

SB 442

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# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1998



## ENROLLED

*Committee Substitute For*  
SENATE BILL NO. 442

(By Senator ROSS, ET AL)



PASSED March 14, 1998  
In Effect 90 Days From Passage

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SENATE OF WEST VIRGINIA

**ENROLLED**

COMMITTEE SUBSTITUTE  
FOR

**Senate Bill No. 442**

(SENATORS ROSS, BOWMAN, DITTMAR, KESSLER, SNYDER,  
WHITE, DEEM, KIMBLE, WOOTON, HELMICK, SHARPE,  
HUNTER, JACKSON, OLIVERIO, MCKENZIE, SPROUSE,  
BALL, ANDERSON, SCHOONOVER, DUGAN  
AND PLYMALE, *original sponsors*)

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[Passed March 14, 1998; in effect ninety days from passage.]

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AN ACT to amend chapter thirty-one-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article two-a; to amend article four of said chapter by adding thereto a new section, designated section ten-a; and to amend article five, chapter thirty-one-c of said code by adding thereto a new section, designated section eleven, all relating generally to limiting access to certain records of financial institutions; providing for the access of certain

governmental entities to financial records; defining terms; establishing requirements for government access to records; permitting access upon written authorization of a customer; requiring state entity to certify compliance; enumerating exceptions; establishing subpoena and notice requirements; setting forth procedures when subpoena issued by grand jury; providing for civil and criminal liability and penalties; establishing the statute of limitations and the tolling thereof; authorizing injunctive relief; providing for the exclusiveness of remedies; limiting stockholder inspection of books and records of state banking institutions; and limiting the inspection of books and records by credit union members.

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

That chapter thirty-one-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article two-a; that article four of said chapter be amended by adding thereto a new section, designated section ten-a; and that article five, chapter thirty-one-c of said code be amended by adding thereto a new section, designated section eleven, all to read as follows:

#### **CHAPTER 31A. BANKS AND BANKING.**

##### **ARTICLE 2A. MAXWELL GOVERNMENTAL ACCESS TO FINANCIAL RECORDS ACT.**

###### **§31A-2A-1. Definitions.**

1 As used in this article:

2 (a) "Customer" means any person or his or her duly  
3 authorized representative who has transacted business  
4 with or has used the services of a financial institution or  
5 for whom a financial institution has acted as a fiduciary  
6 in relation to an account maintained in such person's  
7 name;

8 (b) "Financial institution" means a bank, a savings and  
9 loan association, a trust company or a credit union

10 chartered pursuant to any state or federal law;

11 (c) "Financial record" means the original or a copy of  
12 any record or document held by a financial institution  
13 pertaining to a customer of the financial institution,  
14 including any record of a transaction conducted by means  
15 of a customer bank communication terminal or other  
16 electronic device. "Financial record" also means any  
17 information derived from such records or documents;

18 (d) "Investigation" includes, but is not limited to, any  
19 inquiry by a state or local law-enforcement officer, sheriff  
20 or prosecuting attorney, or any inquiry made by a state or  
21 local governmental entity for the purpose of determining  
22 whether there has been a violation of any law which is  
23 punishable by imprisonment or by a fine or other mone-  
24 tary liability;

25 (e) "Person" means an individual, partnership, corpora-  
26 tion, limited liability company, association, trust or any  
27 other legal entity;

28 (f) "State entity" means any state or local governmental  
29 office, officer, department, division, bureau, board or  
30 commission, including the Legislature, and any other state  
31 or local government agency of West Virginia, its political  
32 subdivisions and any agent thereof; and

33 (g) "Subpoena" includes a subpoena duces tecum or any  
34 other lawful subpoena to compel testimony or the disclo-  
35 sure or production of documents.

**§31A-2A-2. Requirements for government access to records.**

1 (a) No state entity may have access to or obtain from a  
2 financial institution financial records of any customer  
3 except as set forth in section four of this article or under  
4 the following circumstances:

5 (1) The customer has executed a written authorization  
6 pursuant to section three of this article;

7 (2) The financial records are disclosed in response to a  
8 judicial order, warrant, summons or subpoena issued by a  
9 court of competent jurisdiction or a valid administrative  
10 order or subpoena of a state entity expressly ordering or  
11 requiring the disclosure of financial records: *Provided,*  
12 That any subpoena issued pursuant to the provisions of  
13 this subsection shall comply with the provisions of section  
14 five of this article;

15 (3) The financial records are disclosed in response to a  
16 judicial order authorizing the appointment of the state  
17 entity or its agent: (A) As guardian of the customer or  
18 conservator of his or her property; or (B) as administrator  
19 or executor of the customer's estate;

20 (4) The financial records are disclosed: (A) Pursuant to  
21 a state or federal rule of civil or criminal procedure or any  
22 comparable rule of another court of competent jurisdic-  
23 tion; (B) in response to a subpoena issued in connection  
24 with any pending civil or criminal proceeding in which a  
25 state entity is a party; or (C) in response to interrogatories  
26 in aid of execution propounded by a state entity where it  
27 is a judgment creditor of the customer;

28 (5) The financial records are disclosed to law-enforce-  
29 ment officers pursuant to a grand jury or trial subpoena  
30 resulting from a criminal investigation which complies  
31 with the provisions of section six of this article; or

32 (6) As may be required or permitted by any other state  
33 or federal law.

34 (b) No state entity obtaining financial records pursuant  
35 to the provisions of this article and no person who obtains  
36 financial records from a state entity which obtained such  
37 financial records pursuant to the provisions of this article  
38 shall disclose such financial records: (i) To any other state  
39 entity unless such other state entity has authority or  
40 authorization to receive the financial record in accordance  
41 with the provisions of this article; or (ii) to any person

42 unless such person has authority or authorization to  
43 receive the financial record: *Provided*, That nothing  
44 herein shall limit or prevent the disclosure of financial  
45 records which are otherwise public documents or matters  
46 of public record or the disclosure of financial records  
47 made to facilitate a lawful proceeding, investigation,  
48 examination or inspection by a state entity. Financial  
49 records obtained under this article by a state entity shall  
50 not be subject to disclosure under the provisions of article  
51 one, chapter twenty-nine-b of this code.

**§31A-2A-3. Written authorization of customer; contents; certification of compliance.**

1 (a) A customer may authorize disclosure under section  
2 two of this article by signing and dating a statement in  
3 which he or she:

4 (1) Authorizes the disclosure for such period as may be  
5 agreed upon;

6 (2) Indicates an understanding of his or her right to  
7 revoke such authorization at any time before the financial  
8 records are disclosed;

9 (3) Identifies the financial records which are authorized  
10 to be disclosed;

11 (4) Specifies the purposes for which, and the state entity  
12 to which, such records may be disclosed; and

13 (5) Acknowledges that he or she has been advised of his  
14 or her rights under this article by the state entity seeking  
15 the disclosure of the financial records.

16 (b) No authorization as provided in subsection (a) of this  
17 section shall be required as a condition of doing business  
18 with any financial institution.

19 (c) No financial institution shall release the financial  
20 records of a customer pursuant to his or her authorization  
21 under this section until the state entity seeking the records

22 also provides certification in writing to the financial  
23 institution that it has complied with the applicable  
24 provisions of this article. The financial institution and the  
25 state entity seeking to obtain the disclosure of the finan-  
26 cial records shall retain copies of this written authoriza-  
27 tion.

**§31A-2A-4. Exceptions.**

1 (a) Nothing in this article is intended to, or shall pro-  
2 hibit, apply to or interfere with:

3 (1) The lawful authority or ability of the commissioner  
4 of banking or any other state or federal regulatory agency  
5 of a bank, savings and loan association, trust company or  
6 credit union to obtain or to share between such regulatory  
7 agencies any records which the commissioner of banking  
8 or such state or federal regulatory agency may deem  
9 appropriate for the examination and regulation of the  
10 financial institution;

11 (2) The lawful authority or ability of the commissioner  
12 of insurance or the state auditor to obtain any records  
13 from a financial institution relating to the financial  
14 institution's sale of insurance or securities;

15 (3) The dissemination or publication of information  
16 derived from financial records if the information cannot  
17 be identified to any particular customer, deposit or  
18 account, or if the information is in composite form and is  
19 not disseminated or published in a way which identifies  
20 any particular customer, deposit or account;

21 (4) The making of reports or returns specifically re-  
22 quired or permitted by federal or state law, including  
23 applicable tax law or regulations;

24 (5) The disclosure of any information under the provi-  
25 sions of the uniform commercial code governing the  
26 dishonor of a negotiable instrument, or the disclosure to  
27 any purported state entity payee or to any purported state

28 entity holder of a check, draft, order or other item,  
29 whether or not such instrument has been accepted by such  
30 payee or holder as payment, as to whether or not such  
31 instrument would be honored if presented at the time of  
32 such disclosure;

33 (6) A state entity obtaining a credit report or consumer  
34 credit report from anyone other than a financial institu-  
35 tion;

36 (7) The exchange, in the regular course of business, of  
37 information showing the outstanding balance of a mort-  
38 gage loan account in connection with a sale, refinancing  
39 or foreclosure of real property in a transaction to which  
40 the state entity is a party; or the disclosure, in the regular  
41 course of business, of information on a mortgage or deed  
42 of trust on a subject property to a state entity as holder of  
43 any subordinate mortgage, deed of trust or security  
44 interest;

45 (8) The disclosure to the department of health and  
46 human resources, upon written request, of an individual's  
47 financial records which the department determines are  
48 necessary to verify or confirm the individual's eligibility  
49 or ineligibility for public assistance;

50 (9) The disclosure of an individual's financial records in  
51 response to a written request by the department of health  
52 and human resources, as authorized by the federal parent  
53 locator service of the United States department of health  
54 and human services;

55 (10) The examination or audit of financial records  
56 relating to preneed funeral trust accounts pursuant to  
57 article fourteen, chapter forty-seven of this code;

58 (11) The disclosure of financial records relating to  
59 unclaimed property pursuant to article eight, chapter  
60 thirty-six of this code, including the examination of  
61 financial records by the state treasurer or his or her agent  
62 to determine compliance with the handling and reporting



63 of unclaimed property as provided by, and subject to, the  
64 limitations set forth in section twenty of said article;

65 (12) The presentation to appropriate local, state or  
66 federal law-enforcement authorities of a certificate under  
67 oath by an authorized representative of a financial  
68 institution drawee that declares the dishonor of the check,  
69 draft or order by the drawee, the lack of an account with  
70 the drawee at the time of utterance or the insufficiency of  
71 the drawer's funds at the time of presentation and utter-  
72 ance in connection with any criminal action for obtaining  
73 property or services by a worthless check, draft or order;

74 (13) The notification to appropriate local, state or  
75 federal law-enforcement authorities or regulatory agen-  
76 cies that the financial institution, its officers, employees  
77 or agents thereof have information which may be relevant  
78 to a possible violation of any statute or regulation. The  
79 disclosure of any information pursuant to this subdivision  
80 may only include the name or other identifying informa-  
81 tion concerning any individual, corporation or account  
82 involved in and the nature of any suspected illegal activ-  
83 ity;

84 (14) The disclosure of information or records by a  
85 financial institution to any court or other appropriate  
86 state entity which is incidental to recording a lien, per-  
87 fecting a security interest, proving a claim in bankruptcy  
88 or otherwise collecting on a debt owing either to the  
89 financial institution itself or in its role as a fiduciary;

90 (15) The disclosure of information or records by a  
91 financial institution which is incidental to processing an  
92 application for assistance to a customer in the form of a  
93 government loan, loan guaranty, or loan insurance agree-  
94 ment, or which is incidental to processing a default on, or  
95 administering, a government guaranteed or insured loan  
96 or to initiating contact with an appropriate state entity for  
97 the purpose of providing any financial record necessary to  
98 permit such authority to carry out its responsibilities

99 under a loan, loan guaranty or loan insurance agreement;

100 (16) The disclosure of information incidental to a  
101 transaction in the normal course of business of the finan-  
102 cial institution where there is no reasonable cause to  
103 believe that the information is intended to be used by the  
104 state entity in connection with an investigation of the  
105 customer;

106 (17) The preparation, review, handling or maintenance  
107 of financial records in the ordinary course of business by  
108 any officer, employee or agent of a financial institution  
109 having custody of the records; or

110 (18) The disclosure to appropriate law-enforcement  
111 officials of the financial records of any officer, director,  
112 employee or controlling shareholder of a financial institu-  
113 tion by a financial institution or by any state or federal  
114 regulatory agency having authority to regulate the  
115 financial institution, if there is reason to believe that the  
116 financial record is relevant to a possible violation by such  
117 person of any law relating to a crime against the financial  
118 institution or any such state or federal regulatory agency.  
119 No state or federal regulatory agency which discloses any  
120 information pursuant to this subdivision shall be deemed  
121 to have waived any privilege applicable to that record  
122 under law.

123 (b) Nothing in this article shall preclude a state entity  
124 from obtaining information that is public record without  
125 regard to this article although the information may have  
126 been derived from financial records.

127 (c) Nothing in this article shall preclude a state entity  
128 from obtaining information or financial records volun-  
129 tarily submitted to it by others in an attempt to seek  
130 governmental assistance or redress of a grievance, includ-  
131 ing legislative change: *Provided*, That the financial record  
132 or information was not solicited by the state entity in an  
133 effort to evade the requirements of this article or submit-

134 ted by a financial institution in contravention of section  
135 seven of this article.

**§31A-2A-5. Subpoena and notice requirements.**

1 (a) A financial institution may disclose or produce  
2 financial records to a state entity in compliance with a  
3 subpoena served upon it if the subpoena contains a  
4 certification that: (1) A copy of the subpoena has been  
5 served on the customer whose records are sought by the  
6 state entity seeking disclosure or production of the records  
7 at least ten days prior to the date on which disclosure or  
8 production is sought; or (2) that service on the customer  
9 has been waived for good cause by the circuit court of  
10 Kanawha County or other circuit court of competent  
11 jurisdiction.

12 (b) Any person whose financial records are to be dis-  
13 closed pursuant to a subpoena served under the provisions  
14 of subdivision (1), subsection (a) of this section may  
15 challenge the subpoena by filing a motion to quash in a  
16 court of competent jurisdiction at any time prior to the  
17 disclosure of the records. After the filing and service of  
18 the motion upon the financial institution and the state  
19 entity requesting the issuance of the subpoena, the pro-  
20 duction of financial records shall be stayed, without  
21 liability to the financial institution, until the court holds  
22 a hearing on the motion and an order is entered sustain-  
23 ing, modifying or quashing the subpoena.

**§31A-2A-6. Subpoena issued by grand jury.**

1 (a) In addition to the requirements of section five of this  
2 article, financial records obtained pursuant to a subpoena  
3 issued under the authority of a grand jury:

4 (1) Shall be returned and actually presented to the grand  
5 jury;

6 (2) Shall be used only: (A) For the purpose of consider-  
7 ing whether to issue an indictment or presentment by that

8 grand jury; (B) for the purpose of prosecuting a crime for  
9 which that indictment or presentment is issued; or (C) for  
10 any other purpose authorized by the West Virginia rules of  
11 criminal procedure; and

12 (3) Shall be destroyed or returned to the financial  
13 institution if not used for one of the purposes specified in  
14 subdivision (2) of this subsection.

15 (b) Financial records obtained pursuant to a subpoena  
16 issued under the authority of a grand jury and any de-  
17 scriptions of the contents of such financial records must  
18 be maintained in sealed records of the grand jury unless  
19 such financial records or descriptions thereof have been  
20 used in the prosecution of a crime for which the grand jury  
21 issued an indictment or presentment or for any other  
22 purpose authorized by the West Virginia rules of criminal  
23 procedure.

**§31A-2A-7. Penalties.**

1 (a) Any state, county or local government official or  
2 employee who knowingly and willfully discloses financial  
3 records with intent to violate this article, or who know-  
4 ingly and willfully induces or attempts to induce an  
5 officer, employee, agent or director of a financial institu-  
6 tion to disclose financial records to a state entity with  
7 intent to violate this article, is guilty of a misdemeanor  
8 and, upon conviction thereof, shall be fined not more than  
9 one thousand dollars.

10 (b) Any customer whose financial records or the infor-  
11 mation contained therein has been negligently disclosed  
12 by a state entity or a financial institution in violation of  
13 this article may file an action in any circuit court of this  
14 state against the state entity or financial institution and,  
15 if the customer proves that the state entity or financial  
16 institution negligently disclosed the customer's financial  
17 records or the information contained therein, may recover  
18 from the state entity or financial institution an amount

19 equal to the sum of:

20 (1) Up to one thousand dollars in civil damages, as  
21 penalty, without regard to the volume of records involved  
22 or lack of actual damages;

23 (2) Any actual damages sustained by the customer as a  
24 result of the disclosure; and

25 (3) The costs of the action, including reasonable  
26 attorney's fees, as may be allowed by the court.

27 (c) No financial institution or person shall be held liable,  
28 notwithstanding subsection (a) or (b) of this section, for  
29 the disclosure of financial records pursuant to a subpoena,  
30 summons, warrant, court order or administrative order  
31 which on its face appears to have been issued upon lawful  
32 authority. No financial institution or agent or employee  
33 thereof who discloses financial records pursuant to this  
34 article: (i) In good faith reliance upon a certificate by any  
35 state entity that this article has been complied with; or (ii)  
36 pursuant to the provisions of subsection (13), section four  
37 of this article shall be liable under this article or any other  
38 law or rule of this state or any political subdivision hereof.

**§31A-2A-8. Statute of limitations; tolling of statute.**

1 (a) An action to enforce any provision of this article may  
2 be brought in any circuit court of competent jurisdiction  
3 in this state within three years from the date on which the  
4 violation occurs or the date of discovery of such violation,  
5 whichever is later.

6 (b) If any customer files a motion or application under  
7 this article which has the effect of delaying the access of  
8 a state entity to financial records pertaining to such  
9 customer, any applicable statute of limitations shall be  
10 tolled for the period extending from the date such motion  
11 or application was filed until the date an order is entered  
12 pursuant thereto.

**§31A-2A-9. Injunctive relief; recovery of attorney fees.**

1 In addition to any other remedy contained in this article,  
2 injunctive relief shall be available to require compliance  
3 with any procedure established in this article. Any  
4 customer awarded injunctive relief pursuant to this  
5 section may recover costs and reasonable attorney's fees  
6 as determined by the court.

**§31A-2A-10. Exclusive remedies.**

1 The remedies provided in this article are exclusive for  
2 any violations or alleged violations of this article.

**ARTICLE 4. BANKING INSTITUTIONS AND SERVICES GENERALLY.**

**§31A-4-10a. Stockholder inspection of books and records.**

1 (a) Any stockholder or group of stockholders of a state  
2 banking institution, holding of record the number of  
3 voting shares of such bank specified below, upon making  
4 written demand stating a proper purpose, shall have the  
5 right to examine, in person or by agent or attorney, at any  
6 reasonable time or times, nonconfidential portions of its  
7 books and records of account, minutes and record of  
8 stockholders and to make extracts therefrom. Such right  
9 of examination is limited to a stockholder or group of  
10 stockholders holding of record:

11 (1) Voting shares having a cost of not less than one  
12 hundred thousand dollars or constituting not less than one  
13 percent of the total outstanding voting shares: *Provided*,  
14 That such stockholder or group of stockholders have held  
15 of record such voting shares for a period of at least six  
16 months before making such written demand; or

17 (2) Not less than five percent of the total outstanding  
18 voting shares.

19 (b) Except as provided in subsection (a) of this section  
20 and in section ten of this article with respect to inspection  
21 of a list of stockholders, no stockholder or group of  
22 stockholders of a state banking institution shall have any  
23 other right under this section or common law to examine

24 its books and records of account, minutes and record of  
25 stockholders.

26 (c) The right to examination authorized by subsection (a)  
27 of this section and any right to inspect the list of stock-  
28 holders provided by a bank's bylaws to an extent greater  
29 than that authorized under section ten of this article may  
30 be denied to any stockholder or group of stockholders  
31 upon the refusal of any such stockholder or group of  
32 stockholders to furnish such institution, its transfer agent  
33 or registrar an affidavit that such examination or inspec-  
34 tion is not desired for any purpose which is in the interest  
35 of a business or object other than the business of the  
36 institution, that such stockholder has not within the five  
37 years preceding the date of the affidavit sold or offered for  
38 sale, and does not now intend to sell or offer for sale, any  
39 list of stockholders of the bank or of any other bank or  
40 bank holding company, and that such stockholder has not  
41 within said five-year period aided or abetted any other  
42 person in procuring any list of stockholders for purposes  
43 of selling or offering such list for sale.

44 (d) Notwithstanding any provision of this section or any  
45 common law, no stockholder or group of stockholders  
46 shall have the right to obtain, inspect or copy any portion  
47 of any books or records of a state banking institution  
48 containing:

49 (1) A list of depositors in, borrowers from or customers  
50 of such banking institution;

51 (2) The addresses of the banking institution's depositors,  
52 borrowers or customers;

53 (3) Individual deposit or loan balances or records of the  
54 banking institution's depositors, borrowers or customers;  
55 or

56 (4) Any data from which such information could be  
57 reasonably constructed.

58 (e) For purposes of this section a confidential record  
59 includes, but is not limited to:

60 (1) Any document or information relating to a nonpublic  
61 market strategy or plan of the bank;

62 (2) Any document or information relating to matters  
63 declared confidential under state or federal law, includ-  
64 ing, but not limited to, bank regulatory reports;

65 (3) Any document or information relating to a proposed  
66 merger, acquisition or sale of assets which has not yet  
67 been disclosed to the public by the bank, including any  
68 document or information which constitutes inside infor-  
69 mation for purposes of state or federal securities law; and

70 (4) Any document or information deemed by the bank as  
71 proprietary relating to the loan policy established by the  
72 bank.

## CHAPTER 31C. CREDIT UNIONS.

### ARTICLE 5. DIRECTION OF CREDIT UNION AFFAIRS.

#### §31C-5-11. Inspection of books and records by members.

1 (a) Each credit union shall keep at its principal office in  
2 this state a record of the names and addresses of its  
3 members entitled to vote. A credit union shall keep  
4 correct and complete books and records of account and  
5 shall keep minutes of the proceedings of its members,  
6 board of directors and committees having any of the  
7 authority of the board of directors. Any member or group  
8 of members of a credit union, upon making a demand  
9 stating a proper purpose, shall have the right to examine,  
10 in person or by agent or attorney, at any reasonable time  
11 or times, nonconfidential portions of its books and records  
12 of account, minutes and records of members and to make  
13 extracts therefrom.

14 (b) The right to examination authorized by subsection  
15 (a) of this section and any right to inspect the list of  
16 members provided by a credit union's bylaws to an extent



17 greater than that provided by this section may be denied  
18 to any member or group of members upon the refusal of  
19 any such member or group of members to furnish the  
20 credit union with an affidavit that such examination or  
21 inspection is not desired for any purpose which is in the  
22 interest of a business or object other than the business of  
23 the credit union.

24 (c) Notwithstanding any provision of this section or  
25 common law, no member or group of members shall have  
26 the right to obtain, inspect or copy any portion of any  
27 books or records of a credit union containing:

28 (1) Individual deposit or loan balances or records  
29 regarding other credit union members or information  
30 respecting their personal affairs; or

31 (2) Any data from which such information could be  
32 reasonably constructed.

33 (d) For purposes of this section, a confidential record  
34 includes, but is not limited to, the following:

35 (1) Any document or information relating to a nonpublic  
36 market strategy or plan of the credit union;

37 (2) Any document or information relating to matters  
38 declared confidential under state or federal law, includ-  
39 ing, but not limited to, credit union regulatory reports;  
40 and

41 (3) Any document or information deemed by the credit  
42 union as proprietary relating to the loan policy established  
43 by the credit union.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Randy Schoover*  
.....  
Chairman Senate Committee

*Nick Fantani*  
.....  
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

*Carroll E. White*  
.....  
Clerk of the Senate

*Gary M. Gray*  
.....  
Clerk of the House of Delegates

*Carl Roy Tomlin*  
.....  
President of the Senate

*Paul*  
.....  
Speaker House of Delegates

The within *approval* this the *6th*  
day of *April*, 1998.

*Earl Krehbiel*  
.....  
Governor

PRESENTED TO THE

GOVERNOR

Date 3/31/98

Time 10:45 am