

US EPA ARCHIVE DOCUMENT

# WEST VIRGINIA CODE

ANNOTATED

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First Extraordinary Sessions)*

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Prepared by the Editorial Staff of the Publishers

*Under the Supervision of*

ADRIAN D. KOWALSKY  
DEBORAH S. TUSSEY  
HENRY W. TAYLOR  
KEITH F. MCKINELL  
KATHLEEN E. SKINNER

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# WEST VIRGINIA CODE

## CHAPTER 29A.

### STATE ADMINISTRATIVE PROCEDURES ACT.

#### Article

1. Definitions and Application of Chapter.
2. State Register.
3. Rule Making.
  - 3A. Higher Education Rule Making.
  - 3B. State Board of Education Rule Making.
4. Declaratory Rulings and Declaratory Judgments.
5. Contested Cases.
6. Appeals.
7. General Provisions.

**W. Va. Law Review.** — Article, "The West Virginia Administrative Procedure Act," 66 W. Va. L. Rev. 159 (1964).

Survey of developments in West Virginia administrative law in 1979, 82 W. Va. L. Rev. 723 (1980).

**This chapter and chapter 15 must be considered in pari materia,** though enacted at different times. State ex rel. Burchett v. Taylor, 150 W. Va. 702, 149 S.E.2d 234 (1966).

**Section 15-2-1 et seq. not expressly repealed.** — In enacting the State Administrative Procedures Act in 1964, the legislature did not expressly repeal any portion of § 15-2-1 et seq., which deals with the department of public safety. State ex rel. Burchett v. Taylor, 150 W. Va. 702, 149 S.E.2d 234 (1966).

**Applicability of chapter.** — A schedule established by the Workers' Compensation Commissioner under § 23-4-3, which fixes maximum reasonable amounts payable to health care providers and determines the type and amount of medical services reasonably required, is a rule subject to the rule-making requirements of this chapter. West Virginia Chi-

ropractic Soc'y, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987).

**No legislative authority to diminish constitutional strictures regarding administrative law.** — Administrative law originated in the development of constitutional perimeters which circumscribe the administrative process. The fact that these original constitutional limitations were later codified by statute in such acts as this chapter or the Public Service Commission Act, § 24-1-1 et seq., in no regard implies legislative authority to diminish or nullify the constitutional strictures. VEPCO v. Public Serv. Comm'n, 162 W. Va. 202, 248 S.E.2d 322 (1978).

**This chapter reflects an unambiguous legislative commitment** to effective public participation in administrative rule making and insures that West Virginia administrative agencies are not permitted the luxury of conducting their rule-making activities insulated from public sentiment and views. Op. Att'y Gen., Oct. 31, 1980, No. 15.

**Stated** in State ex rel. West Virginia Secondary Sch. Activities Comm'n v. Oakley, 152 W. Va. 533, 164 S.E.2d 775 (1968).

ARTICLE 1.

DEFINITIONS AND APPLICATION OF CHAPTER.

Sec.

29A-1-1. Legislative findings and statement of purpose.

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

Sec.

29A-1-3. Application of chapter; limitations.

**Revision of article.** — Acts 1982, c. 121 amended and reenacted this article with the following changes. Section 29A-1-1 was added by the 1982 act. Former §§ 29A-1-1 (now § 29A-1-2) and 29A-1-2 (now § 29A-1-3) were transferred to their present locations and were so extensively amended as to make a detailed comparison impossible.

**W. Va. Law Review.** — Survey of developments in West Virginia law of administrative procedure for the year 1977, 80 W. Va. L. Rev. 113 (1977).

**Applicability to local governments.** — A local government entity may, by a proper ordinance and in conformity with this chapter, delegate to a local human relations commission, organized under § 5-11-12, the right to seek a

subpoena from the appropriate circuit court under § 8-12-2(c). *Huntington Human Relations Comm'n ex rel. James v. Realco, Inc.*, 175 W. Va. 24, 330 S.E.2d 682 (1985).

**Effect of Administrative Procedures Act.** — The effect of the enactment of the Administrative Procedures Act is to require that all rules and regulations adopted by any state agency be first presented to the legislature for ratification; all other delegations of legislative authority to adopt substantive rules and regulations have been withdrawn. *West Virginia Mfrs. Ass'n v. West Virginia*, 714 F.2d 308 (4th Cir. 1983).

**Applied in** *United Hosp. Ctr., Inc. v. Richardson*, 174 W. Va. 588, 328 S.E.2d 195 (1985).

§ 29A-1-1. Legislative findings and statement of purpose.

The Legislature finds and declares that administrative law and the administrative practice and procedure of the various executive and administrative officers, offices and agencies comprises a body of law and policy which is voluminous, often formulated without adequate public participation and collected and preserved for public knowledge and use in an unacceptable and essentially inaccessible fashion. The Legislature further finds that the delegation of its legislative powers to other departments and agencies of government requires of the Legislature that the rules and regulations of such other departments and agencies, which have the force and effect of law because of their legislative character, should be carefully and extensively reviewed by the Legislature in a manner properly respectful of the separation of powers but in keeping with the legislative force and effect of such rules and regulations. Accordingly the Legislature has and by this chapter intends to fix by law uniform and settled administrative practices and procedures, subject only to enumerated exceptions, for the exercise of executive rule-making authority and for the exercise by executive and administrative officers, offices and agencies of lawfully delegated legislative power, with appropriate legislative review of that exercise of such a delegated legislative authority and with established procedures for legislative oversight of the exercise of executive rule-making authority.

## DEFINITIONS AND APPLICATION OF CHAPTER

## § 29A-1-2

In that light chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code establishes, with enumerated exceptions, procedures for rule making, declaratory rulings by agencies and the conduct of contested administrative cases, together with a plan for the systematic preparation, public consideration, orderly promulgation, preservation and public availability of the body of law, policy and administrative decisions within the purview of this chapter. (1982, c. 121.)

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 1.02, 2.03, 3.02, 3.04, 3.05, 3.07, 4.02, 4.04, 4.05, 4.07, 4.08, 4.17, 4.36, 5.02 to 5.05, 5.26, 5.44.

**W. Va. Law Review.** — Article, "Rights and Responsibilities in Administrative Rule Making in West Virginia," 79 W. Va. L. Rev. 313 (1977).

"Survey of Recent Developments in West Virginia Law: Judicial Review of Department of Welfare Decisions," 85 W. Va. L. Rev. 415 (1983).

Archibald, "Proposed 'Nonproduction' or 'Excess Acreage' Tax: Viable Revenue Source or Unconstitutional Property Tax?," 90 W. Va. L. Rev. 953 (1988).

**Public participation.** — One of the basic purposes of this section is to provide an opportunity for public participation in the rule-making process. West Virginia Chiropractic Soc'y, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987).

**Labels attached to actions.** — The label attached to an administrative action is not determinative as to whether the action taken

constitutes an administrative rule falling within the rule-making requirements of this section. West Virginia Chiropractic Soc'y, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987).

**Policies.** — A fee schedule as set by the civil service commission is not such rule as is contemplated by the provisions of the Administrative Procedures Act. Conner v. Civil Serv. Comm'n, 175 W. Va. 127, 331 S.E.2d 858 (1985).

**Quoted in** West Virginia Chiropractic Soc'y, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987); Chico Dairy Co. v. West Virginia Human Rights Comm'n, 181 W. Va. 238, 382 S.E.2d 75 (1989).

**Stated in** Serian v. State, 171 W. Va. 114, 297 S.E.2d 889 (1982).

**Cited in** Appalachian Regional Health Care, Inc. v. West Virginia Human Rights Comm'n, 376 S.E.2d 317 (W. Va. 1988); West Virginia Bd. of Educ. v. Hechler, 376 S.E.2d 839 (W. Va. 1988); Canterbury v. West Virginia Human Rights Comm'n, 181 W. Va. 285, 382 S.E.2d 338 (1989).

## § 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.

## § 29A-1-2

## STATE ADMINISTRATIVE PROCEDURES ACT

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. (1964, c. 1; 1982, c. 121.)

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 1.02, 3.02, 4.01, 4.05, 4.06, 4.11, 4.28, 4.29, 5.08.

The air pollution control commission is an "agency" as defined by this section. Op. Att'y Gen., July 7, 1976.

**"Rule".** — Any rule promulgated by state agencies setting forth the form of compliance with § 6-9A-3 would be a "rule" as defined under the present section, and as such must be promulgated in compliance with the provisions of the state Administrative Procedures Act. Op. Att'y Gen., Nov. 20, 1978.

**"Agency"** within the meaning of the State Administrative Procedures Act, refers to state, not local agencies, and does not include a local human relations commission established by a local government entity pursuant to municipal ordinance. *Southwestern Community Action Council, Inc. v. City of Huntington Human Relations Comm'n*, 179 W. Va. 573, 371 S.E.2d 70 (1988).

**Legislative rules.** — Rule of the West Virginia Human Rights Commission defining a "handicapped person" to include a person who did not in fact have a "handicap," as then defined by § 5-11-3, former subsection (t), was a "legislative rule" under subsection (d) of this section, which required submission to the legislative rulemaking review committee. *Chico Dairy Co. v. West Virginia Human Rights Comm'n*, 181 W. Va. 238, 382 S.E.2d 75 (1989).

**Local boards of health.** — The rule-making provisions of the West Virginia Administrative Procedures Act are not applicable to local (county, municipal and combined) boards of health. Op. Att'y Gen., May 5, 1986, No. 42.

The demotion of a state trooper by the superintendent of the department of public safety is purely a disciplinary measure "relating solely to the internal management" of the

department within the meaning of subdivision (c) of this section. In this respect, the case may be distinguished from a case involving the rights of a member of the public. *State ex rel. Burchett v. Taylor*, 150 W. Va. 702, 149 S.E.2d 234 (1966).

A policy of the workmen's compensation commissioner applied in arriving at a decision in a case under § 23-4-6 was not, under former provisions, such rule as is contemplated by the provisions of §§ 29A-1-1 and 29A-2-1. *Haines v. Workmen's Comp. Comm'r*, 151 W. Va. 152, 150 S.E.2d 883 (1966).

**Agency action.** — The dismissal of a sex discrimination complaint after a finding of probable cause was an agency action affecting the legal rights, duties, interests and privileges of a specific party required to be determined by a hearing and falls squarely within the statutory definition of contested cases. *Currey v. State Human Rights Comm'n*, 166 W. Va. 163, 273 S.E.2d 77 (1980).

Quoted in *West Virginia Chiropractic Soc'y, Inc. v. Merritt*, 178 W. Va. 173, 358 S.E.2d 432 (1987).

Stated in *Serian v. State*, 171 W. Va. 114, 297 S.E.2d 889 (1982).

Cited in *Point Express, Inc. v. Public Serv. Comm'n*, 148 W. Va. 732, 137 S.E.2d 212 (1964); *State ex rel. Board of Educ. v. Dyer*, 154 W. Va. 840, 179 S.E.2d 577 (1971); *Tulley v. State Farm Mut. Auto Ins. Co.*, 345 F. Supp. 1123 (S.D.W. Va. 1972); *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 160 W. Va. 348, 234 S.E.2d 321 (1977); *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982); *Adkins v. CSC*, 173 W. Va. 89, 312 S.E.2d 752 (1984); *Fourco Glass Co. v. West Virginia Human Rights Comm'n*, 181 W. Va. 432, 383 S.E.2d 64 (1989).



§ 29A-1-3. Application of chapter; limitations.

(a) The provisions of this chapter do not apply in any respect whatever to executive orders of the governor, which orders to the extent otherwise lawful shall be effective according to their terms: Provided, That the executive orders shall be admitted to record in the state register when and to the extent the governor deems suitable and shall be included therein by the secretary of state when tendered by the governor.

(b) Except as to requirements for filing in the state register, and with the Legislature or its rule-making review committee, provided in this chapter or other law, the provisions of this chapter do not apply in any respect whatever to the West Virginia board of probation and parole, the public service commission, the board of public works sitting as such and the secondary schools activities commission: Provided, That rules of such agencies shall be filed in the state register in the form prescribed by this chapter and be effective no sooner than sixty consecutive days after being so filed: Provided, however, That the rules promulgated by the state colleges and universities shall only be filed with the higher education governing boards: Provided further, That such agencies may promulgate emergency rules in conformity with section fifteen [§ 29A-3-15], article three of this chapter.

(c) The provisions of this chapter do not apply to rules relating to or contested cases involving the conduct of inmates or other persons admitted to public institutions, the open seasons and the bag, creel, size, age, weight and sex limits with respect to the wildlife in this state, the conduct of persons in military service or the receipt of public assistance. Such rules shall be filed in the state register in the form prescribed by this chapter and be effective upon filing.

(d) Nothing herein shall be construed to affect, limit or expand any express and specific exemption from this chapter contained in any other statute relating to a specific agency, but such exemptions shall be construed and applied in accordance with the provisions of this chapter to effectuate any limitations on such exemptions contained in any such other statute. (1964, c. 1; 1982, c. 121; 1986, c. 97; 1988, 3rd Ex. Sess., c. 7; 1989, c. 4; 1990, c. 74.)

**Cross references.** — Construction of "board of probation and parole," § 62-13-7.

**Administrative Procedure Act is not meant to apply to an administrative hearing held by a local board of education.** Op. Att'y Gen., June 18, 1975 (decided under former law).

**The state superintendent of schools is not subject to the Administrative Procedure Act.** Mason County Bd. of Educ. v. State Superintendent of Sch., 160 W. Va. 348, 234 S.E.2d 321 (1977) (decided under former law).

**Nor is a county board of education, not being a state agency.** Mason County Bd. of Educ. v. State Superintendent of Sch., 160 W. Va. 348, 234 S.E.2d 321 (1977) (decided under former law).

**Proceedings of the board of regents are exempt from the provisions of this chapter.** Clarke v. West Virginia Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981) (decided prior to 1982 revision).

**Certiorari proper where chapter inapplicable.** — Certiorari is the proper means for obtaining judicial review of a decision made by a state agency not covered by the Administrative Procedures Act. State ex rel. Ginsberg v. Watt, 168 W. Va. 503, 285 S.E.2d 367 (1981) (decided prior to 1982 revision).

**Decision of commissioner of department of health to suspend pharmacists from participation as vendors of pharmacy services in the Medical Services of the State of West Virginia was one which related to "the receipt of public**



assistance" and thus was not within the scope of the Administrative Procedures Act. State ex rel. Ginsberg v. Watt, 168 W. Va. 503, 285 S.E.2d 367 (1981) (decided prior to 1982 revision).

Applied in State ex rel. Bowlick v. Board of Educ., 345 S.E.2d 824 (W. Va. 1986); West Virginia Chiropractic Soc'y, Inc. v. Merritt, 178 W.

Va. 173, 358 S.E.2d 432 (1987).

Quoted in Thomas v. Staats, 633 F. Supp. 797 (S.D.W. Va. 1985); West Virginia Bd. of Educ. v. Hechler, 376 S.E.2d 839 (W. Va. 1988).

Cited in Serian v. State, 171 W. Va. 114, 297 S.E.2d 889 (1982).

## ARTICLE 2.

## STATE REGISTER.

Sec.

29A-2-1. Duty of the secretary of state.

29A-2-2. State register created.

29A-2-3. Contents of state register.

29A-2-4. Contents of state register deemed a public record.

29A-2-5. Agency rules to be filed in state register; failure to file.

Sec.

29A-2-6. Format and numbering of agency rules filed in state register.

29A-2-7. Publication of state register.

29A-2-8. Publication of rules by agencies.

29A-2-9. Making orders and records available.

**Revision of article.** — Acts 1982, c. 121 amended and reenacted this article. The revision was so extensive as to make impossible a detailed comparison with the former article, enacted by Acts 1964, c. 1.

**Cross references.** — Constructions of "rule" and cases involving policies of commissioners, § 29A-1-2.

**W. Va. Law Review.** — Survey of developments in West Virginia law of administrative procedure for the year 1977, 80 W. Va. L. Rev. 113 (1977).

**Mandamus available to compel secretary of state's performance.** — Refusal of the secretary of state to perform the duties imposed upon him by this article subjects the secretary of state to a mandamus action to compel the performance of those duties. Op. Att'y Gen., Dec. 15, 1982, No. 9.

**Priority of required functions in funding allocations.** — The secretary of state is under

a statutory mandate to implement the provisions of this article, notwithstanding an actual or claimed lack of funds for the tasks. As with other executive officials faced with similar circumstances, he must allocate his available funds to those functions required by law, and only after those functions have been performed is he free to devote funds to discretionary activities. Op. Att'y Gen., Dec. 15, 1982, No. 9.

**Legislature's budget bill cannot negate duties imposed by this article.** — The legislature's failure to include appropriations for the specific line items "Rules and Regulations Division" and "Publication of State Register" in the budget bill for fiscal year 1982-1983 cannot legally supersede or negate the new and expanded legal duties imposed upon the secretary of state in this article. Op. Att'y Gen., Dec. 15, 1982, No. 9.

Applied in Conner v. Civil Serv. Comm'n, 175 W. Va. 127, 331 S.E.2d 858 (1985).

## § 29A-2-1. Duty of the secretary of state.

It is the nondiscretionary, nondelegable duty of the secretary of state to establish and maintain the state register hereby created, and offer copies for subscription and public distribution in accordance with the provisions of this article. (1982, c. 121.)

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.13, 4.19, 4.28, 4.29.

**W. Va. Law Review.** — Ramey, "Constitutional Law," 84 W. Va. L. Rev. 560 (1982).

**§ 29A-2-2**

## STATE ADMINISTRATIVE PROCEDURES ACT

**§ 29A-2-2. State register created.**

There is hereby created in the office of the secretary of state, a public record to be known and denominated as the state register, to be established, compiled, indexed and copied, and such copies offered for subscription and distribution, in accordance with the provisions of this article. (1982, c. 121.)

**Textbooks.** — Administrative Law in West Virginia (Neely), § 5.24.

**§ 29A-2-3. Contents of state register.**

The secretary of state shall receive and file in the state register:

- (a) Every notice of a proposed rule or a public hearing for the finding of facts or public comment on a proposed rule.
- (b) The text of every proposed rule and subsequent proposed amendment thereto and fiscal notes attached thereto.
- (c) Every determination of fact or judgment tendered by an agency for inclusion therein and every notice of submission to the Legislature or its rule-making review committee made in conformity with this chapter.
- (d) Every executive order tendered by the governor.
- (e) Every notice of and the text of any report or finding of the legislative rule-making review committee and such other material as may be tendered by the clerk or presiding officer of either house of the Legislature for filing in the state register.
- (f) Such other material related to administrative procedures and actions as an agency may desire to make a public record or the secretary of state may deem appropriate, or where required by law.
- (g) Notice of and the text of any action by an agency of the legislature or its committees relative to the process of promulgation of rules tendered to the secretary of state for inclusion in the register.
- (h) Every other paper required by law to be filed in such register or which may be filed therein in order to comply with any other provision of law. (1982, c. 121.)

**§ 29A-2-4. Contents of state register deemed a public record.**

Every paper filed in the state register shall be a public record provable and admissible as evidence if otherwise relevant, of which judicial notice may be taken, either under lawful certification or by reason of duplication and distribution as a copy of the state register in accordance with this article. (1982, c. 121.)

**§ 29A-2-5. Agency rules to be filed in state register; failure to file.**

(a) Notwithstanding any filing prior to the effective date of this section [May 11, 1982], each agency shall hereafter file in the state register a certified copy of all of its lawfully adopted rules which are in force on the date of such filing and all of its proposed rules which have not become effective prior to the date of such filing. All such rules and proposed rules shall be arranged, compiled, numbered and indexed in accordance with the provisions of section six [§ 29A-2-6] of this article, and shall also include a designation of each rule as either legislative rule, interpretive rule or procedural rule. Any agency desiring to pursue promulgation of a rule proposed prior to the effective date of this section but not then yet effective, shall refile such proposed rule, following the procedure set forth in article three [§ 29A-3-1 et seq.]: Provided, That it shall not be necessary for the agency to again hold a public hearing to determine facts or public comment, but in all other respects the procedures provided for the promulgation of rules under this section shall be complied with. On or before the first day of January, one thousand nine hundred eighty-three, any other agency required by law to file its rules in the state register in order for such rules to be effective shall resubmit and refile such rules in accordance with this section. If any agency fails to file a certified copy of any rule or proposed rule in accordance with this section on or before the first day of January, one thousand nine hundred eighty-three, then such rule or proposed rule not so filed shall be thereafter void and unenforceable and shall be of no further force and effect except as to enforcement of its effective provisions for actions, causes or matters occurring prior to the first day of January, one thousand nine hundred eighty-three.

(b) Except for such changes in the designation and numbering of a rule, including numerical references within a rule, as are required to comply with the provisions of section six [§ 29A-2-6] of this article, no legislative rule filed under the provisions of this section may be amended in any way prior to such filing unless such amendment is made in compliance with the requirements of article three [§ 29A-3-1 et seq.] of this chapter. (1982, c. 121.)

**Construction of savings clause of § 29A-3-17.** — The savings clause of § 29A-3-17, which states that "any rule lawfully promulgated prior to the effective date of this chapter shall remain in full force and effect," does not affect the requirements of this section concerning the refiling of proposed rules, since the phrase "lawfully promulgated" cannot mean a rule or regulation merely published or approved by an agency and can only be interpreted to encompass rules or regulations that have met all conditions precedent to the effectiveness prescribed by law. Op. Att'y Gen., Nov. 18, 1982, No. 8.

**Effect of regulations set to be effective**

**May 20, 1982.** — Where effective date of regulations was set on May 20, 1982, and on May 11, 1982, an amendment to this chapter became effective which required the approval of the full legislature of all "legislative" rules promulgated by executive agencies of the state, the regulations were only "proposed rules" for the purposes of this section, which required the department to follow the amended procedures of this chapter in order to pursue promulgation of the regulations. Op. Att'y Gen., Nov. 18, 1982, No. 8.

Cited in *Tony P. Sellitti Constr. Co. v. Caryl*, 408 S.E.2d 336 (W. Va. 1991).

**§ 29A-2-6**

## STATE ADMINISTRATIVE PROCEDURES ACT

**§ 29A-2-6. Format and numbering of agency rules filed in state register.**

(a) Each rule or proposed rule filed by an agency in the state register shall include as its initial provision: (1) A statement identifying such rule as a legislative rule, an interpretive rule, or a procedural rule, as the case may be; (2) a statement of such section, article and chapter of this code to which such rule or any part thereof relates; and (3) a statement of the section, article and chapter of this code or any other provision of law which provides authority for the promulgation of such rule. The agency shall be estopped from relying on any authority for the promulgation of such rule which is not stated therein in accordance with the requirements of this subdivision.

(b) Each rule when filed to be finally effective shall have attached thereto an abstract of its promulgation history prepared by the agency showing the date of the filing in the state register of the content of, or notice of any procedure relating to, action necessary under this chapter to cause such rule to be finally effective: Provided, That any error or omission in such abstract shall not affect the validity of any rule or action in respect thereto.

(c) The secretary of state shall prescribe by legislative rule a standard size, format, numbering and indexing for rules to be filed in the state register and he may prescribe such procedural or interpretive rules as he deems advisable to clarify and interpret the provisions in this section. The secretary of state shall refuse to accept for filing any rules which do not comply with the specific provisions of this section, and he may refuse to accept for filing any rules which do not comply with the procedural rules issued by him pursuant to this section until the rules sought to be filed are brought into conformity with the secretary of state's procedural rules.

(d) Unless and until the secretary of state prescribes otherwise by rule issued and made effective under the provisions of subsection (c) of this section, each rule filed in the state register shall be on white paper measuring eight and one-half inches by eleven inches, typewritten and single-spaced, with a one inch margin at the top, bottom and each side of each page, and shall be reproduced photographically, or by xerography or other duplication process. The secretary of state may grant specific exceptions to such requirements in the case of maps, diagrams and exhibits, if the same may not be conveniently folded and fastened with the other pages of rules and in the case of rules which incorporate the promulgation of a federal agency or other organization which could not be submitted in the standard size and format except at undue expense. Materials submitted for inclusion in the state register shall be fastened on the left side by two or more fasteners attached through holes suitable for insertion into ring binders. (1982, c. 121; 1986, c. 97.)

**§ 29A-2-7. Publication of state register.**

(a) The Legislature intends that the secretary of state offer to the public convenient and efficient access to copies of the state register or parts thereof desired by the citizens. The provisions of this section are enacted in order to provide a means of doing so pending any other means provided by law or legislative rule.

(b) Until the first day of January, one thousand nine hundred eighty-three, the secretary of state may use any procedure he adopts to fulfill the objects of this section including any of the procedures provided in this section.

(c) On and after the first day of January, one thousand nine hundred eighty-three, and the refile of all rules effective on the effective date [May 11, 1982] of this section the body of the rules thus refiled together with (1) those rules made effective from and after the effective date of this section (2) all proposed rules not yet effective on and before the first day of January, one thousand nine hundred eighty-three (3) all notices and other materials related to such proposed rules and (4) the chronological index hereinafter provided shall constitute the first biennial permanent state register and have a publication date of the first day of January, one thousand nine hundred eighty-three.

(d) All materials filed in the state register after the effective date of this section shall be indexed daily in chronological order of filing with a brief description of the item filed and a columnar cross index to (1) agency and (2) section, article and chapter of the code to which it relates and by which it is filed in the state register and (3) such other information in the description or cross index as the secretary of state believes will aid a citizen in using the chronological index.

(e) The secretary of state shall cause to be duplicated in such number as shall be required, on white paper with two punches suitable for fastening in two-ring binders, the permanent biennial state register, the chronological index and other materials filed in the register, or any part by agency or section, article or chapter for subscription at a cost including labor, paper and postage, sufficient in his judgment to defray the expense of such duplication. The secretary of state shall also offer, at least at monthly intervals, supplements to the published materials listed above. Any subscription for monthly supplements shall be offered annually and shall include the chronological index and materials related to such agency or agencies, or section, article or chapter of the code as a person may designate. A person may limit the request to notices only, to notices and rules, or to notices and proposed rules, or any combination thereof.

(f) On and after the first day of January, one thousand nine hundred eighty-three, and every two years thereafter the secretary of state shall offer for purchase succeeding biennial permanent state registers which shall consist of all rules effective on the date of publication selected by the secretary of state, which date shall be at least two years from the last such publication date, and materials filed in the state register relating thereto. The cost of the succeeding biennial permanent state register and for the portion relating to



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any agency or any section, article or chapter of the code which may be designated by a person purchasing the same shall be fixed in the same manner specified in subsection (e) of this section.

(g) The secretary of state may omit from any duplication made pursuant to subsections (c) and (f) of this section any rules the duplication of which would be unduly cumbersome, expensive or otherwise inexpedient, if a copy of such rules is made available from the original filing of such rule, at a price not exceeding the cost of duplication, and if the volume from which such rule is omitted includes a notice in that portion of the publication in which the rule would have been located, stating (1) the general subject matter of the omitted rule, (2) each section, article and chapter of this code to which the omitted rule relates, and (3) the means by which a copy of the omitted rule may be obtained.

(h) All fees and other moneys collected by the secretary of state pursuant to the provisions of this section shall be deposited by him in a separate fund in the state treasury and shall be expended solely for the purposes of this section, unless otherwise provided by appropriation or other action of the legislature.

(i) The secretary of state may propose changes to the procedures outlined in the section above by proposing a legislative rule under the provisions of section nine [§ 29A-3-9], article three, but may promulgate no rules containing such changes unless authorized by the Legislature pursuant to article three [§ 29A-3-1 et seq.]. (1982, c. 121.)

**§ 29A-2-8. Publication of rules by agencies.**

(a) No agency may duplicate copies of its rules for general distribution except in accordance with this section. However, a duly certified copy may be provided by the agency, at the cost of reproduction, if requested and if not presently available from the secretary of state. Whenever an agency desires multiple copies of all or parts of its rules or other materials filed in the state register, it shall purchase the same from the office of the secretary of state: Provided, That when reproduction of the number of copies desired by the agency can be accomplished at a lower cost by the agency, it shall notify the secretary of state in writing of such lower cost and, unless the secretary of state shall within ten days agree to furnish such copies for an equal and lower cost and do so within twenty days thereafter, may proceed at its cost to acquire such copies elsewhere if otherwise authorized to do so by law.

(b) Any published rules may be distributed only to those persons who specifically request a copy of the rules and may not be distributed in any manner to persons who have not requested a copy. The agency may print or otherwise acquire only the number of copies of any rule that it may reasonably anticipate will be requested by members of the general public.

(c) Except as provided in this section, no agency may expend funds to alter the format or presentation of such rules from that provided in the state register (except to adequately fasten and bind the pages) or expend funds to compensate the office of the secretary of state to do so.

(d) Whenever for public convenience an agency deems it appropriate to reproduce one or more rules for general public distribution in some printed

**§ 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. (1982, c. 121; 1988, 3rd Ex. Sess., c. 7.)

**Textbooks.** — Administrative Law in West Virginia (Neely), § 4.02.

**Private meetings.** — Failure to provide proper notice of private meetings with one or more groups of interested parties may constitute a procedural defect in the rule promulgation process. Op. Att'y Gen., Apr. 16, 1990, No. 29.

**Changes in proposed rules after submission to committee.** — An agency should follow all rule-making procedures required by the Administrative Procedures Act applicable to the agency promulgation process if the agency was to make changes in proposed rules after

they have been submitted to the legislative rule-making review committee. Op. Att'y Gen., Apr. 16, 1990, No. 29.

**Quoted in** West Virginia Chiropractic Soc'y, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987); Chico Dairy Co. v. West Virginia Human Rights Comm'n, 181 W. Va. 238, 382 S.E.2d 75 (1989).

**Stated in** Wheeling Barber College v. Roush, 174 W. Va. 43, 321 S.E.2d 694 (1984).

**Cited in** West Virginia Mfrs. Ass'n v. West Virginia, 714 F.2d 308 (4th Cir. 1983); West Virginia Bd. of Educ. v. Hechler, 376 S.E.2d 839 (W. Va. 1988).

**§ 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. (1989, c. 4.)



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**§ 29A-3-1b. Rules of the tax department.**

Notwithstanding the provisions of section eight [§ 29A-2-8], article two of this chapter, the tax commissioner may reproduce the same in his state tax bulletin and may, upon request, distribute copies of the proposed or emergency rule after such proposed or emergency rule has been filed in the state register and may charge a reasonable fee in an amount set to recover his cost of duplicating and mailing the same. The moneys so received shall be deposited in the treasury to the credit of the tax commissioner's account for printing, office supplies or postage. (1989, c. 4.)

**§ 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. (1982, c. 121.)

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.03, 4.09, 4.37, 5.24.

**W. Va. Law Review.** — Archibald, "Proposed 'Nonproduction' or 'Excess Acreage' Tax: Viable Revenue Source or Unconstitutional Property Tax?" 90 W. Va. L. Rev. 953 (1988).

Quoted in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987); Chico Dairy Co. v. West Virginia Human Rights Comm'n, 181 W. Va. 238, 382 S.E.2d 75 (1989).

**§ 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. (1964, c. 1; 1976, c. 117; 1982, c. 121.)

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.28, 4.29.

#### § 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 non-compliance with this subsection. (1982, c. 121.)

**Cross references.** — State register, § 29A-2-1, et seq.  
**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.17, 4.29.

**Quoted in** West Virginia Chiropractic Soc'y, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987).

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

When an agency proposes to promulgate a rule other than an emergency rule it shall file in the state register a notice of its action, including a text of the rule proposed, a fiscal note as defined in subsection (b) of section four [§ 29A-3-4(b)], and any request for the submission of evidence to be presented on any factual determinations or inquiries required by law to promulgate such rule. If the agency is considering alternative draft proposals it may include the text thereof.

The notice shall fix a date, time and place for the taking of evidence for any findings and determinations which are a condition precedent to promulgation of the proposed rule and contain a general description of the issues to be decided. If no findings and determinations are required as a condition precedent to promulgation, the notice shall fix a date, time and place for receipt of public comment on such proposed rule.

If findings and determinations are a condition precedent to the promulgation of such rule, then an opportunity for 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.

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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.

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. (1982, c. 121.)

**Cross references.** — State register, West Virginia, 542 F. Supp. 1247 (S.D.W. Va. 1982).  
§ 29A-2-1 et seq.

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.17, 4.31. Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987).

Applied in West Virginia Mfrs. Ass'n v. (1987).

**§ 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. (1982, c. 121.)

**Cross references.** — State register, 1982); West Virginia Mfrs. Ass'n v. West Virginia, 714 F.2d 308 (4th Cir. 1983).  
§ 29A-2-1 et seq.

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.17, 4.19, 4.29. Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987).

Applied in West Virginia Mfrs. Ass'n v. West Virginia, 542 F. Supp. 1247 (S.D.W. Va. (1987)).

**§ 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. (1982, c. 121.)

**Cross references.** — State register, § 29A-2-1 et seq. **Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.17, 4.22, 4.23.

### § 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. (1982, c. 121; 1985, c. 153.)

**Textbooks.** — Administrative Law in West Virginia (Neely), § 4.17.

### 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, shall first file in the state register a notice of its proposal, including the text of the legislative rule and including all materials required in the case of a procedural or interpretive rule. The agency 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 approve the 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.

Such approval of the rule by the agency for submission to the Legislature shall be deemed to be approval for submission to the Legislature only and not deemed to give full force and effect until authority to do so is granted by law. (1982, c. 121; 1986, c. 97.)

**Cross references.** — State register, § 29A-2-1 et seq. **Human Rights Comm'n**, 181 W. Va. 238, 382 S.E.2d 75 (1989).

**Textbooks.** — Administrative Law in West Virginia (Neely), § 4.17. **Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt**, 178 W. Va. 173, 358 S.E.2d 432 (1987).

Applied in *Chico Dairy Co. v. West Virginia*

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Cited in *Fourco Glass Co. v. West Virginia Human Rights Comm'n*, 181 W. Va. 432, 383 S.E.2d 64 (1989).

**§ 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. (1982, c. 121; 1989, c. 113.)

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.19, 4.22, 4.29. Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987).  
Stated in West Virginia Chiropractic Soc'y,

**§ 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 agency 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; and (5) any other information which the committee may request or which may be required by law.

(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 proposed rule was promulgated;

(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 promulgated 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 agency to promulgate the legislative rule, or

(2) Authorize the agency to promulgate part of the legislative rule, or

(3) Authorize the agency to promulgate the legislative rule with certain amendments, or

(4) Recommend that the 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 agency to promulgate 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



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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. (1982, c. 121; 1986, c. 97.)

**Cross references.** — State register, § 29A-2-1 et seq.

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.21 to 4.23, 4.26, 4.29.

**W. Va. Law Review.** — Flannery and Poland, Hazardous Waste Management Act — Closing the Circle, 84 W. Va. L. Rev. 347 (1982).

**Applied in** United Hosp. Ctr. v. Richardson,

757 F.2d 1445 (4th Cir. 1985); Chico Dairy Co. v. West Virginia Human Rights Comm'n, 181 W. Va. 238, 382 S.E.2d 75 (1989).

**Stated in** West Virginia Chiropractic Soc'y, Inc. v. Merritt, 178 W. Va. 173, 358 S.E.2d 432 (1987).

**Cited in** West Virginia Mfrs. Ass'n v. West Virginia, 714 F.2d 308 (4th Cir. 1983).

§ 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 cochairman 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 refuse to consider and withhold from its report any proposed legislative rule which was submitted to the committee fewer than two hundred ten days before the end of a regular session. The clerk of each house shall submit the report to his 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 otherwise 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 enacted in contemplation of this section in the state register 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.

(b) If the Legislature fails during its regular session to act upon all or part of any legislative rule which was submitted to it by the legislative rule-making



ing 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.

(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 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) 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.

(f) 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. (1982, c. 121; 1986, c. 97.)

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.24, 4.29.

**W. Va. Law Review.** — Flannery and Poland, "Hazardous Waste Management Act — Closing the Circle," 84 W. Va. L. Rev. 347 (1982).

**Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt,** 178 W. Va. 173, 358 S.E.2d 432 (1987).

**Cited in West Virginia Mfrs. Ass'n v. West Virginia,** 714 F.2d 308 (4th Cir. 1983).

## § 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 agency shall promulgate the rule only in conformity with the provisions of law authorizing and directing the promulgation of such rule.

(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 file such legislative rule in the state register in lieu of the proposed legislative rule previously filed pursuant to section six [§ 29A-3-6], article three. (1982, c. 121.)

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**Textbooks.** — Administrative Law in West Virginia (Neely), § 4.22. *Inc. v. Merritt*, 178 W. Va. 173, 358 S.E.2d 432 (1987).  
**Stated in West Virginia Chiropractic Soc'y,**

### § 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 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. (1982, c. 121.)

**Cross references.** — State register, § 29A-2-1 et seq. *Stated in West Virginia Chiropractic Soc'y, Inc. v. Merritt*, 178 W. Va. 173, 358 S.E.2d 432 (1987).  
**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 4.20, 4.31.

### § 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 in the state register and 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 [§ 29A-3-15b] or upon the thirty-fifth 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 agency has exceeded the scope of its statutory authority in promulgating the emergency rule; (B) an emergency does not exist justifying the promulgation of such rule; or (C) the rule was not promulgated in compliance with the provisions of this section.

(2) The agency has not previously filed and fails 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 (1), (2), (3) or (4), 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 [§ 29A-3-15a] of this article or upon approval of the attorney general in accordance with section fifteen-b [§ 29A-3-15b] of this article or upon the thirty-fifth 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 (1), (2), (3) or (4), subsection (a) of this section, the agency may not refile the same or similar rule as an emergency rule.

(d) Emergency legislative rules currently in effect under the prior provisions of this section may be refiled under the provisions of this section.

(e) 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.

(f) The legislative rule-making review committee may review any emergency rule to determine (1) whether the agency has exceeded the scope of its statutory authority in promulgating the emergency rule; (2) whether there exists an emergency justifying the promulgation of such rule; and (3) whether

## § 29A-3-15a STATE ADMINISTRATIVE PROCEDURES ACT

the 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.

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest. (1982, c. 121; 1985, c. 153; 1986, c. 97; 1987, cc. 75, 76; 1991, c. 2.)

**Effect of amendment of 1991.** — The amendment rewrote the introductory paragraph in (a); in (a)(2), substituted "thirty" for "sixty" and "thirty-first" for "sixty-first"; in (a)(3), substituted "ninety" for "one hundred eighty" and "ninety-first" for "one hundred eighty-first"; and added the proviso in (b).

**Editor's notes.** — The references in subsections (b) and (c) to "subdivision (1), (2), (3) or (4), subsection (a)" apparently may now be references to subdivisions (2), (3), (4) or (5) of sub-

section (a) in view of the addition in 1986 of a new (a)(1) and the redesignation of former (a)(1) — (4) as present (a)(2) — (5).

**Textbooks.** — Administrative Law in West Virginia (Neely), § 4.28.

Applied in *Boyd v. Merritt*, 177 W. Va. 472, 354 S.E.2d 106 (1986).

Cited in *West Virginia Chiropractic Soc'y, Inc. v. Merritt*, 178 W. Va. 173, 358 S.E.2d 432 (1987); *AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

## § 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 thirty-five 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 agency has exceeded the scope of its statutory authority in promulgating the emergency rule or in filing an amendment to the emergency rule;

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

(3) That the rule or an amendment to the 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 determi-

nation 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. (1986, c. 97; 1987, cc. 75, 76; 1991, c. 2.)

**Effect of amendment of 1991.** — The amendment rewrote (a) and (b); added present (d); and redesignated former (d) as (e).

### **§ 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 [§ 29A-3-15] of this article, the attorney general shall review such rule or such amendment and, within thirty-five 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 secretary of state has exceeded the scope of its statutory authority in promulgating the emergency rule or in filing an amendment to the emergency rule;
- (2) That an emergency does not exist justifying the promulgation of the rule or the filing of an amendment to the rule; or

## CHAPTER 29B.

# FREEDOM OF INFORMATION.

### Article

#### 1. Public Records.

Stated in *Child Protection Group v. Cline*,  
177 W. Va. 29, 350 S.E.2d 541 (1986).

Cited in *Daily Gazette Co. v. Withrow*, 177  
W. Va. 110, 350 S.E.2d 738 (1986).

### ARTICLE 1.

#### PUBLIC RECORDS.

##### Sec.

- 29B-1-1. Declaration of policy.
- 29B-1-2. Definitions.
- 29B-1-3. Inspection and copying.
- 29B-1-4. Exemptions.

##### Sec.

- 29B-1-5. Enforcement.
- 29B-1-6. Violation of article; penalties.
- 29B-1-7. Attorney fees and costs.

**Cross references.** — State lottery commission security and validation procedures and techniques confidential, § 29-22-9.

**Construction.** — The disclosure provisions of Freedom of Information Act are to be liberally construed, and the exemptions to such act are to be strictly construed. *Queen v. West Virginia Univ. Hosps.*, 179 W. Va. 95, 365 S.E.2d 375 (1987); *Daily Gazette Co. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989) (writ of prohibition granted in related case, *State ex rel. Caryl v. MacQueen*, 182 W. Va. 50, 385 S.E.2d 646 (1989)).

**Agreement as to confidentiality.** — An agreement as to confidentiality between a public body and the supplier of the information may not override the Freedom of Information Act. *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).

**West Virginia Hospitals, Inc., included.**

— Because of the provisions in § 18-11C-1 et

seq. mandating openness and accountability in the management of the corporation, and because of the statutory requirement that we liberally construe the disclosure provisions of the Freedom of Information Act, *West Virginia University Hospitals, Inc.*, is covered by the latter act and its records are subject to disclosure. *Queen v. West Virginia Univ. Hosps.*, 179 W. Va. 95, 365 S.E.2d 375 (1987).

**Records relating to tax liability compromises** made pursuant to the tax commissioner's authority under § 11-10-5q are exempt from disclosure under the Freedom of Information Act. *Daily Gazette Co. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989).

Cited in *Daily Gazette Co. v. West Virginia Bd. of Medicine*, 177 W. Va. 316, 352 S.E.2d 66 (1986); *Veltri v. Charleston Urban Renewal Auth.*, 178 W. Va. 669, 363 S.E.2d 746 (1987).

#### § 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. (1977, c. 147.)

**Textbooks.** — Administrative Law in West Virginia (Neely), § 7.02.

Handbook on Evidence for West Virginia Lawyers (2d ed., Cleckley), § 5.4.

**Quoted** in 4-Hawaii Rd. Community Ass'n v. West Virginia Univ. Found., Inc., 182 W. Va. 434, 388 S.E.2d 308 (1989).

**Stated** in Sattler v. Holliday, 173 W. Va. 471, 318 S.E.2d 50 (1984).

**Cited** in Robinson v. Merritt, 375 S.E.2d 204 (W. Va. 1988); Sattler v. Johnson, 857 F.2d 224 (4th Cir. 1988); Sattler v. Bailey, 400 S.E.2d 220 (W. Va. 1990).

## § 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. (1977, c. 147.)

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 7.03 to 7.05.

**Public body.** — The public legal services council is included in the Freedom of Information Act's definition of a public body. Op. Att'y Gen., Apr. 11, 1986, No. 39.

West Virginia University Foundation was neither created by state authority nor primarily funded by state authority and therefore is not a public body, subject to this chapter. 4-Hawaii Rd. Community Ass'n v. West Virginia Univ. Found., Inc., 182 W. Va. 434, 388 S.E.2d 308 (1989).

**Public record.** — A public official has a common law duty to create and maintain, for public inspection and copying, a record of the terms of settlement of litigation brought

against the public official or his or her employee(s) in their official capacity. Daily Gazette Co. v. Withrow, 177 W. Va. 110, 350 S.E.2d 738 (1986).

Lack of possession of an existing writing by a public body at the time of a request under the State's Freedom of Information Act is not by itself determinative of the question whether the writing is a "public record" under this section, which defines a "public record" as a writing "retained by a public body." The writing is "retained" if it is subject to the control of the public body. Daily Gazette Co. v. Withrow, 177 W. Va. 110, 350 S.E.2d 738 (1986).

A release or other litigation settlement document in which one of the parties is a public body, involving an act or omission of the public



body in the public body's official capacity, is a "public record" within the meaning of a freedom of information statute, such as the one in this section, defining a "public record" as a writing which contains information "relating to the conduct of the public's business." *Daily Gazette Co. v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1986).

Assurances of confidentiality do not justify withholding public information from the public; such assurances by their own force do not transform a public record into a private record for the purpose of the State's Freedom of Information Act. *Daily Gazette Co. v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1986).

**Internal memorandum.** — A tape recording of a public meeting of the Charleston urban renewal authority does not constitute an internal memorandum and is not exempt from disclosure under the Freedom of Information Act. *Veltri v. Charleston Urban Renewal Auth.*, 178 W. Va. 669, 363 S.E.2d 746 (1987).

**Quoted in** *Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50 (1984); *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985); *Queen v. West Virginia Univ. Hosps.*, 179 W. Va. 95, 365 S.E.2d 375 (1987).

**Cited in** *State ex rel. Rose v. Fewell*, 170 W. Va. 447, 294 S.E.2d 434 (1982).

### § 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-1-4] 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. (1977, c. 147; 1992, c. 85.)

**Effect of amendment of 1992.** — The amendment, effective March 7, 1992, in the first and second sentences of (3), inserted "or her" preceding "office"; added the third sentence to (3); and, in (4)(b), inserted "or she" following "he."

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 7.04 to 7.08, 7.13.

**Applied in** Veltri v. Charleston Urban Renewal Auth., 178 W. Va. 669, 363 S.E.2d 746 (1987).

**Quoted in** Sattler v. Holliday, 173 W. Va. 471, 318 S.E.2d 50 (1984); *Queen v. West Virginia Univ. Hosps.*, 179 W. Va. 95, 365 S.E.2d 375 (1987); *Robinson v. Merritt*, 375 S.E.2d 204 (W. Va. 1988); *Daily Gazette Co. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989).

**Stated in** 4-Hawaii Rd. Community Ass'n v. West Virginia Univ. Found., Inc., 182 W. Va. 434, 388 S.E.2d 308 (1989).

### § 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. (1977, c. 147.)

**Textbooks.** — Administrative Law in West Virginia (Neely), §§ 7.03, 7.06, 7.08 to 7.15.

**W. Va. Law Review.** — Flannery and Poland, Hazardous Waste Management Act — Closing the Circle, 84 W. Va. L. Rev. 347 (1982).

**Tests regarding public interest and disclosure.** — In determining the extent or value of the public interest, purpose or object of the individuals seeking disclosure, the court uses two tests: The first is the value of the public interest. The interest may be pecuniary, or the public may have an interest because their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity. The second test also concerns the purpose for which the information is sought. If the information is sought to provide for something which would be useful to the public, then the courts will weigh this favorably. *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986).

If there is a substantial invasion of privacy involved, the court must measure the seriousness of the invasion. The right of privacy is relative to the customs of the time and place, and is determined by the norm of the ordinary man; courts must look at the extent to which the release of the information would cause an ordinary man in the time and place of the private individual involved, embarrassment or harm. *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986).

In deciding whether the public disclosure of information of a personal nature under subdivision (2) would constitute an unreasonable invasion of privacy, a court will look to five factors: (1) Whether disclosure would result in a substantial invasion of privacy and, if so, how serious; (2) the extent or value of the public interest, and the purpose or object of the individuals seeking disclosure; (3) whether the information is available from other sources; (4) whether the information was given with an expectation of confidentiality; and (5) whether it is possible to mould relief so as to limit the invasion of individual privacy. *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986).

The West Virginia Code requires a balancing test when there has been a "unreasonable" invasion of privacy. The legislature obviously intended "unreasonable" to be a trigger which would invoke subdivision (2) protections. The legislature recognized that certain information about individuals is routinely disclosed as public record and does not rise to such a level that a balancing test need be applied. By "unreasonable" the legislature means a "substantial" invasion of privacy, i.e., more than what the average person would normally expect the government to disclose about him. *Child Protec-*

*tion Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986).

**Human rights commission.** — The recorded predecisional discussion and deliberation of the human rights commission in adjudicatory matters, whether characterized as "minutes" or otherwise, are exempt from public disclosure under the internal-memoranda exemption, subdivision (8) of this section. *Op. Att'y Gen.*, July 17, 1986, No. 2.

Final decisions and orders reached as a result of adjudicatory assemblages of the human rights commission are not protected by an exemption provided under the Freedom of Information Act. Accordingly, any such decision and order entered on the record of a convened open meeting and properly recorded in the minutes is a "public record" within the meaning of the Freedom of Information Act, § 29B-1-1 et seq., and is subject to public inspection and review. *Op. Att'y Gen.*, July 17, 1986, No. 2.

**Public legal services.** — Information discovered in a public legal services audit, pertaining to possible violations of the law by an attorney, which is turned over to prosecuting authorities, is exempt under the Freedom of Information Act from access by the public and media; however, should the authorities decide not to prosecute the attorney in question, the information would then revert back to its original status with public legal services and be no longer exempt from access by the public or media. *Op. Att'y Gen.*, Apr. 11, 1986, No. 39.

**Similarity with federal exemptions.** — The exemptions in this section are similar to those in the federal Freedom of Information Act, 5 U.S.C. § 552, and other state acts. *Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50 (1984).

**Law enforcement records.** — Although the state law enforcement records exemption was adopted after the federal exemption had been amended, it did not include the new language comparable to the federal statute which enlarged access to these records, and would initially appear to create a blanket exemption; however, a good argument could be made that material should only be exempt if it protects an interest that weighs more greatly than the public's right to know. *Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50 (1984).

The language, "internal records and notations... which are maintained for internal use in matters relating to law enforcement," refers to confidential investigative techniques and procedures. *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).

"Records... that deal with the detection and investigation of crime," do not include information generated pursuant to routine administration or oversight, but is limited to information

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## FREEDOM OF INFORMATION

compiled as part of an inquiry into specific suspected violations of the law. *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).

**Names and addresses.** — This section does not normally exempt from disclosure an individual's name and residential address because they are not personal or private facts but are public in nature in that they constitute information normally shared with strangers and are ascertainable by reference to many publicly obtainable books and records; thus, disclosure of an individual's name and residential address would not result in an unreasonable invasion of privacy. *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).

This section does not exempt from disclosure under the Freedom of Information Act a list of names and addresses of security guards furnished to the secretary of state pursuant to his licensing and regulation of the guards' employer, since such information constitutes public facts, the risk of harm from disclosure is speculative, and was not part of an inquiry into specific suspected violations but was generated pursuant to routine administration of § 30-18-1 et seq. and the regulations promulgated thereunder, and does not reveal confidential investigative techniques or procedures. *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985).

**Internal memorandum.** — A tape recording of a public meeting of the Charleston urban renewal authority does not constitute an internal memorandum and is not exempt from dis-

closure under the Freedom of Information Act. *Veltri v. Charleston Urban Renewal Auth.*, 178 W. Va. 669, 363 S.E.2d 746 (1987).

**Tax compromise information** made and maintained pursuant to § 11-10-5q is exempted from disclosure under the provisions of § 11-10-5q and subdivision (5). *Daily Gazette Co. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989) (writ of prohibition granted in related case, *State ex rel. Caryl v. MacQueen*, 182 W. Va. 50, 385 S.E.2d 646 (1989)).

**Burden of proof.** — The party claiming exemption from the general disclosure requirement under this section has the burden of showing the express applicability of such exemption to the material requested. *Queen v. West Virginia Univ. Hosps.*, 179 W. Va. 95, 365 S.E.2d 375 (1987).

**Exemption from disclosure upheld.** — Where an individual fails to present, by clear and convincing evidence, a legitimate reason sufficient to overcome the exemption from disclosure found in subdivision (2), and where an adequate source of information is already available, the records will not be released. *Robinson v. Merritt*, 375 S.E.2d 204 (W. Va. 1988).

**Quoted in** *Daily Gazette Co. v. West Virginia Bd. of Medicine*, 177 W. Va. 316, 352 S.E.2d 66 (1986).

**Cited in** *4-Hawaii Rd. Community Ass'n v. West Virginia Univ. Found., Inc.*, 182 W. Va. 434, 388 S.E.2d 308 (1989); *Sattler v. Bailey*, 400 S.E.2d 220 (W. Va. 1990).

## § 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. (1977, c. 147.)

**Textbooks.** — *Administrative Law in West Virginia* (Neely), §§ 7.07, 7.16 to 7.19.

**Nondisclosure favored.** — Although 5

U.S.C. § 552(b)(6) (1982), is similar to subdivision (2), the statutes differ in an important regard. While the burden of proof is always on

the agency resisting disclosure, the burden is different. The federal code unambiguously favors disclosure of personal information with the resisting party having to show clear evidence of an unwarranted invasion of personal privacy. The West Virginia Code, with some ambiguity, favors nondisclosure of personal information unless public interest clearly requires disclosure. *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986).

Applied in *Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50 (1984).

Cited in *Daily Gazette Co. v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1986); *Daily Gazette Co. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989); *4-Hawaii Rd. Community Ass'n v. West Virginia Univ. Found., Inc.*, 182 W. Va. 434, 388 S.E.2d 308 (1989).

### § 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. (1977, c. 147.)

Stated in *Daily Gazette Co. v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1986).

*West Virginia Univ. Found., Inc.*, 182 W. Va. 434, 388 S.E.2d 308 (1989).

Cited in *4-Hawaii Rd. Community Ass'n v.*

### § 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. (1992, c. 85.)