

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

House Bill 4658

FISCAL
NOTE

BY DELEGATES LINVILLE, MAYNARD, WORRELL,

ROHRBACH, LOVEJOY AND BARNHART

[Introduced February 03, 2020; Referred to the

Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §6B-2-5d; and to amend and reenact §29B-1-2, §29B-1-3, and §29B-1-4; and
3 to amend said code by adding thereto two new sections designated §29B-1-3b and §29B-
4 1-6a; all relating to complaints against public agencies to obtain records through the
5 Freedom of Information Act; providing that any person may file a complaint with the Ethics
6 Commission under certain conditions; providing that the commission use a certain
7 standard of evidence; providing for a complete defense for public agencies acting in good
8 faith; providing for criteria for the commission to use when determining the validity of a
9 complaint; providing for definitions of electronic records; providing that a public agency
10 may respond to a request for documents with an anticipated time frame the requestor may
11 expect to receive documents; providing that electronic records are more cumbersome for
12 public agencies to review for public information; providing that a public agency may
13 establish a fee schedule for production of electronic records; providing criteria to establish
14 a fee schedule; providing for criteria for a public agency to deny a request for
15 documentation; providing for exemption of disclosure of personally identifiable information
16 under certain circumstances; and providing for the Ethics Commission the authority to
17 investigate complaints and render penalties.

Be it enacted by the Legislature of West Virginia:

CHAPTER 6B. PUBLIC OFFICERS AND EMPLOYEES; ETHICS;

CONFLICTS OF INTEREST; FINANCIAL DISCLOSURE.

**ARTICLE 2. WEST VIRGINIA ETHICS COMMISSION; POWERS AND DUTIES;
DISCLOSURE OF FINANCIAL INTEREST BY PUBLIC OFFICIALS AND
EMPLOYEES; APPEARANCES BEFORE PUBLIC AGENCIES; CODE OF
CONDUCT FOR ADMINISTRATIVE LAW JUDGES.**

§6B-2-5d. Freedom of Information Act.

1 (a) Any person who is unlawfully denied access to public records pursuant to §29B-1-1 et
2 seq. of this code may file a complaint pursuant to §6B-2-3a of this code against any custodian of
3 the requested public records who is alleged to have intentionally violated the provisions of §29B-
4 1-1 et seq. of this code.

5 (b) The Ethics Commission shall process, investigate, and render a disposition on the
6 complaint in accordance with this chapter.

7 (c) If the commission finds evidence of a violation by a preponderance of the evidence,
8 the commission may impose one or more sanctions pursuant to §6B-2-4(r) of this code.

9 (d) As used in this section, "custodian" shall have the same definition as provided in §29B-
10 1-2 of this code.

11 (e) It shall be a complete defense to the imposition of a sanction by the commission if the
12 agency made a good faith effort to comply with the provisions of §29B-1-1 et seq. of this code, or
13 if the agency withheld information based on a good-faith interpretation of §29B-1-1 et seq. of the
14 code.

15 (f) For a custodian of records to be held to have intentionally violated the provisions of
16 §29B-1-1 et seq. of this code, the custodian must have:

17 (1) Failed to initially respond to a records request within the statutorily prescribed period,
18 or failed to have provided records or maintained communication with the person requesting
19 records: *Provided*, That the person requesting records must have made multiple efforts to receive
20 the records before a failure to respond can be deemed intentional;

21 (2) Intentionally withheld records without having just cause pursuant to an exemption, or
22 a good faith belief that an exemption applied, from the person requesting records; or

23 (3) Failed to exercise good faith in responding in a timely manner to the request.

24 (g) Nothing in this section shall be construed to grant the Ethics Commission authority to
25 determine what documents or information are exempt from disclosure pursuant to §29B-1-1 et
26 seq. of this code

CHAPTER 29B. FREEDOM OF INFORMATION.

ARTICLE 1. PUBLIC RECORDS.

§29B-1-2. Definitions.

1 As used in this article:

2 (1) "Custodian" means the elected or appointed official charged with administering a public
3 body.

4 (2) "Electronic record" means a public record that is produced, prepared, stored, or
5 received by a computer or other electronic device. Examples of electronic records include, but
6 are not limited to, e-mail messages, word-processed documents, electronic spreadsheets, audio
7 and video recordings, digital images, and databases.

8 (2) "Law-enforcement officer" shall have the same definition as this term is defined in
9 ~~W.Va. Code §30-29-1 of this code:~~ *Provided*, That for purposes of this article, "law-enforcement
10 officer" shall additionally include those individuals defined as "chief executive" in ~~W.Va. Code §30-~~
11 ~~29-1 of this code.~~

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

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

18 (5) "Public record" includes any writing containing information prepared or received by a
19 public body, the content or context of which, judged either by content or context, relates to the
20 conduct of the public's business.

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

§29B-1-3. Inspection and copying of public record; requests of Freedom of Information Act requests registry.

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

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

5 (c) The custodian of any public records, unless otherwise expressly provided by statute,
6 shall furnish proper and reasonable opportunities for inspection and examination of the records
7 in his or her office and reasonable facilities for making memoranda or abstracts therefrom, during
8 the usual business hours, to all persons having occasion to make examination of them. The
9 custodian of the records may make reasonable rules and regulations necessary for the protection
10 of the records and to prevent interference with the regular discharge of his or her duties. If the
11 records requested exist in magnetic, electronic or computer form, the custodian of the records
12 shall make copies available on magnetic or electronic media, if so requested.

13 (d) All requests for information must state with reasonable specificity the information
14 sought. The custodian, upon demand for records made under this statute, shall as soon as is
15 practicable but within a maximum of five days not including Saturdays, Sundays or legal holidays:

16 (1) Furnish copies of the requested information, or provide a response concerning the
17 anticipated date and time at which he or she may expect to receive the records;

18 (2) Advise the person making the request of the time and place at which he or she may
19 inspect and copy the materials; or

20 (3) Deny the request stating in writing the reasons for such denial. A denial shall indicate
21 that the responsibility of the custodian of any public records or public body to produce the
22 requested records or documents is at an end, and shall afford the person requesting them the
23 opportunity to institute proceedings for injunctive or declaratory relief in the circuit court in the
24 county where the public record is kept.

25 (e) The public body may establish fees reasonably calculated to reimburse it for its actual
26 cost in making reproductions of records. A public body may not charge a search or retrieval fee
27 or otherwise seek reimbursement based on a man-hour basis as part of costs associated with
28 making reproduction of records.

29 (f) The Secretary of State shall maintain an electronic data base of notices of requests as
30 required by section three-a of this article.

§29B-1-3b. Electronic records.

1 (a) The Legislature finds and declares that the rise in the use of electronic records in the
2 conduct of government work has dramatically increased the number of public records that are
3 subject to disclosure under this chapter. The Legislature further recognizes that electronic
4 records, although necessarily and appropriately provided in response to a request to ensure that
5 the government remains accountable to the public, frequently contain information that is exempt
6 from disclosure, and therefore require a significant amount of time to review and prepare for
7 disclosure to the public. This added burden on state agencies of reviewing these electronic
8 records means that, although public disclosure remains a priority, doing so in a manner that
9 protects exempt information and ensures that government is not unduly burdened by overly broad
10 and unduly burdensome requests.

11 (b) Notwithstanding the provisions of §29B-1-3(e) of this code to the contrary, a public
12 body may establish a fee schedule for the production of electronic documents, subject to the
13 following criteria:

14 (1) The public body shall establish a minimum number of electronic documents to be
15 provided to a requesting person free of charge; and

16 (2) The cost of producing electronic records for disclosures shall be no more than 50
17 percent of the cost of providing electronic copies of records.

18 (c) A public body may communicate with the requesting party in order to narrow the scope
19 of a request that is determined to be overly broad or unduly burdensome as initially presented.

20 (d) A public body may deny a request seeking electronic records if:

21 (1) The person making the request refuses to narrow the request or otherwise engage
22 with the public body to narrow the scope of the request;

23 (2) The person making the request refuses to pay for the electronic records requested; or

24 (3) The public body determines that the request is being made to harass the public body
25 or another individual.

§29B-1-4. Exemptions.

1 (a) There is a presumption of public accessibility to all public records, subject only to the
2 following categories of information which are specifically exempt from disclosure under this article:

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

9 (2) Information of a personal nature such as that kept in a personal, medical, or similar file
10 or other personally identifiable information, if the public disclosure of the information would
11 constitute an unreasonable invasion of privacy, either alone or in connection with other disclosed
12 information, unless the public interest by clear and convincing evidence requires disclosure in this
13 particular instance: *Provided*, That this article does not preclude an individual from inspecting or
14 copying his or her own personal, medical, or similar file;

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

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

20 (B) Records identifying motor vehicles used, and the agencies using them, for undercover
21 investigation activities conducted by state law-enforcement agencies or other agencies that are
22 authorized by this code to use undercover or unmarked vehicles;

23 (5) Information specifically exempted from disclosure by state or federal statute;

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

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

32 (8) Internal memoranda or letters received or prepared by any public body;

33 (9) Records assembled, prepared, or maintained to prevent, mitigate, or respond to
34 terrorist acts or the threat of terrorist acts, the public disclosure of which threaten the public safety
35 or the public health;

36 (10) Those portions of records containing specific or unique vulnerability assessments, or
37 specific or unique response plans, data, databases, and inventories of goods or materials
38 collected or assembled to respond to terrorist acts; and communication codes or deployment
39 plans of law-enforcement or emergency response personnel;

40 (11) Specific intelligence information and specific investigative records dealing with
41 terrorist acts or the threat of a terrorist act shared by and between federal and international law-
42 enforcement agencies, state and local law-enforcement, and other agencies within the
43 Department of Military Affairs and Public Safety;

44 (12) National security records classified under federal executive order and not subject to
45 public disclosure under federal law that are shared by federal agencies and other records related

46 to national security briefings to assist state and local government with domestic preparedness for
47 acts of terrorism;

48 (13) Computing, telecommunications, and network security records, passwords, security
49 codes, or programs used to respond to or plan against acts of terrorism which may be the subject
50 of a terrorist act;

51 (14) Security or disaster recovery plans, risk assessments, tests, or the results of those
52 tests;

53 (15) Architectural or infrastructure designs, maps, or other records that show the location
54 or layout of the facilities where computing, telecommunications, or network infrastructure used to
55 plan against or respond to terrorism are located or planned to be located;

56 (16) Codes for facility security systems; or codes for secure applications for facilities
57 referred to in subdivision (15) of this subsection;

58 (17) Specific engineering plans and descriptions of existing public utility plants and
59 equipment;

60 (18) Customer proprietary network information of other telecommunications carriers,
61 equipment manufacturers and individual customers, consistent with 47 U.S.C. §222;

62 (19) Records of the Division of Corrections and Rehabilitation, Regional Jail and
63 Correctional Facility Authority, and the Division of Juvenile Services relating to design of
64 corrections, jail and detention facilities owned or operated by the agency, and the policy directives
65 and operational procedures of personnel relating to the safe and secure management of inmates
66 or residents, that if released, could be used by an inmate or resident to escape a facility, or to
67 cause injury to another inmate, resident, or to facility personnel;

68 (20) Information related to applications under §61-7-4 of this code, including applications,
69 supporting documents, permits, renewals, or any other information that would identify an applicant
70 for or holder of a concealed weapon permit: *Provided*, That information in the aggregate that does
71 not identify any permit holder other than by county or municipality is not exempted: *Provided*,

72 *however*, That information or other records exempted under this subdivision may be disclosed to
73 a law-enforcement agency or officer: (i) To determine the validity of a permit, (ii) to assist in a
74 criminal investigation or prosecution, or (iii) for other lawful law-enforcement purposes;

75 (21) Personal information of law-enforcement officers maintained by the public body in the
76 ordinary course of the employer-employee relationship. As used in this paragraph, "personal
77 information" means a law-enforcement officer's social security number, health information, home
78 address, personal address, personal telephone numbers, and personal email addresses and
79 those of his or her spouse, parents, and children as well as the names of the law-enforcement
80 officer's spouse, parents, and children; and

81 (22) Information provided by a person when he or she elects to remain anonymous after
82 winning a draw game prize, pursuant to §29-22-15a of this code.

83 (b) As used in subdivisions (9) through (16), inclusive, subsection (a) of this section, the
84 term "terrorist act" means an act that is likely to result in serious bodily injury or damage to property
85 or the environment and is intended to:

86 (1) Intimidate or coerce the civilian population;

87 (2) Influence the policy of a branch or level of government by intimidation or coercion;

88 (3) Affect the conduct of a branch or level of government by intimidation or coercion; or

89 (4) Retaliate against a branch or level of government for a policy or conduct of the
90 government.

91 (c) The provisions of subdivisions (9) through (16), inclusive, subsection (a) of this section
92 do not make subject to the provisions of this chapter any evidence of an immediate threat to public
93 health or safety unrelated to a terrorist act or the threat of a terrorist act which comes to the
94 attention of a public entity in the course of conducting a vulnerability assessment response or
95 similar activity.

96 (d) The Secretary of State shall provide on the website a form for use by a public body to
97 report the results of the Freedom of Information request, providing the nature of the request and

98 the public body's response thereto, whether the request was granted, and if not, the exemption
99 asserted under this section to deny the request.

§29B-1-6a. Complaint; ethics commission; penalties.

1 Notwithstanding the penalties contained in §29B-1-6 of this code, any person who is
2 unlawfully denied access to public records requested pursuant to this article may file a complaint
3 with the West Virginia Ethics Commission against any custodian of the requested public records
4 who has intentionally violated the provisions of this article pursuant to §6B-2-5d of this code. The
5 Ethics Commission shall have the authority to investigate complaints and render administrative
6 penalties in accordance with §6B-1-1 et seq. of this code.

NOTE: The purpose of this bill is to permit the Ethics Commission to investigate complaints and render administrative penalties relating to public bodies failing to provide access or disclose documents pursuant to the Freedom of Information Act.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.