

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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AMERICAN CIVIL LIBERTIES))
UNION OF WEST VIRGINIA,))
))
Petitioner,))
))
v.)	Civil Action No. _____
))
WEST VIRGINIA DEPARTMENT OF)	Judge: _____
HOMELAND SECURITY, WEST VIRGINIA))
DIVISION OF CORRECTIONS AND))
REHABILITATION, JEFF SANDY, in his))
official capacity, and WILLIAM K.))
MARSHALL, III, in his official capacity,))
))
Respondents.))
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PETITION FOR MANDAMUS

INTRODUCTION

1. This Petition arises out of Respondents’ maintenance of a secret set of legislative rules which they have unlawfully refused to make available to the public in violation of W. Va. C.S.R. § 90-1-2 and W. Va. Code. § 29A-2-4. Petitioner seeks a writ of mandamus compelling Respondents to cease their unlawful withholding of public documents.

2. A writ of mandamus is an extraordinary remedy, available only when the Petitioner has a clear legal right, the Respondent has a clear legal duty, and there is no other adequate remedy at law. Such is the case in the present claim. There is no “secret law” in West Virginia; the mere suggestion of such is in odious contradiction to the foundational principles of our democracy. Despite this, Respondents refuse to comply with their clear legal duty to make agency rules which bear the force and effect of law available to the public. Petitioner respectfully requests this Court intervene to remedy this violation.

PARTIES, JURISDICTION, AND VENUE

3. Petitioner, the American Civil Liberties Union of West Virginia [hereinafter referred to as “ACLU of West Virginia”] is a non-partisan, non-profit organization whose mission is to fulfill the promise of the Bill of Rights for all West Virginians.

4. Respondent West Virginia Department of Homeland Security [hereinafter referred to as “DHS”] provides support and oversight to the state’s criminal justice and correctional systems. As part of that work, Respondent DHS oversees the West Virginia Division of Corrections and Rehabilitation.

5. Respondent West Virginia Division of Corrections and Rehabilitation [hereinafter referred to as “DCR”] is a state agency that operates and oversees the state’s prisons, jails, and juvenile detention facilities. The Division of Corrections and Rehabilitation also oversees probation and parole services.

6. Respondent Jeff Sandy is the Secretary of the Department of Homeland Security. He is named herein in his official capacity.

7. Respondent William K. Marshall, III, is the Commissioner of the Division of Corrections and Rehabilitation. He is named herein in his official capacity.

8. This Court has jurisdiction over this claim as “Jurisdiction of writs of mandamus... shall be in the circuit court of the county in which the record or proceeding is to which the writ relates” W. Va. Code § 53-1-2.

9. Venue is proper as Kanawha County Circuit Court is the exclusive venue in which to litigate a writ of mandamus when a state official is named as a Respondent. Syl. pt. 2, *State ex rel. Steward v. Alsop*, 2017 W. Va. 430, 533 S.E.2d 362 (2000).

STATEMENT OF FACTS

10. Respondents DHS and DCR have maintained a secret set of legislative rules of which they have failed to provide accurate copies to the West Virginia Secretary of State's office, have requested not be published in the Secretary of State's Register, and to which they have refused public access.

11. When Petitioner attempted to access these documents through the Secretary of State's office, Respondents intervened to stop the viewing of this legislative rule.

12. On information and belief, Respondents have failed to provide accurate copies of this legislative rule to the Secretary of State, and now contend that they are the only entity in possession of an accurate copy of their own governing regulations.

13. As a result, Respondents have maintained a legislative rule secret from the public, and to which they have repeatedly, unlawfully, denied Petitioner access.

The Policy Directives Manual is a Legislative Rule, an Inherently Public Document

14. West Virginia Code of State Rules § 90-1-2 incorporates by reference the Policy Directives Manual as a legislative rule.

15. The full text of that section reads "The Policy Directives Manual is hereby incorporated by reference as a legislative rule. The document is available from the Secretary of State's office or the West Virginia Department of Corrections." W. Va. C.S.R. § 90-1-2.

16. In addition to identifying the Policy Directives Manual as a Legislative Rule, W. Va. C.S.R. § 90-1-2 also makes clear where it can be accessed by the public, through the Department of Corrections [the prior name of the agency which is currently identified as Respondent DCR] and through the Secretary of State.

Access to the Legislative Rule is Improperly Denied Through Respondent DCR

17. Petitioner first requested a copy of the Policy Directives Manual pursuant to W. Va. C.S.R. § 90-1-2 from Respondent DCR on January 10, 2023.

18. Petitioner thereafter received a partial copy of the Policy Directives Manual from Respondent DCR, by letter dated January 19, 2023. Included with the partial document was a cover letter, indicating that Petitioner's request for the manual was being treated as a Freedom of Information Act request, and that additional records may have been exempted pursuant to W. Va. Code § 29B-1-4(a)(19).

19. On February 2, 2023, Petitioner responded to Respondent DCR via an email to Sarah Daughtery and Brad Douglas. In that email, Petitioner reiterated that the request for the Policy Directives Manual was made pursuant to W. Va. C.S.R. § 90-1-2. As such, Petitioner's request was wholly unrelated to W. Va. Code § 29B-1-1 *et seq.* and the exemptions contained therein bore no relationship to the present request for documents. Petitioner sought to confirm that the document received from Respondent DCR was the full text of the Policy Directives Manual and received no response.

Respondents Improperly Restrict Access to Legislative Rules through the Secretary of State's Office

20. Petitioner sought a copy of the Policy Directives Manual from the office of the West Virginia Secretary of State.

21. The Secretary of State's office provided a copy of the Policy Directives Manual for in-office viewing and copying.

22. Through Petitioner's review of the document made available through the Secretary of State, it became clear that Respondents had failed to provide an accurate copy of this legislative rule to Petitioner. In addition to withholding information marked as "restricted access... not

available for inmate or resident review,” to which the public still has a legal right of access, Respondents additionally withheld access to documents which were not restricted and were marked for general public dissemination.

23. After initially being granted access to the full text of the legislative rule as held in the Secretary of State’s office, Petitioner was thereafter denied access to those same documents. On information and belief this restriction was at the direction of Respondent DHS.

24. Petitioner was informed by the Secretary of State’s office that Respondent DHS had requested that access to the documents be restricted, and that they be permitted to remove the documents from the Secretary of State’s office.

25. The Secretary of State’s office did not comply with Respondents’ request and maintained a copy of the documents in their office. Petitioner was informed by the Secretary of State that some, but not all, of the legislative rule would remain available for public viewing.

26. Petitioner was informed by the Secretary of State’s office that Respondents will be permitted to restrict access to portions of the legislative rule they deem to be “restricted” until the Secretary of State’s office is directed to act otherwise.

27. Further, on information and belief Respondents allege they had previously failed to provide accurate copies of the legislative rule to the Secretary of State and thereby assert that they are the only entity with access to a full, complete, and accurate copy of this legislative rule.

28. Additionally, Respondents allege that they have retroactively restricted previously public legislative rules and have restricted public access not only to present copies of those rules, but removed reference to the historic, public, records of those rules as well.

29. While Petitioner has been given access to portions of the legislative rule, Petitioner to date has not received this document in full. As such, at this point in time Petitioner and the

public do not have access to the full text of this legislative rule, in contravention of the law and the foundational principles of democracy.

Respondents are Attempting to Create Secret Law, Inaccessible to the Public

30. Respondent DCR has maintained its regulations through its Policy Directives Manual by incorporating that document by reference as a legislative rule.

31. By incorporating the Policy Directives Manual as a legislative rule Respondents made that document available for public review.

32. “As is well-established, legislative rules have the force and effect of law.” *Murray Energy Corp. V. Steager*, 241 W. Va. 629, 638 (2019) citing Syl. Pt. 5, *Smith v. W. Va. Human Rights Comm’n*, 216 W. Va. 2, 602 (2004).

33. Through this process, Respondents have unlawfully created a legislative rule, with the full force and effect of law, which is inaccessible to the public. Petitioner respectfully requests that this Court remedy this failure by requiring that this legislative rule be made public as requested herein.

STATEMENT OF LAW

34. Petitioner seeks injunctive relief, and irreparable harm would result from the delay in this action.

35. “Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.” *State ex rel. W. Virginia Parkways Auth. v. Barr*, 228 W. Va. 27, 716 S.E.2d 689, 693 (2011) (quoting Syl. Pt. 1, *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W. Va. 207, 151 S.E.2d 102 (1966)).

36. A writ of mandamus requires three elements coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the

respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law. Syl. Pt. 1, *State ex rel. Sams v. Comm’r, W. Virginia Div. of Corr.*, 218 W. Va. 572, 625 S.E.2d 334 (2005) (quoting Syl. Pt. 3, *Cooper v. Gwinn*, 171 W. Va. 245, 298 S.E.2d 781 (1981)).

Petitioner has a Clear Right to the Relief Sought

37. Pursuant to W. Va. C.S.R. § 90-1-2 the Policy Directives Manual is a legislative rule. (“The Policy Directives Manual is *hereby incorporated by reference as a legislative rule*. The document is available from the Secretary of State’s office or the West Virginia Department of Corrections.” (emphasis added). *Id.*)

38. A “legislative rule” is defined as “... every rule, as defined in subsection (j) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the Legislature has: (1) the force of law; or (2) supplies a basis for the imposition of civil or criminal liability; or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting constitutional, statutory or common law rights, privileges or interests is a legislative rule.” W. Va. Code § 29A-1-2(d).

39. “As is well-established, legislative rules have the force and effect of law.” *Murray Energy Corp. V. Steager*, 241 W. Va. 629, 638 (2019) citing Syl. Pt. 5, *Smith v. W. Va. Human Rights Comm’n*, 216 W. Va. 2, 602 (2004).

40. Legislative rules are inherently public documents. W. Va. Code § 29A-2-4.

41. As a member of the public, and an organization with an interest in making members of the public aware of their fundamental rights, Petitioner has a right to access legislative rules and public laws.

42. W. Va. C.S.R. § 90-1-2 specifically codifies this right of access and specifies that “*the document*” referring to the Policy Directives Manual, “is available from the Secretary of State’s office or the West Virginia Department of Corrections.” (emphasis added) W. Va. C.S.R. § 90-1-2.

43. This right of access, rooted both in the general laws of this State and the specific language of W. Va. C.S.R. § 90-1-2 does not entitle the public to a portion of the document, a redacted copy of the document, or an outdated copy of the document. Instead, it entitles the public to the full text of this legislative rule.

44. This request is made on the basis of the public’s right to access laws and legislative rules, and the particular language of W. Va. C.S.R. § 90-1-2. Petitioner is not requesting this information through the Freedom of Information Act, and none of the exceptions therein apply to restrict public access to laws and legislative rules.

Respondent has an Established Legal Duty, which They have Neglected to Perform

45. Respondents, either individually or collectively, maintain the Policy Directives Manual.

46. The Policy Directives Manual is a legislative rule. W. Va. C.S.R. § 90-1-2.

47. W. Va. C.S.R. § 90-1-2 creates a duty on behalf of the West Virginia Department of Corrections and the Secretary of State’s office to promulgate and make available the Policy Directives Manual to the public.

48. Not only have the Respondents neglected to perform this duty with respect to Petitioner, but they have neglected this duty by failing to provide updated documents to the Secretary of State, and they have actively interfered in the Secretary of State’s efforts to comply with the law.

Petitioner's sole adequate remedy at law is the requested writ of mandamus

49. Petitioner lacks any other legal remedy to compel Respondent to comply with its statutory and constitutional obligations, both towards Petitioner and with respect to other similarly situated West Virginians.

Narrowly Tailored Request for Relief

50. Any determination on the part of the government regarding what was or was not incorporated by reference into a legislative rule does not negate the public's right of access to the full text of legislative rules, nor does it give state agencies a unilateral right to make portions of such rules secret, thereby creating a series of shadow regulations outside the public view.

51. Nevertheless, Petitioner does not seek the following directives through this request for mandamus:

- a. Policy Directive 300;
- b. Policy Directive 301;
- c. Policy Directive 304;
- d. Policy Directive 306.02;
- e. Policy Directive 306.03;
- f. Policy Directive 309;
- g. Policy Directive 313.03;
- h. Policy Directive 314.06;
- i. Policy Directive 317.01;
- j. Policy Directive 318;
- k. Policy Directive 318.04;
- l. Policy Directive 318.05;
- m. Policy Directive 318.06;
- n. Policy Directive 321;
- o. Policy Directive 322;
- p. Policy Directive 323; and
- q. Policy Directive 324.

CONCLUSION

West Virginians are not governed by secret laws. The laws, regulations, and legislative rules that bind together our civil society through the force of law are inherently open and available

for the public for all to see. Respondents have attempted to circumvent that system and maintain an unlawful secrecy over legislative rules to which the public is entitled access. The public has an unassailable right to know the laws put in place by their government, and by which they may be bound. Petitioner now respectfully requests this Court compel Respondents to comply with their clear legal duty and make the full text of their legislative rules, except for those documents specifically exempted herein from Petitioner's request, available for public review.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests the following relief:

- (a) The Court issue a rule in mandamus directing the Respondent to show cause why the Court should not immediately order, as a form of injunctive relief, that Respondents to make public the text of its legislative rules as requested herein;
- (b) Reasonable attorney's fees and the costs of this action; and
- (c) Any other relief which this Court deems equitable and just.

Respectfully submitted,
AMERICAN CIVIL LIBERTIES
UNION OF WEST VIRGINIA,
By counsel,

/s/Aubrey Sparks
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American Civil Liberties Union of
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ORDER TO SHOW CAUSE

This day came Petitioner American Civil Liberties Union of West Virginia on its Petition for Mandamus filed against Respondents West Virginia Department of Homeland Security, West Virginia Department of Corrections and Rehabilitation, Jeff Sandy, and Jim Rubenstein. Having reviewed the Petition, the Court hereby Orders that the Respondent appear before the Court on ___ day of _____ 2023 at _____ to show cause why the Court should not grant preliminary relief prayed for in the Petition for Mandamus.

It is so ORDERED.

CIRCUIT JUDGE

DATED: _____

Prepared by
Aubrey Sparks (WV Bar No. 13469)
Counsel for Petitioner

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PETITIONER’S MOTION FOR EXPEDITED CONSIDERATION

Petitioner, the American Civil Liberties Union of West Virginia, respectfully requests this Court exercise its discretion pursuant to West Virginia Rule of Civil Procedure Rule 16 and set an expedited briefing schedule in this matter and notice, as soon as is practicable, a hearing on the pending *Petition for Writ of Mandamus*.

Rule 16 of the West Virginia Rules of Civil Procedure permits the Court to enter a scheduling order limiting the time to file and hear motions. W. Va. R. Civ. P. 16. The rule is “the principal source of the powers and tools that . . . courts are to use to achieve the fundamental purpose articulated by Rule 1 of the . . . Rules of Civil Procedure: securing ‘the just, speedy, and inexpensive determination of every action and proceeding.’” *GMS Mine Repair & Maint., Inc. v. Miklos*, 238 W. Va. 707, 712, 798 S.E.2d 833, 838 (2017) (citing James Wm. Moore, 3 Moore’s Federal Practice, 3d Edition § 16.03 (2007)).

The urgency of the matter at hand cannot be understated. Respondents' non-compliance is a gross abuse of the very foundational principles of our democracy. Further, Respondents have been in non-compliance with the requirements imposed upon them by law for decades by failing to make publicly available its governing legislative rules. It is difficult to quantify the breadth of the damages Respondents' non-compliance may have done to those in their care and custody, as those individuals have been denied access to information regarding the conditions of their incarceration to which they have been entitled access. Additionally, Respondents have failed to properly apprise the Secretary of State and the Public of changes made to legislative rules. It is antithetical to democratic principles to allow an agency of government to be the sole caretaker of its limiting regulations, and swift court action is necessary to ensure that the public has adequate access to the laws and regulations by which they are bound.

Given the urgency of this matter, the irreparable harm which will occur if action is not taken, and Petitioner's narrowly tailored request for injunctive relief, Petitioner respectfully requests that this Court set an expedited briefing schedule regarding the pending Petition for Mandamus and a hearing date as soon thereafter as possible.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES
UNION OF WEST VIRGINIA,
By counsel,

/s/Aubrey Sparks
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VERIFICATION

I, Kyle Vass, an employee of the Petitioner named in the foregoing Petition for Mandamus, after being duly sworn, state and affirm that I have firsthand knowledge of the facts and allegations contained in the Petition and do swear that such statements are true, except insofar as they are stated to be upon information and belief, in such case they are believed to be true.

Kyle Vass
Agent of Petitioner

Taken, sworn to and subscribed before me this ____ day of _____, 2023. My commission expires _____.

Notary Public

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SUMMONS

To the above-named Respondent:

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon Aubrey Sparks, plaintiff’s attorney, whose address is P.O. Box 3952, Charleston WV 25339, an answer, including any related counterclaim you may have, to the complaint filed against you in the above styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer within 30 days after service of this summons upon you, exclusive to the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint and you will be thereafter barred for asserting in another action any claim you may have which must be asserted by counterclaim in the above styled civil action.

Dated: February 9, 2023

By: _____
Deputy Clerk