

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0811

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

Petitioner,

v.

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

Respondent.

PETITIONER
CHARLESTON GAZETTE'S REPLY BRIEF

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III PRELIMINARY STATEMENT

Most of the assertions made by Respondent in the opening “summary” remarks of his Response Brief are, at best, either unsupported conclusory statements, or red herrings. However, two of these summary assertions are dead wrong. First, Respondent is remarkably transparent in his contempt for the basic propositions of the Freedom of Information Act. The FOIA mandates that it is,

“the public policy of the state of West Virginia that . . . [t]he 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). Despite the foregoing, Respondent audaciously states in his Response Brief that he is deciding what the Public “needs” to know: “The West Virginia State Police is providing all of the information the public might need to be assured that the agency is doing its job in processing and investigating complaints[.]” Response Brief at 4. Respondent has neither the right nor the power to decide what is good for the Public to know.¹

¹ The FOIA law gives all persons the right to full and complete information regarding the affairs of government - not simply the restricted and limited information the State Police may want to disclose:

“[A]ll 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.”

W. Va. Code § 29B-1-1. Despite the foregoing, the Respondent feigns indignation that the Public could ever question the State Police’s secret investigation of its own employees:

Second, Respondent ascribes “exploitation” as the “purpose or object” of the instant public records request. Response Brief at 3. This unsupported accusation is an affront to the Public’s interest in accountability of police officers investigating their own. “[T]he 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). Respondent’s suggestion that the Public’s interest is not in making the State Police accountable, but instead is for the purpose of “exploitation,” is nothing more than sophistry.

IV ARGUMENT

A THE THRESHOLD TEST FOR APPLICATION OF THE PRIVACY EXEMPTION

The Respondent fails to acknowledge or address the threshold question for application of the privacy exemption under FOIA: “The threshold inquiry as to the type of information initially subject to this exemption turns [on whether the information in the records are] detailed Government records on an individual which can be identified as applying to that individual.’

“These individuals [who oversee and review complaints against officers] are the upper echelon of the West Virginia State Police. To dispute the [their] oversight and review of those identified by the Early Identification System is to impugn the whole agency and the oversight of the agency.”

Response Brief at 2. The Respondent’s purported indignation aside, all members of the Public always have the right to “full and complete information” about the affairs of the State Police and any other agency in government. Given the history in the United States of police officers “Blue Wall of Silence,” see Chin, Gabriel; Wells, Scott *"The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury"* 59 University of Pittsburgh Law Review 233 (1998), Respondent’s refusal to disclose records that would allow the Public to know whether the State Police is protecting its own officers accused of misconduct is remarkable.

[citation omitted]” *Id.*, 456 U.S. at 602, 102 S.Ct. at 1961, 72 L.Ed.2d at 364.” *Hechler v. Casey*, 175 W. Va. 434, 444, 333 S.E.2d 799, 809 (1985). “[B]efore proceeding to balance the competing interests, the Court must find that the disclosure of the requested information suggests a potential invasion of privacy sufficient to trigger the application of the balancing test. This potential invasion must involve substantial and not minimal privacy concerns. Any potential invasion will not suffice.” *Tennessean Newspaper, Inc. v. Levi*, 403 F. Supp. 1318, 1320-21 (M.D. Tenn. 1975).²

In *Hechler v. Casey, supra*, this Court found persuasive a federal district court case that specifically found that records concerning police officers involvement in law enforcement activities are not “private facts” and therefore disclosure could not be an unwarranted invasion of a police officer’s privacy under FOIA :

“In *Cunningham v. Federal Bureau of Investigation*, 540 F.Supp. 1 (N.D.Ohio 1981), an action was brought under the Federal FOIA to compel disclosure of information held by the F.B.I. “Many of the individuals about whom the plaintiff seeks information are police officers. The Court does not believe that any denial of information concerning police officers can be justified under either exemption [exemption 6 or exemption 7(C) authorizing withholding of law enforcement investigatory records when disclosure would constitute an unwarranted invasion of personal privacy]....” 540 F.Supp. at 2. The court held that **there would not be an unwarranted invasion of the police officers' privacy because “[t]heir involvement in law enforcement activities is not a ‘private fact’.**” *Id.* “Absent some showing that disclosure would endanger their safety and, thus that Exemption 7(F) applies, defendants must produce these documents.” *Id.* *Cunningham* is persuasive[.]”³

² *Tennessean Newspaper* is the case cited and followed by this Court in *Child Protection Group v. Cline, infra*, for explaining the five factors used to decide if the release of a public record would constitute an unreasonable invasion of privacy.

³ *Cunningham* was reversed on other grounds, 765 F.2d 61 (6th Cir. 1985).

Hechler v. Casey, 175 W. Va. at 445, 333 S.E.2d at 810 (emphasis added).

Virtually all other courts addressing whether a police officer has a privacy interest in records of the officer's on-the-job activities have reached the same conclusion as this Court in *Hechler*, holding that the threshold test is **not** met because police officers have **no** privacy interest in such records. 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)).

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.2010). 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 v. Freedom of Info. Comm'n, 228 Conn. 158, 177, 635 A.2d 783, 792 (1993). It is unsurprising, in light of the holdings of courts around the country finding no privacy interest in similar records, that the Respondent simply ignores this threshold test in his response brief.⁴

**B POLICE OFFICERS ARE PUBLIC FIGURES WHEN WORKING, AND
THUS NO RIGHT TO PRIVACY**

As this Court has recognized, police officers are public officials, and the right to privacy does not extend to public officials. “Police and other law enforcement personnel are almost always classified as public officials. It is hard to conceive of speech more vital to a free and democratic society than speech concerning public officials, for the police are the embodiment of the government's maintenance of social order.’ R. Smolla, *Law of Defamation* 2.26[1] (1991); see *Starr v. Beckley Newspapers Corp.*, 157 W.Va. 447, 201 S.E.2d 911 (1974)[.]” *Dixon v. Ogden Newspapers, Inc.*, 187 W. Va. 120, 123 n.3, 416 S.E.2d 237, 240 n.3 (1992). “The ‘right of privacy’ does not extend to communications . . . which concern public figures or matters of legitimate public interest[.]” *Syllabus* Point 9, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 703, 320 S.E.2d 70, 74 (1983). In other words, because police officers are public officials, they have no right to privacy for records related to complaints about how they do their work.

⁴ The foregoing was clearly addressed in the *Gazette*'s first assignment of error, and under this Court's rules: “the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with petitioner's view of the issue.” *W.Va.R.App.Pro.* 10(d). Alternatively, the *Gazette* requested these records with names redacted. If the names are redacted, the records can not be “records on an individual which can be identified as applying to that individual.” *Hechler, supra*. Therefore, the records do not even remotely meet the threshold test for the application of the privacy exemption.

Because police officers have no right to privacy over such records, it follows that the Respondent can not assert FOIA's privacy exemption as a basis for nondisclosure of the requested records.

C THE FIVE FACTORS OF *Child Protection Group v. Cline*

Ignoring the threshold test for whether any right to privacy is extant, Respondent instead encourages the Court instead to look only at *Syl. Pt. 2 of Child Protection Group v. Cline*, 177

W.Va. 29, 350 S.E.2d 541 (1986). The *Cline* court stated:

“In deciding whether the public disclosure of information of a personal nature would constitute an unreasonable invasion of privacy, this Court now adopts a five factor test:

1. Whether disclosure would result in a substantial invasion of privacy and, if so, how serious? *See, e.g., Tennessean Newspapers, Inc. v. Levi*, 403 F.Supp. 1318, 1320-21 (M.D.Tenn.1975).
2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure. *See, e.g., Campbell v. United States Civil Service Comm'n*, 539 F.2d 58, 61 (10th Cir.1976).
3. Whether the information is available from other sources. *See e.g., Wooster Republican Printing Co. v. City of Wooster*, 10 O.O.3d 312, 56 Ohio St.2d 126, 135, 383 N.E.2d 124, 129 (1978).
4. Whether the information was given with an expectation of confidentiality. *See e.g., Judiciary Committee v. Freedom of Information Commission*, 39 Conn.Sup. 176, 473 A.2d 1248, 1254 (1983).
5. Whether it is possible to mould relief so as to limit the invasion of individual privacy. *See generally Rural Housing Alliance v. United States Dept. of Agriculture*, 498 F.2d 73, 78 (D.C. Cir.1974).

Id., 177 W. Va. at 32, 350 S.E.2d at 543. While it is obvious from the Response Brief that Respondent is unable to meet his threshold burden of showing police officers' have a legally cognizable privacy interest in public records of their on-the-job activities, as shown below, and even assuming *arguendo* there is a privacy interest in the requested records, none of the five

Cline factors weigh in favor if nondisclosure of these public records.

1 The First Cline Factor: Whether Disclosure Would Result in a Substantial Invasion of Privacy And, If So, How Serious?

This Court in *Cline* explained the first factor as a two part test:

“First, the court must determine whether disclosure would result in an invasion of privacy and, if so, how serious. This is a two-part test. The first part is whether there is a substantial invasion of privacy. Private information is something which affects or belongs to private individuals as distinct from the public generally. *See Black's Law Dictionary* 1076 (5th ed. 1979). The invasion into the private information must be substantial. Information of a non-intimate or public nature may be disclosed. *See generally, Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799, 810 (1985).”

Id. These two parts are addressed in turn.

a Disclosure Would Not Result in a Substantial Invasion of Privacy

As noted above, this Court has held public officials like police officers have no right to privacy. *See Dixon, supra*, and *Crump, supra*. Additionally, *Cline* explained this factor by referring back to *Hechler v. Casey*, where this Court already had given examples of the application of the test for deciding whether release of records similar to those requested here could constitute an unreasonable invasion of privacy. For example, in *Hechler*, this Court explained that FBI agents involvement in investigative activities for the FBI is not a private fact: “The agent's “involvement in investigative activities for the FBI is not a ‘private fact.’” *Hechler v. Casey*, 175 W. Va. at 445, 333 S.E.2d at 811, citing with approval *Ferguson v. Kelley*, 448 F.Supp. 919 (N.D.Ill.1977).

Most other courts in this Country hold that law enforcement officers have no privacy interest in these kinds of records related to complaints about their conduct at work. *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981); *White v.*

Fraternal Order of Police, 909 F.2d 512, 517 (D.C. Cir. 1990); *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 603 F. Supp. 377, 390 (E.D. Pa. 1985); *Cox v. New Mex. Dept. Of Pub. Safety*, 242 P.3d 501, 507 (N.M. Ct. App.2010); *State Org. of Police Officers v. Society of Professional Journalists-University of Haw. Chapter*, 83 Haw. 378, 398 (1996); *Spokane Police v. Liquor Control Board*, 769 P.2d 283, 286-87 (Wash. 1989); *Rawlins v. Hutchinson Publishing Company*, 218 Kan. 295, 543 P.2d 988 (Kan. 1975).

Respondent does not actually address the first *Cline* factor as it applies to the requested records other than to refer to *Manns v. City of Charleston Police Dep't*, 209 W. Va. 620, 550 S.E.2d 598 (2001) (*per curiam*). As a *per curiam* decision, *Manns* clearly did not intend to make new law, to change the law in West Virginia or to bind non-parties. The records requested by Petitioner here are not the same records requested in *Manns*.

More problematically, the *per curiam* decision in *Manns* was based on an inapposite 1982 intermediate court decision from New York state, *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). Respectfully, the *Manns* court's reliance on *Gannett Co., Inc.* was misplaced and erroneous for two major reasons – one, much more recent New York decisions take hold that such records are **not exempt** from disclosure, holding that such records do not include personal and intimate details of an employee's personal life,

“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). And second, the 1982 New York decision wrongly likened disposition of complaints against police officers to

pedestrian “job performance evaluations” in a personnel file, which is not what the requested records are in this case (and not what Respondent has ever asserted as a basis for nondisclosure). Considering that virtually all courts find that law enforcement officers do not have a privacy interest in these kinds of records, it is thus highly questionable whether the cursory conclusions of the *per curiam* decision in *Manns* were correct, but at the very least they are inapplicable to the case at bar.

b The Seriousness of the Invasion of Privacy

Because there is no privacy interest in the requested records, the inquiry into the level of seriousness of the invasion of privacy is unnecessary. However, it is worth noting that Respondent admits that the level of seriousness of the invasion of privacy for some requested records is slight, referring to those records as “minor complaints such as rudeness or tardiness.” It is axiomatic that one would have a lesser privacy interest in “minor complaints” that are not serious.

2 The Second *Cline* Factor: the Extent or Value of the Public Interest, and the Purpose or Object of the Individuals Seeking Disclosure

a the Extent or Value of the Public Interest

In its opening brief, Petitioner extensively addressed the extent and value disclosure of the requested records would have on the public interest in accountability. Petitioner’s Brief at 20-25.⁵ Respondent fails to address this issue, instead simply asserting the Public should be satisfied with “generalized statistics.” Response Brief at 9. Instead of addressing the many cases

⁵ The circuit court (in signing without any modifications the order proposed by Respondent) never addressed the extent or value of the public interest.

cited by Petitioner where courts have found a strong and valuable public interest in disclosure of these kinds of records, Respondent addresses only two cases, and those are not cases about accountability for these kinds of records.

For example, the Supreme Court of Hawaii discussed the public interest in accountability of police officer's fitness to perform public duty:

““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)). Nowhere does Respondent address this interest.

Similarly, the Tenth Circuit concluded a police officer's alleged misconduct is 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). Again, Respondent ignores and does not dispute this interest the Public has in accountability.

Perhaps most significant, however, is that Respondent in the Response Brief (like the circuit court below) ignores this Court's clear and detailed holding that the Public does has a very strong interest in accountability warranting disclosure of records concerning complaints filed and how they were decided. There is absolutely no reason, justification or logic for protecting state police officers and treating them differently from other individuals. Indeed, West Virginia caselaw directly on point addresses the applicability of the FOIA privacy exemption to complaints made against West Virginia doctors and lawyers with the State Bar and the State Board of Medicine.

This Court has 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 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:

"[I]nformation 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.

Addressing the very same issue, the Supreme Court of New Mexico found no basis to treat citizen complaints against police officers differently than citizen complaints against other professionals licensed by the state. *Cox v. New Mexico Dept. of Pub. Safety*, 148 N.M. 934, 941, 242 P.3d 501, 508 *cert. granted*, 149 N.M. 65, 243 P.3d 1147 *cert. quashed*, 150 N.M. 765, 266 P.3d 634 (2011).

Revealingly, rather than address the foregoing, Respondent has created a red herring defense to the public interest in accountability. First, he argues that the Public no interest in accountability because the Public does not “pick and choose” state police officers who respond to emergencies or investigate crimes. Response Brief at 21. Simply put, there is no legal or factual basis for making a distinction between police officers and others, in terms of public accountability, based on the fact that one may (sometimes) pick and choose a lawyer, or a doctor. The issue of public accountability is not based on “picking or choosing” a professional - the issue concerns how public bodies making decisions, and why those decisions are made. Indeed, the fact that state police officers are public employees, wielding exclusive and important government powers of force, actually heightens the public interest in accountability beyond the interest in how complaints against private lawyers and doctors are made.⁶

⁶ For example, in *King County v. Sheehan*, 114 Wash. App. 325, 347, 57 P.3d 307, 318 (2002) the court held:

“[P]olice officers are public employees, paid with public tax dollars. They are granted a great deal of power, authority, and discretion in the

The other red herring put forth by Respondent in an effort to avoid application of this Court's holdings of the public interest in accountability is the suggestion that the secret decision making by the State Police is part of the framework of a "paramilitary organization" that provides "vast oversight and controls[.]" Response Brief at 22. Respondent's argument boils down to the suggestion that because the Governor oversees the Secretary of Military Affairs, and the Secretary oversees Respondent, there is less public interest in accountability than how the State Bar or Board of Medicine makes decisions. Respondent's position violates the public policy mandate in *W.Va. Code 29B-1-1*, and if the Governor or Secretary of the Department of Military Affairs are involved in making the secret decisions on complaints filed against state police officers, that is all the more reason why they should be held accountable for the decisions that are being made, and the Public has every right to know what role the Governor and the Secretary are playing in this process.

b The Purpose or Object of the Persons Seeking Disclosure

Respondent seems to acknowledge that the purpose of Petitioner's records request is to inform the Public as to how complaints against officers are being handled - in other words, in furtherance of the public interest in accountability. Response Brief at 8. Thus, there is no

performance of their duties. [. . .] The legitimate media utilize lists containing names of police officers to track over time how well individual officers are performing their jobs, whether they participate in continuing police training and education programs, and to safeguard against corruption and abusive use of authority. These actions are undoubtedly related to governmental operations and a legitimate matter of public concern."

See Columbian Pub. Co. v. City of Vancouver, 36 Wash. App. 25, 29, 671 P.2d 280, 283 (1983).

dispute the purpose and object of the Petitioner is coextensive with the public interest in accountability.⁷ Respondent also argues Petitioner must show that negligently or improperly in order to obtain the requested records - this argument is based on an unpublished federal district court decision disposing of a *pro se* inmate's request for the entire personnel file on the agent who had prosecuted him. Utterly unlike the case at bar, the district court stated that the prisoner's, "interest is, at bottom, that of a private litigant, and he has not articulated any cognizable public interest." *Cano v. Drug Enforcement Admin.*, 2006 WL 1441383 (D.D.C. 2006). The *Cano* case is unpersuasive, and not on point.

3 The Third *Cline* Factor: Whether the Information is Available from Other Sources

The parties agree that the records requested are unavailable from any other source. Respondent mistakenly believes that this fact supports nondisclosure. Response Brief at 10 -12. Respondent is incorrect. "[I]f there is absolutely no other place or method to gather the information than from the particular Freedom of Information Act request before the court, this is a factor in favor of disclosure." *Cline, supra*, 177 W. Va. at 33, 350 S.E.2d at 544.

4 The Fourth *Cline* Factor: Whether the Information Was Given with an Expectation of Confidentiality

Respondent argues the records should not be released based upon administrative rules Respondent promulgated that require Respondent to keep the records confidential. As discussed

⁷ Petitioner questions the applicability of this part of the *Cline* factors because most court hold that the purpose or object of the requestor should *not* be considered. See *Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075, 1078-79 (6th Cir. 1998); *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1082, 1089 (9th Cir. 1997); *United Technologies Corp. by Pratt & Whitney v. F.A.A.*, 102 F.3d 688, 690-91 (2d Cir. 1996); *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463, 880 N.E.2d 10, 15 (2007).

at length in Petitioner's opening brief, Brief at 25 - 29, this Court, as well as courts around the country have held that administrative rules requiring confidentiality do create an exemption under FOIA or Open Records laws. In *State ex rel. Billy Ray C. v. Skaff*, 194 W.Va. 178, 459 S.E.2d 921 (1995) this Court rightly 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.*[" See *Anderson v. Health & Human Servs.*, 907 F.2d 936, 951 n. 19 (10th Cir. 1990); *Retired Railroad Workers Assoc. v. Railroad Retirement Board*, 830 F.2d 331, 334 (D.C. Cir. 1987). The Respondent ignores the foregoing, and instead argues simply that his rules qualify as "legislative rules" and should be treated as an exemption under FOIA even though FOIA specifically exempts only those records made confidential by a "statute." In West Virginia, a legislative rule is not the same as a statute, which is an act of the Legislature codified in the West Virginia Code. Courts may not read into a statute words that are not there: "[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted.*' *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996)" *Longwell v. Bd. of Educ. of County of Marshall*, 213 W. Va. 486, 491, 583 S.E.2d 109, 114 (2003) (emphasis in original).

This is a matter of simple statutory interpretation - if the Legislature had meant to include an exemption for records made confidential both under "legislative rules" and "statutes," it would have said so. The word "statute" is clear and unambiguous, and not subject to interpretation, and therefore legislative rules can not create an exemption under FOIA the same

way a statute can.

5 The Fifth *Cline* Factor: Whether the Information Was Given with an Expectation of Confidentiality

Petitioner explained in its opening brief that, assuming police officers had a cognizable and substantial privacy interest in nondisclosure that outweighed the public interest in accountability, that still would not justify nondisclosure of the records with names of the police officers and/or complainant redacted. As this Court has held, a public body has a 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 have not asserted that cost or burden is a reason for not redacting, and has provided no rationale justification for refusing to redact. In essence, Respondent argues that the release of any complaint against a police officer with names redacted could possible enable someone to narrow down the identity of the officer involved, and even if one could not identify the officer involved, disclosure could impugn all police officers by implication. Again, this argument is borderline nonsensical - if that speculative argument is sustained, redaction would never be an alternative and relief never could be moulded under *Cline*. The fifth factor in *Cline* must mean something, and it means that redaction of names

satisfies FOIA and warrants disclosure.

D THE PUBLIC INTEREST IN ACCOUNTABILITY FAR OUTWEIGHS ANY PRIVACY INTEREST

Respondent admits the great weight of authority holds that the public interest in disclosure of records relating to investigations of alleged police misconduct is substantial and far outweighs any privacy interest. Response Brief at 18. It is unnecessary therefore to repeat all of that authority in this reply. Respondent declines to address any of those cases, however, disingenuously suggesting that this Court actually considered and rejected those cases in its *per curiam* decision in *Manns, supra*, even though none of those cases are mentioned or discussed therein. Respondent cites no authority for his proposition that cases not cited or addressed in a *per curiam* opinion have been rejected as authority by this Court.⁸ Indeed, it defies logic, for if this Court was aware of those cases, it would have had a duty to discuss and distinguish them. It would be wrong as a matter of law, equity and policy for the Court to decline to consider overwhelming authority supporting disclosure of the requested records that clearly had not been brought to the Court's attention when *Manns* was decided.

Respondent also argues that because the Legislature has not affirmatively passed a statute changing this secret system of internal review of complaints against police officers, that somehow vitiates the public interest in accountability. There is no caselaw anywhere that

⁸ Respondent further argues the "government interest" in confidentiality outweighs the interest in accountability. Response at 23 -24. No cases support that proposition, and all of the caselaw rejects it. Indeed, as discussed above, even this Court has held that, "disclosure 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." *Daily Gazette Co. v. Committee on Legal Ethics of the W. Va. State Bar, supra*.

suggests the public interest in accountability can be dependent on a lack of action by the Legislature.

Lastly, Respondent states, without citation to any specific record or evidence, that some of the requested records, “may also include medical and psychiatric records, financial records, and information about any personal issue which may be causing stress that could affect the employee’s work.” Response Brief at 18. This entirely equivocal statement, unsupported by any evidence of record, is insufficient to meet Respondent’s burden of proving the applicability of the exemption.

By law, respondent has the obligation to detail each record that is exempt from disclosure. Our Supreme Court is clear in holding that a public agency asserting an exemption in FOIA litigation must create a *Vaughan* Index and a **detailed** justification for each document not disclosed,

“**must** produce a *Vaughn* index[.] The *Vaughn* index **must** provide a relatively detailed justification as to why each document is exempt, specifically identifying the reason(s) why an exemption under W. Va.Code, 29B-1-4 is relevant and **correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies.** [. . .] The public body **must** also submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt[.]”

Syllabus Point 6, in part, of *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004) (emphasis added).⁹ Respondent has not met his burden.

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

⁹ Even if some of the records are medical and psychiatric records, financial records, or information about personal issues, Respondent has proffered no reason whatsoever that those records can not be excluded and separated from the records that do not have such information.

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.). Bizarrely, Respondent’s argument for the “law enforcement” exemption is that the records it has represented all are in “closed” cases might not be closed. Response brief at 28. This inconsistent argument falls woefully short of meeting Respondent’s burden of proof on this exemption. Nevertheless, even if some case investigation was not closed, a balancing test would apply, something Respondent doesn’t even address. For the same reason the public interest in accountability outweighs the privacy exemption, it also outweighs the application of the law enforcement exemption to these records.

F THE INTERNAL MEMORANDUM EXCEPTION DOES NOT APPLY

Respondent argues that “some” of the requested records “may be exempt” under the internal memorandum exemption. Response Brief at 29 -30. This clearly equivocal assertion is unsupported by any evidence of record and has all the hallmarks of the bald, conclusory assertions of a throwaway argument. As noted in Petitioner’s opening Brief, Respondent failed to assert this exemption timely, and has waived it.

IV 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
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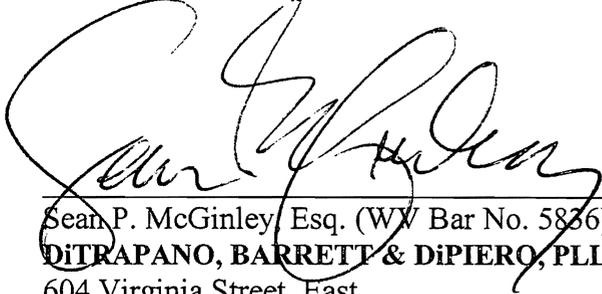
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CERTIFICATE OF SERVICE

I, Sean P. McGinley, do hereby certify that I mailed a copy of the foregoing
PETITIONER'S REPLY BRIEF on this the 20th day of November, 2012, to the following
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