No. 34768 - *The Associated Press v. Steven D. Canterbury, Administrative Director of the West Virginia Supreme Court of Appeals*

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OF WEST VIRGINIA

Workman, Justice, concurring, in part, and dissenting, in part:

I agree with the majority's conclusions to this extent:

(1) A trial court may conduct an *in camera* review of records subject to a request under West Virginia's Freedom of Information Act, West Virginia Code §§ 29B-1-1 to -7 (2007 & Supp. 2009) ("FOIA").

(2) E-mails are "writings" subject to disclosure under FOIA, and FOIA may be used to obtain nonexempt "public records" of the judicial branch.

(3) A personal e-mail communication by a public official or public employee, which does not relate to the conduct of the public's business, is not a public record. (However, as more fully set forth herein, I do not agree with the majority's conclusion that the messages at issue in this case do not relate to the conduct of the public's business.)

(4) Campaign-related e-mails are not *per se*[1] subject to disclosure.

But while the lower court released the five campaign-related e-mails (albeit for the wrong reason, i.e. that they were public records because they related to campaign activity), and the majority has held that none of the thirteen e-mails were public records, I

[1]A writing generated on a public computer, or otherwise prepared, owned and retained by a public body, that provided information relating to the conduct of the public's business, as apart from the conduct of the campaign, would be a public record.

would hold that all thirteen e-mails at issue should be considered "public records," because they contain information relating to the conduct of the public's business, based on the context in which they were written. They reflect that there was an ongoing personal relationship between a sitting Supreme Court Justice and the chief corporate officer of a litigant in a major case at a time when the Justice was participating in that case. John Q. Citizen is entitled to have that information and to accord to it whatever weight and meaning he deems appropriate.

Accordingly, I must respectfully dissent from the majority's conclusion that a determination of whether an e-mail communication is a public record subject to FOIA disclosure is restricted to an analysis of the content of the writing and that such analysis cannot be context-driven. Further, I disagree with the majority's conclusion that the e-mails which are the subject of this case were strictly personal and therefore exempt from public disclosure. While it is accurate that the **substance** of the messages was primarily personal in nature,[2] it is that very fact, when viewed in the context of the juxtaposition of Justice Maynard's position as a Supreme Court Justice with his participation in the then-pending

[2]One of the e-mails released by the circuit court contained a comment by Justice Maynard that could be construed as relating to the merits of a case involving Mr. Blankenship and a Massey subsidiary, which was at that time pending before a circuit court in West Virginia. Because circuit court cases can ultimately be appealed to the Supreme Court of Appeals, an e-mail commenting on the merits of such a case arguably contains information relating to Justice Maynard's conduct of the public's business, based on content alone.

litigation involving Mr. Blankenship's companies, which makes them relevant to the conduct of the public's business. The fact that a judicial officer is a close personal associate of a litigant whose case he is hearing ***is*** relevant public information.

I. The Factual Background

In order to better understand the issues before this Court and the important role that the context of a communication can play in determining whether a writing contains information that relates to the conduct of the public's business, a more thorough description of the factual background of this case is needed. The majority provides no factual background whatsoever, so that the casual reader might never understand why the context of the communications is so important in resolving whether these were public records. All the majority tells us is that Mr. Blankenship is the Chief Executive Officer ("CEO") of Massey Energy Corporation, but with only that information, one might be left to wonder why his relationship with Justice Maynard or their communications would be of interest to the Associated Press ("AP") or to the general public of the State of West Virginia. That background is essential to a meaningful examination of this legal issue.

In early 2008, the AP submitted two requests pursuant to West Virginia's FOIA to Steven D. Canterbury, the Administrative Director of the West Virginia Supreme Court of Appeals. Both requests sought a variety of documents, including records reflecting communications between Justice Elliot E. Maynard and Donald L. Blankenship. At the time

of the AP's requests, an appeal of a civil verdict in the amount of approximately $50 million against Massey Energy Company, *Caperton v. A.T. Massey Coal Company, Inc.*, No. 33350, — W. Va.—, — S.E.2d —, 2009 WL 3806071 (W. Va. filed Nov. 12, 2009), was pending before this Court. Mr. Blankenship, as the Chairman and CEO of Massey Energy Company,[3] was obviously closely connected to the defendant corporate entity in that suit.

Prior to the AP's FOIA requests, on November 20, 2007, the Court, with Justice Maynard voting in the majority, had issued its first decision in the *Caperton* case, reversing the $50 million verdict against Massey in a 3-2 vote. On December 20, 2007, following the verdict against them, the Plaintiffs in *Caperton* filed petitions for rehearing. While those petitions were pending, in early January 2008, photos surfaced showing Justice Maynard and Mr. Blankenship together in Monte Carlo, Monaco, during the summer of 2006 - thus prior to the Court's original decision in *Caperton*, but while that case was pending.

Shortly after the photos surfaced, the Plaintiffs in *Caperton* filed motions asking Justice Maynard to recuse himself from that case. The AP filed its first FOIA request on January 16, 2008, while that motion to recuse was pending. Justice Maynard then officially recused himself from all pending Massey cases on January 18, 2008.[4] On January

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[3]In 2000, A.T. Massey Coal Company, Inc., was renamed Massey Energy Company.

[4]At the time of the AP's FOIA request, Massey Energy Company was a party to (continued...)

24, 2008, the Court, without Justice Maynard's participation, granted the Plaintiffs' petitions for rehearing in *Caperton* and vacated its November 2007 decision.[5]

After the AP submitted the first of its FOIA requests on January 16, 2008, Mr. Canterbury released certain information, but refused to release thirteen e-mails that had been sent by Justice Maynard to Mr. Blankenship from Justice Maynard's official Supreme Court of Appeals e-mail address. The AP then made its second request on February 29, 2008, and Mr. Canterbury again refused to disclose the e-mails. The thirteen e-mails at issue had been sent over a two-year time period, from January 2006 through November 2007. At all relevant times, *Caperton* was pending before the Court in some form.

In addition, throughout the fall of 2007 and winter of 2008, Justice Maynard was in the midst of a re-election campaign, seeking to secure another term on the West

[4](...continued)
several other cases also pending in this Court, most of which involved worker's compensation claims.

[5]The Court issued its second decision in *Caperton* on April 3, 2008, again voting 3-2 in favor of Massey. After the Plaintiffs appealed that decision, the United States Supreme Court reversed and remanded. The case was heard for a third time in September 2009, and the Court issued its third decision on November 12, 2009, again ruling favor of Massey, but this time by a vote of 4-1.

Virginia Supreme Court of Appeals.[6] It is under these circumstances that the AP made its FOIA request.

II. Discussion

At the outset, an examination of West Virginia's FOIA statute is in order. It provides that "[e]very person has a right to inspect or copy any *public record* of a public body of this state . . . ." W. Va. Code § 29B-1-3(1) (emphasis added). The focus of the majority's decision, and my disagreement therewith, centers on the definition of "public record." West Virginia Code § 29B-1-2(4) defines a "public record" as "any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body." Notably, nothing in the plain language of the statute prevents a court from considering the "context" in which a document is written in determining whether it "contains information relating to the conduct of the public's business."

In its "declaration of policy" explaining the principles on which it was enacting the FOIA law, the Legislature stated that "all persons are . . . 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." *Id.* at § 29B-1-1. "To that end, the provisions of

[6]By September 2008, when the Circuit Court of Kanawha County, West Virginia, finally ruled on the AP's FOIA request, Justice Maynard had lost his bid for re-election.

this article shall be liberally construed . . . ." *Id.* This directive by the Legislature should not be taken lightly.

Despite this clear directive, however, the majority construes the definition of "public record" narrowly, not liberally, by holding that a court's consideration of whether a particular writing is a public record is confined to the literal content of that document. I would adopt a more liberal construction, recognizing that information relating to the conduct of the public's business may be contained in the context in which a document is written, in addition to the actual words of that writing.

A. The Majority's Analysis

In support of its position, the majority cites cases from many other jurisdictions around the country holding that purely personal e-mails are not subject to disclosure. Unlike the instant case, those seeking disclosure of records in the cited cases primarily rely on the contention that records should be public by virtue of the fact that they are generated by a public official on a public computer, paid for by public funds, or generated during work hours at a public place.[7] The cases cited hold that these factors alone do not make a document a public record. I agree that the same is true under West Virginia's FOIA.

[7]This is not the contention of the AP in the instant case. Indeed, in its reply brief, the AP specifically disavowed Mr. Canterbury's assertion to that effect, re-affirming its position that, to be disclosed, the records must relate to "the conduct of the public's business."

However, in each and every case cited, there is either a lengthy, fact-specific discussion as to why the documents at issue are determined to be personal in nature, and thus exempt from disclosure under that state's FOIA, or the case is remanded to a lower court for such analysis. In *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 260 S.W.3d 718 (Ark. 2007), for example, the Supreme Court of Alabama concluded that "[c]omparing the nature and purpose of a document with an official's or agency's activities to determine whether the required nexus exists *necessarily requires a fact-specific inquiry*." *Id.* at 724 (emphasis added). Moreover, it recognized that while the personal notes of a public official are not usually "public records" in Arkansas, "[t]here may be instances, however, in which *the personal activities of a public official or employee are inextricably linked to his or her governmental role*." *Id.* at 722 (*quoting* John J. Watkins & Richard J. Peltz, *The Arkansas Freedom of Information Act*, 91 and 93 (m & m Press, 4th ed., 2004)) (emphasis added).

Moreover, most of the cases cited by the majority also provide some standard for analyzing writings that might otherwise be considered personal in nature. For example, courts look to whether the writing contained a "'substantial nexus'" to governmental activity, *Griffis v. Pinal County*, 156 P.3d 418, 421 (Ariz. 2007), or whether the documents had "a demonstrable connection" to the performance of public functions, *Denver Publishing Company v. Board of County Commissioners of County of Arapahoe*, 121 P.3d 190, 192 (Colo. 2005).

The majority in our case, however, performs no such factual analysis nor does it discuss the appropriate analytical framework for determining whether a writing relates to the conduct of the public's business. Instead, they simply make a conclusory statement that all the e-mails at issue in the instant case are personal in nature, without attempting to discuss whether an e-mail between a sitting Supreme Court Justice and the CEO of a corporate litigant with a pending case worth over $50 million creates such a substantial nexus or has any other demonstrable connection to the conduct of the public's business.

I am equally unpersuaded by the majority's reliance on two federal FOIA cases, *Gallant v. National Labor Relations Board*, 26 F.3d 168 (D.C. Cir. 1994), and *Bloomberg, L.P. v. United States Securities and Exchange Commission,* 357 F. Supp. 2d 156 (D.D.C. 2004). In each of those cases, the reviewing court interpreted the term "agency records" under the federal Freedom of Information Act, 5 U.S.C. §§ 551 to 559. Unquestionably, the determination of an "agency record" under the federal FOIA bears little relation to what constitutes a "public record" under West Virginia's FOIA. Because the federal statute does not define "agency record," the United States Supreme Court has looked to the definition of agency records set forth in the Records Disposal Act, 44 U.S.C. § 3301, which indicates that "agency records" must be made "*under Federal law or in connection with the transaction of public business.*" *U.S. Dept. of Justice v. Tax Analysts,* 492 U.S. 136, 145 (1989).

Requiring that a record be made "in connection with the transaction of public business," significantly narrows the scope of what constitutes an "agency record," as compared to West Virginia's statutory requirement that the document must simply *relate* to the conduct of the public's business. Because West Virginia's definition of "public record" is significantly broader than the federal definition, I find the analysis of the federal statute unhelpful and misleading in the context of the instant case.

Furthermore, the majority rejects the reasoning in *Cowles Publishing Co. v. Kootenai County Board of County Commissioners*, 159 P.3d 896 (Idaho 2007), which I find persuasive in the instant case. In *Cowles*, the Supreme Court of Idaho held that the context in which a writing is generated is relevant to whether it may be considered a public record. In that case, a county prosecutor had exchanged e-mails with the manager of a juvenile education and training court, who he supervised and with whom he was romantically involved. *Id.* at 898. After a scandal emerged involving the official duties of the manager, the prosecutor publicly defended her actions. *Id.* Determining that the personal e-mails between the two were subject to disclosure under that state's FOIA, the Supreme Court of Idaho stated:

> The public has a legitimate interest in these communications between this elected official and the employee whom he hired and supervised because when the JET Court's financial problems and eventual demise became apparent to the public, Douglas defended Kalani's management to both the Board and the public. Whether he did so as her supervisor defending her job performance, or whether he did so because of an alleged

> inappropriate relationship is a public concern. *Put another way, Douglas's reasons for defending Kalani relate to the conduct and administration of the public's business.*

Id. at 900 (emphasis added). Thus, the context of the relationship between the prosecutor and the manager transformed communications which would otherwise have been strictly of a personal nature into communications relating to the conduct of the public's business.

To distinguish *Cowles*, the majority relies on a difference in the language of our FOIA statute and the one found in Idaho. In Idaho "[a] public record 'includes, but is not limited to, any writing containing information relating to the conduct or administration of the public's business prepared, owned, used *or* retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics.'" *Id.* at 900 (*quoting* Idaho Code § 9-337(13)).

As the Circuit Court of Kanawha County noted in the instant case, Idaho's definition of "public record" closely mirrors West Virginia's definition. Both define "public record" as a writing containing information relating to the conduct of the public's business, which is prepared, owned, used or retained by a public body. Indeed, the only difference of any significance to this case is that Idaho's definition includes the "but not limited to" provision. The majority reasons that this provision "permits the disclosure of *any writing*, even if it does not involve 'the conduct of the public's business.'"

What the majority fails to recognize, however, is that, in *Cowles*, the "but not limited to" provision of Idaho's FOIA was completely irrelevant to the Supreme Court's decision. Explaining its statutory scheme, the Idaho Supreme Court stated that

> a record may be a public record if it is a writing that (1) contains information relating to the conduct or administration of the public's business, *and* (2) was prepared, owned, used or retained by a governmental agency. However, our legislature has broadly defined public records; other records and writings may qualify even if they do not meet this definition.

159 P.3d at 900 (internal citation omitted). In reviewing the writings at issue in that case, however, the Idaho Supreme Court concluded "it is clear that the emails contain information relating to the conduct and administration of the public's business," and that they were prepared, owned, and used by a public body. *Id.* at 900-01. The "but not limited to" phrase contained within Idaho's statute was *not discussed in analyzing that case* and thus was completely irrelevant to the court's decision. Put another way, even if Idaho's statute did not contain the "but not limited to" provision, the reasoning of the Idaho Supreme Court would not have been affected in *Cowles*. Consequently, I cannot agree with the majority that the "but not limited to" provision distinguishes the basis for the holding in *Cowles*.

In reaching its conclusion, the majority's opinion completely ignores the various ways that the context in which a document is written can both provide information and implicate its designation as a public record. Indeed, the majority limits its discussion of "context" to whether or not the public's interest in, or fascination with, an issue should be

considered in determining its status as a public record.[8] On this question, I agree with the majority that the public's personal curiosity, or lack thereof, in a particular writing should not influence whether the document is a public record. West Virginia's FOIA does not contemplate such consideration, and I find no reasonable public policy basis for including such consideration. That a curious public may be interested in the details of a public official's private life does not mean that writings revealing aspects of such private life can be equated to "information relating to the conduct of the public's business." In fact, completely personal e-mails are not accessible under FOIA. Thus, I agree with the majority that the public's interest, i.e. purely personal curiosity, in a particular issue is not relevant to a court's determination of whether a particular document is a public record.

B. The Role of Context

Two ways in which a consideration of "context" is not only relevant, but necessary, to a FOIA determination immediately come to mind. First, context necessarily must be considered where the meaning of a writing is not apparent on its face. For example, consider a hypothetical e-mail from a judge to a personal friend that simply states: "Go ahead

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[8]It is important to distinguish between the "public's interest" and "the public interest." As used by the majority, the "public's interest" refers to the population's curiosity or fascination with an issue or person, such as interest in some aspect of a public figure's personal life. "The public interest," on the other hand, refers to "[s]omething in which the public as a whole has a stake." *Blacks Law Dictionary* 1350 (9th ed. 2009). For example, the public may be very "interested" in the fashion choices or personal habits of an elected official, but such matters are not something in which the public as a whole has a stake, and thus do not relate to "the public interest."

and rent the boat." A consideration of the context in which that e-mail was written is necessary to determine whether it contains information relating to "the conduct of the public's business." If the judge and the recipient of that e-mail are merely discussing a planned weekend adventure, and the friend has no connection to the court or any pending cases, the e-mail is clearly personal and does not contain information relating to the conduct of the public's business. As such, it would not be a public record nor subject to disclosure under FOIA.

If, however, the judge sent the hypothetical e-mail to a personal friend who also happened to be hired by the judge to plan a court retreat, and the boat was being rented for that purpose using public funds, such statement does relate to the conduct of the public's business. Specifically, the context in which the e-mail was sent reveals that it relates to official court business and involves the expenditure of public funds. As such, it would be considered a public record and be subject to disclosure under FOIA.

In this example, the meaning of the content of the e-mail depends on understanding the circumstances in which it was written. Thus, "context" can be central to determining whether the content relates to "the conduct of the public's business."

Second, the context in which a document is written can provide, in and of itself, information relating to the conduct of the public's business. The mere fact that Justice

Maynard and Mr. Blankenship exchanged e-mails (the content of which had nothing to do with the case then pending before the Supreme Court of Appeals) demonstrates virtually nothing when examined solely by their literal content.[9] But the public can garner from the context of the e-mails that the two are friends. That information is relevant under the circumstances of their roles as Justice and litigant, and thus such information should be subject to disclosure as a public record.[10]

By way of analogy, the well-settled law in the area of free speech rights provides support for this proposition. Specifically, the United States Supreme Court has recognized that, in determining if particular speech - whether spoken aloud or in written form - relates to a "public concern," and thus is subject to protections under the First Amendment, a court must consider not only the content of that speech, but the context in which it is spoken. *Connick v. Myers,* 461 U.S. 138, 145-46 (1983). Specifically, in addressing this issue, the Supreme Court has stated, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, *and context* of a given statement, as revealed by the whole record." *Id.* at 147-48 (emphasis added).

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[9]In fact, with the one exception described in note 2, *supra*, the e-mails are basically innocuous.

[10]Justice Maynard clearly has a right to personal associates, and nothing in this opinion makes any judgment as to whether Justice Maynard in any way acted improperly with regard to continuing to sit on the Massey case during the time of the e-mails. That is not the issue before this Court.

Although the test for "public record" under West Virginia's FOIA obviously is not identical to the test for whether particular speech relates to a "public concern," the parallels are clear. In both cases, a court is attempting to discern whether a communication relates to a private or public matter. Like a determination of whether particular speech addresses a "public concern," I believe that a determination of whether a particular writing "relates to the conduct of the public's business" must also include a consideration of the context in which the communication is made.

To better explain how the context in which a writing was created can determine whether it relates to the conduct of the public's business, I return to my earlier hypothetical example. Assume that the e-mail sent from the judge to his personal friend, which stated simply, "Go ahead and rent the boat," is merely in reference to a planned weekend adventure. Further assume that this personal friend also happens to be a party litigant in a case pending before the judge. In such scenario, the content of the e-mail, taken alone, does not provide information relating to the conduct of the public's business; it merely provides information relating to weekend plans between friends. Nevertheless, the context in which that e-mail was written, by a judge to a party litigant, provides, in and of itself, information relating to that judge's conduct of the public's business. It indicates to the reader that the judge and that party have a relationship of such a nature that they would spend a weekend together. While such relationship does not necessarily indicate that the judge will be biased in his or her

judicial decisions or rule in an unjust manner, the mere fact that the e-mail was sent "contains information" relating to the judge's performance of his or her public duties.

In the case at hand, a Justice sitting on the West Virginia Supreme Court of Appeals communicated by e-mail on a somewhat regular basis with a friend who was the Chairman and CEO of a party litigant with a case pending before the Court. With one exception, the literal content of those e-mails did not contain information relating to the conduct of public business. The fact that those e-mails had been sent, however, did contain relevant information. First and foremost, it discloses the existence of a personal relationship between a sitting Justice and a CEO of a party litigant. In addition, when the AP made its first FOIA request, a motion filed by the Plaintiffs in *Caperton* seeking Justice Maynard's recusal from that case was pending, the basis of which was his personal relationship with Mr. Blankenship. The fact that the e-mails were sent, albeit on issues unrelated to matters pending before this Court, is clearly relevant to the relationship between Justice Maynard and Mr. Blankenship. Because that relationship was the basis of a motion for recusal, the relationship was itself related to Justice Maynard's conduct of the public's business.[11]

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[11]The circuit court acknowledged that the importance of the fact that these e-mails were sent between a sitting justice and a CEO of a party litigant, when it stated:

> It is important to note that had Justice Maynard not recused himself from the *Caperton* case, and other cases involving Massey, these e-mails would have been placed into the public's business by Caperton's Motion to Recuse and the public release

(continued...)

Because of the context in which the e-mails in this case were sent, and in light of the legislative intent expressed in West Virginia's FOIA statute, as well as extensive case law from this Court indicating that our statute is to be given a liberal interpretation in favor of the public's right to access to information,[12] I would hold that all thirteen of the e-mails

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[11](...continued)

> of the photographs of Justice Maynard and Don Blankenship. Because the information contained within the e-mail communications would have shed light on the extent of Justice Maynard's relationship with Don Blankenship and whether or not that relationship may have affected or influenced Justice Maynard's decision-making in Massey cases, the public would have been entitled to that information.

I disagree with the circuit court, however, that the e-mails were not public records because Justice Maynard had recused himself from Massey cases when the request was made. When the e-mails were sent, *Caperton* was pending, and Justice Maynard was participating in the decision. It is the context in which the writing is made that should determine whether the document contains information relating to the conduct of public business, not some subsequent action by the author.

[12] "We have . . . made clear that, '[t]he disclosure provisions of this State's Freedom of Information Act, W. Va. Code, 29B-1-1 *et seq.*, as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed. W. Va. Code, 29B-1-1 [1977].' Syllabus Point 4, *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985). *See also Daily Gazette Co. Inc. v. W. Va. Development Office*, 198 W. Va. 563, 574, 482 S.E.2d 180, 191 (1996) ('WVFOIA . . . was enacted to fully and completely inform the public '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 [1977], in part.'); *AT & T Communications of West Virginia, Inc. v. Public Serv. Comm'n of West Virginia*, 188 W. Va. 250, 253, 423 S.E.2d 859, 862 (1992) ('The general policy of the [FOIA] act is to allow as many public records as possible to be available to the public.')(footnote omitted))."

(continued...)

at issue were public records, because they contained information relating to the conduct of the public's business. Put simply, when a judge or justice communicates, via a record that is prepared, owned and retained by a public body, with a party litigant (or someone closely connected therewith) while that party's case is pending before that judge, such communication necessarily contains information that relates to that judge or justice's conduct of the public business to the extent that it reveals the nature of the relationship between the two.[13]

[12](...continued)

In re Charleston Gazette FOIA Request, 222 W. Va. 771, 778-79, 671 S.E.2d 776, 783-84 (2008) (footnote omitted).

[13]Importantly, the mere existence of such communication in no way indicates that an improper relationship existed between the judge and the recipient, nor does the existence of such communication necessarily indicate that the judge's recusal was or was not appropriate. Rather, it merely contains information that relates to the conduct of the public's business, and, as such, is subject to disclosure under West Virginia's FOIA statute.

Aside from mandatory disclosure under West Virginia's FOIA statute,[14] I additionally believe that such communications should be subject to public disclosure to ensure the legitimacy of the legal process. As the Commentary to Canon 1 of the Code of Judicial Conduct states, "[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." To maintain the public confidence necessary to sustain the legitimacy of the judiciary, judges must disclose, when requested under FOIA, their communications with party litigants. Such disclosure may be required despite the fact that the literal content of such communications may not directly relate to the pending case or other conduct of public business, as in this case. Consequently, given these significant public policy concerns, and in light of the statutory requirement that West Virginia's FOIA be "liberally construed," I would hold that the *context* in which a

[14]Under West Virginia's FOIA statute, once a writing is determined to be a "public record," it is subject to disclosure unless it falls under one of eight exemptions. W. Va. Code § 29B-1-4. Only one of these exemptions, for "information of a personal nature, such as that kept in a personal, medical or similar file," could be of relevance here. *Id.* at § 29B-1-4(2). In the event that the "public record" includes documents of such personal nature, those documents are still subject to public disclosure unless "the public disclosure thereof would constitute an unreasonable invasion of privacy[.]" *Id.* However, even when a writing of a personal nature could constitute "an unreasonable invasion of privacy," it is still subject to disclosure if "the public interest by clear and convincing evidence requires disclosure in the particular instance[.]" *Id.* Importantly, the exemptions are to be strictly construed against non-disclosure. *In re Charleston Gazette FOIA Request*, 222 W. Va. at 778, 671 S.E.2d at 783. For the reasons discussed throughout this opinion, I would find that the e-mails in this case, while constituting information of a personal nature, would not be exempted from disclosure, because the public interest by clear and convincing evidence requires disclosure in this instance.

document is written can "contain information relating to the conduct of the public's business," and should be considered when determining if a writing is a "public record."

III. Conclusion

In light of the majority's decision that consideration of whether a document constitutes a public record is limited to the content found in the four corners of the document, the Legislature should consider amending the statute to clarify that the context in which the communication was made may also be considered. This legislative change is sorely needed if our State is to continue developing a vivacious body of law regarding the right of the public to full information.

For the reasons stated herein, I respectfully concur, in part, and dissent, in part.