

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0811

THE CHARLESTON GAZETTE
d/b/a **DAILY GAZETTE CO.,**

Petitioner,

v.

Civil Action No. 10-C-1971
(Hon. Jennifer Bailey, Judge)

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

Respondent.

PETITIONER
CHARLESTON GAZETTE'S BRIEF

Rudolph L. DiTrapano (WV Bar# 1024)
Rudy.DiTrapano@dbdlawfirm.com
Sean P. McGinley (WV Bar# 5836)
Sean.McGinley@dbdlawfirm.com
Robert M. Bastress III (WV Bar# 9616)
Rob.Bastress@dbdlawfirm.com
DiTRAPANO BARRETT & DiPIERO, PLLC
604 Virginia Street, East
Charleston, WV 25301
Phone: 304-342-0133
<http://www.dbdlawfirm.com>

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III. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The Circuit Court erred in finding that disclosure of the requested records would result in an unreasonable invasion of privacy.

The Issue: The lower court did not conduct the required inquiry or the balancing test necessary to apply the “unreasonable invasion of privacy” exemption. It made numerous conclusory factual findings and conclusions of law without any admissible evidence or basis. Applying the FOIA law and the evidence in this case, the public records at issue are not subject to any exemption under FOIA because they deal with police officers’ public work, not intimate details of their personal lives.

Why the Court Should Review the Issue: Nearly all other courts have found police officers have **no** privacy interest in similar records, and the lower court’s holding if affirmed, would make West Virginia a lone voice for un-accountability and lack of transparency. For example, the Tenth Circuit Court of Appeals held in *Denver Policemen’s Protective Ass’n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981) that **police officers have no privacy interest in documents related solely to the officer’s work as police officers**. Likewise, the Supreme Court of Hawaii recognized,

“[i]nstances of misconduct of a police officer while on the job are **not** private, intimate, personal details of the officer’s life.”

State Org. of Police Officers v. Society of Professional Journalists-University of Haw. Chapter, 83 Haw. 378, 398 (1996). See *White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990) (stating that drug use or administering of tests to detect drug use among police officers can never be regarded as mere “private facts”); *Coughlin v. Westinghouse Broadcasting and Cable*,

Inc., 603 F. Supp. 377, 390 (E.D. Pa. 1985 (“**A police officer's on-the-job activities are matters of legitimate public interest, not private facts.**”) (emphasis added).); *Rawlins v. Hutchinson Publishing Company*, 218 Kan. 295, 543 P.2d 988 (Kan. 1975) (finding no invasion of privacy where newspaper published account of police officer’s alleged misconduct in office because facts did not concern the “private life” of the officer and “a truthful account of misconduct in office cannot form the basis of an action for invasion of privacy.”); *Spokane Police v. Liquor Control Board*, 769 P.2d 283, 286-87 (Wash. 1989) (citing *Restatement, supra*, § 652D) (holding that disclosure of investigative report into liquor law violations at bachelor party held at private police guild club and attended by police officers did not implicate right to privacy, which “is commonly understood to pertain only to the intimate details of one’s personal and private life.”). There is thus a “**strong public interest in ensuring open discussion and criticism of**” the police officer’s “**qualifications and job performance.**” *Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir.1981) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85-86, 86 S. Ct. 669, 675-76, 15 L. Ed. 2d 597 (1966)) (citations omitted). In *Obiajulu v. City of Rochester*, 625 N.Y.S.2d 779, 780 (N.Y. App. Div. 1995), a New York appellate court found that,

“disciplinary files containing disciplinary charges, the agency determination of those charges, and the penalties imposed . . . are not exempt from disclosure” because they were not “personal and intimate details of an employee's personal life.”

Id. As held by the New Mexico Court of Appeals:

Unlike other materials in the personnel file, **the officer does not have a reasonable expectation of privacy in a citizen complaint because the citizen making the complaint remains free to distribute or publish the information in the complaint in any manner the citizen chooses.**

DPS also argues that police officers are “lightening [*sic*] rods for complaints by disgruntled citizens” and, therefore, information in the

complaint may be untrue or have no foundation in fact. **The fact that citizen complaints may bring negative attention to the officers is not a basis under this statutory exception for shielding them from public disclosure.**”

Cox v. New Mex. Dept. Of Pub. Safety, 242 P.3d 501, 507 (N.M. Ct. App. Aug. 16, 2010)

(emphasis added). The Connecticut Supreme Court explained,

“we note that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties. The public has a right to know not only who their public employees are, but also when their public employees are and are not performing their duties.”

Perkins, 228 Conn. at 177

By accepting public employment as a State Police officer, a person does not become exempt from public scrutiny. To the contrary, government officials such as police officers are accountable to the public, and the public who pays these officers' salaries has a right to know not only who their State Police officers are, but also when and how their police officers are, and are not, performing their duties. Disclosure of the public records requested by the *Gazette* concern information about how police officers do their jobs, and thus disclosure of those records promotes accountability and could not be unexpected to any reasonable public official.

Persuasively, complaints against private attorneys and medical doctors in West Virginia both must be disclosed as soon as the investigation results in charges or is closed. *Syl.* Pts. 5 and 6, *Daily Gazette Co. v. Committee on Legal Ethics of the W. Va. State Bar*, 174 W. Va. 359, 326 S.E.2d 705 (1984) (holding the public has a right to access records relating to disciplinary charges against an attorney following completion of the investigation, regardless of whether the disciplinary charges are dismissed for a lack of probable cause or not); *Syl.* Pts. 1-3, *Daily*

Gazette Co. v. W. Va. Bd. of Medicine, 177 W. Va. 316, 352 S.E.2d 66 (1986) (extending same logic for disciplinary allegations against doctors). There is no reason to treat police officers differently.

ASSIGNMENT OF ERROR NO. 2: The Circuit Court erred in finding that, “the public interest does not require the disclosure,” of the records requested.

The Issue: The Circuit Court never articulated or even addressed the public interest in disclosure.

Why the Court Should Address the Issue: The great majority of courts have held that the public interest in the disclosure of records relating to the investigation of alleged police misconduct is substantial and far outweighs any privacy interest. For example, the Supreme Court of Hawaii, balancing the same interests at issue here, found the purported privacy interests of officers to be “slight’ as compared to the public interest in accountability:

““If the off duty acts of a police officer bear upon his or her fitness to perform public duty or if the activities reported in the records involve the performance of a public duty, then the interest of the individual in "personal privacy" is to be given slight weight in the balancing test and the appropriate concern of the public as to the proper performance of public duty is to be given great weight. **In such situations privacy considerations are overwhelmed by public accountability.**”

Stated another way, “the public does have a legitimate interest in how a police department responds to and investigates such an allegation against an officer. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wash.2d 398, 416, 259 P.3d 190, 198 (2011). Thus, the public interest is in the important issue of “public accountability” and “how a police department responds to and investigates allegations] against [its] officer[s].” If investigations of alleged police misconduct and their outcomes are done entirely in secret, as here, there is no public

accountability whatsoever. As held in *Daily Gazette Co. v. Committee on Legal Ethics of the W. Va. State Bar*, 174 W. Va. at 367, there is an important public interest of accountability that *disclosure* of records concerning the investigation of complaints of misconduct serves:

“Accountability for all decisions can only bolster confidence in this self-regulatory process, and at the same time, increase the likelihood of receiving information concerning attorney misconduct.”

ASSIGNMENT OF ERROR NO. 3: The Circuit Court erred in finding that, “the public interest in disclosure of [the requested] records does not outweigh the government interest in confidentiality.”

The Issue: The trial court never weighed or balanced the public interest with the asserted privacy interest as required by FOIA.

Why the Court Should Address the Issue: Virtually all other courts addressing this issue have found that the public interest in accountability far outweighs any privacy interest, and this court should be consistent with the rest of the Nation.

ASSIGNMENT OF ERROR NO. 4: The Circuit Court erred in relying on an administrative regulations to justify nondisclosure.

The Issue: WVFOIA recognizes a limited exception to its “full and complete” disclosure requirements in instances where the information requested is specifically exempt from disclosure under a separate “statute,” *W.Va. Code* § 29B-1-4(a)(5), but the administrative regulations the lower court relied on, 81 *W.Va.C.S.R.* §§ 10, 10.6.2, 10-8, 10.8.1, 10.8.16 and 10.9, are not “statutes.”

Why the Court Should Review the Issue: All other courts uniformly have rejected the idea that an agency regulation may serve to stifle a FOIA request. *See, e.g., Anderson v. Health & Human*

Servs., 907 F.2d 936, 951 n. 19 (10th Cir. 1990). Because the administrative regulations are not statutory exemptions found in *W. Va. Code* § 29B-1-4, the administrative regulations are not a valid basis for withholding the records requested. Caselaw from around the country is clear that courts do not defer to agency interpretations of what is or is not permissible to withhold under FOIA because the agency generally is an interested party (as is the case here) and further, an agency may not usurp the legislative prerogative and policy by creating new exemptions to the statute that the Legislature did not enact. Simply put, an agency, like the State Police, may not promulgate its own administrative rules that defeat the express statutory disclosure mandate of FOIA passed by the Legislature.

ASSIGNMENT OF ERROR NO. 5: The Circuit Court erred in refusing to order disclosure with names redacted and in finding “there is no way to mould the relief so as to limit the invasion of individual privacy.”

The Issue: Even if the unreasonable invasion of privacy outweighed the public interest, the documents must be released with names redacted.

Why the Court Should Address the Issue: “[I]n response to a proper . . . [WVFOIA] request, 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 upon the public body an unreasonably high burden or expense.” *Syl. Pt. 5, in part, Farley*, 215 W. Va. 412, 599 S.E.2d 835. “If the public body refuses to provide redacted or segregated copies because the process of redacting or segregating would impose an unreasonably high burden or expense, the public body must provide the requesting party a written response that is sufficiently detailed to justify refusal

to honor the FOIA request on these grounds.” *Id.* The State Police never supplied a detailed written response that could justify not redacting names, and in the case of *Bainbridge Island Police Guild v. The City of Puyallup*, *supra*, the police department there asserted the same argument the trial court accepted here, and the *Bainbridge* court found that, even if there was a possibility someone could figure out the police officer’s identity, that possibility did not justify a failure to redact and disclose.

ASSIGNMENT OF ERROR NO. 6: The Circuit Court erred in concluding that, “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.’”

The Issue: Even assuming the public records requested qualify for the law enforcement records exemption, the exemption only applies to ongoing investigations.

Why the Court Should Address the Issue: All of the records requested were for complaints investigations that the State Police had deemed “closed.” Therefore, the law enforcement investigation exemption does not apply.

ASSIGNMENT OF ERROR NO. 7: The Circuit Court erred in concluding that the requested records were exempt as “internal memoranda or letters received or prepared by any public body.”

The Issue: The burden of proof is on the Respondent to prove the applicability of the internal memoranda exemption, and Respondent never made any showing whatsoever that these documents qualify for that exemption.

Why the Court Should Address the Issue: Respondent never asserted an “internal memorandum” exemption until its response to the motion for summary judgment. It did so in

brief, conclusory fashion, never explained how or why the records requested could even qualify for that exemption, nor even attempted to discuss the law relating to that exemption. The lower court then made a baseless, conclusory finding that the exemption applied.

IV. STATEMENT OF THE CASE

The instant case is about transparency in government and accountability of public officials. The West Virginia State Police refuse to provide the Public with any substantive public records or documents concerning its secret internal review of complaints made against State Police officers. It insists it is not accountable to the Public for how it handles and resolves such complaints.

Under the West Virginia Freedom of Information Act, there is a mandatory public policy of transparency and accountability, with its roots in “the fundamental philosophy of the American constitutional form of representative government[.]” Transparency and accountability are especially important where government officials, like the State Police, operate without any outside oversight of complaints made against them. Transparency is necessary for there to be accountability, in order to create a bond of trust between the public and those who exercise the police power; therefore, the process of investigation and decision-making regarding complaints against police officers must be as transparent as possible, especially where, as here, the investigations and decisions on the complaints have concluded.

Many states have addressed this issue and have held that transparency must prevail over assertions of secrecy. For example, the Supreme Court of Alaska has held that there was, “perhaps no more compelling justification for public access to documents” than for those “regarding citizen complaints against police officers, because public access to such records

guarantees the, [preservation of] democratic values and foster[s] the public's trust in those charged with enforcing the law.” *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990). This Court also has been mindful that “the lawfulness of police operations is a matter of great concern to the state’s citizenry.” *Maclay v. Jones*, 208 W.Va. 569, 576, 542 S.E.2d 83, 90 (2000). It further held that, “[t]he notion that police departments should be able to completely shield their internal affairs investigatory process from the public offends basic notions of openness and public confidence in our system of justice.” *Id.* (quoting *Soto v. City of Concord*, 162 F.R.D. 603, 612 (N.D. Cal. 1995)).

Despite identical arguments by proponents of secrecy and un-accountability, this Court consistently has held that similar complaints of misconduct against lawyers, doctors and other licensed professionals must be disclosed under FOIA. No sound or rational reasoning can distinguish why complaints of misconduct against professionals must be disclosed to the public, but not complaints against police officers.

Against this backdrop of total secrecy, lack of accountability and transparency, the *Charleston Gazette* requested specific public records concerning the State Police’s handling of reports or complaints of abuse and misconduct by its members. On May 25, 2010, the *Charleston Gazette*, by its reporter, Gary A. Harki, requested public records from Respondent pursuant to WVFOIA.¹ See Appendix at 11, 16-21, 32 (Answer ¶¶ 7-8, admitting Compl. ¶¶ 7-8; 5-25-10 Letters from Harki to Pack, attached to Compl. as Exs. A and B). The FOIA requests sought, *inter alia*, the following items:

¹ One request sought four items; another request sought three items; and a final request sought two items. Respondent withheld certain items responsive to each of the three requests.

- (1) Quarterly, Bi-Annual and Yearly Reports of the Internal Review Board for the last five years, with the names of the employees identified by the Early Identification System redacted;
- (2) Data provided to the Internal Review Board that was used to assist it in determining if subordinates of certain supervisors tend to be employees frequently identified by the internal review system; and
- (3) A copy of the central log of complaints maintained by the West Virginia State Police Professional Standards section.

See Appendix at 10, 31 (Answer ¶ 1, admitting Compl. ¶ 1).

Respondent, by letter dated June 2, 2010, denied the May 25, 2010 requests by the *Gazette* for the foregoing documents. *Id.* ¶ 9, admitting Compl. ¶ 9. The letter concludes, “[p]ursuant to West Virginia Code § 29B-1-3(c) *et seq.*, the responsibility of the custodian of any public records or public body to produce the requested records for documents is at an end. You may institute proceedings for injunctive or declaratory relief in the circuit court in the country where the public record is kept.” *Id.*

Thereafter, in person and by email, *Gazette* reporter Harki requested the State Police reconsider its position, and had further discussions with Joe DeLong, the Deputy Secretary Military Affairs & Public Safety. *Id.* Then, by email dated August 18, 2010, Mr. DeLong again refused to provide any further information, and stated Respondent’s refusal to disclose requested documents even in redacted form, stating in pertinent part,

“The state police have reviewed further their information and determined that they will not be able to break the information down any further. As I stated in the email below there are several factors that must be taken into account when determining what information is in the public interest and what is protected personnel file information.”

Id. In other words, the State Police took the position that complaints against its employees are

“protected personnel file information” that outweighs the public interest. The State Police decided that it, and it alone, will decide what is, and what is not, in the public interest, and refused even to discuss its rationale in coming to that self-serving conclusion.

On September 24, 2010, the *Charleston Gazette*, by counsel, made one final effort to discuss Respondent’s FOIA obligations in an effort to get the State Police to reconsider its non-disclosure position. The September 24, 2010 letter specifically stated that it should be considered a separate FOIA request. *Id.* ¶ 11. The letter requested that if, as it appeared from Mr. DeLong’s email, the State Police took the position that the privacy rights of officers who are the subject of complaints are at issue, then the State Police should redact the records and produce them in that form:

“This letter is a follow-up to the June 2, 2010 letter from Mr. Hoyer to Mr. Harki, and the August 18, 2010 email from Joseph DeLong to Mr. Harki, both refusing to produce public records requested under the *West Virginia Freedom of Information Act*, WV Code §29-B-1-1, et seq.”

This purpose of this letter is to request that the refusal to provide the requested public records be reconsidered, but you should consider this letter a separate request under the Act for public records. The request is as follows:

Please produce for inspection and copying the following public records: All Quarterly, Bi-Annual and Yearly Reports of the Internal Review Board for the last five years, with the names of the employees identified by the Early Identification System redacted.”

Id. (emphasis added).

In response, by letter dated October 4, 2010, the State Police’s John A. Hoyer wrote again denying the *Gazette*’s public records request, and refused to discuss redaction as an alternative to

complete non-disclosure. *Id.* ¶ 12. That denial letter concludes, “[p]ursuant to the West Virginia Code § 29B-1-3(c) *et seq.*, the responsibility of the custodian of any public records or public body to produce the requested records for documents is at an end. You may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.” *Id.*

On November 3, 2010, the *Charleston Gazette* filed its Complaint in the circuit court. Appendix at 10. The State Police Respondent filed an Answer on November 24, 2010, and again repeated its refusal to disclose the requested public records. Appendix at 31. On April 18, 2011, the Gazette moved for summary judgment. Appendix at 36. The Gazette’s supporting Memorandum exhaustively examined the relevant FOIA caselaw from West Virginia and other jurisdictions that support its request for public records concerning complaints made against State Police officers, and why such records must be disclosed to the Public. *Id.* On August 22, 2011, the State Police filed its Response, essentially ignoring the extensive authority cited by the Gazette that supports the conclusion that FOIA requires disclosure of the requested records. Appendix at 79. The Gazette replied to the State Police’s response on August 30, 2011. Appendix at 106. On September 1, 2011 the lower court heard oral argument, and directed the parties to submit proposed orders by September 16, 2011. Then, on May 16, 2012, the Circuit Court signed (without any modification) the proposed order prepared by Respondent’s counsel granting summary judgment in favor of nondisclosure, an order that fails to address virtually every argument made by Petitioner below. Appendix at 1.

V. SUMMARY OF ARGUMENT

To summarize Petitioner's argument, the paramount considerations in West Virginia's Freedom of Information Act, such as liberally construing the Act, and the policy behind the FOIA, support disclosure, not withholding of the requested records. While this Court addressed a similar question in *Manns v. City of Charleston* and held that the records requested there were exempt under FOIA's privacy exemption, the decision failed to address the public interest in accountability of public officials. Caselaw from around the Country consistently holds the public interest in records of complaints against police officers far outweighs any privacy interest under FOIA (which most courts hold is "slight" for public officials conduct while working). Additionally, as courts around the country have concluded, a state agency can not, by enacting an administrative regulation, countermand the statutory directive of FOIA. Likewise, since the investigations upon which the records were based are closed, the "law enforcement" and internal memorandum exemptions do not apply. For all of these reasons, the order of the lower court should be reversed, and this case remanded with directions to enter an order ensuring disclosure of the requested records.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary. The case should be set for Rule 20 argument because the case involves issues of fundamental public importance, specifically, the public accountability of state agencies that wield the police power of the State and secretly self investigate and review complaints against its employees.

VII. ARGUMENT

The West Virginia Legislature, in enacting the Freedom of Information Act, *W.Va. Code* § 29B-1-1 (“WVFOIA”), declared transparency in government and public officials is the “**public policy**” of the State:

“Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be 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. 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. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.”

W.Va. Code § 29B-1-1 (emphasis added).²

² The “public policy” of transparency in a democracy has deep historical roots. As British historian Lord Acton stated,

“Every thing secret degenerates, even the administration of justice; nothing is safe that does not show it can bear discussion and publicity.”

The Founding Fathers clearly agreed with that principle, and this Country was formed on the basis of governmental openness. The great early patriot Patrick Henry wrote,

“[t]he liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.”

President James Madison, another Founding Father, stated that,

“[k]nowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.”

And from the judiciary, U.S. Supreme Justice Louis Brandeis famously concurred, stating:

The mandatory public policy of transparency, with its roots in “the fundamental philosophy of the American constitutional form of representative government,” unequivocally applies to the State Police and all who exercise the police power of the State. Indeed, transparency is especially important where government officials, like the State Police, operate without any outside oversight of complaints made against it. Transparency is necessary for accountability, which in turn creates a bond of trust between the public and those who exercise the police power.

In the case at bar, by withholding the public records requested the State Police seek to subvert this democratic principle, and by doing so, it erodes the public trust in it as an agency. In West Virginia, the State Police’s internal review of complaints against police personnel lacks any transparency, and takes place in secret. Far from being provided “full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees” as mandated by the Legislature, *W.Va. Code* § 29B-1-1, the public is provided no records or information to account for how the State Police conducts or resolves complaints beyond generic, non-specific statistics concerning the numbers of complaints made, investigated and resolved.

As shown below, the Respondent’s non-disclosure of public records clearly violates the public policy of the State of West Virginia, the specific mandates of the WVFOIA, and lacks legal justification. Therefore, this Court should reverse the holding of the lower court and direct the public records requested concerning State Police internal investigations be disclosed.

“sunlight is . . . the best disinfectant[.]” L. Brandeis, Other People's Money 62 (1933).

A. THE PARAMOUNT CONSIDERATIONS WHEN APPLYING FOIA

The paramount consideration of the WVFOIA is that it must be “liberally construed in favor of disclosure,” and its exemptions (relied on here by the State Police) must be “strictly construed” against non-disclosure:

“[i]n addition to setting forth a clear statement of the public policy behind the Act, the Legislature also guided us in how to interpret disputes arising under that Act when it mandated that ‘the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.’ W.Va. Code, 29B-1-1. We recognized this mandate of liberal construction in Syllabus Point 4, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985), where we held that:

‘The disclosure provisions of this State's Freedom of Information Act, W.Va. Code, 29B-1-1 et seq., as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed. W.Va. Code, 29B-1-1 [1977].’”

Shepherdstown Observer, Inc. v. Maghan, — W. Va. — , 700 S.E.2d 805, 810 (2010) (emphasis added). *Accord* Syl. Pt. 4, *In re Gazette FOIA Request*, 222 W. Va. 771, 671 S.E.2d 776 (2008); Syl. Pt. 4 *Farley*, 215 W. Va. 412, 599 S.E.2d 835. This explication of West Virginia’s FOIA law is nothing new. It has been interpreted consistently throughout its history:

“Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.’”

Farley, 215 W. Va. at 420, 599 S.E.2d 835.

Indeed, “[t]he general policy of the [WVFOIA] act is to allow as many public records as possible to be available to the public.” *AT & T Communications of West Virginia, Inc. v. Public Serv. Comm'n of West Virginia*, 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992) (footnote omitted)). Said another way, “the following two salient points must be remembered in any FOIA

case, regardless of which exemption is claimed to be applicable. First, the *fullest responsible disclosure*, not confidentiality, is the dominant objective of the Act.”” *Ogden Newspapers v. City of Williamstown*, 192 W. Va. 648, 654, 453 S.E.2d 631, 637 (1994) (quoting *Hechler v. Casey*, 175 W.Va. at 445, 333 S.E.2d at 810 (1985)) (emphasis in original).³

B. *MANNIS v. CITY OF CHARLESTON POLICE DEPARTMENT*

The Respondent and the Circuit Court took the position that this Court’s decision in *Manns v. City of Charleston Police Dep’t*, 209 W. Va. 620, 550 S.E.2d 598 (2001) (*per curiam*) mooted the Petitioner’s FOIA requests. That position is erroneous. The circumstances today and the public records requests in this case stand in stark contrast to those addressed in *Manns, supra*. There, broad FOIA requests were made for the *names* of City of Charleston police officers against whom complaints had been made by an individual who had a simultaneous § 1983 lawsuit pending against the City. After the FOIA case was appealed, the § 1983 lawsuit settled. This Court noted that the parties’ settlement of the underlying litigation in *Manns, supra*, had made the appeal, “arguably moot.” 209 W.Va. at 623, n.4, 550 S.E.2d at 601, n.4. Nevertheless, this Court addressed the merits of the appeal.

In *Manns*, this Court concluded, without discussing why, that the records requested, “contain personal information which if disclosed would constitute an unreasonable invasion of privacy.” 209 W.Va. at 625, 550 S.E.2d at 603.⁴ This Court then held that it had to “consider

³ “WVFOIA . . . was enacted to fully and completely inform the public ‘regarding the affairs of government and the official acts of those who represent them as public officials and employees.’” *Daily Gazette Co. Inc. v. W.Va. Development Office*, 198 W.Va. 563, 574, 482 S.E.2d 180, 191 (1990) (quoting W.Va. Code, 29B-1-1 [1977], in part).

⁴ Strangely, despite the fact that the law places the burden of proof on the government agency resisting the records request, the language this Court used in *Manns* shows it

whether the public interest outweighs the privacy interests of the police officers thereby requiring disclosure of the information.” *Id.* While this Court in *Manns* then restated its conclusion that disclosure of the records “would result in a substantial invasion of privacy,” *id.*, 209 W.Va. at 626, 550 S.E.2d at 604, the *Manns* Court never addressed the public interest in disclosure.

The *Manns* Court did not actually address or discuss the public interest, and merely quoted from *Maclay v Jones*, 208 W.Va. 569, 542 S.E.2d 83 (2000), a case that it also stated was, “not dispositive of the issues now before us.” *Manns*, 209 W.Va. at 623, 550 S.E.2d at 601. Despite stating *Maclay* was “not dispositive,” the *Manns* Court then seemingly found it to be dispositive when it stated,

“This Court is certainly mindful that ‘the lawfulness of police operations is a matter of great concern to the state’s citizenry.’” *Maclay*, ___ W.Va. ___, 542 S.E.2d at 90. However, our concern in *Maclay* that ‘compelled disclosure of police investigatory materials might result in ‘fishing expeditions’ and thereby encourage frivolous litigation’ leads us to conclude that the public interest does not require the disclosure of the requested information. *Id.*”

Manns, 209 W.Va. at 626, 550 S.E.2d at 604. Utterly unlike the plaintiffs in *Manns* or *Maclay*, the Gazette here offers the strong public interest in accountability that was unaddressed both by this Court in *Manns* and by the Circuit Court below.

It also is important to note that while *Manns* appears to have based its conclusion in significant part on a 1982 intermediate court decision from New York, *id.*, 209 W.Va. at 625, 550 S.E.2d at 603, citing *Gannett Co., Inc. v. James*, 86 A.D.2d 744, 447 N.Y.S.2d 781 (1982), more

actually placed the burden of proof on the requestor, holding, “[w]e see no basis for a determination that the investigation file at issue in this case is not a ‘similar file’ as we interpret that term.” *Id.*, 209 W.Va. at 625, 550 S.E.2d at 603. The burden of proof should have been placed on the City to prove the records were, in fact, similar files, not on the requestor to prove they were *not* similar files.

recent New York decisions take an opposite approach, holding that,

“disciplinary files containing disciplinary charges, the agency determination of those charges, and the penalties imposed . . . are not exempt from disclosure” because they were not “personal and intimate details of an employee's personal life.”

Obiajulu v. City of Rochester, 625 N.Y.S.2d 779, 780 (N.Y. App. Div. 1995). It is thus questionable in retrospect whether the cursory conclusions of the *Manns* court, expressed *per curiam*, were based upon the most recent or probative caselaw available.

The records requests in *Manns* were for a “broad ‘any complaint’ personnel file inspection,” *Id.*, 209 W. Va. at 627 (Starcher, J. concurring), or, in other words, “access to all of the police department’s investigation and/or complaint records (this includes notes, letters, phone slips, *etc.*) regarding all of its current officers.” *Id.* Before explaining that WVFOIA requires the disclosure of documents not information, Justice Starcher’s concurrence to the *per curiam* opinion “emphasize[d]” *Manns* was a “narrow holding.” *Id.* at 626. Justice Starcher’s concurrence in *Manns* was careful to note:

“The Court's opinion in the instant case, however, does nothing to bar or undermine reasonable requests for access to public records to seek information about official misconduct, or other narrowly tailored requests that do not unreasonably affront legitimate personal privacy concerns. For example, had the appellee sought to inspect and copy documents alleging police use of excessive force, with names (at least initially) redacted, we would have had a different kettle of fish -- and quite possibly a different result, if such a request had been refused.”

Id. (emphasis added).

Here, the narrowly-tailored FOIA requests, tracking the language of the 2008 State Police regulations requiring them to compile certain records, seek the State Police-generated records demonstrating their oversight and administration of alleged trooper misconduct. A request has

been made for public records, with the names **redacted** (a “different kettle of fish” from *Manns*) if necessary. That is a far cry from the open-ended request for all individual officers’ personnel records at issue in *Manns*.

As shown in detail below, when the “public interest” is considered against the assertion that disclosure would result in a substantial invasion of privacy, the public interest in accountability far outweighs the speculative possibility of an invasion of privacy by the disclosure of the records requested.

C. THE PUBLIC INTEREST IN ACCOUNTABILITY

The great majority of courts addressing the same issues found here have explained and held that the public interest in the disclosure of records relating to the investigation of alleged police misconduct is substantial, and far outweighs any privacy interest. For example, the Supreme Court of Hawaii held the purported privacy interests of officers to be “slight” as compared to the public interest in accountability:

“If the off duty acts of a police officer bear upon his or her fitness to perform public duty or if the activities reported in the records involve the performance of a public duty, then the interest of the individual in "personal privacy" is to be given slight weight in the balancing test and the appropriate concern of the public as to the proper performance of public duty is to be given great weight. **In such situations privacy considerations are overwhelmed by public accountability.**”

State Org. of Police Officers v. Society of Professional Journalists-University of Haw. Chapter, 83 Haw. 378, 399 (1996) (quoting Restatement (Second) of Torts § 652D, at 386, comment b (1977)). Stated another way, “the public does have a legitimate interest in how a police department responds to and investigates such an allegation against an officer. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wash.2d 398, 416, 259 P.3d 190, 198 (2011). Thus, the

issue is not merely one of the “lawfulness of police operations,” as indicated by the *Manns* court, but also the more important issue of “public accountability” and “how a police department responds to and investigates allegation[s] against [its] officer[s].” If investigations of alleged police misconduct and their outcomes are done entirely in secret, as here, there is no public accountability whatsoever. This issue of public accountability never was considered or addressed in *Manns, supra*.

Helpfully, compelling West Virginia caselaw addresses the applicability of FOIA to complaints made against West Virginia doctors and lawyers. Indeed, the same arguments (some might say better arguments) were made in cases in defense of secrecy in those investigations and complaints, and were rejected by this Court on the basis of **public accountability**. Neither the lower court nor the State Police ever addressed why accountability trumps secrecy in complaints and investigations of lawyers and doctors,⁵ but not those regarding police officers. There is no rationale explanation for making such a distinction.

Convincingly, this Court held that complaints about lawyer misconduct, even where dismissed, pose “no real threat” to the reputations of those accused. As held in *Daily Gazette Co. v. Committee on Legal Ethics of the W. Va. State Bar*, 174 W. Va. at 367:

“information regarding complaints dismissed without formal charges [. . .] is a necessary and vital component of the whole public process. While we

⁵ Complaints against private attorneys, and complaints against medical doctors both must be disclosed as soon as the investigation results in charges or is closed. *Syl. Pts. 5 and 6, Daily Gazette Co. v. Committee on Legal Ethics of the W. Va. State Bar*, 174 W. Va. 359, 326 S.E.2d 705 (1984) (holding the public has a right to access records relating to disciplinary charges against an attorney following completion of the investigation, regardless of whether the disciplinary charges are dismissed for a lack of probable cause or not); *Syl. Pts. 1-3, Daily Gazette Co. v. W. Va. Bd. of Medicine*, 177 W. Va. 316, 352 S.E.2d 66 (1986) (extending same logic for disciplinary allegations against doctors).

recognize that there are reputational and investigatory justifications to restrict disclosure of information pertaining to complaints during the initial investigatory stage, those justifications are limited.”

The Supreme Court of Appeals continued:

“The reporting of the existence of groundless or frivolous complaints after there has been a decision to dismiss them as such **poses no real threat to the reputations of attorneys**. Moreover, information on the disposition of all complaints not only serves the objective of accountability, but also promotes a greater flow of information from the most substantial source of information pertaining to ethical violations, the public.”

Id., 174 W. Va. at 367, n.17, *citing* Steel & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 Am. Bar Found. Research J. 919, 1004. This Court further explained the crucial public function of accountability that *disclosure* of records concerning the investigation of complaints of misconduct serves:

“Accountability for all decisions can only bolster confidence in this self-regulatory process, and at the same time, increase the likelihood of receiving information concerning attorney misconduct.”

Id.

In weighing the competing interests in the context of attorneys reviewing citizen complaints about fellow attorneys, our Supreme Court of Appeals in *State Bar* easily arrived at the conclusion,

“if the legal profession’s practice of self-regulation is to remain viable, the public must be able to observe for themselves that the process is impartial and effective. We cannot simply expect the public to blindly accept that justice is being done. ‘People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.’”

Id. at 174 W. Va. at 365, 326 S.E.2d at 711-712 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572, 100 S. Ct. 2814, 2825, 65 L. Ed. 2d 973, 986 (1980)); *see also* *State Bd. of*

Medicine, 177 W. Va. 316, 352 S.E.2d 66. *State Bar* continued,

“The Committee on Legal Ethics is dominated by lawyers, who are charged with the responsibility of scrutinizing the conduct of other lawyers. Carrying on this process in secrecy ‘denies the public information that would demonstrate the profession's concern for effective disciplinary enforcement and show the steps taken by the bar to maintain its integrity.’”

Id. Similarly, as explicitly held by the New Mexico Court of Appeals:

“We see no reason why citizen complaints against police officers should be treated any differently than citizen complaints against other professionals licensed by the state for which disclosure is required.”

Cox, 242 P.3d at 508.

Courts in other jurisdictions follow the principle of public accountability and recognize that accountability is a public interest that trumps assertions of privacy. In *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 603 F. Supp. 377, 385-390 (E.D. Pa. 1985) (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-95, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975) and Restatement, *supra*, § 652D)), *aff'd*, 780 F.2d 340 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1187, 106 S. Ct. 2927, 91 L. Ed. 2d 554 (1986)), the federal district court granted summary judgment against a police officer who claimed, *inter alia*, that a television broadcast portraying his alleged misconduct *on the job* invaded his privacy. The *Coughlin* court disagreed, holding that because “the broadcast dealt with [the officer’s] public activity as a police officer. **A police officer's on-the-job activities are matters of legitimate public interest, not private facts.**” 603 F. Supp. at 390 (emphasis added).⁶

⁶ The Supreme Court of Appeals has “looked to federal FOIA cases for guidance in interpreting the West Virginia Freedom of Information Act.” *Farley*, 215 W. Va. at 420 (citing *Daily Gazette Co. v. West Virginia Develop. Office*, 198 W. Va. 563, 571, 482 S.E.2d 180, 188 (1996)). In particular, “[t]he exemptions in W.Va. Code § 29B-1-4 are similar to those in the Federal Freedom of Information Act.” *Gazette FOIA Request*, 222 W. Va. at 779 (citing *Sattler v.*

As in *Coughlin*, courts uniformly have concluded a police officer's alleged misconduct is decidedly public in part because of the importance of their governmental role:

“[police officers] ‘have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs,’ . . . and their position ‘has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees’ . . . The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss.”

Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir.1981) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85-86, 86 S. Ct. 669, 675-76, 15 L. Ed. 2d 597 (1966)) (citations omitted). There is thus a

“strong public interest in ensuring open discussion and criticism of” the police officer’s

“qualifications and job performance.” *Id.* (emphasis added); *Rawlins v. Hutchinson Publishing*

Company, 218 Kan. 295, 543 P.2d 988 (Kan. 1975) (finding no invasion of privacy where

newspaper published account of police officer’s alleged misconduct in office because facts did not

concern the “private life’ of the officer and “a truthful account of misconduct in office cannot

form the basis of an action for invasion of privacy.”); *Spokane Police v. Liquor Control Board*,

769 P.2d 283, 286-87 (Wash. 1989) (citing *Restatement, supra*, § 652D) (holding that disclosure

of investigative report into liquor law violations at bachelor party held at private police guild club

and attended by police officers did not implicate right to privacy, which “is commonly understood

to pertain only to the intimate details of one's personal and private life.”).

The public interest in accountability never was addressed by *Manns*, and is ignored

Holliday, 173 W.Va. 471, 318 S.E.2d 50 (1984)).

completely by the circuit court's order below. Based on the overwhelming caselaw on this topic, there is no way any privacy interest in the records requested can outweigh the public's interest in accountability.

D. AN ADMINISTRATIVE REGULATION CAN NOT CREATE AN EXEMPTION TO FOIA

In its initial response to the Gazette's FOIA requests, the State Police attempted to argue that its internal regulations trump the applicability of FOIA. Indeed, the State Police repeatedly asserted that one of the bases for its refusal to disclose was its own administrative regulation, §1 *W.Va.C.S.R.* § 10.6.2. The Gazette notes that the Supreme Court of Appeals in *State ex rel. Billy Ray C. V. Skaff*, 194 W.Va. 178, 459 S.E.2d 921 (1995) held that, regardless of what the administrative regulations may say concerning public access to records generated in the investigation of complaints, public access to such records, "would be controlled by the West Virginia Freedom of Information Act, *W.Va. Code, 29B-1-1, et seq.*["] Despite this clear holding, the Circuit Court relied on the State Police's own administrative rules in finding the complaint records were exempt under FOIA. Summary Judgment Order, Conclusions of Law at ¶¶ 3, 4, 8, 13 and 14.

WVFOIA requires public documents be released unless the statutory exemptions expressly mandate otherwise. WVFOIA states: "(1) Every person has a right to inspect or copy any public record of a public body in this state, except as otherwise expressly provided by section four [§ 29B-1-4] of this article." *W. Va. Code* § 29B-1-3(1) (emphasis added).

The Supreme Court of Appeals has made clear: "West Virginia's FOIA provides for the disclosure of public records unless the requested information falls under one of eight exceptions." *Gazette FOIA Request*, 222 W. Va. at 779 (citing *W.Va. Code* §§ 29B-1-1, 29B-1-4); *see also*

Ogden, 192 W.Va. at 651, 453 S.E.2d at 634.⁷

While WVFOIA recognizes a limited exception to its “full and complete” disclosure requirements in instances where the information requested is specifically exempt from disclosure under a separate “statute,” *W.Va. Code* § 29B-1-4(a)(5), the administrative regulation the State Police cited, 81 *W.Va.C.S.R.* § 10.6.2, is not a “statute.” By contrast, WVFOIA obviously is a “statute,” and while it allows the Legislature the leeway to carve out non-disclosure exemptions by so specifying in enacted legislation (a *statute*), it does not remotely suggest a mere administrative regulation promulgated by an agency can vitiate WVFOIA’s mandate of full and complete disclosure. This style of exemption is common in many state open records laws, and uniformly is interpreted as *not* including administrative rules, as advocated here by the State Police.

Despite the obvious and direct inconsistency with *W.Va. Code* § 29B-1-3(1), in its letter attempting to justify non-disclosure, the State Police asserted as its non-disclosure rationale that, “pursuant to 81 *W.Va.C.S.R.* § 10.6.2 ‘Documents, evidence, and other items related to complaints, internal investigations, internal inquiries and/or contained in case files shall not be released, disseminated or disclosed, except by the direction of the Superintendent or by order of a court with competent jurisdiction.’” Appendix at 28 (10-4-10 Letter from Hoyer to Harki, attached as Ex. E to Compl.). Simply put, the administrative rule proffered by the State Police to

⁷ The Supreme Court of Appeals has “looked to federal FOIA cases for guidance in interpreting the West Virginia Freedom of Information Act.” *Farley*, 215 W. Va. at 420 (citing *Daily Gazette Co. v. West Virginia Develop. Office*, 198 W. Va. 563, 571, 482 S.E.2d 180, 188 (1996)). In particular, “[t]he exemptions in *W.Va. Code* § 29B-1-4 are similar to those in the Federal Freedom of Information Act.” *Gazette FOIA Request*, 222 W. Va. at 779 (citing *Sattler v. Holliday*, 173 W.Va. 471, 318 S.E.2d 50 (1984)).

justify non-disclosure is not an exemption, “expressly provided by section four [§ 29B-1-4] of [WVFOIA,]” as required by *W.Va. Code* § 29B-1-3(1). There is no blanket exemption, express, implied or otherwise in *W.Va. Code* § 29B-1-4 for all “items related to complaints, internal investigations, internal inquiries and/or contained in case files,” whether it be express, implied or otherwise.

While not asserted as a basis for non-disclosure, it is a fact that WVFOIA’s Section 4 exemptions include, “[i]nformation specifically exempted from disclosure by statute[.]” *W.Va. Code* § 29B-1-4(a)(5). Thus, if another *statute* allowed the State Police to withhold the requested public records, they would be justified under that exemption. Of course, the reason the State Police does not cite to the “other statute” exemption in its denial letter is that administrative rules, such as 81 *W.Va.C.S.R.* § 10.6.2, are not statutes.⁸ It also is instructive that other courts uniformly have rejected the idea that an agency regulation may serve to stifle a FOIA request. *See, e.g., Anderson v. Health & Human Servs.*, 907 F.2d 936, 951 n. 19 (10th Cir. 1990).

⁸ The statute that gives the State Police the power to promulgate 81 *W.Va.C.S.R.* § 10.6.2 likewise can not be construed to excuse the State Police from complying with WVFOIA. *West Virginia Code* § 15-2-5(b) is titled, “Career progression system; salaries; exclusion from wages and hour law, with supplemental payment; bond; leave time for members called to duty in guard or reserves,” and says absolutely nothing about withholding or exempting records from disclosure, let alone the “specific exemption” required by the law:

“(b) The superintendent may propose legislative rules for promulgation in accordance with article three, chapter twenty-nine-a of this code [or *W. Va. Code* § 29B-1-3, which deals with rule making under the West Virginia Administrative Procedures Act,] for the purpose of ensuring consistency, predictability and independent review of any system developed under the provisions of this section.”

W.Va. Code § 15-2-5(b) (emphasis added). This statute may generally enable the State Police to promulgate administrative rules, but it clearly does not specifically exempt any document from disclosure under WVFOIA.

Logically, the reasoning underlying other courts' holdings is that public bodies are not disinterested parties to the decision of whether to disclose their own public records. *See, e.g., Retired Railroad Workers Assoc. v. Railroad Retirement Board*, 830 F.2d 331, 334 (D.C. Cir. 1987) ("no single agency is entrusted with FOIA's primary interpretation, and agencies are not necessarily neutral interpreters insofar as FOIA compels release of information the agency might be reluctant to disclose."). Simply put, the State Police's attempt to rely upon its own administrative regulation to avoid compliance with the statutory disclosure obligation under WVFOIA is unavailing. *Id.*⁹

More generally, it is basic hornbook law that an agency cannot usurp the authority of the Legislature by adding restrictions to a statute which are not there. *See, e.g., Ann Jackson Family Found. v. Commissioner*, 15 F.3d 917, 920 (9th Cir. 1994). The foregoing caution is true especially where, as here, the Legislature specifically has indicated WVFOIA is to be **broadly construed to promote disclosure**. If a state agency is permitted to promulgate a rule allowing it to ignore or reject a FOIA request, the emphatic public policy articulated in *W.Va. Code* § 29B-1-1 of open, transparent government would be frustrated. Using Respondent's logic, all agencies simply could promulgate their own rules making all public records exempt from disclosure, follow their internal regulations, and WVFOIA quickly would be rendered a nullity.

In sum, given that 81 *W.Va.C.S.R.* § 10.6.2 is not a statutory exemption found in *W. Va.*

⁹ Were the foregoing not enough, it likewise is clear that, "[a] basic policy of [the] FOIA is to ensure that Congress and not administrative agencies determines what information is confidential. Given the court's responsibility to ensure that agencies do not interpret the exemptions too broadly . . . deference appears inappropriate in the FOIA context." *Lessner v. U.S. Dept. of Commerce*, 827 F.2d 1333, 1335 (9th Cir. 1987); *see also Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075, 62 L. Ed. 2d 757, 100 S. Ct. 1021 (1980).

Code § 29B-1-4, the administrative regulation is an invalid basis for withholding the records requested and the inquiry ends there. Courts do not defer to agency interpretations of what is or is not permissible to withhold under FOIA because the agency generally is an interested party (as is the case here) and further, an agency may not usurp the legislative prerogative and policy by creating new exemptions to the statute that the Legislature did not enact. The State Police's argument that 81 *W.Va.C.S.R.* § 10.6.2 excuses compliance with WVFOIA plainly fails, and the Circuit Court should not have relied on the administrative regulations as support for nondisclosure.

E. REDACTING THE OFFICERS' NAMES

In addition to the paramount issue of the public interest in accountability, the instant case differs from *Manns* because the *Gazette* asked for the records with names redacted, as opposed to the request in *Manns* which was specifically for the officers names. As Justice Starcher said in his concurrence:

“The Court's opinion in the instant case, however, does nothing to bar or undermine reasonable requests for access to public records to seek information about official misconduct, or other narrowly tailored requests that do not unreasonably affront legitimate personal privacy concerns. For example, had the appellee sought to inspect and copy documents alleging police use of excessive force, with names (at least initially) redacted, we would have had a different kettle of fish -- and quite possibly a different result, if such a request had been refused.”

Id. (emphasis added). Because the *Gazette*'s request is reasonable, and the issue here is redacting the names as opposed to providing the names, this case is “a different kettle of fish” from *Manns* and the court should reach a “different result.”

Justice Starcher's concurrence is consistent with Supreme Court precedent establishing a public body's duty to redact:

“[I]n response to a proper . . . [WVFOIA] request, 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 upon the public body an unreasonably high burden or expense.”

Syl. Pt. 5, in part, *Farley*, 215 W. Va. 412, 599 S.E.2d 835. “If the public body refuses to provide redacted or segregated copies because the process of redacting or segregating would impose an unreasonably high burden or expense, the public body must provide the requesting party a written response that is sufficiently detailed to justify refusal to honor the FOIA request on these grounds.” *Id.* The State Police has not asserted that cost or burden is a reason for not redacting. If redactions were necessary, for example redacting names of officers accused, such a redaction could not be said to impose an unreasonable burden.¹⁰

The circuit court did not address the issue of redaction other than to say, in conclusory fashion that, relief could not be moulded in a way to prevent a substantial invasion of privacy. The circuit court gave no explanation to support that proposition, and it is absolutely unclear and speculative how anyone possibly could identify anything more than the detachment where an officer is stationed if the officer’s name was redacted from the records requested.

Importantly, the mere possibility that someone could examine the records to narrow the identity of the redacted person’s name is not a basis to sustain non-disclosure. The Supreme

¹⁰ An example of a public defendant improperly failing to redact or segregate exempt information so that the non-exempt portions of the public records could be disclosed is found in *Ogden*, 192 W. Va. at 656, 453 S.E.2d at 639, where the identity of juveniles contained in a police report were at issue. This Court found the circuit court erred in allowing the entire report to be withheld simply because the identity of the juveniles were contained in the report. This Court held that the names could have been redacted and the redaction satisfied the concerns for protecting the juvenile’s identity. *Id.* If redactions are required here, the same logic would apply and show that the exemption at issue can be satisfied easily by redacting the name of the officer involved without imposing an unreasonable burden on Respondent.

Court of Washington decided this precise issue in *Bainbridge Island Police Guild v. The City of Puyallup*, 172 Wash.2d 398, 259 P.3d 190 (2011). There, the police department argued the same thing the State Police argued here, that redaction would not be enough to prevent someone with outside knowledge from possibly narrowing the possible police officers who might be the police officer whose name was redacted. The Washington Supreme Court rejected that possibility as a basis for imposing a blanket rule of non-disclosure, stating:

“We recognize that appellants' request under these circumstances may result in others figuring out Officer Cain's identity. However, it is unlikely that these are the only circumstances in which the previously existing knowledge of a third party, paired with the information in a public records request, reveals more than either source would reveal alone. We hold that while Officer Cain's identity is exempt from production under former RCW 42.56.230(2), the remainder of the PCIR and the MIIIR is nonexempt.”

Id.

While the Washington decision shows that disclosure is required with names redacted and is the method to use even if there is a possibility that one could identify the person whose name is redacted, the State Police here has not even come close to meeting its burden of proving that the release of the public records requested with officers names redacted still would contain information sufficient to identify the officers. In reality, if the State Police's real concern is about the privacy interests of individual troopers, that concern is resolved easily by an appropriate redaction. *See* Syl. Pt. 5, *Farley*, 215 W. Va. 412, 599 S.E.2d 835; *Obiajulu*, 625 N.Y.S.2d at 780. However, the State Police's repeated refusal to take the reasonable step of redaction shows it is unwilling to follow the law in this regard, and frankly, that the assertion of the privacy exemption is a smokescreen for its real purpose to keep beyond accountability how it internally and secretly handles investigations of its own. This lack of transparency, and concomitant lack of

accountability is the antithesis of an open and free society, and violates West Virginia's Freedom of Information Act in both letter and spirit.

F. W.VA. CODE § 29B-1-4(4) IS INAPPLICABLE BECAUSE THE PUBLIC RECORDS AT ISSUE CONCERN CLOSED INVESTIGATIONS

The State Police claim the public records of misconduct complaints and the outcome of its investigation are exempt from disclosure pursuant to the "law enforcement exemption" stated in *W.Va. Code* § 29B-1-4(4):

"Records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement[.]"

W. Va. Code § 29B-1-4(4). While there are a number of reasons why exemption (4) is inapplicable to the records requested, the most obvious reason for its inapplicability is that all of the investigations for which records have been requested are closed.

The State Police itself deems the misconduct allegation investigations that the requested records address to be "closed." Appendix at 25 (*See* 09-24-10 Letter from McGinley to Hoyer, attached as Ex. D to Compl.). As such, the documents clearly fall outside of the law enforcement exemption and must be disclosed. *See W.Va. Code* § 29B-1-4(4); *Syl. Pt. 11, Hechler*, 175 W. Va. 434, 333 S.E.2d 799.

A balancing test for the law enforcement exemption is required similar to the test used to determine the applicability of the "unreasonable invasion of privacy" exemption discussed above:

"Once a document is determined to be a law enforcement record, it may still be disclosed if society's interest in seeing the document outweighs the government's interest in keeping the document confidential."

Id. at 192 W. Va. at 653; *see also Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50 (1984). In

explaining the proper balance, *Syllabus* Point 1 of *Ogden* explains that the exemption applies only to “an ongoing law enforcement investigation:”

“To the extent that information in an incident report dealing with the detection and investigation of crime will not compromise an ongoing law enforcement investigation, we hold there is a public right of access under the West Virginia Freedom of Information Act.”

Syl. Pt. 1, Ogden, 192 W. Va.648, 453 S.E.2d 631 (emphasis added). The State Police never offered any discussion, evidence or argument as to this exemption, and the lower court never addressed this balancing test in finding that the law enforcement exemption applied.

Ogden applied the law enforcement exemption the same way as federal case law applies the similar exemption under the federal FOIA. As the United State Supreme Court explained in regard to the analogous federal exemption, the agency asserting the law enforcement exemption must show the records relate to an ongoing or future investigation, not one that is closed:

“where an agency fails to ‘[demonstrate] that the . . . documents [sought] relate to any **ongoing investigation** or . . . would jeopardize any future law enforcement proceedings,’ Exemption 7 (A) would not provide protection to the agency’s decision. 1975 Source Book 440 (remarks of Sen. Kennedy). [T]he Court of Appeals was correct that the amendment of Exemption 7 was designed to eliminate ‘blanket exemptions’ for Government records simply because they were found in investigatory files compiled for law enforcement purposes[.]”

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 235-236 (U.S. 1978).

In *Foster v. United States DOJ*, 933 F. Supp. 687, 692 (E.D. Mich. 1996), the federal district court explained concisely:

“In order to invoke [the law enforcement exemption], an agency must show (1) that a law enforcement proceeding is pending or prospective and (2) that release of information regarding the proceeding could reasonably be expected to cause some articulable harm. *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978). The exemption applies when release of law enforcement

information would harm the government's case in court. *Id.* at 232.”

Once a law enforcement investigation is closed, the public agency no longer may assert the law enforcement exemption to FOIA as a basis for withholding documents. *See, e.g., Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 870 (D.C. Cir. 1980) (rejecting application of the analogous federal FOIA exemption in 5 U.S.C. § 552(b)(7) stating, “[t]here is no reason to protect yellowing documents contained in long-closed files.”).

While law enforcement records may be exempt from disclosure if the investigation is ongoing, that is not the case here. Additionally, however, the State Police's assertion of the privacy interests of officers raises the issue of whether these records are law enforcement records at all, or whether they are simply internal agency investigation records which are not exempt under the law enforcement exemption. For example, in *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W. Va. 648, 652, 453 S.E.2d 631, 635 (1994), the West Virginia Supreme Court of Appeals reiterated *Hechler's* clarification of the “law enforcement exemption,” holding:

“Records . . . that deal with' the detection and investigation of crimes, within the meaning of *W.Va. Code* §29B-1-4(4) [1977], do not include information generated pursuant to routine administration or oversight, but is limited to information compiled as part of an inquiry into specific suspected violations of the law.”

Id. (quoting *Syl. Pt. 11, Hechler*, 175 W. Va. 434, 333 S.E.2d 799). The State Police cant have it both ways - it cant be both a law enforcement records, and a personal, medical or similar file.

In arriving at its conclusion in *Syllabus Point 11*, the *Hechler* court cited *Stern v. FBI*, 737 F.2d 84, 89-90 (D.C. Cir. 1984). In *Stern*, the Court of Appeals for the District of Columbia held, “[i]nternal agency investigations present special problems in the [law enforcement] Exemption.” *Id.* In this context, “it is necessary to distinguish between those investigations conducted ‘for a

law enforcement purpose,’ and those in which an agency, acting as the employer, simply supervises its own employees.” *Stern*, 737 F.2d at 88-89. The *Stern* court held, “an agency’s general internal monitoring of its own employees to insure compliance with the agency’s statutory mandate and regulations is not protected from public scrutiny under” the law enforcement exemption. *Id.* (citing *Rural Housing Alliance v. U.S. Dep’t of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974)). Otherwise, the exemption would “devastate FOIA” because, if it is interpreted broadly, the exemption would eviscerate the general policy of FOIA. *Id.*

Ogden also echoed another earlier sentiment in *Hechler* that the “primary purpose of the law enforcement exemption is ‘to prevent premature disclosure of investigatory materials which might be used in a law enforcement action.’” *Id.* at 192 W. Va. at 652; 453 S.E.2d at 635 (citing *Hechler*, 175 W. Va. at 447; 333 S.E.2d at 812) (emphasis added). The documents requested pertain to oversight and review of the officers’ allegedly past wrongful behavior, not information relative to an ongoing criminal investigation or detection of crime. There is no ongoing law enforcement investigation, and the State Police do not assert the existence of an ongoing investigation, and its own report states that virtually all of its investigations from prior years have been closed.

In short, the law enforcement exemption refers only to confidential techniques and can not be asserted as a “blanket exemption” of anything conceivably related to law enforcement. *See Hechler*, 175 W. Va. 434, 333 S.E.2d 799. The records requested pertain to administration and oversight of the State Police force, not pending criminal investigations. *Id.* at *Syl.* Pt. 11. Even assuming, for the sake of argument, the records were found to resemble criminal investigations, rather than oversight and administration of the police force, the undisputed fact that the

investigations are closed overwhelmingly tips the scales in favor of disclosure when balancing the public's right to know about the State Police's handling of police misconduct. Syl. Pt. 1, *Ogden*, 192 W. Va. 648, 453 S.E.2d 631. Therefore, the exemption in *W. Va. Code* § 29B-1-4(4) plainly does not apply.

G. THE BELATED ASSERTION OF THE INTERNAL MEMORANDUM EXCEPTION

Petitioner initially requested the records at issue in May of 2010. Through its many responses and its Answer, the State Police never asserted the “internal memorandum” exemption in FOIA. It did so for the first time in its response to the motion for summary judgment, but even then nowhere was it explained how the records requested could qualify for that exemption, or even discuss any caselaw relating to that exemption. Because the burden of proof is on the Respondent to prove the applicability of the internal memoranda exemption, the lack of any showing whatsoever should have precluded the lower court from applying that exemption. Nevertheless, the lower court made a conclusory finding that the records requested “also fit into the categories of ‘[i]nternal memoranda or letters received or prepared by a public body[.]’”

In the response to the motion for summary judgment, filed tens months after the Complaint was filed and only ten days before the summary judgment hearing, Respondent for the first time asserted that the requested records were subject to the internal memoranda exemption. This belated assertion of additional reasons for nondisclosure was improper. *W. Va. Code* § 29B-1-3(4) mandates that the custodian of records must within five days of the records request either (a) provide copies; (b) advise the requestor of a time and place for inspection and copying of the records; or (c) “Deny the request **stating in writing the reasons for such denial.**” (Emphasis added). By law, Respondent had a mandatory duty to state the reasons for the denial, in writing,

within five days of the records request. The FOIA statute does not allow new reasons to be stated months later.

Respondent's attempt to state for the first time new reasons for denial of the records request ten months later in its response brief violates *W.Va. Code* § 29B-1-3(4)(c). As stated recently by the Pennsylvania Appeals Court:

“the [Pennsylvania Right-to-Know] Law does **not** permit an agency that has given a specific reason for a denial to assert a different reason on appeal. . . . If an agency could alter its position after the agency stated it and the requester addressed it in an appeal, then the requirements in [the Right-to-Know] Law would become a meaningless exercise. An agency could assert any improper reason for the denial of a right-to-know request and would not have to provide an arguably valid reason unless and until the requester filed an appeal. Such a reading of [the Right to Know] Law would make a mockery of the process set forth in the Law. . . . It is not fair or just to a requester to allow an agency to alter the reason given for a denial after the requester has taken an appeal based on the stated reason. Moreover, permitting an agency to set forth additional reasons for a denial at the appeal level does not allow for an expeditious resolution of the dispute.”

Signature Info. Solutions, LLC v. Aston Twp., 995 A.2d 510, 514 (Pa. Commw. Ct. 2010)

(emphasis in original). The same logic applies here. If Respondent is permitted to alter its position after the it stated it and the requester addressed it in this action, then the requirement in FOIA to “state in writing the reasons for the denial” would become a meaningless exercise.

Respondent could assert any improper reason for the denial of a public records request and would not have to provide an arguably valid reason unless and until the requester filed a lawsuit (or worse, as here, until ten days before a hearing for summary judgment). Such a reading of FOIA would make a mockery of the process set forth in the FOIA, and it is not fair or just to the Public to allow state agencies to alter the reason given for the denial after the requester has filed this Complaint based on the reasons stated. Moreover, permitting Respondent to set forth additional

reasons for its denial after the Complaint is filed does not allow for an expeditious resolution of the dispute.

H. THE SUMMARY JUDGMENT STANDARD UNDER FOIA

FOIA cases often can be decided by way of dispositive motions, without the need for discovery or taking evidence. The Supreme Court of Appeals has held, “[s]ummary judgment is the preferred method of resolving cases brought under FOIA.” *Farley v. Worley*, 215 W.Va. 412, 418, 599 S.E.2d 835, 841 (2004) quoting *Evans v. Office of Personnel Mgt.*, 276 F. Supp.2d 34, 37 (D.D.C. 2003).

When a summary judgment is filed in a FOIA case, the burden falls on the Respondent governmental official to present a legal justification for non-disclosure. “FOIA summary judgment is viewed through the evidentiary burden placed upon the public body to justify the withholding of materials.” *Farley v. Worley*, 215 W.Va. 412, 418, 599 S.E.2d 835, 841 (2004) (internal citation omitted). The party claiming exemption, here the State Police, has the burden of showing the express applicability of such exemption to the material requested. *See, e.g., Daily Gazette Co. v. West Virginia Dev. Office*, 198 W. Va. 563, 573, 482 S.E.2d 180, 190 (1996); *Queen v. West Virginia University Hospitals*, 179 W. Va. 95, 103, 365 S.E.2d 375, 383 (1987).

Curiously, the State Police did not respond to the Gazette’s Motion for Summary Judgment by addressing any of the caselaw cited, nor did the State Police present any evidence to meet its burden of proof. Rather, it merely submitted an affidavit that was nothing more than inadmissible conclusory statements that could not be considered by the Court. It never met its burden of entitlement to summary judgment.

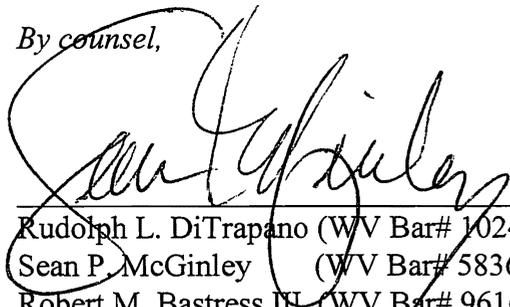
VIII. CONCLUSION

WVFOIA must be construed liberally in favor of disclosure of public records, and the exemptions asserted by the State Police must be construed narrowly against nondisclosure. Therefore, the *Gazette* respectfully requests the Court reverse the order of the lower court, and enter an order directing the Respondent to disclose the requested records, and award of Petitioner fees and costs.

Respectfully submitted,

THE CHARLESTON GAZETTE d/b/a DAILY GAZETTE COMPANY

By counsel,



Rudolph L. DiTrapano (WV Bar# 1024)
Sean P. McGinley (WV Bar# 5836)
Robert M. Bastress III (WV Bar# 9616)

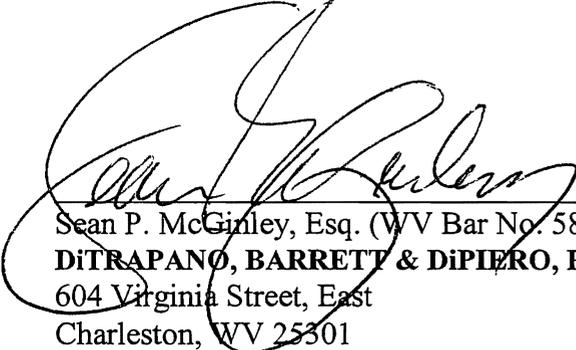
DiTRAPANO BARRETT & DiPIERO, PLLC
604 Virginia Street, East
Charleston, WV 25301
Phone: 304-342-0133
Fax: 304-342-4605
<http://www.dbdlawfirm.com>

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Sean P. McGinley, do hereby certify that I mailed a copy of the foregoing
PETITIONER'S BRIEF on this the 17th day of September, 2012, to the following address via
first class U.S. Mail:

John A. Hoyer, Esq.
Virginia Grottendieck Lanham, Esq.
Assistant Attorney General
West Virginia State Police - Legal Division
725 Jefferson Road
South Charleston, WV 25309



Sean P. McGinley, Esq. (WV Bar No. 5836)
DiTRAPANO, BARRETT & DiPIERO, PLLC
604 Virginia Street, East
Charleston, WV 25301
<http://www.dbdlawfirm.com>