

1 **H. B. 3114**

2
3 (By Delegates Miley, Armstead, Boggs, Ellem,
4 Fleischauer, Lane, D. Poling, Ireland, Manchin,
5 Sobonya and Moye)

6 [Introduced March 25, 2013; referred to the
7 Committee on the Judiciary then Finance.]

**FISCAL
NOTE**

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9
10 A BILL to amend and reenact §29B-1-2 and §29B-1-3 of the Code of
11 West Virginia, 1931, as amended; to amend said code by adding
12 thereto a new section, designated §29B-1-3a; and to amend and
13 reenact §29B-1-4 of said code, all relating to the Freedom of
14 Information Act; redefining the term "public record";
15 establishing reporting of actions taken to Secretary of State;
16 directing Secretary of State to establish web site of FOIA
17 responses; and revising the exemption for communications
18 received or prepared by any public body.

19 *Be it enacted by the Legislature of West Virginia:*

20 That §29B-1-2 and §29B-1-3 of the Code of West Virginia, 1931,
21 as amended, be amended and reenacted; that said code be amended by
22 adding thereto one new section, designated §29B-1-3a; and that
23 §29B-1-4 of said code be amended and reenacted, all to read as
24 follows:

25 **ARTICLE 1. PUBLIC RECORDS.**

1 **§29B-1-2. Definitions.**

2 As used in this article:

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

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

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

15 (4) "Public record" includes any writing containing
16 information ~~relating~~ prepared or received by a public body, the
17 content or context of which, judged either by content or context
18 relates to the conduct of the public's business. ~~prepared, owned~~
19 ~~and retained by a public body.~~

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

23 **§29B-1-3. Inspection and copying of public record; requests of**
24 **Freedom of Information Act requests registry.**

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

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

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

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

24 ~~(a)~~ (1) Furnish copies of the requested information;

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

3 ~~(c)~~ (3) Deny the request stating in writing the reasons for
4 such denial. ~~Such~~ A denial shall indicate that the responsibility
5 of the custodian of any public records or public body to produce
6 the requested records or documents is at an end, and shall afford
7 the person requesting them the opportunity to institute proceedings
8 for injunctive or declaratory relief in the circuit court in the
9 county where the public record is kept.

10 ~~(5)~~ (e) The public body may establish fees reasonably
11 calculated to reimburse it for its actual cost in making
12 reproductions of ~~such~~ records.

13 (f) The Secretary of State shall maintain an electronic data
14 base of notices of requests as required by section three-a of this
15 article. The data base shall be made available to the public via
16 the Internet and shall list each freedom of information request
17 received and the outcome of the request. The Secretary of State
18 shall provide on the web site, a form for use by a public body to
19 report the results of the freedom of information request, providing
20 the nature of the request and the public body's response thereto,
21 whether the request was granted, and if not, the exemption asserted
22 under section four of this article to deny the request.

23 **§29B-1-3a. Reports to Secretary of State by public bodies.**

24 Each public body that is subject to a freedom of information

1 request, shall within thirty days upon a final action of a freedom
2 of information request, submit a form provided on the Secretary of
3 State's web site providing information required by the Secretary of
4 State.

5 **§29B-1-4. Exemptions.**

6 (a) There is a presumption of public accessibility to all
7 public records subject only to exemptions of the following
8 categories of information which are specifically exempt from
9 disclosure under the provisions of this article:

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

19 (2) Information of a personal nature such as that kept in a
20 personal, medical or similar file, if the public disclosure ~~thereof~~
21 of the information would constitute an unreasonable invasion of
22 privacy, unless the public interest by clear and convincing
23 evidence requires disclosure in the particular instance: *Provided,*
24 That ~~nothing in this article shall be construed as precluding~~ does

1 not preclude an individual from inspecting or copying his or her
2 own personal, medical or similar file;

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

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

10 (5) Information specifically exempted from disclosure by
11 statute;

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

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

23 ~~(8) Internal memoranda or letters received or prepared by any~~
24 ~~public body~~ Internal or external communications received by any

1 member or employee of the public body expressing opinions and
2 mental impressions intended to facilitate deliberation of a matter
3 pending before the public body's deliberative decision-making
4 process: *Provided*, That those communications received after a
5 public body's decision shall be disclosed.

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

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

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

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

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

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

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

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

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

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

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

22 (19) Records of the Division of Corrections, Regional Jail and
23 Correctional Facility Authority and the Division of Juvenile
24 Services relating to design of corrections, jail and detention

1 facilities owned or operated by the agency, and the policy
2 directives and operational procedures of personnel relating to the
3 safe and secure management of inmates or residents, that if
4 released, could be ~~utilized~~ used by an inmate or resident to escape
5 a facility, or to cause injury to another inmate, resident or to
6 facility personnel.

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

11 (1) Intimidate or coerce the civilian population;

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

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

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

18 (c) ~~Nothing in~~ The provisions of subdivisions (9) through
19 (16), inclusive, subsection (a) of this section ~~should be construed~~
20 ~~to~~ do not make subject to the provisions of this chapter any
21 evidence of an immediate threat to public health or safety
22 unrelated to a terrorist act or the threat ~~thereof~~ of a terrorist
23 act which comes to the attention of a public entity in the course
24 of conducting a vulnerability assessment response or similar

1 activity.

NOTE: The purpose of this bill is to redefine public record, to require the Secretary of State to maintain a record of FOIA requests and responses; to require public bodies to submit information to the Secretary of State following final action on a FOIA request, and to redefine exemption as to internal communications to protect deliberative process.

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

§29B-1-3a is new; therefore, it has been completely underscored.