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Mr. Howard D. Kenney
Executive Director
West Virginia Human Rights Commission
1036 Quarrier Street
Charleston, West Virginia 25301

Dear Mr. Kenney:

You have requested an opinion concerning the applicability of the Open Governmental Proceedings Act (the "Sunshine Law") and the Freedom of Information Act as each relates to the proceedings of the West Virginia Human Rights Commission. Specifically, you ask:

"A. Under WV Code, Chapter 6, Article 9A, are Minutes of closed proceedings dealing with the making of an adjudicatory decision by a quasi-judicial body open for public inspection and review?

"B. Under WV Code, Chapter 29B, Article 1, are Minutes of closed proceedings dealing with the making of an adjudicatory decision by a quasi-judicial body open for public inspection and review?"

The context of this request concerns the monthly meetings conducted by the Human Rights Commission during which certain portions of the meetings are deemed "open" and "closed." The Commission enters into a closed session to discuss what action to take following a hearing examiner's recommended decision. During the closed session, in arriving at its decision, the Commission receives advice from its staff attorney, conducts discussion of the merits of the complaint and the hearing examiner's finding in the case, deliberates as to what decision to make, then votes on such decision. Possible decisions by the Commission include acceptance of the hearing examiner's recommendation, rejection of his finding, or remand back to the examiner for clarification or further recommendation. A Human Rights Commission secretary takes notes, later summarizing and incorporating them into minutes indicating

generally the substance of discussion generated and action taken during the closed session.

In response to your first inquiry, the Open Governmental Proceedings Act, W. Va. Code § 6-9A-1 et seq., requires that proceedings of all public bodies (with limited exceptions set forth at Code 6-9A-4 for "executive sessions") be conducted in an open and public manner, and applies to any "meeting" of a "governing body" of said "public body." The Act further provides that:

"Each governing body shall provide for the preparation of written minutes of all of its meetings. All such minutes shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

"(1) The date, time and place of the meeting;

"(2) The name of each member of the governing body present and absent;

"(3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and

"(4) The results of all votes and upon the request of a member, the vote of each member, by name." Code 6-9A-5.

Clearly, the Human Rights Commission, a state administrative agency, qualifies as a "public body" which the Act defines as "any executive, legislative or administrative body or agency of this State or any political subdivision, or any commission, board, council * * *." Code 6-9A-2(6). There should be no challenge that the nine-member Commission, while proceeding pursuant to its enabling statute, the West Virginia Human Rights Act, Code 5-11-1 et seq., to establish after public hearing, "that a respondent has engaged in or is engaging in any unlawful discriminatory practice * * or has not * * *" (W. Va. Code 5-11-10), constitutes a "governing body" defined as follows: "the members of any public body having the authority to make decisions for * * * a public body on policy or administration, the membership of which governing body consists of two or more members * * *." Code 6-9A-2(3).

It should be noted that, in the exercise of its duty to make decisions, the Human Rights Act requires that "[a]ny five members of the Commission shall constitute a quorum for the transaction of

business" and that "[m]inutes of its meetings shall be kept by its secretary." Code 5-11-6.

The definition of "meeting" under the Open Governmental Proceedings Act thus becomes pivotal as set forth at Code 6-9A-2(4):

"'Meeting' means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter, but such term does not include (a) any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding * * *." (Emphasis supplied.)

The threshold issue, then, is whether Human Rights Commission proceedings dealing with the making of "adjudicatory decisions" fall outside the ambit of the Open Governmental Proceedings Act, thereby precluding public inspection and review of "minutes" compiled pursuant thereto.

Particularly probative is the opinion of our Supreme Court in Appalachian Power Company v. Public Service Commission, 162 W. Va. 839, 253 S.E.2d 377 (1979). This rate case involved the applicability of the Open Governmental Proceedings Act to various proceedings of the Public Service Commission of West Virginia.

Before concluding that an adjudicatory session of the Public Service Commission falls within exception (a) in the definition of "meeting" under the Open Governmental Proceedings Act, the court discussed the words "quasi judicial" and "adjudicatory" as follows:

"The most basic definition of quasi judicial is judicial power exercised by an official not within the judicial branch of government. State v. Winne, 21 N.J.Super. 180, 91 A.2d 65. The prefix 'quasi' means, inter alia, 'as if,' 'as though,' or 'in the manner of.' Most simply, a quasi judicial proceeding is a proceeding conducted in the manner of a judicial proceeding. * * *."

* * *

"Having determined that the proceedings in Case No. 9091 are quasi judicial, it logically follows that any decision reached as a result of such proceedings is by definition an adjudicatory

decision. Black's Law Dictionary, 4th ed. defines adjudicate as 'to settle in the exercise of judicial authority. To determine finally. Synonymous with adjudge in its strictest sense.' We believe that any decision which arises out of quasi judicial proceedings and is a final determination of the matters involved is an adjudicatory decision. * * *." 253 S.E.2d at 384-385.

By analogy, and in accord with Appalachian Power, supra, the Human Rights Commission conducts quasi-judicial proceedings in contested cases or matters subject to judicial review under the Administrative Procedures Act, Code 29A-1-1 et seq. Accordingly, it follows that any decision arising from such quasi-judicial proceedings which is a final determination of the matter involved is adjudicatory. Two of the court's syllabus points in Appalachian Power, supra, are particularly salient:

"2. The West Virginia Open Governmental Proceedings Act, Code 6-9A-1, et seq., does not apply to consultations of Public Service Commissioners with commission staff members, deliberations of commissioners, or the process of individual commissioners making a decision.

"3. The West Virginia Open Governmental Proceedings Act, Code 6-9A-1, et seq., does not apply to assemblages of the Public Service Commissioners held for the purposes of discussing their individual decisions, concurring and rendering a final decision or judgement." Id. at 378.

Applying these standards to the issue at hand, we conclude that:

(1) The Human Rights Commission may privately confer with its legal advisors and Commission staff members and may privately deliberate and discuss among its members prospective adjudicatory action on any question of law or fact which may be quasi-judicial in nature, as these deliberations do not fall within the ambit of the Open Governmental Proceedings Act, Code 6-9A-1 et seq. Moreover, the Human Rights Commission is under no duty to record said discussions; however, any such recordation characterized as minutes or otherwise, would constitute nonpublic information.

(2) The Human Rights Commission may privately convene, provided there is a quorum of five members, in adjudicatory assemblages for the purpose of discussing their individual decisions and rendering a final decision. These assemblages also are exempt from the Open Governmental Proceedings Act, Code 6-9A-1

et seq. However, as to decisions or orders reached as a result of said adjudicatory assemblages, such decisions or orders should be entered on the record of a convened open meeting and recorded as minutes in the manner set forth at Code 6-9A-5, thereafter subject to public review and inspection. (Code 5-11-6 requires a quorum of five commissioners to transact business.) In accord, see also 59 Ops. Att'y Gen. 34 (1980).

Your second inquiry, restated, involves the purview of public inspection under the State Freedom of Information Act, Code 29B-1-1 et seq., of minutes generated by the Human Rights Commission as part of its adjudicatory proceedings.

The Freedom of Information Act grants the public a right of access (with limited exceptions set forth at Code 29B-1-4) to "any public record of a public body." Code 29B-1-3(1). The Human Rights Commission clearly qualifies as a "public body," which the Act defines as "every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission * * *." Code 29B-1-2(3). The Act further defines "public record" as "any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body." (Emphasis supplied.) Code 29B-1-2(4).

As discussed infra the West Virginia Act exempts from its open meetings law "any meeting for the purpose of making an adjudicatory decision in any quasi-judicial * * * proceeding * * *." Code 6-9A-2(4). We have previously concluded that the Open Governmental Proceedings Act exempts from its ambit the adjudicatory assemblages of the Human Rights Commission arising from quasi-judicial proceedings and that records of said pre-decisional deliberations or discussions, accordingly, are nonpublic information under that Act. To compel public disclosure of said recorded deliberations under the Freedom of Information Act, Code 29B-1-1 et seq., would defeat the purpose of exempting adjudicatory deliberations under the Open Governmental Proceedings Act. Code 6-9A-1 et seq.

The declarations of policy of the Freedom of Information Act and the Open Governmental Proceedings Act indicate that the West Virginia Legislature intended the two statutes to be consistent rather than contradictory in their results. The Freedom of Information Act, enacted in 1977, adopted almost verbatim much of the language of the declaration of policy of the Open Governmental

Proceedings Act, which had become law two years earlier.¹ By interpreting "public records" to exclude recordings of closed-door deliberations of the Human Rights Commission, we avoid inconsistency of results between the Freedom of Information Act and the Open Governmental Proceedings Act.

At least one commentator, however, has argued strongly against adopting this restrictive interpretation of "public records." Professor Neely, in his treatise on administrative law, argues that almost all government data and documents should be considered public records under the Freedom of Information Act. A. Neely, Administrative Law in West Virginia § 7.03, at 541 (1982). He contends that a "sensible reading [of the Freedom of Information Act] would allow only personal and private writings of government officials entirely unrelated to governmental duties to be excluded, as not pertaining to the public's business." Id. In determining whether government-held information is exempt from public disclosure, one should rely on the explicit exceptions listed in the Freedom of Information Act, according to Neely. Id.

The West Virginia Legislature has declared that the Freedom of Information Act should be liberally construed in favor of public dissemination of information. Code 29B-1-1. In light of this, courts probably would be reluctant to exclude any government agency document from the scope of "public records."

¹Compare this passage from the Open Governmental Proceedings Act:

"The people in delegating authority do not give their public servants the right to decide what is good for them 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 created by them." Code 6-9A-1.

with this excerpt from the Freedom of Information Act:

"The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created." Code 29B-1-1.

Therefore, the strongest argument for denying public access to "minutes" of closed Human Rights Commission deliberation under the Freedom of Information Act is to cite the specific exemption under that Act which applies to this situation.

Information generated during such a closed session appears to be exempt from disclosure to the public under Code 29B-1-4(8), which states that material exempt from the Freedom of Information Act includes "[i]nternal memoranda or letters received or prepared by any public body." Though there are no reported cases in West Virginia construing this exemption, and no previous opinions on this exemption, it has been interpreted as intending "to insulate the internal workings of public bodies from public scrutiny," and as assuring "the free exchange of ideas within public bodies." A. Neely, Administrative Law in West Virginia § 7.15 (1982).

Other courts have interpreted the internal-memoranda exemption to encompass documents consisting of deliberation and recommendations of agency officials. See Cranford v. Montgomery Co., 462 A. 2d 528 (Md. App. 1983). In Cuccaro v. Secretary of Labor, 770 F.2d 355 (3rd Cir. 1985), the documents withheld were "pre-decisional, deliberative, and subjective" (770 F.2d at 357) and were thus exempt from disclosure under the federal internal-memoranda exemption, 5 U.S.C. § 552(b)(5). The United States Supreme Court has agreed that such pre-decisional, deliberative information is exempt under the internal-memoranda exemption. See N.L.R.B. v. Sears, Roebuck and Co., 421 U.S. 132, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975).

The emphasis on the pre-decisional nature of material exempt as internal memoranda indicates that the Human Rights Commission cannot withhold the actual vote from the public.

In summary, we conclude:

(1) The recorded pre-decisional discussion and deliberation of the Human Rights Commission in adjudicatory matters, whether characterized as "minutes" or otherwise, are exempt from public disclosure under the internal-memoranda exemption of the Freedom of Information Act, Code 29B-1-4(8);

(2) Final decisions and orders reached as a result of adjudicatory assemblages of the Human Rights Commission are not protected by an exemption provided under the Freedom of Information Act. Accordingly, any such decision and order entered on the record of a convened open meeting and properly recorded in the minutes is a "public record" within the meaning of the Freedom of Information

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Act, Code 29B-1-1 et seq., and is subject to public inspection and review.

Very truly yours,

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