

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DIANA ASTIZ,

Plaintiff,

v.

STATE OF WEST VIRGINIA OFFICE OF THE
GOVERNOR,

Defendant.

Civil Action No. _____

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. Governor Jim Justice declared his candidacy for U.S. Senate last month. His actions as Governor will no doubt be of keen interest to voters as they decide who they want to support in that race. But, in the face of a request properly issued under the West Virginia Freedom of Information Act (FOIA), his office has refused to produce the most basic records from his time as Governor: lists of the official meetings scheduled for him and his most senior staff. Notably, the last time he produced such records—in 2019—they showed that Governor Justice “almost never meets with his Cabinet, is rarely at the capital and was largely missing at one of the most critical points of [the] year’s legislative session.”¹ The Governor may understandably desire to avoid another round of similar criticism, but he is the chief executive of the State and has the duty to ensure that its laws are faithfully executed. His Office’s refusal to produce the records sought is an open violation of FOIA. W. Va. Code § 29B-1-1 *et seq.*

¹ Anthony Izaguirre, *Schedules show West Virginia governor largely absent in job*, AP NEWS (May 10, 2019), <https://apnews.com/article/ap-top-news-us-news-north-america-west-virginia-charleston-f080da8d7189476e91062c69483166a1>.

2. It is “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.” W. Va. Code § 29B-1-1. FOIA therefore seeks “to allow as many public records as possible to be available to the public.” *AT & T Commc’ns of W. Va., Inc. v. Pub. Serv. Comm’n of W. Va.*, 188 W. Va. 250, 253, 423 S.E.2d 859, 862 (1992). And there is “a presumption of public accessibility to all public records,” subject only to certain delineated exemptions. W. Va. Code § 29B-1-4(a). FOIA’s disclosure provisions “are to be liberally construed, and the exemptions . . . are to be strictly construed.” *Farley v. Worley*, 215 W. Va. 412, 420, 599 S.E.2d 835, 843 (2004) (quoting *Hechler v. Casey*, 175 W.Va. 434, 442, 333 S.E.2d 799, 808 (1985)).

3. On April 13, 2023, Plaintiff Diana Astiz issued a FOIA request to the Office of the Governor, seeking records of all scheduled official meetings involving Governor Justice, his chief of staff, his deputy chief of staff, and his general counsel. The Governor’s Office denied the request in full on April 20. The Governor’s Office explained that it had located responsive documents in its custody, but it refused to produce a single one. The Governor’s Office provided no adequate justification for this refusal. Instead, it cited exemptions that do not apply to the requested records and cases from other jurisdictions which do not track West Virginia law.

4. The Governor’s Office’s failure to produce responsive records violates FOIA. Plaintiff therefore brings this expedited action for declaratory and injunctive relief seeking an order: (1) declaring that the Governor’s Office’s failure to produce records responsive to Plaintiff’s request violates FOIA; (2) enjoining the Governor’s Office from withholding records without justification and ordering immediate production to Plaintiff of all records that have been improperly withheld; and (3) awarding Plaintiff her attorney fees and costs related to this dispute.

5. Plaintiff alleges as follows:

II. JURISDICTION

6. Jurisdiction and venue are proper in the Circuit Court of Kanawha County pursuant to West Virginia Code §§ 29B-1-5(1) and 29B-1-5(2).

III. PARTIES

7. Plaintiff Diana Astiz is the Research Director for the DSCC. She sent the request for documents at issue here to the Governor's Office on April 13, 2023.

8. Defendant the Office of the Governor is the "public body" or state agency that maintains custody and control over the public records Plaintiff requested, and the entity responsible for producing such records. See W. Va. Code § 29B-1-2(1), (4).

IV. FACTS

A. Plaintiff's FOIA Request and the Governor's Office's Denial

9. Four years ago, the Associated Press and other news organizations reported that Governor Justice has been an absentee governor who rarely meets with his Cabinet, is rarely at the Statehouse, and is rarely involved in the day-to-day operations of the state and legislative process.² The reporting included a quote from a veteran legislator stating that Governor Justice is largely "remote" and spends less time at the Statehouse than any governor he had ever seen.

10. On January 12, 2023, Governor Justice announced that he was "seriously considering" running for the U.S. Senate.

11. To ensure that voters have full access to information about Governor Justice's representation of them in advance of the Senate election, Plaintiff submitted a FOIA request to the

² Izaguirre, *supra* note 1.

Governor's Office on April 13, 2023, pursuant to West Virginia Code §§ 29B-1-1, *et seq.* A copy of the Request is attached hereto as Exhibit A.

12. The Request sought records regarding all “scheduled official meetings” involving Governor Jim Justice, the Governor’s Chief of Staff Brian Abraham, the Governor’s Deputy Chief of Staff Ann Urling, and the Governor’s General Counsel Berkeley Bentley, from January 2017 to the present.

13. On April 20, 2023, the Governor’s Office denied the Request in full. A copy of the Denial Letter is attached hereto as Exhibit B. The Denial Letter indicates that the Governor’s Office would take no further action in response to the Request. The Governor’s Office therefore did not produce any records at all in response to the Request.

B. The Governor’s Office’s Violation of FOIA

14. Under FOIA, “[e]very person has a right to inspect or copy any public record of a public body in this state,” subject only to certain delineated exemptions. W. Va. Code § 29B-1-3(a).

15. The Governor’s Office’s denial of the Request violates FOIA because the Request seeks public records, and no exemption applies.

1. The Request seeks public records.

16. A “public record” is “any writing containing information prepared or received by a public body, the content or context of which, judged either by content or context, relates to the conduct of the public’s business.” W. Va. Code § 29B-1-2(5). This includes any writing in the possession of a public body that relates to the conduct of the public’s business which is not specifically exempt from disclosure, even though the writing was not prepared by, on behalf of, or at the request of, the public body. *See Shepherdstown Observer, Inc. v. Maghan*, 226 W. Va. 353, 359, 700 S.E.2d 805, 811 (2010).

17. “Public body” includes “every state officer, agency, department, including the executive, legislative and judicial departments . . . and any other body which is created by state or local authority or which is primarily funded by the state or local authority.” W. Va. Code § 29B-1-2(4).

18. The Office of the Governor is a public body within the meaning of FOIA.

19. “Public business,” as used in definition of “public record,” refers to the business of the government and relates to matters within the purview of “the agency’s duties, functions, and jurisdiction.” *Associated Press v. Canterbury*, 224 W. Va. 708, 716, 688 S.E.2d 317, 325 (2009) (quotation marks omitted).

20. Scheduled official meetings of the governor and his senior staff relate to “public business” within the meaning of FOIA.

21. The Denial Letter cites a federal case, *Bureau of National Affairs, Inc. v. United States Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984), to suggest that the responsive documents are not public records. But that case supports the opposite conclusion: that the records sought must be disclosed. In that case, the D.C. Circuit articulated a “totality of the circumstances” test to determine whether scheduling documents are agency records subject to disclosure under the federal FOIA regime, considering: “whether the document was generated within the agency, has been placed into the agency’s files, is in the agency’s control, and has been used by the agency for an agency purpose.” *Id.* at 1494. Applying this test, the court held that daily agendas of a government official had to be disclosed because they were “created for the express purpose of facilitating the daily activities of the [government agency],” and were created “for the convenience of [the official’s] staff in their conduct of official business.” *Id.* at 1495.

22. West Virginia law articulates a simpler test, but the result is the same. “[A] ‘public record’ includes any writing in the possession of a public body that relates to the conduct of the public’s business which is not specifically exempt from disclosure by W. Va. Code, 29B-1-4, even though the writing was not prepared by, on behalf of, or at the request of, the public body.” *Shepherdstown Observer, Inc.*, 226 W. Va. at 359, 700 S.E.2d at 811; *see also Ogden Newspapers, Inc. v. City of Williamstown*, 192 W. Va. 648, 651, 453 S.E.2d 631, 634 (1994) (explaining that a “public record” within the meaning of West Virginia FOIA must be given a “liberal interpretation”). Records of “scheduled official meetings” relate to the public’s business because they relate to “the business of the government.” *Associated Press*, 224 W. Va. at 716, 688 S.E.2d at 325. As a result, the records must be disclosed whether or not they are integrated into the Governor’s Office’s official files, and whether or not they were prepared on behalf of or at the request of the public body.

23. The records that the Request seeks are therefore “public records” under FOIA.

2. No exemption applies.

24. The Denial Letter argues that the requested records are exempt from disclosure under (1) W. Va. Code § 29B-1-4(a)(2), which exempts from disclosure “[i]nformation of a personal nature such as that kept in a personal, medical, or similar file,” and even then, only if disclosure would constitute an “unreasonable invasion of privacy” and disclosure is not required by the public interest, and (2) § 29B-1-4(a)(8), which exempts disclosure of “[i]nternal memoranda or letters received or prepared by any public body.”

25. Neither of these exemptions applies to the request at issue here—for the scheduled official meetings of the Governor and members of his senior staff.

26. First, the personal information exemption does not apply because the requested records are plainly not “[i]nformation of a personal nature such as that kept in a personal, medical,

or similar file,” W. Va. Code § 29B-1-4(a)(2), nor would the disclosure of records of the Governor’s scheduled official meetings constitute an unreasonable invasion of privacy. *See Hurlbert v. Matkovich*, 233 W. Va. 583, 594, 760 S.E.2d 152, 163 (2014) (compelling disclosure of information where public body was unable to identify any “injury” or “embarrassment” that would be occasioned by the disclosure of the requested information). The purpose of this exemption is to “protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” *Id.* The disclosure of records of *official* meetings would not involve disclosing *personal* information at all, so such records are not exempt from disclosure under § 29B-1-4(a)(2).

27. The internal memoranda exemption, which exempts from disclosure “written internal government communications consisting of advice, opinions and recommendations which reflect a public body’s deliberative, decision-making process,” is also inapplicable to Plaintiff’s request for records of “scheduled official meetings.” *Highland Min. Co. v. W. Va. Univ. Sch. of Med.*, 235 W. Va. 370, 382, 774 S.E.2d 36, 48 (2015) (quoting *Daily Gazette Co. v. W.Va. Dev. Off.*, 198 W.Va. 563, 575, 482 S.E.2d 180, 192 (1996)). For the “internal memoranda” exemption to apply, “the documents must be both predecisional and deliberative” in “the context in which the materials are used.” *Id.* at 383 (internal quotations omitted). Plaintiff’s requests for information about scheduled official meetings do not require disclosure of documents that are both predecisional and deliberative, so the requested records are not exempt under § 29B-1-4(a)(8).

28. Even if some of the records Plaintiff requested contain information exempt from disclosure under the cited exemptions—and Plaintiff has no reason to believe that to be the case—the law requires the Governor’s Office to redact the exempted information and disclose the non-exempt information. *See Farley*, 215 W. Va. at 421, 599 S.E.2d at 844 (explaining that “an entire

document is not exempt merely because an isolated portion need not be disclosed”) (quoting *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973)). An agency “may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information.” *Id.* at 421.

29. The Denial Letter also cites a Kentucky case to argue that responsive documents are exempt from disclosure because they are in draft format and may be inaccurate. But unlike in Kentucky, there is no “draft” exemption in West Virginia’s FOIA. *See* W. Va. Code § 29B-1-4(a). So the Denial Letter’s reliance on Kentucky law does nothing to justify the refusal to disclose the requested records.

3. There is no other defense to disclosure.

30. The Denial Letter offers no other justification for refusing to disclose the requested documents.

31. Disclosing documents responsive to Plaintiff’s request would not create an undue burden or expense because the request states the information sought with reasonable specificity. W. Va. Code § 29B-1-3.

32. Moreover, the Denial Letter asserts that the Governor’s Office has already reviewed all responsive documents and was able to do so within five business days of receiving Plaintiff’s request.

33. The Governor’s Office’s representation in its Denial Letter that it “completed [its] search for and review of the public records in [its] custody that are responsive to [Plaintiff’s] request” indicates that the Governor’s Office has public records in its custody responsive to Plaintiff’s request.

4. The Governor's Office's violation of FOIA harms Plaintiff and the public.

34. The requested records pertain to important matters concerning public issues of the highest interest, including official meetings of the Governor's senior staff and the Governor himself. Under FOIA, "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." W. Va. Code § 29B-1-1. The records Plaintiff requested comprise exactly that, and Plaintiff, as well as the voting public, have a statutory right to review such records and know what they say.

35. The Governor's Office's refusal to disclose records responsive to the Request deprives Plaintiff and all West Virginians of even the most basic information regarding the affairs of government and the official acts of those who represent them as public officials and employees. It also deprives Plaintiff and all West Virginians of the ability to retain control over the instruments of government, particularly in light of the Governor's candidacy in the upcoming U.S. Senate election. And the denial is a clear violation of the Governor's Office's duty to construe FOIA exemptions narrowly and disclosure mandate liberally.

36. Time is of the essence in obtaining the requested information, as voters will have the opportunity to support or reject Governor Justice's Senate bid within the next year. Governor Justice will face at least one opponent in the Republican primary, which will take place on May 14, 2024. West Virginia voters have a right to know the information about the Governor's official meetings that Plaintiff requested.

V. CAUSES OF ACTION

COUNT I: Refusal to Disclose Non-Exempt Records Under FOIA

37. Plaintiff repeats and reasserts by reference each of the allegations set forth in paragraphs one through thirty-six as if fully set forth in this section.

38. The Request seeks public records that are not exempt from disclosure under FOIA.

39. Even if any responsive records are exempt from disclosure in part, the Governor's Office had the duty to redact or segregate exempt from non-exempt information and to produce all non-exempt information but did not do so.

40. Reviewing and disclosing the non-exempt public records responsive to Plaintiff's request would not impose an unreasonably high burden or expense on the Governor's Office.

41. The Governor's Office's refusal to produce responsive records violates FOIA.

42. The burden is on the Governor's Office to sustain its refusal to produce records. W. Va. Code § 29B-1-5(2)

43. Plaintiff is entitled to injunctive and declaratory relief enjoining the Governor's Office from withholding responsive records. *Id.*

COUNT II: Declaratory Judgment

44. Plaintiff repeats and reasserts by reference each of the allegations set forth in paragraphs one through forty-three.

45. West Virginia Code § 55-13-2 states as follows:

Any person interested under a deed, will, written contract, or other writings constituting a contract, whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

46. Plaintiff is a “person” as described above and pray that this Court declare that she is entitled to the documents sought in the Request, for the benefit of the voting public before the 2024 elections.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

- (A) Schedule this matter for a hearing “at the earliest practicable date” so that records can be produced with sufficient time to inform West Virginia voters of their contents in advance of the May 2024 primary elections, pursuant to W. Va. Code § 29B-1-5(3);
- (B) Declare unlawful the Governor’s Office’s refusal to disclose the records Plaintiff requested, pursuant to W. Va. Code § 29B-1-5(1);
- (C) Grant injunctive relief, enjoining the Governor’s Office from withholding records without justification and ordering immediate production to Plaintiff of all records that have been improperly withheld, pursuant to W. Va. Code § 29B-1-5(2);
- (D) Award Plaintiff costs and attorney fees in this action, pursuant to W. Va. Code § 29B-1-7; and
- (E) Grant such other relief as the Court may deem just and proper.

May 23, 2023

By: 

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**Motions for Admission Pro Hac Vice
Forthcoming*

EXHIBIT A

Diana Astiz
Democratic Senatorial Campaign Committee
120 Maryland Avenue NE
Washington, DC 20002

J. Berkeley Bentley
General Counsel
Office of the Governor of West Virginia
State Capitol
1900 Kanawha Blvd. E
Charleston, WV 25305
berkeley.bentley@wv.gov

April 13, 2023

Re: Freedom of Information Act Request

To Whom It May Concern:

Pursuant to the West Virginia Freedom of Information Act, §29-B-1-1 et seq., (“FOIA”), I request copies of records that contain the information outlined in detail below:

- All scheduled official meetings involving Governor Jim Justice from January 2017 to present.
- All scheduled official meetings involving the Governor’s Chief of Staff Brian Abraham from January 2017 to present.
- All scheduled official meetings for the Governor’s Deputy Chief of Staff Ann Urling from January 2017 to present.
- All scheduled official meetings for the Governor’s General Counsel Berkeley Bentley from January 2017 to present.

Please provide records of all scheduled meetings with no evidence of cancellation. We are not requesting records of whether meetings were completed.

If any of these records contain purely personal meetings scheduled, private documents, or sensitive information, please provide records that are redacted as needed, and state the specific legal and factual grounds for withholding any portions of the records.

The West Virginia Freedom of Information Act broadly allows the disclosure of information that relates to the public’s business. West Virginia law still requires the disclosure of records located on a private device or platform when such records directly relate to the public’s business. While the term “agency records” is not defined in the federal Freedom of Information Act (“FOIA”)¹, “public records” is defined under the West Virginia Freedom of Information Act. See 5 U.S.C. § 552; W. Va. Code Ann. § 29B-1-2(5). The West Virginia Freedom of Information Act defines a “public record” to include “any writing containing information prepared or received by a public body, *the content or context* of which, judged either by content or context, relates to the conduct of the public’s business.” W. Va. Code Ann. § 29B-1-2(5) (emphasis added). This definition of “public record” was expanded in 2015 and 2016, after the Supreme Court of

¹ In determining whether documents are “agency records” under federal FOIA, the United States Supreme Court has focused on several factors: whether the documents were (1) in the agency’s control; (2) generated within the agency; (3) placed into the agency’s files; and (4) used by the agency “for any purpose.” *Bureau of Nat. Affs., Inc. v. U.S. Dep’t of Just.*, 742 F.2d 1484, 1489–90 (D.C. Cir. 1984) (citing *Kissinger v. Reprs. Comm. for Freedom of the Press*, 445 U.S. 136 (1980)).

Appeals of West Virginia stated, “[i]f FOIA's definition of a public record is to include an examination of the record's context by virtue of the public's interest in the record, the Legislature must add such language to that definition.” See *Associated Press v. Canterbury*, 688 S.E.2d 317, 335 (W. Va. 2009).

Pursuant to W. Va. Code, § 29B-1-3(d), I request a response to this request within 5 business days.

If the requested documents are located in another division, I request that you please refer this request or any relevant portion of this request to the appropriate division.

To the extent that the responsive records are available in electronic format, I would prefer to receive the information via email or CD, particularly if providing the information reduces the time or expense involved. Otherwise, I will expect to receive the information in paper form.

To help assess my status for copying and mailing fees, please note that I am gathering information for research purposes and not for commercial activities. I am willing to pay all reasonable costs incurred in locating and duplicating these materials. But please contact me prior to processing to approve any fees or charges incurred in excess of \$150.

Thank you for your cooperation with this request. I am willing to discuss ways to make this request more manageable to your office. Please do not hesitate to contact me at my direct line at [REDACTED] or [REDACTED]

Sincerely,

Diana Astiz
Research Director

EXHIBIT B



Jim Justice
Governor of West Virginia

April 20, 2023

Diana Astiz
Research Director
Democratic Senatorial Campaign Committee
[REDACTED]

VIA ELECTRONIC MAIL

Dear Ms. Astiz:

The Office of the Governor received your letter on April 13, 2023, requesting, pursuant to the Freedom of Information Act, W. Va. Code § 29B-1-1, *et seq.* ("FOIA"), access to and copies of records that contain the following:

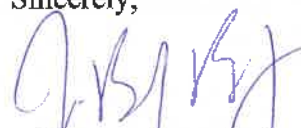
- All scheduled official meetings involving Governor Jim Justice from January 2017 to present.
- All scheduled official meetings involving the Governor's Chief of Staff Brian Abraham from January 2017 to present.
- All scheduled official meetings regarding Governor's Deputy Chief of Staff Ann Urling from January 2017 to present.
- All scheduled official meetings for the Governor's General Counsel Berkeley Bentley from January 2017 to present.

We have completed our search for and review of the public records in our custody that are responsive to your request. Your request is denied to the extent it seeks records exempt from disclosure under West Virginia Code § 29B-1-4(a)(2) and (8). Any calendar or notes which may contain information relating to official meetings of the Governor or senior staff mentioned above are only in draft format, contain appointments that may or may not occur, are revised daily, are never corrected, and are not an accurate log of such meetings. *See, e.g., Courier-Journal v. Jones*, 895 S.W.2d 6 (Ky. App. 1995). Further, any such calendars or notes are maintained exclusively for the personal convenience of those staff members to coordinate both personal and business appointments and are neither under the Office of the Governor's control nor integrated into the Office of the Governor's files. *See, e.g., Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484 (D.C. Cir. 1984).

OFFICE OF THE GOVERNOR

The responsibilities of the Office of the Governor in connection with your FOIA request are now at an end. If you are aggrieved by the denial of your request, FOIA affords you the opportunity to seek injunctive or declaratory relief in the Circuit Court of Kanawha County, West Virginia.

Sincerely,



J. Berkeley Bentley
General Counsel