IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ST. MARY'S MEDICAL CENTER, INC. and PALLOTTINE HEALTH SERVICES, INC.
Petitioners,

v. Nos. 16-1101 and 16-1032

STEEL OF WEST VIRGINIA, INC., and PATRICK MORRISEY, Attorney General,
Respondents,

AND

PATRICK MORRISEY, Attorney General,
Petitioner,

v. No. 16-1104

STEEL OF WEST VIRGINIA, INC.,
Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF CASE

A. Plaintiff Steel of West Virginia becomes concerned about the anticompetitive effect from the merger of the only two general acute care hospitals in Huntington.

St. Mary's Medical Center's ("St. Mary's") and Cabell Huntington Hospital, Inc. ("Cabell Huntington") are the only two general acute care hospitals in Huntington, West Virginia. (St. Mary's Appendix To Petitioners' Brief In Support Of Notice Of Appeal ("SM App.") 15.) The competition between these two hospitals for the Huntington market has helped to keep health care costs down in the region. (Appendix to Brief Of Petitioner Attorney General Patrick Morrisey ("AG App.") 4765.)

In 2014, the owner of St. Mary's decided to sell the hospital through a competitive bidding process. (SM App. 15.) Although there were several other willing buyers, the owner ultimately decided to sell St. Mary's to its closest competitor, Cabell Huntington, and on November 7, 2014, an agreement was entered into whereby Cabell Huntington would become the sole member and ultimate parent of St. Mary's. (SM App. 15.)

In order to close its acquisition of the hospital, Cabell Huntington filed an application for a "Certificate of Need" with the West Virginia Health Care Authority on April 30, 2015. (AG App. 89.) Plaintiff Steel of West Virginia, Inc. ("Plaintiff") is based in Huntington and is one of the largest employers in the region. (AG App. 4765.) Plaintiff is a self-insured employer and, therefore, the health care costs of its employees directly affect Plaintiff's continued viability. (AG App. 4765.)

Plaintiff was deeply concerned that this merger—which removed competition in the Huntington area—would have a detrimental effect on its employees' health care costs. (AG App. 4765.) It therefore sought and was granted "affected party" status in this Certificate of Need proceeding, seeking to protect its employees from the anticompetitive effects of the proposed merger. (AG App. 89.)

B. The Attorney General investigates the hospitals for antitrust violations, and files Assurances of Voluntary Compliance from the hospitals in open court.

The proposed merger of St. Mary's and Cabell Huntington triggered the Federal Trade Commission's ("FTC") merger review jurisdiction, and the FTC initiated a review of the proposed acquisition for antitrust violations. (AG App. 89.) In addition to FTC review, the West Virginia Attorney General is separately vested with the responsibility of protecting the public from violations of the West Virginia Antitrust Act. W.VA. CODE §47-18-6.

"If the attorney general has probable cause to believe that a person has engaged in an act which is subject to action by the attorney general under any of the provisions of this article, he may make an investigation to determine if the act has been committed." W.VA. CODE §47-18-7. The Antitrust Act provides that, following such an investigation, "the attorney general may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be a violation of this article from any person who has engaged or was about to engage in such method, act or practice." W.VA. CODE §47-18-22.

Pursuant to this authority, the Attorney General conducted what he described as a "thorough review and investigation of" the proposed sale of the hospital. (SM App. 16.) As part of this review/investigation, St. Mary's and Cabell Huntington provided the Attorney General with documentation supporting the merger. (AG App. 4743.) The FTC also provided the Attorney General with documents that had been received by the FTC during its investigation. (*Id.*)

Following this investigation, the Attorney General and the hospitals executed an Assurance of Voluntary Compliance on July 30, 2015, which purported to extract certain commitments from St. Mary's and Cabell Huntington to ensure the legality of the proposed transaction. (SM App. 38-47.) The parties thereafter executed an amended Assurance of Voluntary Compliance on November 4, 2016. (SM App. 11-27.)

Although the Antitrust Act provides that "the attorney general shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to this section or the facts disclosed in the investigation," W.VA. CODE §47-18-7(d), the Attorney General filed both Assurances of Voluntary Compliance in open court, identifying both the names and identities of the investigated parties, as well as factual representations made by the parties. (SM App. 11, 38.)

C. The Attorney General refuses to turn over 349 documents responsive to Plaintiff's Freedom of Information Act requests.

During a public hearing on the Certificate of Need application, one of the key issues raised by Plaintiff was the merger's anticipated impact on competition in the Huntington area and the availability of other viable alternatives that would not have the proposed merger's anticompetitive effects. (AG App. 89.) In response, Cabell Huntington repeatedly maintained that the proposed merger would *not* significantly affect competition because the Assurance of Voluntary Compliance that the hospitals had signed with the Attorney General would counteract any such adverse effects flowing from the elimination of competition. (AG App. 89.)

Pursuant to West Virginia's Freedom of Information Act ("the Act"), W.VA. CODE §29B-1-1, *et seq.*, on September 2, 2015, Plaintiff submitted to the Attorney General a request seeking copies of "all public records and incoming and outgoing correspondence relating to the proposed merger of Cabell Huntington Hospital and St. Mary's Medical Center." (SM App. 28.)

Over the next two months, the Attorney General delayed providing copies of the documents requested, repeatedly failing to meet his own established deadlines. (SM App. 29-33.) Finally, on October 28, 2015, the Attorney General provided documents consisting of court records that were already open to the public, news articles regarding the Assurance of Voluntary Compliance, and a handful of e-mails which exchanged press releases or circulated the aforementioned news stories. (SM App. 34-115.)

The Attorney General then informed Plaintiff that it would not be turning over any other responsive documents—choosing wholesale withholding rather than redaction and segregation—claiming the remaining documents located during the search were exempt from disclosure pursuant to sections 29B-1-4(a)(5) and 29B-1-4(a)(8) of the Act. (SM App. 34-35.)

These sections provide:

> (a) There is a presumption of public accessibility to all public records, subject only to the following categories of information which are specifically exempt from disclosure under the provisions of this article:
>
> ...
>
> (5) Information specifically exempted from disclosure by statute;
>
> ...
>
> (8) Internal memoranda or letters received or prepared by any public body
>
> ...

W.VA. CODE §29B-1-4.

The "statute" the Attorney General relied upon to claim the 29B-1-4(a)(5) exemption was the above-cited provision mandating that the "Attorney General shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to this section or the facts disclosed in the investigation." W.VA. CODE §47-18-7(d). The Attorney General additionally claimed that "certain documents located during the search are also exempt from disclosure pursuant to the Federal Trade Commission Act and its related rules and regulations." (SM App. 34-35.)

In an attempt to avoid litigation, Plaintiff asked the Attorney General to voluntarily provide Plaintiff with a "*Vaughn* index"—a "relatively detailed justification as to why each document is exempt," and "correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies." *Farley v. Worley*, 215 W.Va. 412, 425, 599 S.E.2d 835, 848 (2004)—so that Plaintiff could evaluate the denials and seek resolution without litigation. (SM App. 116-118.)

The Attorney General refused, and Plaintiff was thus forced to file suit and asked the circuit

court to order the Attorney General to provide the *Vaughn* index. Objecting, the Attorney General claimed that W.VA. CODE §47-18-7(d) prevented him from even creating a *Vaughn* index in this case. (AG App. 4643-4645.) The circuit court quickly rejected the Attorney General's argument—noting that accepting it would mean the Attorney General, as a public official, "becomes the judge, jury, and executioner," all in "secret" (AG App. 4645-4649, 4662-4665)—and on September 6, 2016, ordered him to provide a *Vaughn* index. (AG App. 2-3.)

When the Attorney General complied with the court order and finally provided the required *Vaughn* index, it revealed the existence of 349 responsive documents that were being withheld from Plaintiff.[1] (AG App. 92-96.) Ultimately, on October 5, 2016, the circuit court concluded that it must undertake an in camera review of the 349 withheld documents in order to determine whether they fall within the claimed exemptions. (AG App. 11.)

D. While this proceeding is still pending, new legislation is enacted which exempts the proposed merger of these two hospitals from all "state and federal antitrust laws."

As noted above, the Attorney General informed Plaintiff that it was withholding 349 documents based upon W.VA. CODE §47-18-7(d), because they were related to the Attorney General's Antitrust Act investigation and the Assurance of Voluntary Compliance that was reached with Cabell Huntington and St. Mary's as part of that antitrust investigation. (SM App. 34-35.)

While Plaintiff's action was pending in the circuit court, legislation was introduced—with retroactive application[2]—to completely exempt the proposed merger of these two hospitals from all "state and federal antitrust laws" in favor of a new "cooperative agreement" procedure, even though

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[1] The *Vaughn* index itself failed to comply with the mandates set forth by this Court in *Farley*. (AG App. 96-99.) Because the circuit court ultimately conducted an independent in camera review of all the documents, however, Plaintiff is not challenging the sufficiency of the *Vaughn* index.

[2] *See* W.VA. CODE §16-29B-28(d)(4)(E).

the statute itself expressly recognized that such a merger "is likely to produce anti-competitive effects due to a reduction of competition." W.VA. CODE §16-29B-28(c),(d).

The *Vaughn* index suggests that both the Attorney General and the two hospitals were aware of and advised on/played a role in the passage of this new legislation. (AG App. Sec. II(G).) Nonetheless, despite the fact that the proposed merger of Cabell Huntington and St. Mary's was no longer subject to the Antitrust Act's reach, the Attorney General still refused to produce the documents at issue, continuing to cite the now-inapplicable Antitrust Act as the basis for this refusal.

Objecting, Plaintiff explained that St. Mary's/Cabell Huntington and the Attorney General were attempting to "have it both ways"; specifically they were relying on the Antitrust Act to prevent disclosure of any documents to Plaintiff, but then working with the Legislature to exempt the St. Mary's/Cabell Huntington merger from that same Antitrust Act.[3] (AG App. 4684-4687.)

E. Despite arguing that the *Vaughn* index must be sealed even from Plaintiff, the Attorney General thereafter provided the index to non-parties, in violation of the circuit court's order sealing the index.

When the circuit court ordered the Attorney General to produce the required *Vaughn* index, the Attorney General insisted that the index be filed under seal, and strenuously objected to providing the index even to Plaintiff. (AG App. 4671-4677.) Although this Court has expressly declared that a *Vaughn* index be drafted so that it does not "compromise the secret nature of the exempt information." *Highland Min. Co. v. West Virginia University School of Medicine*, 235 W.Va. 370, 378, 774 S.E.2d 36, 57 (2015), the Attorney General argued that the index it prepared in this case contained information so confidential that its mere creation violated the Antitrust Act. (AG App.

[3] This merger still has not been completed, but continuing the legislative involvement in the merger, the West Virginia Legislature has now passed a bill (2017 West Virginia House Bill No. 2459) purporting to exempt the Cabell Huntington/St. Mary's merger from Certificate of Need review. *See* W.VA. CODE §16-2D-10(7).

4651-4653.) The circuit court ultimately ordered the Attorney General to provide the index to Plaintiff, but granted his request to file it under seal, allowing only the court and the two parties access to it. (AG App. 3, 7.)

Despite its insistence about the need for complete confidentiality—objecting to even Plaintiff seeing the index—and the need to have the index sealed from all outside parties, the Attorney General thereafter provided the index to outside parties (members of the Federal Trade Commission). (AG App. 226-230.) The Attorney General, however, did not seek relief from the circuit court's order sealing the index before doing so, and he never sought court approval to do so. (*Id.*)

When Plaintiff learned of this, it informed the court that—despite the fact that Plaintiff had all-along requested that that index be made part of the public record because Plaintiff believed the index itself contained "no proprietary, no confidential, and no exempt information"—Plaintiff nonetheless had abided by the sealed nature of the index; again, sealed solely at the insistence of the Attorney General. (AG App. 4766-4767.) This abidance was significant and to Plaintiff's prejudice because Plaintiff wanted to use the information in the *Vaughn* index in the underlying Certificate of Need proceeding,[4] but it could not because it had been sealed. (*Id.*)

In light of this, following the Attorney General's disclosure to outside parties, the circuit court ordered the *Vaughn* index to be unsealed and made part of the public file. (AG App. 18-21.)

F. St. Mary's and Highmark West Virginia seek and are denied intervention, but the circuit court nonetheless addresses all arguments they raised.

After the circuit court ordered the Attorney General to produce the 349 documents so the court could conduct an in camera review of the documents, counsel for St. Mary's wrote the circuit court a

[4] Items identified on the *Vaughn* index are relevant to Plaintiff's contention that "superior alternatives" to the proposed transaction *do* exist.

letter informing the court that, in St. Mary's opinion, "all of these [withheld] documents are protected from public disclosure under both federal and state law, including the West Virginia FOIA, and Steel of West Virginia's petition is wholly without merit." (AG App. 116-117.) St. Mary's letter also informed the circuit court some of these documents were trade secrets. (*Id.*)

Counsel for another entity—Highmark West Virginia, a health insurance provider—also sent the circuit court a letter informing the court that disclosing the information at issue "would be to the detriment of Highmark West Virginia, state law enforcement interests and ultimately, the citizens of West Virginia." (AG App. 171.[5])

Thereafter, St. Mary's, Highmark West Virginia, and Cabell Huntington all separately moved to intervene in the circuit court proceedings. (AG App. 138-164.) Cabell Huntington thereafter withdrew its Motion to Intervene, informing the circuit court that "its interests are effectively represented by the Defendant [Attorney General]." (AG App. 160.)

The circuit court denied the remaining two motions to intervene, finding that "the existing parties to this action adequately represent the interests both of the Intervenors and those sought to be furthered by the Freedom of Information Act." (AG App. 16-17.) Despite denying intervention, however, the circuit court nonetheless addressed the substantive arguments of St. Mary's, Highmark West Virginia, and Cabell Huntington—including the additional exemption grounds they raised, even though the Attorney General himself did not raise these grounds. (*See* next section.)

G. After finally seeing the *Vaughn* index, Plaintiff agrees that 236 documents are exempted from disclosure, and the circuit court declares that 87 of the remaining documents are not exempt.

Once the Attorney General provided Plaintiff with a *Vaughn* index, Plaintiff was able to

[5] The circuit court made both letters part of the court file. (AG App. 4741.)

evaluate the withheld documents and voluntarily agreed that 236 of the 349 documents appeared to fall within the asserted exemptions.[6] (AG App. 229.) The circuit court thereafter conducted an in camera review of the documents themselves and concluded the following 87 documents were not exempt from disclosure and must be provided to Plaintiff:

Document #	**Court's description after in camera review**	**AG's asserted exemption**
Documents 7-14, 19-24	"documents relating to bids submitted to St. Mary's Medical Center by other hospital systems and other interested buyers."	§29B-1-4(a)(5) §47-18-7(d)
Documents 58-89, 91-100, 240	"letters of support from various businesses, organizations, and politicians, writing in favor of the potential merger."	§29B-1-4(a)(5) §47-18-7(d)
Documents 127-131, 144	"series of procedural documents, including Cabell Huntington Hospital's amended Letter of Intent and Certificate of Need application, as well as correspondence between the Health Care Authority and Cabell Huntington Hospital."	§29B-1-4(a)(5) §47-18-7(d)
Document 138	"letter from Cabell Huntington Hospital's counsel waiving confidentiality provisions under the Hart-Scott-Rodino Act, 18 U.S.C. §18a(h), which was also provided to this Court as an attachment to St. Mary's Medical Center, Inc.'s Motion to Intervene."	§29B-1-4(a)(5) §47-18-7(d)
Documents 150-151, 223, 227, 245	"communications similar to Document 138, serving the purpose of obtaining confidentiality waivers."	§29B-1-4(a)(5) §47-18-7(d)
Documents 172, 180, 192, 215-216	Emails scheduling conference calls, forwarding documents, and requesting copies of other documents	§29B-1-4(a)(5) §47-18-7(d) §29B-1-4(a)(8)

[6] Plaintiff agreed the following documents appeared to be exempt based upon the *Vaughn* index description: 1-6, 15-18, 25-27, 29-57, 90, 101, 104-111, 113-124, 126, 132-137, 139-143, 145, 149, 152-155, 157-158, 159-179, 181-199, 201-204, 206-216, 220-222, 224-226, 229-239, 241-244, 246-252, 253-291, 295-309, 315-325, and 335-348.

Documents 205, 228	"e-mails between Assistant Attorney General Davis and Counsel for the Federal Trade Commission, which discuss proposed legislation."	§29B-1-4(a)(5) §47-18-7(d)
Documents 293-296	"e-mails forwarding the already-public Assurance of Voluntary Compliance."	§29B-1-4(a)(5) §47-18-7(d) §29B-1-4(a)(8)
Documents 312-314, 332-334, 349	"documents ... generated or received after the investigation was complete and after the Assurance of Voluntary Compliance was executed."	§29B-1-4(a)(5) §47-18-7(d) §29B-1-4(a)(8)

(*See* AG App. 32-42.)

The circuit court concluded these 87 documents were not exempt from disclosure based on the following reasons:

(1) "Several documents withheld by the Attorney General were generated or received after the investigation was complete and after the Assurance of Voluntary Compliance was executed.... Having been made after the date of the applicable agency decision, they are not—by definition—predecisional and deliberative, and therefore cannot be withheld under the deliberative process exemption."

(2) The "various federal protections" asserted by the FTC[7] do not apply because the "subject FOIA request was submitted to a West Virginia agency, under West Virginia FOIA, and is subject to West Virginia law."

(3) "In reviewing the state and federal cases cited under the law enforcement exemption to FOIA, no precedent exists for Attorney General Morrisey or the Attorney General's Office to apply this exemption to their office's work on this merger."

(4) Newly enacted W.VA. CODE §16-29B-28(c) "exempts the subject acquisition from the state antitrust laws enforced by the Attorney General.... The Attorney General cannot now withhold documents based upon authority that does not exist in the instant matter, as a matter of law."

[7] The FTC sent a letter to the circuit court setting forth its belief that the materials provided to the Attorney General are "nonpublic and statutorily protected from public disclosure." (AG App. 234-236.)

(AG App. 32-42.)

The circuit court then acknowledged proposed intervenors' contention that some of these documents may contain trade secrets, so it expressly ordered that the production of the above documents is "subject to redaction of any trade secret information pursuant to W.Va. Code §29B-1-4(a)(1)." (*Id.*.)

The circuit court ordered the case dismissed. (AG App. 42.) Plaintiff sought to alter or amend this ruling, asking "to place this action back on its docket to permit [Plaintiff] to file a motion to recover its attorney's fees and costs." (AG App. 242-244.) This Court stayed the proceedings before the circuit court could rule on this Motion.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case involves issues of fundamental public importance regarding the application of the West Virginia Freedom of Information Act. Accordingly, Plaintiff believes that this case is appropriate for Rule 20 argument.

STANDARD OF REVIEW

The goal of the FOIA statute is "to allow as many public records as possible to be made available to the public." *Daily Gazette Co. v. W. Va. Dev. Office*, 198 W.Va. 563, 569, 482 S.E.2d 180, 186 (1996); W.VA. CODE §29B-1-1 (providing that the public "is 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"). Underlying this liberal policy of disclosure are two principles: "First, the fullest responsible disclosure, not confidentiality, is the dominant objective of the Act. Second, the exclusive exemptions from disclosure must be narrowly construed." *Hechler v. Casey*, 175 W.Va. 434, 445, 333 S.E.2d 799, 810 (1985).

In FOIA cases where "the issue on an appeal from the circuit court is clearly a question of law

or involving an interpretation of a statute, we apply a de novo standard of review." *Hurlbert v. Matkovich*, 233 W.Va. 583, 589, 760 S.E.2d 152, 158 (2014). However, decisions involving FOIA requests are "viewed through the evidentiary burden placed upon the public body to justify the withholding of materials." *Id.* In this respect, "the burden is on the public body to sustain its action." *Id.*

Finally, "[d]e novo review on appeal means that the result and not the language used in or reasoning of the lower tribunal's decision, is at issue. A reviewing court may affirm a lower tribunal's decision on any grounds." *Alcan Rolled Products Ravenswood, LLC v. McCarthy*, 234 W.Va. 312, 322, 765 S.E.2d 201, 211 (2014).

SUMMARY OF ARGUMENT

The West Virginia Legislature has expressly declared that the people of West Virginia "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." W.VA. CODE §29B-1-1. Despite this clear mandate, the Attorney General wants to keep the people of West Virginia in the dark on the proposed hospital merger of Cabell Huntington and St. Mary's—a merger that will end competition in the healthcare market of the Cabell County region.

Plaintiff and the circuit court have agreed that 262 of the 349 documents are exempted from disclosure by the Freedom of Information Act. After a full in camera review, the circuit court concluded that 87 documents—which include emails scheduling conference calls, emails forwarding documents, emails requesting copies of other documents, documents that have already been filed as part of the public Certificate of Need proceeding, documents voluntarily filed as attachments in the present case, and letters of support for the proposed merger from other entities—did not fall within

any of the Act's exemptions and must be disclosed.

The Attorney General has challenged this conclusion, claiming these documents are exempted by the "deliberative process exemption," the Antitrust Act "investigative exemption," and the Federal Trade Commission Act. St. Mary's—denied the right to intervene below—has nonetheless appealed and asserted "trade secrets" as an additional exemption. With the exception of the trade secret exemption—which the circuit court expressly declared applicable—none of these exemptions apply to the specific documents the circuit court properly ordered disclosed.

To assert the deliberative process exemption, the Attorney General must establish the documents are both deliberative and predecisional. As to the 87 documents at issue, the circuit court correctly concluded they are neither deliberative nor predecisional. For example, emails scheduling conference calls, forwarding documents, and requesting copies of other documents cannot be construed as containing advice, opinions or recommendations or revealing the manner in which the Attorney General evaluates possible alternative policies or outcomes. These documents, therefore, are not deliberative and may not be withheld.

Similarly, documents that were generated or received *after* the investigation was complete and *after* the Assurance of Voluntary Compliance was executed cannot be predecisional. The documents at issue are emails that were sent mere days—sometimes hours—after the Assurance of Voluntary Compliance was signed, and many of these emails are simply forwarding copies of the executed Assurance of Voluntary Compliance. The fact that an amendment was executed months later does not alter the conclusion that the documents are not predecisional.

The circuit court also correctly concluded that neither the Antitrust Act "investigative exemption" nor the FTC statutes apply to the specific documents the circuit court ordered disclosed. In determining whether the Antitrust Act "investigative exemption" applies, courts must use a content-based analysis in determining whether documents are subject to disclosure, not the "context"

approach used by the Attorney General.

Under this analysis, the fact that the documents were "provided during" the Attorney General's antitrust investigation does not mean the investigative exemption applies. Instead, the appropriate question is whether any individual document, by virtue of its contents, constitutes "facts" gleaned from the Attorney General's specific investigation into the legality of this transaction at issue. the anticompetitive effects of this proposed merger, and whether this proposed merger amounted to a combination in restraint of trade or an unlawful attempt to establish a monopoly.

Likewise, even if the FTC statutes apply—a highly questionable proposition given that Plaintiff's request was submitted to a West Virginia agency, under West Virginia FOIA, and is subject to West Virginia law—the same principles discussed above apply to application of the federal statutes.

In this respect the circuit court correctly declared that certain documents do not fall into these exemptions. For example, the documents ordered disclosed are public records that have already been filed as part of the public Certificate of Need proceeding, documents attached to document filed in this case, documents relating to bids submitted to St. Mary's by other hospital systems and other interested buyers, letters of support for the proposed merger from outside parties, and communications that dealt confidentiality of other documents and "proposed legislation."

When looking at scope of the Attorney General's investigation, it becomes clear that although these documents may have been given to Attorney General during its investigation, the documents identified by the circuit court do not address the antitrust investigation and cannot be exempted under the investigative exemption or the FTC regulations.

In addition, another independent ground upon which to order disclosure of the above-listed documents is the fact that legislation has since been enacted which completely exempts the proposed merger of St. Mary's and Cabell Huntington from all "state and federal antitrust laws." St. Mary's/Cabell Huntington and the Attorney General should not be allowed to use the Antitrust Act

and FTC statutes and regulations to prevent disclosure of any documents to Plaintiff, and then turn around and get the St. Mary's/Cabell Huntington merger legislatively exempted from that same Antitrust Act and FTC oversight.

For all of these reasons, the circuit court's conclusion that 87 or the 349 documents must be disclosed was correct and should be affirmed. The other matters raised in this appeal are likewise without merit.

First, despite its strident insistence about the need for complete confidentiality and the need to have the index sealed from all outside parties, the Attorney General thereafter provided the index to outside parties. Given these circumstances, the circuit court did not abuse its discretion in unsealing the *Vaughn* index, and the reality is that the index should never have been sealed in the first place, as it contains no proprietary, no confidential, and no exempt information. It was sealed only at the request of the Attorney General and once he disregarded the sealed nature of the index, there circuit court did not abuse its discretion in ordering the *Vaughn* index to be publicly filed.

Second, the circuit court did not abuse its discretion when denying St. Mary's motion to intervene, finding that the Attorney General "adequately represents" St. Mary's interests (which is the same conclusion that Cabell Huntington reached when it initially sought to intervene, but thereafter withdrew its request, informing the circuit court that "its interests are effectively represented by the Defendant [Attorney General]"). But even if the circuit court's denial could be considered an abuse of discretion, the denial was harmless because the circuit court nonetheless addressed St. Mary's substantive arguments and the additional exemption grounds it raised. There has been no reversible error.

For the foregoing reasons, the circuit court should be affirmed and this case remanded to address Plaintiff's request for attorney fees and costs.

ARGUMENT

I. The circuit court properly ordered disclosure of 87 of the 349 withheld documents.

Quoting Senator Edward V. Long, the circuit court recognized the foundational premise of public openness: "A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, demeans the fervor of its citizens, and mocks their loyalty." (AG App. 25-26.)

Forty years ago, West Virginia fully embraced this premise with the adoption of the West Virginia Freedom of Information Act, "which holds to the principle that government is the servant of the people, and not the master of them," and declared "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.

In doing so, the Legislature has expressly declared that the people of West Virginia "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." *Id.* "To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy." *Id.*[8]

As the circuit court correctly noted, this case is about Plaintiff's attempt to "inform the public about the proposed hospital merger of Cabell Huntington Hospital and St. Mary's Medical Center, Inc., which will virtually tie up the healthcare market of the Cabell County region," and to this end,

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[8] *Accord Charleston Gazette v. Smithers*, 232 W.Va. 449, 461, 752 S.E.2d 603, 615 (2013) ("The West Virginia Freedom of Information Act was adopted by the legislature in 1977. The purpose of the legislation is to open the workings of government to the public so that the electorate may be informed and retain control. In order to facilitate this purpose, this Court has stated on numerous occasions that the disclosure provisions of the FOIA are to be liberally construed."); *Daily Gazette Co.*, 198 W.Va. at 569 (the goal of the Act is "to allow as many public records as possible to be made available to the public.").

"the Attorney General's communications about the merger were not permitted, as a matter of law, to be done in secret." (*Id.*)

Concluding the 262 of the 349 documents *were* exempted by the statutes at issue, the circuit court held the Attorney General's withholding of 87 of those 349 documents was impermissible and ordered these 87 documents disclosed. On appeal, the Attorney General has challenged this conclusion, asserting the following exemptions as justification for its refusal to provide the documents at issue in this case:

(1) the "deliberative process exemption." W.VA. CODE §29B-1-4(a)(8) (exempting "internal memoranda or letters received or prepared by any public body.");

(2) the Antitrust Act "investigative exemption." W.VA. CODE §29B-1-4(a)(5) (exempting "information specifically exempted from disclosure by statute."); W.VA. CODE §47-18-7(d) ("Attorney General shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to [the Antitrust Act] or the facts disclosed in the investigation.").

(3) The Federal Trade Commission Act. 15 U.S.C. §18a(h) ("Any information or documentary material filed with ... the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of Title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.").

(Brief of Attorney General, p.14.) Although not a party below, St. Mary's has also appealed and asserted "trade secrets" as an additional exemption pursuant to W. Va. Code §29B-1-4(a)(1). (Brief of St. Mary's, p. 17-20.)

As seen below, with the exception of the trade secret exemption—which the circuit court expressly declared applicable—none of these exemptions apply to the specific documents the circuit court properly ordered disclosed.

A. The "deliberative process exemption" does not apply to the specific documents the circuit court ordered disclosed.

West Virginia law has a long history of recognizing the "deliberative process" exemption and exempting documents reflecting the decision making processes of government agencies. *Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 235 W.Va. 370, 382 (2015); W.VA. CODE §29B-1-4(a)(8) (exempting "internal memoranda or letters received or prepared by any public body."). Nonetheless, "considering the strong policy favoring disclosure of public documents, courts must construe this exemption narrowly as consistent with efficient state and local government operations." *Id.* at 385.

Accordingly, this exemption does not apply to "written communications between a public body and private persons or entities where such communications do not consist of advice, opinions or recommendations to the public body from outside consultants or experts obtained during the public body's deliberative, decision-making process." *Id.* at 383. To assert this exemption, the Attorney General must therefore establish the documents are both deliberative and predecisional. *Id.*

1. The circuit court properly ordered disclosure of documents that were not deliberative.

To be deliberative, the withheld documents must "reflect the give-and-take of the consultative process by revealing the manner in which the agency evaluates possible alternative policies or outcomes." *Highland Mining Co.*, 235 W.Va. at 383. Following an in camera review, the circuit court correctly concluded Document Nos. 172, 180, 192, 215, and 216 "do not in fact reveal the deliberative process of the Attorney General during its investigation." (AG App. 41.)

Documents 192, 215, 216 are identified as emails from an Executive Assistant (Vicki Pendell) attempting to schedule conference calls and requesting a "hard copy" of certain documents. Document 172 is an email "providing HSR waiver letter and scheduling call," and document 180 is an email forwarding a document. Emails scheduling conference calls, forwarding documents, and

requesting copies of other documents cannot be construed as containing "advice, opinions or recommendations to the public body from outside consultants or experts" nor revealing the "manner in which the agency evaluates possible alternative policies or outcomes." *Highland Mining Co.*, 235 W.Va. at 382-83. These documents, therefore, are not deliberative and may not be withheld.

2. Post-decisional documents were correctly ordered disclosed.

When determining whether a document is "predecisional," this Court must determine that the documents at issue were "prepared in order to assist an agency decision maker in arriving at his decision." *Highland Mining Co.*, 235 W.Va. at 383. Documents revealing "communications made after the decision and designed to explain it do not affect a decision's quality" and are therefore not protected. *Id.* at 387.

In this case, the relevant inquiry involves the Attorney General's investigation into possible antitrust violations culminating in the negotiation of the Assurance of Voluntary Compliance. In this regard, the circuit court concluded that Documents 293, 294, 312, 313, 314, 332, 333, 334, and 349 "were generated or received after the investigation was complete and after the Assurance of Voluntary Compliance was executed," and, therefore, could not be predecisional.

The Attorney General contends the circuit court "misunderstood the relevant factual background." (Brief of Attorney General, p. 23.) He suggests, "The Circuit Court necessarily assumed that the Attorney General's antitrust investigation closed when the Attorney General secured the first AVC [Assurance of Voluntary Compliance] on July 31, 2015. But that assumption overlooks that the investigation continued at least until November 4, 2015, when the Attorney General secured an Amended AVC." (*Id.*)

The Attorney General's argument is without merit. The Attorney General and the hospitals executed an Assurance of Voluntary Compliance on July 30, 2015. While it is true that an amended

Assurance of Voluntary Compliance was executed on November 4, 2016, Documents 293, 294, 312, 313, 314, 332, 333, 334, and 349 are emails that were sent just *days*—in some instances the very next day—after the July 30, 2015 Assurance of Voluntary Compliance was signed, and many of these emails are simply forwarding copies of the executed Assurance of Voluntary Compliance.

Again, for purposes of this exemption, the relevant inquiry is the Attorney General's investigation into possible antitrust violations culminating in the execution of the Assurance of Voluntary Compliance. This was accomplished on July 30, 2015 and emails immediately following that date cannot be assisting the Attorney General "in arriving at his decision"—that decision had been made and finalized already. *Highland Mining Co.*, 235 W.Va. at 383. The fact that an amendment was executed months later does not alter that conclusion.

Documents 293, 294, 312, 313, 314, 332, 333, 334, and 349 are not predecisional and must be disclosed. The trial court, after reviewing each of the documents individually, correctly held the deliberative process exemption did not apply to these emails.

B. Neither the Antitrust Act "investigative exemption" nor the FTC statutes apply to the specific documents the circuit court ordered disclosed.

The Act provides that "information specifically exempted from disclosure by statute" may be withheld for the public. W.VA. CODE §29B-1-4**Error! Bookmark not defined.**(a)(5). The applicable "statutes" at issue in this case are the Antitrust Act "investigative exemption" and the FTC statutes. *See* W.VA. CODE §47-18-7(d) ("Attorney General shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to this section or the facts disclosed in the investigation."); 15 U.S.C. §18a ("Any information or documentary material filed with ... the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of Title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.").

1. Applying a content-based analysis, only documents specifically addressing the legality of Cabell Huntington's acquisition of St. Mary's may be exempted from disclosure.

The circuit court concluded that the Antitrust Act "investigative exemption" and the FTC statutes did not apply to Documents 7-14, 19-24, 58-89, 91¬100, 127-131, 138, 144, 150-151, 205, 22, 227, 228, 240, and 245. This was the correct result. *See Alcan Rolled Products Ravenswood, LLC v. McCarthy*, 234 W.Va. 312, 322 (2014) ("De novo review on appeal means that the result, and not the language used in or reasoning of the lower tribunal's decision, is at issue. A reviewing court may affirm a lower tribunal's decision on any grounds.").

a. Courts must use a content-based analysis in determining whether documents are subject to disclosure, not the "context" approach used by the Attorney General.

The Attorney General seeks to exempt from disclosure *any* document from *any* source that is provided to his office at *any* point during its investigation. This argument improperly focuses exclusively on the *context* in which these documents were "provided" to determine whether the investigative exemption applies, rather than the specific *contents* of the records themselves.

This Court has rejected such a "context" approach, instead advising courts to use a content-based analysis in determining whether documents are subject to disclosure under the Act: "We are not persuaded by ... reliance on a document's context as a determinative factor of a document's status as a public record." *AP v. Canterbury*, 224 W. Va. 708, 725-26, 688 S.E.2d 317, 334-335 (2009). "[I]nstead, that the better approach, which is dictated by our statutory law and followed by a majority of other states that use a solely content-driven analysis in determining whether a document is a public record." *Id.* (internal alterations omitted).

Admittedly, the *Canterbury* Court did suggest that the law might permit a "context-driven" analysis for writings that are, in fact, public records, but which are specifically exempted from

disclosure by FOIA. *Id.* at 725 n.18. However, a closer examination of this suggestion shows that the Court intended to limit this suggestion to section 29B-1-4(a)(2)'s exemption of "personal information," which expressly includes a contextual balancing requirement—protecting the disclosure of such information "unless the public interest by clear and convincing evidence requires disclosure in this particular instance[.]" *Id.*

Absent this statutory directive, the "content-driven analysis" adopted by *Canterbury* for determining whether a document is a "public record" should apply with equal force to the related question of whether a public record is "exempt" under the Freedom of Information Act. The appropriateness of this approach is bolstered by the Attorney General's obligation to segregate and redact non-public information from public information in the withheld documents, which naturally implicates the necessity of a content-driven analysis. *See Farley v. Worley*, 215 W.Va. 412, 417, 599 S.E.2d 835, 848 (2004) ("[A] public body has a duty to redact or segregate exempt from non-exempt information contained within the public record(s) responsive to the FOIA request and to disclose the nonexempt information unless such segregation or redaction would impose an unreasonably high burden or expense.").

Absent a review of the *contents* of each withheld record, it would be impossible for a reviewing court to ensure that the Attorney General has fulfilled his obligation to segregate and has produced non-exempt material. *See also Intl Counsel Bureau v. United States DOD*, 864 F. Supp. 2d 101, 107 (D.D.C. 2012) (addressing whether records regarding Guantanamo Bay detainees were exempt and reasoning "[h]ere, the ultimate consideration turns on the contents of the withheld documents, and not the parties' interpretation of those documents.").

Thus, the fact that the documents were "provided during" the Attorney General's antitrust investigation does not dictate the availability of the investigative exemption. Instead, the appropriate question is whether any individual document, by virtue of its contents, constitutes "facts" gleaned

from the Attorney General's specific investigation into the legality of this transaction at issue.[9]

Applying the reasoning employed by this Court in *Canterbury*, the Attorney General can withhold documents pursuant to this investigative exemption only if—and only to the extent that—the contents of withheld documents specifically address to the Attorney General's inquiry into the suspected violations of law raised by the proposed merger (discussed in further detail in the next section).

In this regard (and as discussed more fully below), the Attorney General has improperly withheld documents—such as, for example, those that have already been filed as part of the public Certificate of Need proceeding (Documents 127-131), documents voluntarily filed as attachments in the present case (Document 138), and letters of support for the proposed merger (Documents 58-89, 91-100, and 240)—that have no impact on whether the proposed merger would violate the antitrust laws of West Virginia. Such withholdings cannot be countenanced.

b. Only those documents specifically addressing the legality of Cabell Huntington's acquisition of St. Mary's may be exempted.

To further understand the scope of the "investigative exemption," the Attorney General's underlying "investigative" authority under the Antitrust Act must be examined. This authority includes investigating those persons that may have "engaged in any act that is a violation of the Act," including the investigation of proposed contracts or commercial combinations in "restraint of trade" and attempts to "establish a monopoly of trade or commerce" for the purpose of excluding competition or controlling pricing. W.VA. CODE §47-18-7(a); W.VA. CODE §47-18-3, W.VA. CODE

[9] Additional support for this approach is found in West Virginia's approach to the protection of communications by the attorney-client privilege. Like the investigative exemption, the attorney-client privilege does not foreclose the disclosure of all information or "facts" sent to the attorney by her client. Instead, the contents of the information supplied must be reviewed to determine whether any single piece of information complies with the strict requirements of the attorney-client privilege. *See State ex rel. Med Assur. of W. Va., Inc. v. Recht*, 213 W.Va. 457, 470, 583 S.E.2d 80, 93 (2003).

§47-18-4.

In accordance with these provisions, an antitrust "investigation" is focused on—and confined to—determining whether a proposed merger, acquisition, or other market action runs afoul of the these antitrust prohibitions. *Id.* In turn, the "investigative exemption" contained in the Antitrust Act is necessarily limited to the "facts disclosed" to the Attorney General as part of his specific investigation of the proposed merger between Cabell Huntington and St. Mary's. Documents that have no bearing on this specific inquiry should not be exempt from disclosure.

Although this Court has not opined on the precise contours of this "antitrust investigative exemption," it has frequently addressed its closest analog in the Freedom of Information Act, the general law enforcement investigative exemption (W.VA. CODE §29B-1-4(a)(4)). This Court has explained the "primary purpose" of the law enforcement investigative exemption is "to prevent premature disclosure of investigatory materials which might be used in a law enforcement action." *Hechler v. Casey*, 175 W.Va. 434, 447, 333 S.E.2d 799, 812 (1985).

Conversely, this Court recognized that this exemption does *not* protect documents "generated pursuant to routine administration or oversight[.]" *Id.* Instead, the protection afforded is "limited to information compiled as a part of an inquiry into specific suspected violations of law." *Id.* Accordingly, unless the disclosure of a document would "compromise an ongoing law enforcement investigation," then "there is a public right of access under the West Virginia Freedom of Information Act." *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W. Va. 648, 649, 453 S.E.2d 631, 637 (1994).

Given the similarity (in both purpose and intent) between the Act's law enforcement investigative exemption and the investigative exemption set forth in the Antitrust Act, the antitrust provision should be similarly limited to exempt only those documents specifically addressing the Attorney General's investigation into the legality of Cabell Huntington's acquisition of St. Mary's.

The Attorney General's statutory charge is to investigate the legality of this proposed merger, to evaluate the anticompetitive effects of this proposed merger, and to determine whether this proposed merger amounted to a combination in restraint of trade or an unlawful attempt to establish a monopoly. W.VA. CODE §47-18-7(a); §47-18-3, §47-18-4. Thus, only those documents addressing these specific legal inquiries should be exempt; the public should retain the ability to access other records unrelated to these inquiries.

The Attorney General argues the Legislature's use of the word "shall" in the Antitrust Act provides the Attorney General with no discretion to disclose this information. (Brief of Attorney General, p.15-16.) This argument, however, is belied by the Attorney General's own actions when it filed the Assurances of Voluntary Compliance *in open court*, identifying both the names and identities of the investigated parties, as well as factual representations made by the parties. (SM App. 11, 38.) If the Attorney General had discretion and legal authority to file the Assurances of Voluntary Compliance in open court, then the "mandatory" nature of the word "shall" is not so mandatory after all.

c. If FTC confidentiality provisions do apply to a proceeding involving the West Virginia Freedom of Information Act, the above limits confine the availability of this exemption.

The Attorney General has cited three federal statutes and one federal regulation which he claims support nondisclosure in this case: 15 U.S.C. §18a; 15 U.S.C. §46(f); 15 U.S.C. §57b-2(b)(6); 16 C.F.R. §4.11(c). As the circuit court noted, however, this is not a federal FOIA action.

Instead, the "subject FOIA request was submitted to a West Virginia agency, under West Virginia FOIA, and is subject to West Virginia law." (AG App. 28-29.) The Attorney General fails to cite a single case for the proposition that the FTC provisions dictate the outcome of a *state court* proceeding applying the provisions of a *state* Freedom of Information Act. His cited cases instead

deal with application of the United States Constitution's Supremacy Clause and, in contrast to his argument, his cited case held the opposite of what the Attorney General suggests here.

For example, in *Printz v. United States*, 521 U.S. 898 (1997), the United States Supreme Court began its discussion by confirming "that state legislatures are *not* subject to federal direction." *Id.* at 912. The Court reaffirmed that "state executive officers" had absolutely *no* "responsibility to execute federal laws," and that its opinions "have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id.* at 915. This background ultimately lead the Court to declare that it was unconstitutional for Congress to impose obligations on state executive officers to enforce provisions of the federal Brady Handgun Violence Prevention Act. *Id.* at 933.

Pursuant to *Printz*, Congress is free to enact laws governing proceedings before the FTC. But that enactment cannot bind the outcome of a *state court* proceeding applying the provisions of a *state* Freedom of Information Act.

Likewise, the Attorney General relies on a confidentiality agreement and certification that was executed between the Federal Trade Commission and the Attorney General's office. This Court, however, has declared that "an agreement as to confidentiality between the public body and the supplier of the information may not override the Freedom of Information Act. To allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *Hechler v. Casey*, 175 W.Va. 434, 444, 333 S.E.2d 799, 809 (1985).

Nonetheless, even if this Court declares the FTC statutes relied upon by the Attorney General to be applicable, similar limits as those discussed above confine these statutes. As with the Antitrust Act exemption, the FTC statutes cannot protect every single utterance or shred of paper that the FTC might create or share during the pendency of an investigation.

d. The circuit court correctly ordered certain documents disclosed.

Applying the above principles, the circuit court correctly concluded that Documents 7-14, 19-24, 58-89, 91-100, 127-131, 138, 144, 150-151, 205, 22, 227, 228, 240, and 245 are not exempted from disclosure.

Documents 127-131 are public records that have already been filed as part of the public Certificate of Need proceeding before the Health Care Authority. While these materials were given to the Attorney General "during" his investigation, it is not reasonable to conclude that public records that are already within the public record of another agency somehow become shielded from disclosure simply because they were "provided during" the Attorney General's purported antitrust investigation.

Similarly, the Attorney General refused to produce Document 138, but St. Mary's attached this document to its Motion to Intervene in this case—an implicit concession that the contents of this document are not protected by the investigative exemption.

Likewise, Documents 7-14 and 19-24 are documents relating to bids submitted to St. Mary's by other hospital systems and other interested buyers. These documents do not include "facts" gleaned from the investigation that warrant protection from the public, nor do they have any bearing on the Attorney General's inquiry into whether the underlying acquisition agreement constituted an agreement "in restraint of trade" or would result in the establishment of a monopoly in the Huntington market. These documents simply do not address the legality of this proposed merger.

Documents 58-89, 91-100, and 240 are identified as letters of support for the proposed merger. Such letters have no impact on whether the proposed merger would violate the antitrust laws of West Virginia—the Attorney General's investigation into the legal impact of the proposed merger could not be affected simply by receipt of letters from the community. Such letters must necessarily be outside the scope of the investigation.

Documents 150-151, 223, 227, and 245 are communications that dealt with a "confidentiality

statute regarding information provided during investigations" and the confidentiality of other documents. Such documents do not reveal the identity or the substantive facts disclosed during the antitrust investigation, as they simply regard confidentiality statutes and/or agreements.

Finally, Documents 205 and 228 are identified as emails between Assistant Attorney General Davis and Counsel for FTC discussing "proposed legislation." These emails do not contain the identity of or the facts disclosed during an investigation into antitrust matters. To the contrary, and as discussed below, these documents raise the specter the Attorney General was exploring legislation to remove the very legal authority pursuant to which he was purporting to conduct a "thorough" investigation.

In summary, when looking at scope of the Attorney General's investigation, it becomes clear that although many documents may have been given to Attorney General during its investigation, the documents identified by the circuit court do not address the antitrust investigation and cannot be exempted under the investigative exemption or the FTC regulations.

This, necessarily, defeats the Attorney General's claim that disclosure "risks chilling the cooperation of third parties in future antitrust investigations." (Brief of Attorney General, p.26.) This dramatic contention is not grounded in the reality of what happened here.

Contrary to the Attorney General's suggestions of dire consequences here, the actual reality is that 75% of the documents at issue in this case *remain exempted from disclosure*. These are documents which actually address the antitrust investigation. Thus, third parties *still* retain the reasonable expectation that these types of documents will be exempted. What will not be exempted are documents that have no direct bearing on any part of the actual antitrust investigation or documents that have already been made public by another state entity.

2. The new legislation removing the proposed merger from all "state and federal antitrust laws" also removed the Antitrust Act and any FTC statute or regulation as a basis for withholding documents.

In addition to the previous section, another independent ground upon which to order disclosure of the above-listed documents is the fact that legislation has since been enacted which completely exempts the proposed merger of St. Mary's and Cabell Huntington from all "state and federal antitrust laws." W.VA. CODE §16-29B-28(c),(d). As noted above, the Attorney General and the two hospitals were aware of and advised on/played a role in the passage of this new legislation.

The Attorney General's attempt to liken this to an improper retroactive application of a statute is not well taken. First, as a practical matter, the statute exempting St. Mary's and Cabell Huntington from all "state and federal antitrust laws" *itself* provides for retroactive application. *See* W.VA. CODE §16-29B-28(d)(4)(E).

Second, despite the fact that the proposed merger of Cabell Huntington and St. Mary's is no longer subject to the Antitrust Act *or* the FTC's reach, the Attorney General still relies on these statutes as the basis for his refusal to provide the documents Plaintiff has requested. Plaintiff respectfully suggests that St. Mary's/Cabell Huntington and the Attorney General should not be permitted to game the system in this fashion. Specifically, St. Mary's/Cabell Huntington and the Attorney General should not be allowed to use the Antitrust Act and FTC statutes and regulations to prevent disclosure of any documents to Plaintiff, but then work with the Legislature to exempt the St. Mary's/Cabell Huntington merger from that same Antitrust Act and FTC oversight.

Just as important, the reality is that St. Mary's and Cabell Huntington had no authority or ability to refuse to cooperate or produce documents as part of the antitrust investigation. Thus, their responses would have been the same even if the Antitrust Act did not provide for nondisclosure in the first instance. Accordingly, claims that allowing disclosure will chill future compliance are not persuasive.

Finally, the 2016 legislation discussed above exempts the proposed merger of these two hospitals from all "state and federal antitrust laws," even though the statute itself expressly recognizes that such a merger "is likely to produce anti-competitive effects due to a reduction of competition." W.VA. CODE §16-29B-28(c),(d). Since this 2016 legislation, however, there has been even more legislative activity taken with regard to the proposed merger—this time involving the passing of a bill (2017 West Virginia House Bill No. 2459) exempting the Cabell Huntington/St. Mary's merger from Certificate of Need review altogether. *See* W.VA. CODE §16-2D-10(7).

This latest legislation makes the disclosures in this case even more critical to protect the public's interest. As the circuit court correctly noted, this case is about Plaintiff's attempt to "inform the public about the proposed hospital merger of Cabell Huntington Hospital and St. Mary's Medical Center, Inc., which will virtually tie up the healthcare market of the Cabell County region." Yet this merger has an unprecedented lack of public accountability and transparency. The circuit court correctly ordered disclosure here.

C. The circuit court has already ordered that any trade secrets are to be redacted from the documents the Attorney General has been ordered to disclose.

St. Mary's contends the circuit court "disregarded the trade secrets exemption as a matter of law." (Brief of St. Mary's, p. 17.) This is wrong and warrants no action on appeal because the circuit court expressly ordered that the production of *all* of the above documents is "subject to redaction of any trade secret information pursuant to W.Va. Code §29B-1-4(a)(1)." (AG App. 38, 41.)

II. Declaring the *Vaughn* index to be a matter of public record was not an abuse of discretion.

Following the Attorney General's disclosure of the sealed *Vaughn* index to outside parties, the circuit court ordered the *Vaughn* index to be unsealed and made part of the public file. The Attorney General wants this sanction reversed.

Review of the sanction order in this case is guided by this Court's admonition that "[t]he inherent power of courts to sanction also provides courts with a means to impose sanctions fashioned to address unique problems which may not be addressed within the rules." *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 111, 697 S.E.2d 139, 147 (2010).

A circuit court's imposition of sanctions will be reversed only when there has been an abuse of discretion. *Perdomo v. Stevens*, 197 W.Va. 552, 555, 476 S.E.2d 223, 226 (1996). "Under the abuse of discretion standard, we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bound of permissible choices in the circumstances." *Wells v. Key Communications, L.L.C.*, 226 W.Va. 547, 551, 703 S.E.2d 518, 522 (2010). "Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed." *Id.* The Attorney General has not met this burden.

During proceedings below, the Attorney General insisted that the *Vaughn* index be filed under seal, and strenuously objected to providing the index even to Plaintiff. (AG App. 4671-4677.) Plaintiff, on the other hand, argued that that index should be made part of the public record because the index itself contained "no proprietary, no confidential, and no exempt information." (AG App. 4766-4767.)

The circuit court ultimately ordered the Attorney General to provide the index to Plaintiff, but granted his request to file it under seal, allowing only the court and the two parties access to it. Thereafter, Plaintiff maintained the sealed nature of the index, even though it prejudiced Plaintiff's desire to use the information in the *Vaughn* index in the underlying Certificate of Need proceeding to bolster Plaintiff's contention that "superior alternatives" to the proposed transaction *did* exist. (*Id.*)

Despite its insistence about the need for complete confidentiality and the need to have the

index sealed from all outside parties, the Attorney General thereafter provided the index to outside parties (members of the Federal Trade Commission). The Attorney General never sought relief from the circuit court's order sealing the index before doing so, and he never sought court approval to do so.

Given these circumstances, the circuit court was justified in unsealing the *Vaughn* index as a sanction. More important, this Court has expressly declared that a *Vaughn* index be drafted so that it does not "compromise the secret nature of the exempt information." *Highland Min. Co. v. West Virginia University School of Medicine*, 235 W.Va. 370, 378, 774 S.E.2d 36, 57 (2015). The index at issue does just that.

The index itself contains no proprietary, no confidential, and no exempt information and, in reality, should never have been sealed in the first place. The parties and the circuit court have implicitly recognized this fact given that many public documents filed in this case—including the order being appealed—have cited to and quoted entries from the index.

Finally, the Attorney General argues that "West Virginia Code section 47-18-7(d) categorically forbids the Attorney General from revealing any 'facts disclosed' during his investigation into the CHH/St. Mary's merger." (Brief of Attorney General, p. 25.) When creating the *Vaughn* index, he contends he had to include "the identities of individuals and entities that provided information to him, the nature of that information, and, for some entries, the reasons why the information was submitted" and, therefore, the *Vaughn* index cannot be disclosed with violating 47-18-7(d). (*Id.*)

But, again, this argument is contradicted by the Attorney General's own actions. If the Attorney General had the unquestioned express discretion and legal authority to file the Assurances of Voluntary Compliance—which identified both the names and identities of the investigated parties, as well as factual representations made by the parties— in open court, then it is not "categorically

forbidden" from likewise complying with the requirements of the West Virginia Freedom of Information Act requirements.

The circuit court did not abuse its discretion in ordering the *Vaughn* index to be publicly filed.

III. The circuit court did not abuse its discretion when denying St. Mary's motion to intervene.

After making highly inappropriate legal arguments to the circuit court via a letter from its counsel, St. Mary's moved to intervene in the circuit court proceedings.[10] It now appeals the circuit court's denial of that motion.

This Court's review of the circuit court's denial of the motion to intervene "is for an abuse of discretion." *In re Michael Ray T.*, 206 W.Va. 434, 441, 525 S.E.2d 315, 321 (1999). "Typically, a grant of discretion to a lower court commands this Court to extend substantial deference to such discretionary decisions.... [W]e will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." *Id.*

St. Mary's has failed to meet this burden. The circuit court denied the motion to intervene after finding that the Attorney General "adequately represents" St. Mary's interests. (AG App. 16-17.) This is same conclusion reached by Cabell Huntington, which initially sought to intervene, but thereafter withdrew its request, informing the circuit court that "its interests are effectively represented by the Defendant [Attorney General]." (AG App. 160.)

St. Mary's claims it should have been permitted to intervene because its "primary" argument—that "many of documents produced by Petitioners to the Attorney General contain trade secrets as that term is defined at W.Va. Code §29B-1-4(a)(1), and are therefore exempt from disclosure under

[10] Highmark West Virginia also moved to intervene, but it has not appealed the denial of that motion.

FOIA"—is not an argument that the Attorney General would "understand." (Brief of St. Mary's, p. 12-13.) This argument is not well-taken, as the expressly ordered that the production of the above documents is "subject to redaction of any trade secret information pursuant to W. Va. Code §29B-1-4(a)(1)." (AG App. 32-42.)

St. Mary's second argument is that its interests are not represented because—although it has never actually seen the *Vaughn* index—it suggests the index itself contains trade secrets that were not protected. St. Mary's is mistaken.

By design, a *Vaughn* index is drafted so that it does not "compromise the secret nature of the exempt information." *Highland Min. Co. v. West Virginia University School of Medicine*, 235 W.Va. 370, 378, 774 S.E.2d 36, 57 (2015). As this Court will see when it reviews the *Vaughn* index, there is absolutely nothing in the index itself that comes close to anything that could resemble a trade secret. In fact, Plaintiff objected to the *Vaughn* index on the ground that it was so lacking and deficient in *any* detail that it failed to allow for a meaningful review. (AG App. 96-99.)

St. Mary's concerns are unfounded. The Attorney General adequately represents St. Mary's interests, and the circuit court did not abuse its discretion in denying intervention. Even if the circuit court's denial could be considered an abuse of discretion, the denial was harmless because the circuit court nonetheless addressed St. Mary's substantive arguments and the additional exemption grounds it raised. There has been no reversible error.

IV. A remand is required to determine the amount of attorney fees to which Plaintiff is entitled.

Finally, "the FOIA provides that any person who is a successful FOIA litigant must be awarded attorney fees and costs." *Highland Min. Co.*, 235 W.Va. at 392 (citing W.VA. CODE §29B–1–7).

Entitlement to an award of attorney's fees does not require the plaintiff "to have prevailed on

every argument advanced during the FOIA proceedings or have received the full and complete disclosure of every public record he/she wished to inspect or examine." *Id.* "An award of attorney's fees is proper even when some of the requested records are ordered to be disclosed while others are found to be exempt from disclosure or are released in redacted form." *Id* "In the final analysis, a successful FOIA action, such as would warrant an award of attorney's fees ... is one which has contributed to the defendant's disclosure, whether voluntary or by order of court, of the public records originally denied the plaintiff." *Id.*

In this case, Plaintiff maintained a "successful" action and, therefore, is entitled to an award of attorney fees. A remand is needed to allow the circuit court to enter an order addressing Plaintiff's request for attorney fees and costs. *Id.*

CONCLUSION

For the foregoing reasons, the circuit court should be affirmed and this case remanded to address Plaintiff's request for attorney fees and costs.

Respectfully submitted,

STATE OF WEST VIRGINIA, *ex rel.*
STEEL OF WEST VIRGINIA, INC.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ST. MARY'S MEDICAL CENTER, INC. and PALLOTTINE HEALTH SERVICES, INC.
Petitioners,

v. Nos. 16-1101 and 16-1032

STEEL OF WEST VIRGINIA, INC., and PATRICK MORRISEY, Attorney General,
Respondents,

AND

PATRICK MORRISEY, Attorney General,
Petitioner,

v. No. 16-1104

STEEL OF WEST VIRGINIA, INC.,
Respondent.

CERTIFICATE OF SERVICE

I, Carte P. Goodwin, hereby certify that I served a copy of the foregoing **Respondent's Brief** on this 17th day of April, 2017, by United States mail, postage prepaid, to the following:

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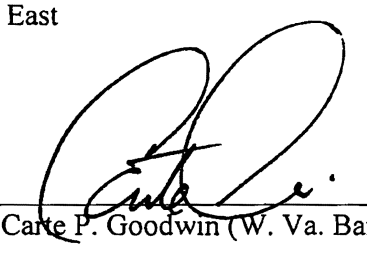

Carte P. Goodwin (W. Va. Bar #8039)