

12-0811

IN THE CIRCUIT COURT OF KANAWHA COUNTY

THE CHARLESTON GAZETTE d/b/a  
DAILY GAZETTE COMPANY,

Plaintiff,

v.

Civil Action No.: 10-C-1971  
Judge Bailey

COLONEL TIMOTHY S. PACK  
Superintendent of the West Virginia State Police

Defendant.

ORDER

Came the Plaintiff, The Charleston Gazette, d/b/a Dailey Gazette Company, by counsel Sean P. McGinley and Robert M. Bastress, III and the Defendant by counsel, Virginia Grottendieck Lanham, for hearing on Plaintiff's Motion for Summary Judgment on September 1, 2011. Having reviewed all of the pleadings in this matter and having heard argument of counsel, the following Findings of Fact and Conclusions of Law are made in this matter:

FINDINGS OF FACT

1. By letters dated May 25, 2010 Gary Harki, staff writer for the Charleston Gazette, submitted three separate FOIA requests to the West Virginia State Police. Those three letters requested the following information:

A. The first request sought:

1. A copy of the information available to the general public regarding the procedures to be followed in registering complaints against the State Police or its employees as directed by Legislative Rule 81-10-3.7

2. A blank copy of the Personnel Complaint Form required in Legislative Rule 81-10-5.2
3. A list of the members of the Superintendent-appointed Internal Review Board as directed in Legislative Rule 81-10-9.1

B. The second request sought:

1. A copy of the data provided to the Internal Review Board that is used to assist that body in determining if subordinates of certain supervisors tend to be employees frequently identified by the internal review system, as directed by Legislative Rule 81-10-9.5
2. A copy of the central log of complaints maintained by the West Virginia State Police Professional Standards Section as directed by Legislative Rule 81-10-3.3

C. The third request sought:

1. A copy of the Annual Statistical Report concerning the Professional Standards Section's activities as directed by Legislative Rule 81-10-3.5
2. A copy of the quarterly reports for review produced by the Internal Review Board naming employees as mentioned in Legislative Rule 81-10-9.1. This report should include but is not limited to information regarding the number of external citizen complaints, internal complaints or use of force incidents for each employee listed in the report
3. A copy of the bi-annual reports for review produced by the Internal Review Board naming employees as mentioned in Legislative Rule 81-10-9.1. This report should include but is not limited to information regarding the number of

external citizen complaints, internal complaints or use of force incidents for each employee listed in the report

4. A copy of the yearly reports for review produced by the Internal Review Board naming employees as mentioned in Legislative Rule 81-10-9.1. This report should include but is not limited to information regarding the number of external citizen complaints, internal complaints or use of force incidents for each employee listed in the report
2. On June 2, 2010, the West Virginia State Police responded by answering the question regarding who was appointed to the Internal Review Board and by providing documents in response to the information available to the general public, a blank Personnel Complaint Form and the Annual Statistical Report concerning the Professional Standard Section's activities. The West Virginia State Police denied the remaining five requests based upon the fact that this information is to be kept confidential pursuant to 81 CSR 10.6.2 and the exemptions set out in W.Va. Code 29B-1-4(2).
3. Plaintiff and Defendant exchanged correspondence regarding this matter. Plaintiff was not satisfied with the response provided by the West Virginia State Police and filed this action.
4. A Vaughn Index has been created and produced showing that the First, Second, Third and Fourth Quarter Reports each contain at least 11 sections of information; each Bi-Annual Report contains 8 sections of information; each Annual Report contains 9 sections of information; and the Central Log of Complaints alone contains over 1200 entries.
5. The Quarterly, Bi-Annual and Yearly reports of the Internal Review Board are a compilation of all of the complaints received by the Professional Standards Section broken down into specific categories to assist the Internal Review Board in the early identification system.

6. The central log of complaints is a system of tracking each complaint and contains all of the information concerning the complaint including personal and identifying information concerning the subject of the complaint, the investigator, the supervisor, unit number, location code, exact dates, narratives and disciplinary action taken.
7. The information contained in the above records includes all employees, both uniformed members and civilian employees. Further, complaints against either civilian employees or uniformed members also include traffic accidents.
8. The information requested is used for personnel and effective management of personnel.
9. The individuals named in these reports, which include civilian personnel could be referred to People Works, the employee assistance program, they may also be referred for remedial training, or some type of review.
10. The data provided to the Internal Review Board to assist them could include actual Professional Standards Investigations which are clearly exempt from disclosure, or other personal and private information. Such information could differ with each review.
11. The documents requested by Plaintiff have never been released to the public.
12. The only way to mould the relief so as to limit the invasion of individual privacy is to provide the information in the format of the Annual Statistical Report. The Annual Statistical Report was provided to Plaintiff on June 2, 2010.
13. All public documents related to professional standards investigations were provided to Plaintiff on June 2, 2011.
14. Even with the names redacted the information requested can be manipulated to determine which employees are the subject of complaints as well as who filed the complaint.

## CONCLUSIONS OF LAW

1. The West Virginia State Police is a statutorily created law enforcement agency whose mission is the “statewide enforcement of criminal and traffic laws with emphasis on providing basic enforcement and citizen protection from criminal depredation throughout the state and maintaining the safety of the state’s public streets, roads and highways.” W.Va. Code § 15-2-12(a).
2. The West Virginia State Police Professional Standards section was created pursuant to *State ex rel Billy Ray C. v. Skaff* which directed that rules and regulations be promulgated to outline “how a citizen may notify the Superintendent of alleged misconduct by a State Police officer and the specific procedures to be followed to ensure that a thorough investigation is conducted by an impartial and neutral party.” *State ex rel Billy Ray C. v. Skaff*, 190 W.Va. 504, 438 S.E.2d 847 (1993).
3. In compliance with this directive, Legislative Rule 81 CSR 10 was promulgated stating with specificity the documents and records that would be disclosed to the public so that the public has an understanding of how the West Virginia State Police is handling complaints against its employees.
4. The Officer in Charge of the Professional Standards Section shall “ensure the confidentiality of all documents and reports relating to the investigation of any complaint through strict control of the Section’s files.” 81 CSR 10.3.3
5. The West Virginia Freedom of Information Act is set out in W.Va. Code §29B-1-1 *et.seq.*
6. There is no dispute that the Freedom of Information Act provides the public with a broad right of access to public records. “Under the Act, a public record includes any writing in the possession of a public body that relates to the conduct of the public’s business which is not

specifically exempt from disclosure.” *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985).

7. The records requested are records of the West Virginia State Police Professional Standards Section which contain “information of a personal nature such as that kept in a personal, medical or similar file” which are exempt from disclosure as set forth in W.Va. Code §29B-1-4(2).
8. Although plaintiff has requested reports and data, the records requested still contain personal information concerning the employee as well as specifics concerning the allegations and the outcome of the investigation. This information, reports and data are compiled to assist the Internal Review Board in analyzing the information for the early identification system but this is not information generated pursuant to routine administration or oversight because it is limited to information compiled as part of an inquiry into specific allegations of violations of code, policy or rule. 81 CSR 10.9
9. To release the requested information would clearly result in a substantial invasion of privacy because it will be clear from reviewing the requested documents which officers and civilians have been the subject of complaints of misconduct no matter how egregious, unfounded or potentially embarrassing. *Manns v. City of Charleston Police Department*, 209 W.Va. 620, 550 S.E.2d 598 (2001)
10. The West Virginia Supreme Court of Appeals has held that the invasion of privacy exemption to FOIA applies to records regarding the outcome of a law enforcement agency’s internal investigations. There is no value in embarrassing individuals because they are alleged to have engaged in some type of misconduct. The primary purpose of the invasion of privacy exemption to the Freedom of Information Act is to protect individuals from the injury and

embarrassment that can result from the unnecessary disclosure of personal information.

Syllabus Point 6, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E. 2d 799 (1985).

11. In reviewing the information that is requested it is clear that the public interest does not require the disclosure of the data provided to the Internal Review Board, the Central Log of Complaints or any of the Quarterly, Bi-Annual or Annual reports which are compiled from the records of the Professional Standards Section. *Manns v. City of Charleston Police Department*, 209 W.Va. 620, 626, 550 S.E.2d 598, 604 (2001). *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986).
12. The public's interest in disclosure of these records does not outweigh the government interest in confidentiality. *Sattler v. Holliday*, 173 W.Va. 471, 318 S.E.2d 50 (1984).
13. An individual who is complaining about the conduct of a member of the West Virginia State Police has a right of privacy. Such an individual makes the complaint with the expectation that all investigative material is closely guarded. 81 CSR 10. *Manns v. City of Charleston Police Department*, 209 W.Va. 620, 550 S.E.2d 598 (2001); *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986).
14. During the investigation of a Professional Standards Section Complaint the employee has limited rights as set out in §81-10-8. Employee Rights and Conduct during an Internal Investigation or Inquiry. These limited rights include that the employee must be read their *Garrity* rights, the employee may be dismissed from employment for refusing to take a polygraph examination when so ordered, the employee may be required to submit to medical, psychological or laboratory examinations, the employee may be photographed, participate in a line-up or submit to financial disclosure statements. 81 CSR 10.8.1 through 81 CSR 10.8.16.

15. Beginning with the actual complaint through the investigation and conclusion of the matter all investigative materials are to be treated with the strictest of confidence. "The expectation of confidentiality is crucial to continued reports of possible misconduct." *Manns v. City of Charleston Police Department*, 209 W.Va. 620, 626, 550 S.E.2d 598, 604 (2001). *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986).
16. Plaintiff is requesting material that has never been subject to disclosure under FOIA and is specifically exempt from disclosure because it is "information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy" W.Va. Code §29B-1-4(4). Further the records requested also fit into the categories of "Internal memoranda or letters received or prepared by any public body" which are exempt pursuant to W.Va. Code §29B-1-4(8) and in some cases the information sought contains "records of law enforcement agencies that deal with the detection and investigation of crime and internal records and notations of such law enforcement agency which are maintained for internal use in matters relating to law enforcement" and are exempt pursuant to W.Va. Code 29(B)-1-4(4). Therefore, the information sought is not, nor should it be, available from another source and there is no way to mould the relief so as to limit the invasion of individual privacy. *Manns v. City of Charleston Police Department*, 209 W.Va. 620, 550 S.E.2d 598 (2001). *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986).

## CONCLUSION

Each of the documents at issue in this matter are exempt from disclosure pursuant to the West Virginia Freedom of Information Act, specifically the exemptions contained in W.Va. Code §29B-1-4(2), (4) and (8). The requested records are a compilation of information contained

in Professional Standards files which contain personal information, the disclosure of which has been determined to constitute an unreasonable invasion of privacy. The documents requested also contain "internal memoranda or letters received or prepared by any public body." Some of the documents may also contain records of law enforcement agencies that deal with the detection and investigation of crime and internal records and notations of such law enforcement agency which are maintained for internal use in matters relating to law enforcement."

WHEREFORE, for the reasons stated above, Plaintiff's Motion for Summary Judgment is DENIED and the Court ORDERS that this Complaint be DISMISSED with prejudice. The objections and exceptions of Plaintiff are noted.

The Clerk is directed to send certified copies of this ORDER to counsel of record.

ENTERED: May 15, 2012

Jennifer Bailey  
Honorable Jennifer Bailey, Judge

Prepared by:

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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY E. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY,  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID STATE, THIS  
DAY OF May 2012.  
Cathy E. Gatson  
CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 5/16/12  
Certified copies sent to:  
 counsel of record  
 parties  
 other  
By: J. Hoyer  
 certified (first class mail)  
 fax  
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Clerk of Circuit Court  
County Circuit Clerk