act, W. Va. Code, 6-9A-3."

The Court in *McComas* noted that the *Appalachian Power Company* case had held that "meetings" under the Open Meetings Act will involve the transaction of business, which includes **deliberating toward a decision** on any matter. The Court held that the Legislature therefore intended the Act to apply to "those assemblies where discussions leading up to a decision take place," and "also encompasses at least some meetings between board members and staff." 197 W. Va. at 195, 475 S.E.2d at 287. Individual meetings or even social gatherings can result in a violation of the Act, depending on their content and the intentions of the parties. *See* 197 W. Va. at 199, 475 S.E.2d at 291.

However, not every gathering between or among members of a governing body of a public agency will constitute a "meeting" in violation of the Open Meetings Law. The Supreme Court in Syllabus Point 4 of *McComas* also held: "In drawing the line between those conversations outside the requirements of the Open Governmental Proceedings Act, W. Va. Code, 6-9A-1, *et seq.*, and those meetings that are within it, a common sense approach is required; one that focuses on the question of whether allowing a governing body to exclude the public from a particular meeting would undermine the Act's fundamental purposes." In answering this question, the criteria to be considered include:

- The content of the discussion;
- The number of members of the public body participating;
- The percentage of the public body that those in attendance represent;
- The significance of the identity of the absent members;
- The intentions of the members;
- The nature and degree of planning involved;
- The duration of the meeting and of the substantive discussion;
- The setting; and
- The possible effects on decision-making of holding the meeting in private.

The above list of criteria is not exhaustive, and courts will carefully examine the facts of each case in determining whether the public has been improperly excluded from the decision-making process. The Supreme Court in *McComas* adopted an expansive interpretation of the Act to achieve its goals, and cautioned against attempts to avoid its requirements by the use of evasive techniques and devices. *See* 197 W. Va. at 197-98, 475 S.E.2d at 289-90. In so doing, the Court rejected the contention that a gathering must have the formal trappings of a regular meeting (such as formal procedures and the keeping of minutes) for it to be a "meeting" within the law. 197 W. Va. at 198, 475 S.E.2d at 290.

The clear import of the *McComas* decision is that whenever a majority of the members of a public body gather to discuss any matter that they know they will be voting on later, the meeting must be open to the public.

The 1999 amendments to the Open Meetings Act provided an exception from the holding of *McComas* for **unintentional violations** which may occur in social, educational or informal settings. *See* W. Va. Code § 6-9A-2(4)(D) (1999) (excluding from the definition of "meeting" in the Act "[g]eneral discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business . . ."). In *Foundation for Independent Living v. Cabell-Huntington Board of Health*, 214 W. Va. 818, 591 S.E.2d 744 (2003), the Supreme Court held that an **educational meeting** between the board of health and two members of the Tobacco Prevention Program to discuss a proposed indoor smoking regulation, which did not involve deliberation toward a decision or a vote, was not a "meeting" as defined by the Act, and therefore no violation had occurred.

However, West Virginia Code § 6-9A-6 (1999) also provides that "it is a violation of this Act for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action." Clearly, a public agency may not intentionally use this exception to circumvent the requirements of the Act.

In *Common Cause of West Virginia v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991), a complaint before the West Virginia Supreme Court of Appeals alleged that the **Conferees Committee on the Budget** caused a "Budget Digest" to be prepared and distributed pursuant to W. Va. Code § 4-1-18 (1969), which differed significantly from the actual budget bill as passed by the Legislature. The petitioners also asserted that no formal meeting was held by members of the Committee and that if such a meeting was held, it did not meet the requirements of the Open Meetings Act, W. Va. Code §§ 6-9A-1 *et seq.* Although it did not address the applicability of the Open Meetings Act, the Supreme Court held that in order to comply with W. Va. Code § 4-1-18, the final **legislative Budget Digest** must be approved by a majority vote of a quorum of the entire Budget Conferees Committee, at a regular meeting scheduled in the normal course of business and open to the public.

When a **county commission**, sitting as a **board of canvassers** for elections pursuant to W. Va. Code § 3-6-9, convenes for the purpose of conducting a canvass or recount, the Open Meetings Act applies, and the meeting must be open. Further, W. Va. Code § 3-6-9 requires the board of canvassers to keep a complete record of its proceedings, and all orders made must be entered upon the record. As to any questions of law or fact which may be "quasi-judicial" in nature, a board of canvassers may privately consult with its legal advisers, and may privately deliberate and discuss prospective **"adjudicatory" decisions** on such questions. However, such decisions must be

announced and entered while the board is convened in open session. 59 Op. Att'y Gen. 34 (October 20, 1980).

Decisions or orders reached as a result of adjudicatory assemblages of the **West Virginia Human Rights Commission** pursuant to the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 *et seq.*, should be entered on the record of a convened open meeting and recorded as minutes in the manner set forth in W. Va. Code § 6-9A-5, thereafter subject to public review and inspection. The Human Rights Commission may privately confer with its legal advisors and Commission staff members and may privately deliberate and discuss among its members prospective **adjudicatory action** on any question of law or fact which may be quasi-judicial in nature, as these deliberations do not fall within the ambit of the Open Meetings Act. The Commission is under no duty to record said discussions; however, any such recordation characterized as minutes or otherwise, would constitute nonpublic information. The Human Rights Commission may privately convene, provided there is a quorum of five members, in **adjudicatory assemblages** for the purpose of discussing their individual decisions and rendering a final decision. These assemblages are also exempt from the Open Meetings Act, W. Va. Code §§ 6-9A-1 *et seq.* Op. Att'y Gen. (July 17, 1986).

EXCEPTIONS:

Even if a meeting of the governing body of a public agency is involved, the meeting may be closed to the public under limited circumstances pursuant to W. Va. Code § 6-9A-4 (1999). The West Virginia Supreme Court of Appeals has yet to discuss any of the exceptions to the Open Meetings Act for which an executive session may be held, as set forth in W. Va. Code § 6-9A-4. Generally speaking, the exceptions for personal or medical information, licensing or disciplinary proceedings require an open meeting if the person requests one. The remaining exceptions deal with public safety and security, law enforcement, financial transactions, prizes or awards, and matters which are confidential by law or rule of court.

Other statutes may also provide a specific exception from the Act for certain proceedings of otherwise "public" bodies. *See*, *e.g.*, W. Va. Code §§ 18-29-3(m) (1992) and 29-6A-3(m) (1998) (education and state employee grievance proceedings). If no specific statutory exception applies, the meeting should be open to the public.

NOTICE:

A **county board of education** may adopt bylaws fixing the time and place of regular meetings of the board [consistent with the provisions of W. Va. Code § 18-5-4 (2001)]. In the absence of other authority, all regular meetings of a county board of education should be held at the office of the board provided by W. Va. Code § 18-4-7. 49 Op. Att'y Gen. 363 (April 5, 1962) (opinion rendered prior to enactment of the Open Governmental Proceedings Act).

The adoption of rules requiring the posting of the time, place and, under some circumstances, the purpose of **county commission** meetings at the courthouse door a reasonable time prior to the meeting will satisfy W. Va. Code §§ 6-9A-1 *et seq.* 57 Op. Att'y Gen. 238 (June 23, 1978).

A **State agency** would be in compliance with the Open Meetings Act, W. Va. Code § 6-9A-3, by promulgating and filing with the Secretary of State's Office a rule requiring the agency to file with the Secretary of State (1) a schedule of the times and places of regular meetings, and (2) notice of the time, place and purpose of each special meeting called by the agency. Such a procedural rule must be promulgated in compliance with the provisions of the State Administrative Procedures Act, W. Va. Code Chapter 29A, and filed in the State Register. Although no specific amount of **advance notice** is required by W. Va. Code § 6-9A-3, such notice should be given as soon as practicable in each case. No advance notice is required in the event of an emergency requiring immediate official action. An agency is free to furnish other kinds of notice in addition to that provided to the Secretary of State. 58 Op. Att'y Gen. 32 (November 20, 1978).

SPECIAL MEETINGS:

A **county board of education** may hold a special meeting at a school building or other place not in the vicinity of the board office, when special circumstances indicate the advisability of same. The time, place and purpose of such meeting should be set forth in the call to board members, and no business other than that included in the call should be transacted at such special meeting. [*See* W. Va. Code § 18-5-4 (2001).] If a board of education considers it to be in the public interest to hold a meeting at some place in the county other than at the board office, any action taken at such a meeting should be ratified at the next board meeting held at the established office of the board. 49 Op. Att'y Gen. 363 (April 5, 1962) (opinion rendered prior to enactment of the Open Governmental Proceedings Act).

ENFORCEMENT:

West Virginia Code § 6-9A-6 (1999) provides that any **civil action** seeking to enjoin or annul a decision made in violation of the Act must be commenced within 120 days "after the action complained of was taken or the decision complained of was made." In *Boggess v. Housing Authority of the City of Charleston*, 273 F. Supp. 2d 729 (S. D. W. Va. 2003), the federal district court granted summary judgment for the defendants on a count alleging violations of the Open Governmental Proceedings Act, because the plaintiff did not file her complaint within 120 days after the actions complained of, and it was thus barred by the **statute of limitations**.

Proof of an intent to violate the Open Meetings Act is not required to establish that the Act was violated. There is **no blanket "good faith" defense** for failing to comply with the statute. *McComas v. Board of Education of Fayette County*, 197 W. Va. 188, 196, 475 S.E.2d 280, 288 (1996). The seriousness of the violation, the intent of the parties involved, and the possible effects are the most important considerations in fashioning an appropriate remedy, which may include setting aside any decision made in violation of the Act. However, a court may uphold a decision if later action by the public body corrects the prior violation.

Although a finding of an intentional violation was required in order to award attorney fees and expenses under W. Va. Code § 6-9A-6 (1993) to persons who sued to enforce the Act, that is no longer required under the 1999 amendments. Under the new Act, the **prevailing party may be awarded fees and expenses** "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." W. Va. Code § 6-9A-7(b) (1999). Similarly, a person who brings a frivolous complaint under the Act in bad faith with the intent to harass or delay, may be ordered to pay the governing body's attorney fees and expenses.

Non-compliance with the requirements of the Act may also give rise to **criminal penalties**. Among its defenses to a suit seeking to enforce an alleged settlement of a grievance case, a board of education claimed that settlement negotiations with the plaintiff, based upon an offer approved during an executive session of the board, were not binding because the proposed settlement was not included in the agenda for that meeting. Finding no true "meeting of the minds" with respect to the terms of the settlement, the Supreme Court declined to enforce the putative agreement. However, the Court cautioned the board regarding the agenda requirements found in W. Va. Code § 6-9A-3 (1999) and the criminal penalties prescribed by W. Va. Code § 6-9A-7(a) (1999) for open meetings violations. *Sprout v. Board of Education of the County of Harrison*, No. 31545, 2004 WL 1092088 & n.2 (W. Va. May 13, 2004).

The adoption of a rule for the posting of notices of **county commission** meetings is mandated by the Open Meetings Act (W. Va. Code § 6-9A-3), and, as such, is not subject to attack under the provisions of W. Va. Code § 6-9A-6 (1978). 57 Op. Att'y Gen. 238 (June 23, 1978).

In *Wetzel County Solid Waste Authority v. West Virginia Division of Natural Resources*, 184 W. Va. 482, 401 S.E.2d 227 (1990), the West Virginia Supreme Court of Appeals recognized that a settlement agreement entered into by a public body during an executive session, in violation of W. Va. Code §§ 6-9A-1 *et seq.*, had been held to be void *ab initio* by a circuit court. Noting that the effect of the lower court's order was to enjoin and annul any subsequent actions pursuant to W. Va. Code § 6-9A-6 (1990), the Supreme Court held that the DNR could not rely on the settlement agreement for regulatory purposes.

ATTORNEY-CLIENT CONSULTATIONS:

Although not specifically excepted from the Open Meetings Act, the West Virginia Supreme Court of Appeals has held that privileged communications between a public agency and its attorney are exempted from the open meetings requirement of the Act. In *Peters v. County Commission of Wood County*, 205 W. Va. 481, 519 S.E.2d 179 (1999), the Court said such meetings may be closed to the public only when a majority of the members present of the governing body vote to go into executive session, and the notice and written minutes requirements of the Act are followed. However, a public agency may not close an otherwise open meeting merely because its attorney is present.

Discussions regarding pending litigation without an attorney present do not appear to be proper subjects of closed executive sessions pursuant to the Act. *State ex rel. Affiliated Construction Trades Foundation v. Vieweg*, 205 W. Va. 687, 701 n. 7, 520 S.E.2d 854, 868 n. 7 (1999). Additionally, in *McComas v. Board of Education of Fayette County*, 197 W. Va. 188, 199-200, 475 S.E.2d 280, 291-92 (1996), the Court noted cases from other jurisdictions holding that otherwise privileged conversations between board members and their attorney may violate the Open Meetings law if any decisions or deliberations take place.

FEDERAL LAW:

The federal equivalent of the State Open Meetings Act is the 1976 "Government in the Sunshine Act," codified as 5 U.S.C. § 552b (1986), which applies to federal executive branch agencies. Subsection (c) of the federal act provides that "every portion of every meeting of an agency shall be open to public observation" unless a specific statutory exception applies. The act further prescribes public announcement of all meetings, and requires a certification by the agency's attorney that a specific exemption applies before a meeting may be closed. The West Virginia Supreme Court of Appeals has not yet compared the provisions of the federal act to those of the State Open Meetings Act.

RESOURCES

If you would like additional information about the materials in this booklet, or if you have questions concerning the Act, please feel free to call or write our Office at:

Office of the Attorney General
State Capitol, Room 26-E
1900 Kanawha Boulevard, East
Charleston, WV 25305-0220

Phone (304) 558-2021, Fax (304) 558-0140

Questions about notices by State executive branch agencies under the Open Meetings Act should be directed to:

Administrative Law Division
Secretary of State's Office
Building 1, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, WV 25305-0771

Phone (304) 558-6000, Fax (304) 558-0900

Open meetings information and this handbook may also be accessed online:
http://www.wvsos.com/adlaw/register/open meetings.htm

Requests for advisory opinions should be made to:

West Virginia Ethics Commission
Committee on Open Governmental Meetings
210 Brooks Street
Suite 300, Lee Building
Charleston, WV 25301

Phone (304) 558-0664, Fax (304) 558-2169
Toll-free (866) 558-0664

For a summary of the open meetings law and a Checklist for Compliance, see:
http://www.wvethicscommission.org/open.htm