

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON**

THE SHEPHERDSTOWN OBSERVER, INC.,

PETITIONER (Plaintiff below),

VS.

**Circuit Court of Jefferson County
Civil Action No. 2009-C-169
Docket Number**

JENNIFER MAGHAN,

RESPONDENT (Defendant below),

**PETITION FOR APPEAL
ON BEHALF OF THE SHEPHERDSTOWN OBSERVER, INC.**

Stephen G. Skinner, WVSB 6725
SKINNER LAW FIRM
P. O. Box 487
Charles Town, West Virginia 25414
304-725-7029/Fax 304-725-4082
sskinner@skinnerfirm.com

Patrick McGinley, WVSB 5620
737 South Hills Drive
Morgantown, WV 26501
(304) 552-2631/Fax: (304) 292-9822
pmcginley@igc.org

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Petitioner The Shepherdstown Observer, Inc. (“Observer”), brought a civil action in the Circuit Court of Jefferson County pursuant to the West Virginia Freedom of Information Act (“WVFOIA”)¹ seeking an order requiring the County Clerk, Respondent Jennifer Maghan, to disclose petitions asking for a zoning referendum. W.Va. Code § 8A-7-8a allows citizens to request a referendum on zoning ordinances within ninety days of their enactment. The Respondent Clerk had refused to permit the Observer to review names presented to her as a part of a petition to allow affected citizens to vote on a recently enacted zoning ordinance. The Respondent Clerk moved to dismiss the Complaint claiming that the requested names were not “public records” as defined by WVFOIA because she had not prepared them herself. The Circuit Court agreed with the Respondent Clerk and granted the Motion to Dismiss. This Petition for Appeal follows.

PARTIES

The Observer is a monthly newspaper based in Shepherdstown, West Virginia. It reports on state, local, and national politics, including long-form investigative pieces. It is published in traditional paper format and on the internet at www.theshepherdstownobserver.com. Key to the Observer's mission is access to public information and informing citizens about important public issues consistent with the First Amendment values underlying the constitutional guarantee of freedom of the press.

Respondent Jennifer Maghan is the Clerk of the County Commission of Jefferson County and is responsible for holding elections and referenda in Jefferson County, West Virginia. She maintains all voter registration and election records in Jefferson County.

¹ W. Va. Code 29B-1-1, et seq

II. STATEMENT OF THE FACTS OF THE CASE

On October 2nd, 2008, the Jefferson County Commission passed a new zoning ordinance to replace a prior zoning ordinance. W. Va Code § 8A-7-7, enacted in 2008, allows citizens to petition to hold a referendum allowing a vote on a newly-enacted zoning ordinance upon presentation to the County Clerk of signatures of 10 percent of the voters in the affected parts of the County. Such a petition must be submitted within 90 days of enactment of the zoning ordinance. Signatures were collected and presented to the County Clerk for verification. Prior to the expiration of the 90 days, the Clerk's office began examining each name, signature and address comparing them to lists and databases. During this process, the Clerk maintained tallies of the valid and invalid signatures. A high percentage (18%) of the signatures were found by the Respondent to be invalid.

According to the Clerk, a "citizen group" collected signatures and "presented them." The Clerk's deputies, through emails and in person, actively communicated with signature gatherers during the 90-day period about the running tally of valid and invalid signatures. Emails of record show that during the process of certifying the petition signatures, the Clerk's office regularly revealed the names and signatures to the citizen group. An example of the emails is attached as Exhibit A. At the conclusion of the certification process, the County Clerk declared that the requisite 10 percent of voters had petitioned for a zoning referendum and that a referendum would be held. The certification is attached as Exhibit B.

The Shepherdstown Observer submitted a WVFOIA letter to the Respondent requesting that she allow it to review the petition signatures and related information. (See Exhibit C). The

Respondent Clerk refused. (See Exhibit D). The Observer filed the instant action pursuant to the WVFOIA asking the Circuit Court to order the requested records be disclosed.

The Clerk moved to dismiss, claiming the information sought by the newspaper fell outside the WVFOIA's definition of "public record." She asserted that "public records" are narrowly limited to those documents "prepared, owned and retained" by a public body. Because the requested petition signatures were prepared by members of the public and not the Clerk's office, Respondent argued that the complaint should be dismissed.

The only issue briefed by the parties below was whether the suit should be dismissed because the records sought were not prepared by the clerk's office and therefore were not subject to the disclosure provisions of the WVFOIA. The Circuit Court dismissed the suit. (See the attached Circuit Court's Order, Exhibit E)

The Circuit Court found that "Because the records requested were not prepared by the public body, they do not qualify as public record within the meaning of the Freedom of Information Act, and that the Plaintiff has failed to state a claim upon which relief may be granted." Cir. Ct. Order, ¶ 6. The Circuit Court stated:

The West Virginia Supreme Court has stated that it finds the definition of a public record in W.Va. Code 29B-1-2 to be "plain and unambiguous." *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W.VA. 648, 650, 453 S.E.2d 631, 633 (1944). Further, in *Daily Gazette Company Inc. v. Withrow*, 177 W.Va. 110, 350 S.E.2d 738 (1986), the Court argued that "[i]n addition to containing information 'relating to the conduct of the public's business,' a writing must have been 'prepared, owned and retained by a public body' in order to be a 'public record' under W.Va. Code 19B-1-2(4)." *Id.* At 116. Finally, in another decision addressing the definition of a public record, *State v. Nelson*, 189 W.Va. 778, 434 S.E.2d 697 (1993), the Court found that "[a]ccording to this legislative definition, the nature of a 'public record' is not based upon public availability...but rather it is based upon whether a public body prepares, owns and retains the record." *Id.* at 787.

Cir Ct Order, ¶ 8. The Circuit Court opined that “The West Virginia Supreme Court has plainly interpreted the definition contained in the West Virginia Code, finding that a public record must not only relate to the public’s business, but also must have been a record that was created by the public body in the first instance.” *Id.*

III. ASSIGNMENTS OF ERROR

THE CIRCUIT COURT ERRED IN HOLDING THAT INFORMATION SUBMITTED TO A PUBLIC BODY DOES NOT FALL WITHIN THE WVFOIA DEFINITION OF A "PUBLIC RECORD"

THE CIRCUIT COURT ERRED IN HOLDING THAT THE ACT OF SIGNING A ZONING REFERENDUM PETITION IS ANALOGUS TO CASTING A SECRET BALLOT

THE CIRCUIT COURT ERRED IN HOLDING THAT PUBLIC ACCESS TO A ZONING REFERENDUM PETITION WOULD HAVE A CHILLING EFFECT ON THE ABILITY OF CITIZENS TO PETITION THE GOVERNMENT

IV. DISCUSSION

A. STANDARD OF REVIEW

A Circuit Court's order granting a motion to dismiss a complaint is reviewed under a *de novo* standard. Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995); see *Richardson v. Kennedy*, 197 W.Va. 326, 331, 475 S.E.2d 418, 423 (1996).

B. THE CIRCUIT COURT ERRED IN HOLDING THAT INFORMATION SUBMITTED TO A PUBLIC BODY DOES NOT FALL WITHIN THE WVFOIA DEFINITION OF A "PUBLIC RECORD"

This is a case of first impression in West Virginia. A circuit court has taken the unprecedented view that disclosure provisions of the WVFOIA apply *only* to documents literally "prepared" by public bodies. In other words, the issue presented in this appeal is whether documents that relate to the public's business and are owned and retained by a public body are nevertheless not considered public records under FOIA because they were not "prepared" by the public body.

1. THE CIRCUIT COURT FAILED TO LIBERALLY CONSTRUE THE TERM "PUBLIC RECORD" CONSISTENT WITH THE BROAD DISCLOSURE MANDATE OF WVFOIA

The Circuit Court failed to liberally construe the WVFOIA's definition of "public record." Instead, the lower court chose an extraordinarily narrow, crabbed, interpretation of "public record" that would cripple the public's ability to obtain full and complete information regarding the affairs of government and the official acts of government officials and employees. Indeed, the Circuit Court's order does not even acknowledge the policy considerations underlying WVFOIA nor the legislative mandate that the statute be liberally construed. The policy un-

derlying WVFOIA's that was ignored by the Circuit Court was explicitly stated by our legislature:

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.**

W. Va. Code § 29B-1-1. (Emphasis added).

Recognizing this legislative mandate, this Court has held that, “[t]he disclosure provisions of this State's Freedom of Information Act . . . are to be liberally construed, and the exemptions to such Act are to be strictly construed. Syl. pt. 4, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985). See also *In re Charleston Gazette FOIA Request*, 222 W.Va. 771, 671 S.E.2d 776 (2008). Moreover, in *Hechler v. Casey*, this Court reminded lower courts and public bodies subject to WVFOIA:

This liberal construction of the State FOIA and the concomitant strict construction of the exemptions thereto are of fundamental importance in deciding any case involving construction of this statute.

175 W.Va. 434, 443, 333 S.E.2d 799, 808 (1985). Moreover, this Court has identified that the “purpose of the [WVFOIA] legislation is to open the workings of government to the public so that the electorate may be informed and retain control.” *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W.Va. 648,650, 453 S.E.2d 631, 633 (1994).

The very idea that a petition that fulfills a basic governmental objective like zoning should be held in secret and concealed from citizens and the press is antithetical to the important

policies underlying the enactment of the WVFOIA. A document such as a petition to the county government triggering a zoning referendum is a quintessential public document. Importantly, nowhere in the West Virginia Zoning Enabling Act does the legislature authorize or otherwise suggest that the petitions would be concealed from the public. The very definition under the WVFOIA statute demonstrates the public nature of such information: “public record includes any writing containing information relating to the conduct of the public's business” W. Va. Code § 29B-1-2(4)(emphasis added).

In *Daily Gazette Co., Inc. v. Withrow*, 177 W.Va. 110,115, 350 S.E.2d 738,743 (1986), this Court emphasized that the WVFOIA’s definition of public record,

constitutes a liberal definition of a “public record” in that it applies to any record which contains information “relating to the conduct of the public's business,” without the additional requirement that the record is kept “as required by law” or “pursuant to law,” as provided by the more restrictive freedom of information statutes in some of the other states.

See Braverman and Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash.L.Rev. 720, 733-35 (1981). The Court warned that the term “ ‘public record’ should not be manipulated to expand the exemptions to the State FOIA.” *Withrow* at 744 (emphasis added)(citations omitted).

The public’s right to be informed concerning the affairs of their government lies at the very core of the principles of democratic governance. In contrast, the Circuit Court’s interpretation of “public record” is so narrow and restrictive that it excludes from WVFOIA’s disclosure mandate all documents or information not literally prepared by a public body. The Circuit Court’s narrow, unprecedented restrictive interpretation of a “public record” is contrary to law and must be rejected.

2. THE PETITIONS ARE “PUBLIC RECORDS” UNDER WVFOIA

The Circuit Court, in narrowly defining public records under the FOIA statute, failed to critically analyze the statute. W. Va. Code §29B-1-1 defines terms used in the WVFOIA:

- (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.

W. Va. Code 29B-1-2. (Emphasis added).

Looking at the definition of “public records” in context demonstrates that there are two ways the Legislature ascribed meaning to WVFOIA’s statutory definitions. First, in sections 1 and 3, the Legislature uses the word “means”: “ ‘Custodian’ *means* ...” and “ ‘public body’ *means*.” The Legislature adopts a different approach in subsections 2, 4 and 5, using the word “includes”: “ ‘person’ includes...” “ ‘public record’ includes ...,” and “ ‘writing’ includes...”

“Include” is defined as “to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate.” WEBSTER'S THIRD NEW INT'L DICTIONARY, 1143 (1993). The Supreme Court of the United States has noted the term “including” “is not one of all-

embracing definition, but connotes simply an illustrative application of the general principle.” *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100, 62 S.Ct. 1, 86 L.Ed. 65 (1941) (citations omitted). Generally, “the verb ‘includes’ imports a general class, some of whose particular instances are those specified in the definition.” *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n. 1, 55 S.Ct. 60, 62 n. 1, 79 L.Ed. 232, 235 n. 1 (1934).

Nothing in the WVFOIA statute indicates that the Legislature intended to depart from the normal use of “include” as introducing an illustrative-and non-exclusive-list of entities entitled to sue. This interpretation of “includes” has been adopted by many courts. *See DIRECTV Inc. v. Budden*, 420 F.3d 521, 527-28 (5th Cir.2005) (“the word ‘includes’ is usually a term of enlargement, and not of limitation”) (citation omitted); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 913 (6th Cir.2001) (“But this explicit reference to a subset of persons aggrieved was not intended to exclude others”).

In *McFadden v. State* ___ So.3d ___, 2009 WL 2031286, Fla. App. 4 Dist. (2009), a Florida intermediate appellate court recently discussed the use of the word “includes”:

The rule's operative term is *includes* (“term ‘statement’ as used herein *includes*”). The State would have us understand that *includes* is here synonymous with *comprise*. We reject this interpretation.

The standard meaning of the word *includes* is not as a term of limitation but only as a partial listing of a larger whole. *See* AMER. HERITAGE DICT. (3d ed.) 913 (“to take in as a part, an element, or a member; to contain as a secondary or subordinate element; to consider with or place into a group, class, or total.”). Indeed, one eminent authority on language has stressed that *includes* should not be employed when *comprises* is intended, as the State would have us do here: “*comprise* is appropriate when what is in question is the content of the whole, and *include* when it is the admission or presence of an item. With *include*, there is no presumption (though it is often the fact) that all or even most of the components are mentioned; with *comprise*, the whole of them are understood to be in the list.” H.W. Fowler, DICT. OF MODERN ENGLISH USAGE (2d ed.), 275.

(Emphasis in the original). *See also McLaughlin v. State*, 698 So.2d 296, 298 (Fla. 3d DCA 1997) (“includes” is term of enlargement not of limitation), *Miami Country Day School v. Bakst*, 641 So.2d 467 (Fla. 3d DCA 1994) (holding that legislature meant “includes” to enlarge definition); *Yon v. Fleming*, 595 So.2d 573, 577 (Fla. 4th DCA), rev. denied, 599 So.2d 1281 (Fla. 1992) (holding that within meaning of Uniform Jurisdiction Child Custody Act, “includes” is term of enlargement not of limitation). If “includes” is ambiguous, then the WVFOIA mandates that it be liberally construed in favor of disclosure.

3. THE WVFOIA STATUTE AND THIS COURT RECOGNIZE THAT DOCUMENTS PREPARED BY THIRD PARTIES FALL WITHIN THE DEFINITION OF “PUBLIC RECORDS”

The WVFOIA contains eight exemptions narrowly limiting the disclosure of certain information. W. Va. Code § 29B-1-4.² Within these exemptions, reference is made to public records prepared by third parties: exemption 8 exempts “Internal memoranda or letters *received* or prepared by any public body.” (Emphasis added). *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996). In *West Virginia Development Office*, this Court examined exemption 8 and held that information in the possession of a public body, but not prepared by it, fell within the definition of “public records” that must be disclosed under WVFOIA. The Court held that the statute “does not exempt from disclosure written communications between a public body and private persons or entities . . .” *Id.* at 575, 192 (Emphasis added). Thus, the Court explicitly recognized that non-deliberative materials prepared by private persons

² WVFOIA also includes other exemptions enacted after the tragic events of September 11, 2001, which addresses concerns about terrorist access to public records that are not relevant to the case at bar. *See* W. Va. Code §29B-1-4 (9)–(19).

and submitted to a public body --- like the petitions at issue in the instant case --- fall within the definition of “public records” and must be disclosed under WVFOIA.

4. THE TRIAL COURT’S EXTRAORDINARILY RESTRICTIVE INTERPRETATION OF “PUBLIC RECORD” LEADS TO AN ABSURD RESULT TOTALLY AT ODDS WITH THE BROAD PUBLIC DISCLOSURE GOALS OF THE WVFOIA

A well-established rule of statutory interpretation requires the rejection of the construction of a statute that produces an absurd result. Syl. Pt. 2, *Conseco Finance Servicing Corp. v. Myers*, 211 W.Va. 631, 567 S.E.2d 641 (2002). Interpreting the WVFOIA definition of “public record” as limiting public access to only those documents prepared by a public body would have the absurd result of excluding from public scrutiny hundreds of thousands, if not millions, of documents that have long been open to public examination. Were the circuit court’s interpretation of “public record” to prevail, documents such as deeds, wills, estate records, applications for environmental, business, corporate, voting and numerous other records of state agencies and commissions as well as local government bodies, would fall outside the definition of “public record.”

It is simply preposterous to assume that the legislature intended for the WVFOIA’s definition of “public record” to drastically curtail the scope of public access to important records in government files because they were not “prepared” by a public body. Such a construction of the statute would devastate the public’s right to information about the conduct of the public’s business. The Circuit Court erred in construing WVFOIA to limit public access only to those documents prepared by public bodies.

C. THE CIRCUIT COURT ERRED IN HOLDING THAT SIGNING A ZONING REFERENDUM PETITION IS ANALOGOUS TO CASTING A SECRET BALLOT

The Circuit Court acted *sua sponte*, without the issue having been raised or briefed by Petitioner or Respondent, holding that “making public the names of those individuals who signed the petitions would have a chilling effect on the ability of citizens to petition the government.” Cir. Ct. Ord. of Dismissal, at ¶15. In so doing, the Circuit Court analogized a citizen signing a petition asking for a zoning referendum to a registered voter casting a secret ballot in an election. The trial court observed that the “United States Supreme Court has recognized that the secret ballot is of paramount importance to our system of voting” *citing Burson v. Freeman*, 504 U.S. 191, 206 (1992). The Circuit Court also relied on *Daily Gazette Company v. Bailey*, 152 W.Va. 521, 164 S.E. 2d 414 (1968) in support of its holding that public disclosure of the instant zoning petitions would chill petition signers’ First Amendment rights. Both cases are inapposite to the case at bar.

In syllabus point 2 of *Bailey*, this Court held that signing a certificate of nomination for a “third party candidate” is analogous to casting a secret ballot:

A qualified voter who signs a certificate in accordance with the provisions of West Virginia Code . . . effectively casts his vote for the nomination of the candidate named therein and his vote, except where necessarily revealed, is entitled to the same secrecy as one cast in a primary election.

In the instant case the records on file in the office of the Secretary of State are records of the manner in which the signers of the certificates voted and nominated a candidate for public office. This is a record of a vote; it is not a public record.

Id., 164 S.E. 2d at 415, 419, 152 W.Va. at 521, 529. (Emphasis added).

The petition process involved in this appeal, however, bears no resemblance to that involved in *Daily Gazette Company v. Bailey*. On the contrary, the petition was explicitly framed

as a request that an referendum be held --- citizens signing the petition clearly did not indicate how they might vote if the requisite number of signatures were gathered to initiate a zoning referendum.

At the top of each petition used to gather signatures appeared the words "PETITION FOR AN ELECTION ON JEFFERSON COUNTY ZONING ORDINANCE." (See Exhibit E).

Above the signature lines on each petition form appeared the following statement:

The undersigned files this petition under West Virginia Code 8A-7-13 (or in the alternative, 8A-7-7c or 8A-7-8a, if applicable) which states that the Jefferson County Commission must hold an election on an amendment to a zoning ordinance if a petition, signed by at least 10% of the eligible voters in the area to which the zoning applies, is filed with the Jefferson County Commission.

Accordingly, we the undersigned residents of Jefferson County request an election be scheduled, concerning the zoning change from non-traditional zoning, adopted by the action of the Jefferson County Commission on October 2, 2008.

Id. (Emphasis added).

The record is clear that citizens who signed the zoning referendum petition did not express any opinion on how they would vote if a zoning referendum were held. The only opinion the petition signers expressed was that voters should have an opportunity to vote on the zoning ordinance previously enacted by the County Commission on October 2, 2008.

In contrast, *Daily Gazette Company v. Bailey*,³ the case turned upon the fact that citizen's action in signing a nominating petition for a third party candidate was tantamount to casting a secret ballot for that candidate in a primary election. 152 W.Va. 521, 528, 164 S.E. 2d 414, 418 (1968). In *Bailey*, this Court held that public access to the nominating certificates would, in essence, reveal how individual petition signers had voted for a particular candidate in a primary

³ *Bailey*, a 1968 opinion, preceded the WVFOIA

election. The *Bailey* Court held that when voters sign a nominating petition they are, effectively, casting a ballot for a candidate in an election. Therefore, just as primary voters cast their ballot in secret, nominating certificate petition signatories are also entitled to keep secret their “vote” secret.

Most important is that the *Bailey* Court distinguished the nomination process from a typical petition:

At the outset of the discussion of this point it is pertinent to note that the petitioners obviously erred by their use of the word ‘petitions’ in referring to the paper signed by those desiring to place George C. Wallace on the ballot in the general election. These signers placed their signatures on a certificate of nomination, not a petition. This is evidenced beyond question by the language ... entitled, ‘Filing of nomination certificates’ [which] reads, in part, ‘All certificates nominating candidates for officer under the preceding section ...’

These signers were not making a supplication or request to a superior or to a group in authority, as in the connotation of a petition. They were affirmatively making a nomination, which, if done in accordance with the appropriate statute, would succeed in placing their candidate on the ballot in the general election.

In other words, this Court implicitly recognized that there is a difference between a nomination certificate—which is equivalent to a secret ballot-- and an actual petition—which is not equivalent to a secret ballot. Accordingly, *Bailey* should does not apply to petitions. To the contrary, this language in *Bailey* suggests that a “real” petition would have been subject to public scrutiny. *Bailey* is, therefore, very helpful to the case at bar wherein those who signed the Jefferson County zoning petition gave no indication as to how they would vote should a zoning referendum be held. The Circuit Court’s reliance on *Bailey* and *Burson v. Freeman* is entirely misplaced.

In addition to relying on *Bailey* and *Burson*, the Circuit Court also relied on two other inapposite federal court opinions. In *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995),

the United States Supreme Court held that prohibition of distribution of anonymous campaign literature abridges the First Amendment. The *McIntyre* court undertook to “decide whether and to what extent the First Amendment's protection of anonymity encompasses documents *intended to influence the electoral process*.” 514 U.S. at 1517 -1518 (emphasis added)

"[T]he speech in which Mrs. McIntyre engaged [was] handing out leaflets in the advocacy of a politically controversial viewpoint.” 514 U.S. at 1519. [Anonymity], said the Court, . . . “exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society.” *Id.* at 1524.

In contrast, in the case at bar, those who signed the zoning referendum petition did not advocate “a politically controversial viewpoint.” In fact, the zoning petition signers simply expressed the opinion that a recently-enacted county zoning ordinance should be subject to the vote of the electorate. Moreover, there is not a scintilla of evidence in the record that the more than four thousand people who signed the Jefferson County zoning referendum petition faced or would face any form of retaliation for merely advocating that an referendum be held. Taking the position that an referendum should be held under a process provided for by law is hardly a “politically controversial viewpoint.” Notwithstanding, it is worth noting that the Supreme Court of the United States has expressed approval of a requirement that entailed public identification of the amount and use of money expended in support of a candidate. *See Buckley v. Valeo*, 424 U.S. 1, at 157-159, 160 (1976). Reflecting on its decision in *Buckley* upholding a federal statutory requirement that names of political campaign contributors be publically revealed, the *McIntyre* Court observed:

A written election-related document---particularly a leaflet---is often a personally crafted statement of a political viewpoint. Mrs. McIntyre's handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. *Disclosure of an expenditure and its use . . . reveals far less information . . .* It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, *even though money may "talk," its speech is less specific, less personal, and less provocative than a handbill*--and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

514 U.S. 334, at 355. (Emphasis added).

It is obvious that the signers of a Jefferson County zoning referendum petitions did not "disclose [their] thoughts on a controversial issue." Public disclosure of the zoning petition would be much "less likely to precipitate retaliation" than if signers were financially supporting a political candidate because signing the petition is "less specific, less personal, and less provocative" than contributing money to support an unpopular viewpoint. Surely, if public identification of those making financial contributions in support of an unpopular viewpoint is consistent with the First Amendment, public disclosure of a non-partisan zoning referendum petition is in harmony with the important values underlying the First Amendment.

The lower court also relied on an Eighth Circuit opinion, *Campaign for Family Farms v. Glickman*, 200 F.3D 1180 (2000) in concluding that release of the instant zoning referendum petitions would reveal the "secret votes" of petition signers and chill their right to petition the government. Unlike either *Burson* or *McIntire*, *Campaign for Family Farms* actually involved a referendum petition.

However, *Campaign for Family Farms* is also readily distinguishable from the case at bar. In that case, a group of pork producers sued to prevent the Department of Agriculture from releasing names and addresses of persons signing petitions seeking a referendum abolishing a

mandatory checkoff program. A percentage of revenue from sale of pork products would fund marketing and advertising of pork. The sole similarity of the instant case and *Campaign for Family Farms* is that, in each, citizens signed a petition. As the Court of Appeals for the Eighth Circuit emphasized in *Campaign*:

[b]esides calling for a referendum on the mandatory checkoff program, *those signing the petition all declared their position on the ultimate issue*: “We support a voluntary check-off program.” In so doing, *petitioners all unequivocally declared that they would vote to end the mandatory program* and thus return to the voluntary program.

200 F.3d 1180, at 1187 (2000) (emphasis supplied). It was in the context of the pork products petition that signers unequivocally declared how they would vote. The Eighth Circuit observed “[t]o make public such an unequivocal statement of their position on the referendum effectively *would vitiate petitioners’ privacy interest in a secret ballot.*” *Id.* (emphasis supplied).

Because the petition signers had expressed how they would vote in a subsequent referendum, the *Campaign* Court held “. . . *in the circumstances of this case* the privacy interest in a secret ballot is severely threatened. Releasing this petition, which contains a clear declaration of how the petitioners intend to vote in the referendum, would substantially invade that privacy interest.” *Id.* at 1187- 1188 (emphasis added). As explained above, in the case at bar, signers of the Jefferson County zoning petition indicated only that they believed the issue of zoning should be put to the electorate; in no way did they indicate the position they would take if a zoning referendum were held. Therefore, *Campaign for Family Farms v. Glickman* does not support the trial court’s conclusion that signers of the Jefferson County zoning referendum petition are entitled to the same secrecy as voters who cast a secret ballot in an election.

In sum, the Circuit Court erred when it held that signing a zoning referendum petition was the equivalent of the situations in *Bailey* and *Burson*, *McIntire* and *Campaign for Family*

Farms where courts held that anonymity is crucial to protecting the right to vote and to express one's opinion on controversial public issues.

D. THE CIRCUIT COURT ERRED IN HOLDING THAT PUBLIC ACCESS TO A ZONING REFERENDUM PETITION WOULD HAVE A CHILLING EFFECT ON THE ABILITY OF CITIZENS TO PETITION THE GOVERNMENT

The Circuit Court concluded as a matter of law that “making the names of those individuals who signed the petitions would have a chilling effect on the ability of citizens to petition the government.” Cir. Ct. Ord. of Dismissal at ¶¶ 15, 23, 25 citing, *Daily Gazette Company v. Bailey*, 152 W.Va. 521, 528, 164 S.E. 2d 414, 418 (1968).⁴ Paragraphs 26, and 27 of the Circuit Court's opinion state that “[p]rotecting the integrity of the secret ballot is more than just a personal privacy issue, it is a matter of great and vital public interest that our electoral process be free from the possibility of voter intimidation or fear of retribution.” Thus, the Circuit Court concluded as a matter of law that public disclosure of zoning referendum petitions :

- A. would have a “chilling effect on the right to petition the government;”
- B. create a “possibility of voter intimidation or fear of retribution;”
- C. severely threaten citizen's “privacy interest in a secret ballot;”
- D. jeopardize “the hard-won right to vote one's conscience without fear of retaliation.”

Id.

As indicated above, these conclusions of law were arrived at by the lower court, *sua*

⁴ The Circuit Court never explained how the disclosure of names by the Clerk to third parties (signature gatherers) and not newspapers fit into the idea of a secret ballot. Moreover, the Court did not explore how the petitions could be secret when names on the petitions were visible to other signers of the petition.

sponte. The Respondent Clerk had asserted only that the zoning petitions were withheld from the Petitioner because they were not “prepared” by a public body and thus did not satisfy WVFOIA’s definition of a “public record.”

Neither Respondent nor Petitioner herein raised or briefed the “secret ballot” and First Amendment issues that formed a major basis for the Circuit Court’s opinion. Moreover, the Circuit Court made no findings of fact that those who signed the zoning referendum petition had been or could reasonably be expected to face retaliation, intimidation, or retribution. Nor did the court make findings of fact supporting its assertion that public access to zoning petitions would “chill” citizens’ rights to petition their government. The Circuit Court did not make such findings because there is absolutely nothing in the record that remotely supports that legal conclusion.


Because the record is devoid of evidence supporting the Circuit Court’s conclusions of law, the Court’s conclusions of law set forth in paragraphs 15, 23, 25, 26 and 27 of its Order cannot be sustained. A trial court may not base its legal conclusions on issues not litigated and on facts not set forth in the record. Therefore, its granting of Respondent’s motion to dismiss must be reversed.

V. REQUEST FOR RELIEF


For these reasons, the Petitioner respectfully requests that this Court grant the Petition for Appeal and that it provide the following relief:

1. Accept this Petition;
2. Declare that the records are public records and that Respondent was not justified in withholding the records.
3. Direct by injunction that the Respondent immediately provide the records requested;
4. Grant the Peitioner its costs of litigation, including reasonable attorney fees as provided by W. Va. Code § 29b-1-7 ; and
4. Provide such other relief as the Court deems just and proper.

Respectfully submitted,



Stephen G Skinner WVSB 6725
SKINNER LAW FIRM
PO Box 487
Charles Town, WV 25414
304-725-7029/Fax: 304-725-4082
sskinner@skinnerfirm.com



Patrick McGinley, WVSB 6620
737 South Hills Drive
Morgantown, WV 26501
Phone: (304) 552-2631
Fax: (304) 292-9822
pmcginley@igc.org

Nikki Painter

From: Wendy Evangelisti [wevangelisti@jeffersoncountywv.org]
Sent: Monday, June 29, 2009 9:37 AM
To: Nikki Painter (Nikki Painter)
Subject: FW: Petition Update

From: Wendy Evangelisti [mailto:wevangelisti@jeffersoncountywv.org]
Sent: Monday, December 15, 2008 10:42 AM
To: Ronda; Ed Burns
Cc: Nikki Painter
Subject: Petition Update

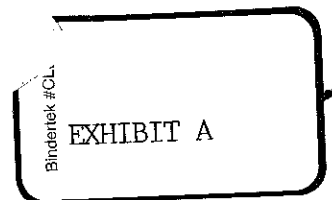
Hello,

There were 199 valid signatures with the latest stack. The 65 that were not valid are listed below

Nikki and I are in most of the week and can both work on these. If you want to bring in multiple stacks we will keep them separated and provide updates per group. We're ready for them anytime.

Have a good day
Wendy

- ██████████ address/precinct not eligible
- ██████████: address/precinct not eligible
- ██████████ not registered
- ██████████ not registered
- ██████████: no signature on petition; doesn't match record
- ██████████: no signature on petition; doesn't match record
- ██████████ not registered
- ██████████ signature doesn't match
- ██████████ address/precinct not eligible
- ██████████: address/precinct not eligible
- ██████████ not active
- ██████████ not registered
- ██████████ duplicate
- ██████████: not registered
- (name illegible): no address provided; could not verify
- ██████████: not registered
- ██████████: address/precinct not eligible
- ██████████: address/precinct not eligible
- ██████████: signature doesn't match
- ██████████ not registered
- ██████████: not registered
- ██████████ not registered
- ██████████: not registered
- ██████████ not registered
- ██████████ not registered
- ██████████ not registered
- ██████████ not registered
- (last name illegible): no match with voter street record
- ██████████: not registered
- ██████████ not registered
- ██████████ not registered
- ██████████ not registered
- ██████████ not registered



[REDACTED]: no signature on petition; doesn't match record
[REDACTED]: not registered
[REDACTED]: no signature on petition; doesn't match record
[REDACTED]: signature doesn't match
(name illegible): no address provided; could not verify
[REDACTED]: not registered
[REDACTED]: not registered
[REDACTED]: not registered
[REDACTED]: not registered
[REDACTED]: not registered
[REDACTED]: not registered
[REDACTED]: not registered
[REDACTED]: not registered
[REDACTED]: not registered
[REDACTED]: address/precinct not eligible
[REDACTED]: no signature on petition; doesn't match record
[REDACTED]: not registered
[REDACTED]: not registered
(name illegible): no address provided; could not verify
[REDACTED]: not registered
[REDACTED]: not registered
[REDACTED]: not active
[REDACTED]: not active
[REDACTED]: not registered
[REDACTED]: duplicate
[REDACTED]: not registered
[REDACTED]: signature doesn't match
[REDACTED]: address/precinct not eligible
[REDACTED]: not registered
[REDACTED]: lives in Berkeley county
(name illegible): no address provided; could not verify
(last name illegible): no match with voter street record
[REDACTED]: not registered

Nikki Painter

From: Nikki Painter
Sent: Tuesday, December 09, 2008 2:44 PM
To: R30NIK@aol.com
Cc: Ed Burns
Subject: Signatures

You have 253 signatures from the second batch that are valid. The following 30 signatures are invalid:

- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Registered in Berkeley
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Registered within city limits
- [REDACTED] - Registered within city limits
- [REDACTED] - Not Registered
- [REDACTED] - Not registered by the date he signed the petition
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- Name right under Sven Carl- Can't read signature, did not give address or print name
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not eligible to sign the petition
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Not Registered
- [REDACTED] - Cancelled Voter
- [REDACTED] - Not Registered

As before if you have questions about any of them please let me know and I will look at them again.

REMINDER- I will be out of the office Dec 11-12 and 19-29.

Thank you,

Nikki Painter
Deputy Clerk, Voter Registration
100 East Washington Street
PO Box 208
Charles Town, West Virginia 25414
304-728-3246 (Office)
304-728-1957 (Fax)

For News and Information go to: <http://groups.yahoo.com/group/j-a/>
Visit us online at: <http://jeffersoncountyclerkwv.com>

Nikki Painter

From: Nikki Painter
Sent: Monday, October 06, 2008 2:56 PM
To: R30NIK@aol.com
Subject: Re: mis quote

No problem!

----- Original Message -----

From: R30NIK@aol.com
To: npainter@jeffersoncountywv.org
Sent: Monday, October 06, 2008 2:53 PM
Subject: Re: mis quote

Thank you Nikki, it's nice having someone I can trust in the building!

Talk to you soon,

Ronda

In a message dated 10/6/2008 2:50:53 P.M Eastern Daylight Time, npainter@jeffersoncountywv.org writes:

That's OK and I will let you know as soon as someone turns a sheet in.

----- Original Message -----

From: R30NIK@aol.com
To: npainter@jeffersoncountywv.org
Sent: Monday, October 06, 2008 9:02 AM
Subject: mis quote

Hi Nikki,

Just wanted to let you know that the Herald reported that I would be helping the Clerk's office qualify the signatures. That's not exactly what I said! I explained that we would be working on the qualification process before the end of 90 days, and that I had come up with a way of cluing in your office on which sheets were generated by our effort. Especially since I fully expect members of the community to try to hurt the credibility of the drive.

I certainly didn't want it to sound like your office couldn't do the task without my assistance. I apologize for any confusion this may cause for your office.

By the way, just an update, I'm having everyone collecting signatures, return their sheets to me. I've considered a lot of different ideas for letting you know that the sheets are generated by me. But I believe the easiest way to clear this up, is by me simply initialing the bottom of each sheet I turn in.

If you have other people dropping of signature sheets, would it be possible for you to copy those for me, so I may also check their credibility? I really do expect this will be an issue at some point. I have instructed all to turn their sheets to me, so anyone else turning in sheets should be considered suspect. Not everyone will listen so it's hard to say if people may drop them off thinking they are helping.

I'll drop of sheets on Thursdays

Let me know what you think, and again I apologize for the misquote, and any confusion resulting from it.

Thanks again for all of your help!

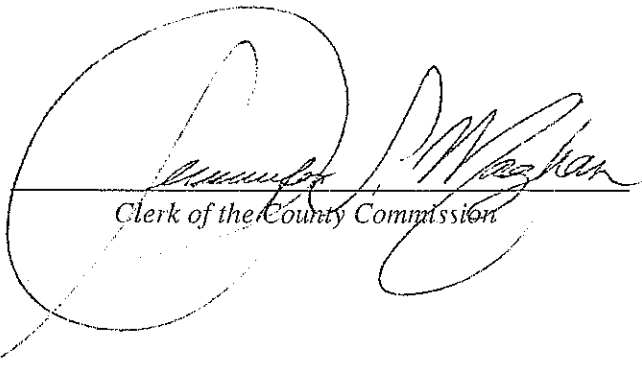
Warm Regards,



Certification of Valid and Invalid signatures on the Zoning Petition 2008

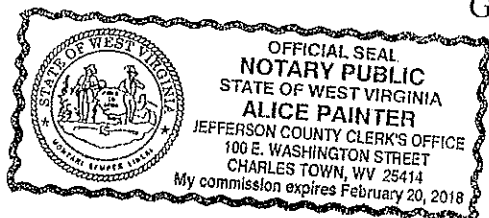
I, Jennifer S. Maghan, Clerk of the Jefferson County Commission, hereby certify that the signatures of persons to the nominating petitions for the zoning referendum have been compared to the voter registration records of this county, and that the following accurately reflects the number of signatures found to be in the specified category:

- 3463** *Number of valid signatures*
- 796** *Number of invalid signatures*
- 4259** *Total number of signatures checked*


Clerk of the County Commission

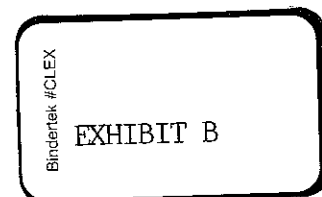
STATE OF WEST VIRGINIA
COUNTY OF JEFFERSON

I, Alice Painter, a notary public in and for said state, do hereby certify that Jennifer S. Maghan, whose name is signed to the writing above, has this day acknowledged the same before me.



Given under my hand this 15th day of January, 2009
My commission expires February 20, 2018.


Notary Public



JOHN C SKINNER, JR.
STEPHEN G SKINNER (DC, NY & WV)
ANDREW C. SKINNER (IL & WV)
LAURA C. DAVIS
F. DEAN NICHOLS (1922-1990)



1701 16TH STREET NW, SUITE 716
WASHINGTON, DC 20009
(202) 667-2700/Fax: (202) 478-1619

WRITER'S EMAIL:
sskinner@skinnerfirm.com

115 EAST WASHINGTON STREET
PO BOX 487
CHARLES TOWN, WV 25414-0487
(304) 725-7029/Fax (304) 725-4082
WWW.SKINNERFIRM.COM

March 30, 2009

Jennifer Maghan, County Clerk
Jefferson County Clerks Office
Charles Town, West Virginia 25414
HAND DELIVERED

RE: FOIA Regarding Certification for the Current Proposed Zoning Referendum

Dear Ms. Maghan:

Pursuant to West Virginia's Freedom of Information Act, please provide a copy of any and all petitions in any form you received them for the current zoning referendum. This includes all copies of petitions and petition forms delivered to the Clerk for certification for the current proposed zoning referendum. For your purposes know that the Shepherdstown Observer is my client and seeks this information.

Before copying, please contact me regarding the fees and the method of copying or inspection.

Very truly yours,

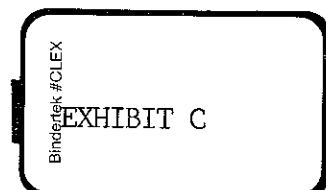
SKINNER LAW FIRM

A handwritten signature in black ink, appearing to be "Stephen G. Skinner", written over a horizontal line.

Stephen G. Skinner

SGS/krb

cc: Stephanie Grove, Esquire

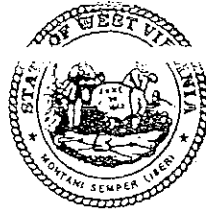


RALPH A. LORENZETTI JR.
PROSECUTING ATTORNEY

CHARLES B. HOWARD
ASSISTANT PROSECUTING ATTORNEY

STEPHEN V. GROH
ASSISTANT PROSECUTING ATTORNEY

BRANDON C.H. SIMS
ASSISTANT PROSECUTING ATTORNEY



OFFICE of THE
PROSECUTING ATTORNEY
of
JEFFERSON COUNTY, WEST VIRGINIA

P. O. Box 729
110 N George St., 3rd Floor
Charles Town, WV 25414
(304) 728-3243
fax (304) 728-3293
paoffice@jeffersoncountywv.org
www.jeffersoncountywv.org/pa

April 6, 2009

VIA FACSIMILE AND HAND DELIVERY

Stephen G. Skinner
Skinner Law Firm
115 East Washington Street
PO Box 487
Charles Town WV, 25414

Re: FOIA Request for Regarding Certification for the Current Proposed Zoning Referendum

Dear Mr. Skinner:

This letter is intended to address your FOIA request dated March 30, 2009, wherein you, on behalf of the Shepherdstown Observer, sought copies of the petition for the current zoning referendum presented to the County Clerk of Jefferson County

Enclosed a "Certification of Valid and Invalid Signatures on the Zoning Petition 2008," which certification is only the document in the County Clerk's possession that satisfies the definition of a public record as defined by W.Va. Code § 29B-1-2. A public record is defined as "any writing containing information in relation to the conduct of the public's business, *prepared*, owned and retained by a public body" (emphasis added). Obviously the petition was not prepared by the County Commission, nor was it prepared on behalf of the County Commission as would be the case if someone were working in the Commission's employ or at the request of the County Commission. Because the petition does not meet the definition of a public record, it is not subject to the provisions of the Freedom of Information Act, codified at W.Va. Code 29B-1-1 *et seq.*

The West Virginia Supreme Court has stated that it finds the definition of a public record in W.Va. Code 29B-1-2 to be "plain and unambiguous." Ogden Newspapers, Inc. v. City of Williamstown, 192 W.Va. 648, 650, 453 S.E.2d 631, 633 (1994). Further, in Daily Gazette

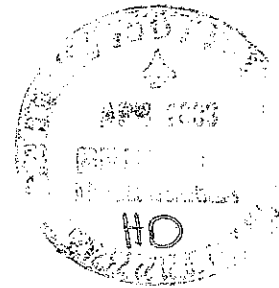
LAURENCE R. CROFFORD
ASSISTANT PROSECUTING ATTORNEY

HASSAN RASHEED
ASSISTANT PROSECUTING ATTORNEY

CIVIL DIVISION
(304) 728-3346
fax (304) 728-3353

STEPHANIE F. GROVE
ASSISTANT PROSECUTING ATTORNEY

JAMES CASIMIRO III
ASSISTANT PROSECUTING ATTORNEY



Blindertek #CLEX
EXHIBIT D

Company, Inc. v. Withrow, 177W Va. 110, 350 S.E.2d 738 (1986), the Court argued that “[i]n addition to containing information ‘relating to the conduct of the public’s business,’ a writing must have been ‘prepared, owned and retained by a public body’ in order to be a ‘public record’ under W.Va. Code 29B-1-2(4).” *Id.* at 116. Finally, in yet another decision addressing the definition of a public record, State v. Nelson, 189 W.Va. 778, 434 S.E.2d 697 (1993), the Court found that “[a]ccording to this legislative definition, the nature of a ‘public record’ is not based upon public availability . . . but rather it based upon whether a public body prepares, owns and retains the record.” *Id.* at 787. Thus, it is clear that the West Virginia Supreme Court has plainly interpreted the definition contained in the West Virginia Code, finding that a public record must not only relate to the public’s business, but also must have been a record that was created by the public body in the first instance.

Upon information, the petition drive was instituted under the direction of a citizen group. There is no affiliation between the County Commission and this citizen group, and the County Commission did not request that the group undertake the petition drive. Rather, a private group presented the petition and signatures to the County Commission through the County Clerk for certification. It is clear that the petition and signatures do not fall within the definition of a public record as the document was not prepared by the public body but rather was prepared by a private citizen group that was neither affiliated with nor under the control of the County Commission. Accordingly, the petition does not comply with the requirements of a public record as articulated by both the West Virginia Code and the West Virginia Supreme Court, and as such the petition and its signatures are not subject to the provisions of the West Virginia Freedom of Information Act. Therefore, the County Clerk is under no obligation to provide the petition and signatures requested under authority of the Act.

Pursuant to West Virginia Code § 29B-1-3(c) please be further advised that the responsibility of the custodian of any public records or public body to produce the requested records or documents is at an end. You may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.

Finally, should you have any further questions concerning your request or this response, please do not hesitate to contact me.

Sincerely,


Stephanie F. Grove
Assistant Prosecutor

S.



**IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA**

The Shepherdstown Observer, Inc.
Plaintiff,

vs

Civil Action # **09-C-169**

Jennifer Maghan,
Clerk of the County Commission
Of Jefferson County
Defendant

RECEIVED

AUG 21 2009

**JEFFERSON COUNTY
CIRCUIT COURT**

ORDER OF DISMISSAL

This matter came before the court upon the Motion to Dismiss filed by the Defendant. After considering the briefs and arguments of the parties, those of the Plaintiff represented by Stephen G. Skinner and the Defendant by Stephanie F. Grove, the Court makes the following findings.

FINDINGS OF FACT

1. In October of 2008, the County Commission of Jefferson County enacted a traditional zoning ordinance, which ordinance was intended to replace the County's non-traditional zoning ordinance.
2. Shortly thereafter, a petition drive in accordance with the provisions of W. Va. Code 8A-7-13, was instituted by a citizen group to bring the newly enacted ordinance to a referendum.
3. The group collected signatures and presented them to Jennifer Maghan, the

County Clerk of the County Commission of Jefferson County (*hereinafter* "County Clerk" or "Clerk").

4. After reviewing each and every signature on the petition and eliminating those signatures that were determined to be invalid, the Clerk certified that the petition contained the requisite number of signatures to bring the ordinance to referendum.

5. On March 30, 2009, Stephen Skinner, Esq., on behalf of the Shepherdstown Observer, requested the petition documents pursuant to the West Virginia Freedom of Information Act ("FOIA"). In his correspondence, Mr. Skinner asked the Clerk to provide him copies of any and all certification for the current proposed zoning referendum, including all petitions and petition forms that were delivered to the Clerk's office for certification for the current proposed zoning referendum.

6. The Clerk provided Mr. Skinner a certified copy of "Certification of Valid and Invalid Signatures on the Zoning Petition 2008," but refused to provide any other documents listed in the request, relying in part upon advice from the West Virginia Secretary of State's Office that the signatures and petitions should be kept confidential. After the Clerk denied the request, the Shepherdstown Observer filed a complaint in this Court in an attempt to enforce Mr. Skinner's FOIA request.

CONCLUSIONS OF LAW

1. Rule 12(b)(1) of the West Virginia Rules of Civil Procedure allows a party to challenge subject matter jurisdiction by pre-answer motion.

2. Due process of law requires that a court assuming to determine the rights of

parties must have jurisdiction over the subject matter. *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.* 158 W.Va. 492, 211 S.E.2d 705 (1975). Any judgment or decree rendered without such jurisdiction is utterly void. *Easterling v. American Optical Corp.*, 207 W.Va. 123, 429 S.E.2d 588 (2000).

3. Whenever it is determined that a circuit court has no jurisdiction to entertain the subject matter of a civil action, the court must take no further action in the case other than to dismiss it from the docket. See *Hanson v. Board of Educ. of Mineral County*, 198 W.Va. 6, 479 S.E.2d 305 (1996).

4. Rule 12(b)(6) of the West Virginia Rules of Civil Procedure "permits a party to file a motion in the circuit court, prior to filing an answer, to dismiss a claim for failure to state a cause of action." *Shaffer v. Charleston Area Medical Center*, 199 W.Va. 428, 485 S.E.2d 12 (1997). Rule 12(b) is designed to test the formal sufficiency of the complaint. *Mandolidis v. Elkins Indus., Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978). A motion under Rule 12(b)(6) enables a court to weed out unfounded suits. *Harrison v. Davis*, 197 W.Va. 651 n.17, 478 S.E.2d 104 n 17 (1996).

5. For the purposes of a motion to dismiss, the allegations contained in the Plaintiff's Complaint must be accepted as true and construed most favorably in his behalf. See *Wiggins v. Eastern Associated Coal Corporation*, 178 W.Va. 63, 357 S.E.2d 745 (1987); *Harless v. First National Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978). If it appears beyond doubt that the Plaintiff can prove no set of facts in support of a claim which would entitle him to relief, the motion to dismiss should be granted. *Owen v. Board of Educ.*, 190 W.Va. 677, 441 S.E.2d 398 (1994).

6. Because the records requested were not prepared by the public body, they do not qualify as public record within the meaning of the Freedom of Information Act, and the Plaintiff has failed to state a claim upon which relief may be granted.

7. A public record is defined as “any writing containing information in relation to the conduct of the public’s business, prepared, owned and retained by a public body” W.Va. Code 29B-1-2(4) (*emphasis added*).

8. The West Virginia Supreme Court has stated that it finds the definition of a public record in W.Va. Code 29B-1-2 to be “plain and unambiguous.” *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W.Va. 648, 650, 453 S.E.2d 631, 633 (1994). Further, in *Daily Gazette Company, Inc. v. Withrow*, 177 W.Va. 110, 350 S.E.2d 738 (1986), the Court argued that “[i]n addition to containing information ‘relating to the conduct of the public’s business,’ a writing must have been ‘prepared, owned and retained by a public body’ in order to be a ‘public record’ under W.Va. Code 29B-1-2(4).” *Id.* at 116. Finally, in another decision addressing the definition of a public record, *State v. Nelson*, 189 W.Va. 778, 434 S.E.2d 697 (1993), the Court found that “[a]ccording to this legislative definition, the nature of a ‘public record’ is not based upon public availability . . . but rather it is based upon whether a public body prepares, owns and retains the record.” *Id.* at 787.

9. The West Virginia Supreme Court has plainly interpreted the definition contained in the West Virginia Code, finding that a public record must not only relate to the public’s business, but also must have been a record that was created by the public body in the first instance.

10. It is clear that the petition and signatures do not fall within the definition of a public record as the document was not prepared by or on behalf of the public body but rather was prepared by a private citizen group that was neither affiliated with nor under the control of the County Commission.

11. Accordingly, the petition does not comply with the requirements of a public record as articulated by both the West Virginia Code and the West Virginia Supreme Court, and as such the petition is not subject to the provisions of the West Virginia Freedom of Information Act. Therefore, the County Clerk was under no obligation to provide the petition and signatures that were requested under authority of the Act, and the plaintiff has failed to state a claim upon which relief can be granted.

12. The Supreme Court has ruled that “[i]n the absence of evidence to the contrary, public officers will be presumed to have properly performed their duties.” *Daily Gazette Company v. Bailey*, 152 W.Va. 521, 528, 164 S.E.2d 414, 418 (1968) see also *Syl. Pt. 3, West Virginia Human Rights Commission and Tidewater Grill v. West Virginia Human Rights Commission*, 183 W.Va. 108, 394 S.E.2d 340 (1990) quoting *Syl. Pt. 2 State ex rel. Staley v. County Court*, 137 W.Va. 431, 73 S.E.2d 827 (1952).

13. In *Bailey*, which case addressed a certificate of nomination, the petitioners contended that failure to publish the names on the certificate would encourage forgery or other types of fraud or irregularity. The Court found that the chief election officer took steps to insure that only valid signatures would be counted in the total required by the statute.

14. Similar to the *Bailey* case, the County Clerk is the chief election officer of the

county, and as such she is vested with the duty to determine that the signatures presented complied with all statutory requirements. There is no reason to believe that the Clerk did not properly perform her duty to certify each and every signature presented or that a newspaper is in a better position to verify the signatures than those deputy clerks who are trained by and use the methods prescribed by the West Virginia Secretary of State.

15. Furthermore, as the Supreme Court stated in *Bailey* “many signers of the certificates indicated that they would not have signed had they believed their names would be published.” This Court finds that making the names of those individuals who signed the petitions would have a chilling effect on the ability of citizens to petition the government.

16. The Court further finds that there are several checks on the County Clerk’s verification of the signatures.

17. West Virginia Code § 53-3-2 provides in relevant part “in every case, matter or proceeding before a county court. . . the record or proceeding may, after judgment or final order therein, or after any judgment. . . be removed by writ of certiorari to the circuit court of the county in which such judgment was rendered.”

18. West Virginia Code 8A-7-13(j), which section provides the manner in which the voters may petition for an election on replacing a non-traditional ordinance with a traditional ordinance, indicates that “a petition, signed by at least ten percent of the eligible voters. . . may be filed with the governing body of the county. . .” The County Clerk is the Clerk of the County Commission, whose duty it is to assist the

Commission with its statutorily assigned duties. W.Va. Const. art. IX § 12.

19. As such, any decision of the county clerk, which decision is necessarily performed on behalf of the County Commission, is subject to review by certiorari.

20. If the Plaintiff or any member of the public feels that the County Clerk has acted improperly in the manner in which she certified the petitions, the West Virginia Secretary of State has a Fraud Unit formed to investigate any type of election fraud. Such a unit is authorized pursuant to W.Va. Code 3-1A-8.

21. Accordingly, it is clear that there are several checks on the County Clerk's authority, and a FOIA request for a document that does not meet the definition of a public record should not be used as a substitute for the remedies already available by law.

22. Because of these checks on the powers of the County Clerk, there is no valid public purpose in making the signatures public.

23. Furthermore, FOIA is a Federal enactment it is instructive to look to the decisions of United States Courts on this subject. Federal Courts have prohibited the dissemination of names from a petition in circumstances very like that in this case upon grounds very similar to the West Virginia Supreme Court's rationale in *Bailey* (as referenced above in Point 15) - "that making the names of those individuals who signed the petitions would have a chilling effect on the ability of citizens to petition the government."

24. The United States Supreme Court has recognized that the secret ballot is of paramount importance to our system of voting. In *Burson vs Freeman*, 504 U.S. 191, 206, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), the Court found a “widespread and time-tested consensus” that the secret ballot is necessary to prevent voter intimidation and election fraud.

25. In a subsequent decision recognizing a First Amendment interest in anonymous political advocacy, the Supreme Court described the secret ballot as “the hard-won right to vote one’s conscience without fear of retaliation. *McIntyre vs Ohio Elections Comm’n*, 514 U.S. 334, 343, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).

26. In prohibiting the disclosure of the names and addresses of persons signing a petition seeking a referendum to terminate a controversial program (*circumstances very like the instant case*) and referencing the two Supreme Court cases recited above, the U.S. Court of Appeals for the 8th Circuit held that “there is a strong and clearly established privacy interest in a secret ballot and that this privacy interest is no less compelling in the context of FOIA’s personal privacy exemption [5 U.S.C.A. § 552(b)(6)] than it is in other contexts. We also believe that in the circumstance of this case the privacy interest in a secret ballot is severely threatened. Releasing this petition, which contains a clear declaration of how the petitioners intend to vote in the referendum, would substantially invade that privacy interest.” *Campaign For Family Farms vs Glickman*, 200 F.3d 1180, 1188, (2000)

27. Protecting the integrity of the secret ballot is more than just a personal privacy issue, it is a matter of great and vital public interest that our electoral process be free of the possibility of voter intimidation or fear of retaliation.

CONCLUSION

ACCORDINGLY: this complaint must be dismissed, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, because the Plaintiff has failed to state a claim under the provisions of the Freedom of Information Act. The records requested were not public records as defined by W.Va. Code 29B-1-2(4), and the Clerk never had an obligation to provide the documents to the Plaintiff. Further, pursuant to Federal statute and case-law the requested records are covered by FOIA's personal privacy exemption. Accordingly, the Plaintiff has failed to state a cognizable claim pursuant to the provisions of the West Virginia Freedom of Information Act.

WHEREFORE, it is hereby ORDERED that the Defendant's Motion to Dismiss is hereby GRANTED.

It is further ORDERED that the Clerk of this Court shall transmit an attested copy of this Order, once entered, to all counsel of record and retire this case from the active docket.

ENTERED: August 21, 2009

2 cc's

S. Skinner

S. Grove

8-21-09

bc



David H. Sanders

Chief Judge of the Twenty-Third Judicial Circuit

A TRUE COPY
ATTEST:

LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY Betty Chalk
DEPUTY CLERK

CERTIFICATE REGARDING FACTS AND SERVICE

I, Stephen G. Skinner, of SKINNER LAW FIRM, do hereby certify that the facts alleged are faithfully represented and they are accurately presented to the best of my ability and that I have served a true copy of the attached PETITION FOR APPEAL, DESIGNATION OF RECORD AND DOCKETING STATEMENT, upon the Respondent by mailing the same to her counsel Stephanie Grove, Esq., Jefferson County Assistant Prosecuting Attorney, PO Box 729, Charles Town, WV 25414 this September 29th, 2009.



Stephen G Skinner