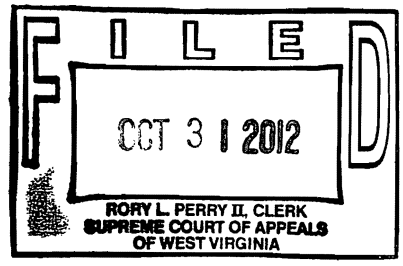

No. 12-0811

In The Supreme Court Of Appeals Of West Virginia

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

Plaintiff Below, Petitioner,

v.

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

Defendant Below, Respondent.

Honorable Jennifer Bailey
Circuit Court of Kanawha County
Civil Action No. 10-C-1971

RESPONSE BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

The documents requested by Petitioner are exempt from disclosure under the West Virginia Freedom of Information Act because the documents contain "information of a personal nature such as that kept in a personal, medical or similar file" and the release of that information would constitute an unreasonable invasion of privacy. Further, the information requested 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." Finally, some of the information requested may contain "internal memoranda or letters received or prepared by any public body."

Specifically, the documents requested are the quarterly, bi-annual and yearly reports produced by the Early Identification System, the "data provided to the Internal Review Board that is used to assist that body in determining if subordinates of certain supervisors tend to be employees frequently identified by the internal review system," and the central log of complaints maintained by the West Virginia State Police Professional Standards Section. Although Petitioner specifically refers to law enforcement officers throughout his brief, the information requested is not broken down into civilians or members of the West Virginia State Police. The requested records reflect complaints and investigations into the conduct of all employees of the West Virginia State Police.

The Early Identification System, which is maintained and administered by the Professional Standards Section is charged with producing quarterly, bi-annual and yearly reports for review by the Internal Review Board. The reports name employees who have one or more

complaints or use of force incidents.[1] Those employees subject to review by the Board are those who have two or more complaints in a quarter or three or more responses to resistance or aggression incidents in a quarter. The bi-annual and yearly reports are a compilation of the quarterly reports which also list each employee entered into the system by having one or more complaints or responses to resistance or aggression. Additionally, the yearly report identifies those employees who have received either four or more internal and/or external complaints or have been involved in six or more responses to resistance or aggression during that year. 81 W.Va. C.S.R. 10 §9

The Internal Review Board is composed of the Deputy Superintendent, the Chief of Staff Services, the Chief of Field Operations, the Officer in Charge of the Professional Standards Section and any other member authorized by the Superintendent. These individuals are the upper echelon of the West Virginia State Police. To dispute the Board's oversight and review of those identified by the Early Identification System is to impugn the whole agency and the oversight of the agency. The Internal Review Board may request any and all type of information in order to assist it in its review and decision making process regarding a specific individual. This information can include medical and/or psychological reports and records, financial records or any other information deemed necessary to the internal review board in addition to

[1] A use of force incident is the term previously used for a response to resistance or aggression. These responses could include physical presence, verbal direction, empty hand tactics, chemical weapon, police baton, or lethal weapon. All such responses must be documented and reviewed to ensure appropriate use of the chosen response. Documentation of a response to resistance or aggression does not mean that any wrong doing or inappropriate action was taken by the member or members. Once a perpetrator triggers the need to respond to his or her resistance or aggression any response from empty hand tactics through use of a lethal weapon must be documented for review. When documentation is triggered all officers present are documented as participating in the response to resistance or aggression, including those who used only their physical presence or verbal direction in response to the perpetrators resistance or aggression. An individual officer can have three documented physical presence responses or verbal direction responses and they will be identified by the Early Identification System and their responses will be reviewed by the Internal Review Board.

professional standards investigations. The information requested and provided is tailored for each individual under review.

The central log of complaints is the manner used to track complaints to ensure that each complaint proceeds through all phases from inception to closure and to keep track of the timeframes associated with each phase of the complaint and investigation procedure. The central log of complaints contains all of the pertinent information concerning each and every complaint that is made whether an internal complaint, initiated by another employee of the West Virginia State Police, or an external complaint, initiated by a member of the general public. The information included in the central log of complaints includes the subject of the complaint, the investigator, the supervisor, unit number, location code, exact dates of the incident complained of, when the complaint was made, narratives concerning the complaint, closure, and any disciplinary action taken. The central log of complaints is a fluid document that changes each time a new complaint is made and each time the status of a complaint changes as it proceeds through the process of investigation, review, closure, discipline and appeal.

Each of the requested documents contains information of a personal nature, the disclosure of which would result in a substantial invasion of privacy. The purpose or object of the Petitioner is to exploit the information for use in newspaper stories. The information requested is not available from other sources in that the information is used solely for the purposes identified in 81 W.Va. C.S.R. 10 and the information is expected to remain confidential throughout the entire process. Importantly for personnel and effective management, those who are named in these reports "may be referred to the employee assistance program, that the employee be referred for remedial training, or that the employee be subject to review by the employee's immediate supervisor to attempt to determine the reasons for the employee's conduct or any circumstances

that may have contributed to the conduct and evaluate the employee's current performance." 81W.Va. C.S.R. 10 §9.1

In addition to the fact that these documents all contain personal and private information, some of the documents contain information related to law enforcement investigations that are ongoing and some contain internal memoranda all of which are exempt from disclosure.

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 and meting out appropriate discipline to its employees as necessary by providing the public with the annual statistical report as to the activity of the Professional Standards Section. This generalized report provides an overview of the Professional Standards Section including its mission, organizational structure and staffing. The Report then provides the number of complaints for the calendar year stating how many alleged acts of misconduct were contained within those complaints and the number of external allegations and internal allegations are discussed. A chart is provided that lists the Total Complaints, Total Allegations, Internal Allegations and External Allegations, numbers are provided for the current year's report and the two previous years. The final section sets forth the disciplinary action taken on sustained allegations enumerating how many allegations resulted in the employee being counseled, how many allegations resulted in letters of reprimand, suspensions, demotions, or dismissals from employment. The number of allegations which resulted in the employee resigning prior to discipline is also listed as is the number of allegations which were sustained but no further action was taken.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Counsel for Respondent does not believe this case meets the criteria for oral argument because the dispositive issues have been authoritatively decided, the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not

be significantly aided by oral argument. However, should this honorable Court deem oral argument necessary, Counsel for Respondent would respectfully request the right to present argument.

ARGUMENT

A. Disclosure of the requested records would result in an unreasonable invasion of privacy

"The primary purpose of the invasion of privacy exemption to the Freedom of Information Act, W.Va. Code, §29B-1-4[a](2) [1977], is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.' *In Re Charleston Gazette FOIA Request*, 222 W.Va. 771, 779, 671 S.E.2d 776, 784 (2008) citing Syl. Pt. 2 of *Manns v. City of Charleston Police Dept.*, 209 W.Va. 620, 550 S.E.2d 598 (2001) and Syl. Pt. 6 *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985).

"In deciding whether the public disclosure of information under W.Va. Code §29B-1-4[a](2) (1980) would constitute an unreasonable invasion of privacy, this Court will look to five factors:

1. Whether disclosure would result in a substantial invasion of privacy and if so, how serious.
2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.
3. Whether the information is available from other sources.
4. Whether the information was given with an expectation of confidentiality
5. Whether it is possible to mould relief so as to limit the invasion of individual privacy."

Syllabus Point 2, *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986); Syllabus Point 4, *Manns v. City of Charleston Police Dept.*, 209 W.Va. 620, 550 S.E.2d 598 (2001); and Syllabus Point 5, *In Re Charleston Gazette FOIA Request*, 222 W.Va. 771, 779, 671 S.E.2d 776, 784 (2008). Review of these five factors leads to the conclusion that disclosure of records concerning West Virginia State Police Professional Standards Investigations, Employee

Rights, Early Identification System, Psychological Assessment and Progressive Discipline as requested by Petitioner would result in an unreasonable invasion of privacy to the employees, the complainants, and the witnesses.

Petitioner criticizes Respondent for not conducting an analysis of each of the cases cited in its Motion for Summary Judgment. The law on this issue is clear in West Virginia. To make its decision, the Court needed only to look at *Manns v. City of Charleston Police Department*, 209 W.Va. 620, 550 S.E.2d 598 (2001) and conduct the analysis as stated in *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541(1986). Additionally, the *Manns* Court had the vast majority of the cases Petitioner cites at its disposal for review and analysis because those cases were decided well before *Manns*.

The plaintiff in *Manns* sued the City of Charleston under the Freedom of Information Act (FOIA) W.Va. Code §§29B-1-1 to 29B-1-7 to compel disclosure of the names of law enforcement officers against whom complaints had been made or who were investigated through internal mechanisms; the names of every officer against whom civil or criminal complaints had been filed; and the outcome of those complaints or investigations. The Court looked to the Freedom of Information Act itself and determined that the records listed above "contain 'information of a personal nature such as that kept in a personal, medical or similar file' as set forth in W.Va. Code §29B-1-4(2)." *Manns v. City of Charleston Police Department*, 209 W.Va. 620, 624, 550 S.E.2d 598, 602 (2001). The Court further stated "Clearly, these records contain personal information which if disclosed would constitute an unreasonable invasion of privacy." *Id.* at 603, 626. Finally, the Court looked to the five factors listed above which had been set out in *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541(1986) to determine whether public interest outweighs the invasion of privacy. The Court found that the public interest did

not require the disclosure of the Internal Affairs material requested by the Plaintiff. *Manns v. City of Charleston Police Department*, 209 W.Va. 620, 550 S.E.2d 598 (2001).

Petitioner has requested the quarterly, bi-annual and yearly reports which are provided to the Internal Review Board through the Early Identification System, the data provided to the Internal Review Board to assist the board in determining if subordinates of certain supervisors tend to be employees frequently identified by the system, and the central log of complaints maintained by the Professional Standards Section. Although they are not investigations, these records most certainly contain personal information concerning the employee, personal information concerning the complainant, as well as specifics concerning the allegations against the employee and whether the investigation is pending or closed and the outcome of closed investigations. The quarterly, bi-annual and yearly reports are compiled to assist the Internal Review Board in analyzing the information from the early identification system. The data provided to the Internal Review Board can be evidentiary in nature or testimonial and will include all information the Board deems necessary for its review. This is not information generated pursuant to routine administration or oversight because it is information compiled as part of a focused inquiry into individual supervisors, specific allegations of violations of code, policy or rule or is generated pursuant to identification of an individual identified by the Early Identification system.

In reviewing the factors set out by the Court in *Child Protection Group v. Cline* and reiterated in *Manns*, it is clear the requested documents are all exempt from disclosure as set out below.

1. **Whether disclosure would result in a substantial invasion of privacy and if so, how serious.**

As found in *Manns* by the West Virginia Supreme Court of Appeals, to release the requested information would result in a substantial invasion of privacy because it will be clear from reviewing the requested documents which officers have been the subject of complaints of misconduct no matter how egregious, unfounded or potentially embarrassing the allegations. Because "the State Police **shall** investigate through internal investigation or inquiry **all** complaints received by the Section," this will include even minor complaints such as rudeness or tardiness and every one of those complaints is recorded in the central log of complaints. 81 W.Va. C.S.R. 10 §4.1 (emphasis added) Those minor complaints are also then included in the complaints that trigger identification by the Early Identification System and would then be reviewed by the Internal Review Board.

2. **The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.**

The stated purpose or object of the Petitioner is accountability of the West Virginia State Police and because the public pays the salaries of the employees of the West Virginia State Police, they have the right to know who they are and what they are or are not doing while working. At the time the FOIA request was made, the requestor was writing newspaper articles concerning misconduct by members of the West Virginia State Police and advocating for a civilian review board. Also at that time, legislation was proposed revising the Law Enforcement Training Subcommittee to create the Law Enforcement Professional Standards Committee. In reviewing the articles written prior to the FOIA requests it is apparent that Petitioner sought disclosure to identify specific individuals who have been accused of misconduct in order to write newspaper articles detailing the misconduct. The Supreme Court of Appeals has held that the

invasion of privacy exemption to FOIA applies to records regarding the outcome of a law enforcement agency's internal investigations. The primary purpose of the invasion of privacy exemption to the Freedom of Information Act is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. Syllabus Point 6, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E. 2d 799 (1985). There is no value in embarrassing individuals because they are alleged to have engaged in some type of misconduct. As well, there is no value in embarrassing those who have made complaints against employees of the West Virginia State Police. As set out in *Manns* "the public interest does not require the disclosure of the requested information." *Manns* at 604 and 626. The information Petitioner seeks in order to review the generalized statistics of the professional standards section has been provided, there is no need to embarrass individuals in pursuit of Petitioner's agenda to sell newspapers.

Petitioner asserts that because the public pays the officer's salaries the public has the right to know who their State Police officers are and also when and how their police officers are and are not performing their duties. This language is taken from *In re Charleston Gazette FOIA Request* which cites *Perkins v. Freedom of Info. Comm'n.* "The public has the right to know not only who their public employees are, but also when their public employees are and are not performing their duties. We conclude that numerical data concerning an employee's attendance records, including or limited to sick leave, does not constitute an invasion of personal privacy [and that] disclosure in this instance is required." *In re Charleston Gazette FOIA Request* 222 W.Va. 771, 781, 671 S.E.2d 776, 786 (2009) citing *Perkins v. Freedom of Info. Comm'n,* 228 Conn. 158, 635 A.2d 783 (1993) *In re Charleston Gazette FOIA Request* concerns allegations of double dipping by officers of the Charleston Police Department and the request was for payroll

records. That differs greatly from the matter at hand. The records requested here are not numerical data concerning attendance, these records contain personal and private information about allegations of conduct on or off the job and can reveal details about employees' private lives, finances or medical history. In this instance, the Petitioner has not articulated or even asserted a bare suspicion that the responsible officials of the West Virginia State Police have acted negligently or otherwise improperly in performance of their duties relating to Professional Standards Investigations, Employee Rights, Early Identification System, Psychological Assessment and Progressive Discipline.[2]

3. Whether the information is available from other sources.

Due to the nature of the information, the West Virginia State Police is the only source for the information requested. Specifically, the requested information is kept in the Professional Standards Section files under strict control of the officer in charge of that section pursuant to 81 W.Va. C.S.R. 10 § 3.3. As to the quarterly, bi-annual and yearly reports produced by the Early Identification System, the statistical information contained within those reports is contained within the annual generalized statistical report that is made available to employees and members of the public pursuant to 81 W.Va. C.S.R. 10 §3.5. This report was provided to Petitioner and includes the number of complaints and allegations that were made in the year requested and how many were external allegations or internal allegations (this information is also provided for the two previous years for comparison purposes), the action taken on sustained allegations for the year requested including how many allegations resulted in being counseled, a letter of reprimand,

[2] "to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the request must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety occurred." *Cano v. DEA*, 2006 WL 1441383 (D.D.C. May 2006)

suspension, demotion, dismissal, resignation prior to discipline, or sustained with not further action. The quarterly, bi-annual and yearly reports contain the information from the annual report relevant to each time period with the specific information such as the employee at issue, the specific allegations made, the date of the alleged occurrence, the date the complaint was made, the location where the employee worked and the identity of the employee's supervisor, the outcome of the investigation, any discipline issued and whether the employee appealed the discipline.

Neither the central log of complaints nor the data provided to the Internal Review Board are available from any other source. This log is kept in the Professional Standard Section files under strict control of the officer in charge of that section pursuant to 81 W.Va. C.S.R. 10 § 3.3.

The data provided to the Internal Review Board is not available from any other source and may not be able to be duplicated. When the Internal Review Board meets, they can request any information they find necessary to conduct their review and make determinations as to whether "no further action is required, that the employee be referred to the employee assistance program, that the employee be referred for remedial training, or that the employee be subject to review by the employee's immediate supervisor to attempt to determine the reasons for the employee's conduct or any circumstances that may have contributed to the conduct and evaluate the employee's current performance." 81 W.Va. C.S.R. 10 §9.1 This information they receive could be procured through inquiry of the director of Professional Standards or other senior staff members or through review of personnel files, medical records, psychological records, financial records, professional standards investigations, criminal investigative reports or any other document or information necessary for the review of the individual employee's situation.

The actual documents requested and all information other than generalized statistics which are contained within those documents, are not available from any other source because they are kept strictly and confidentially within the Professional Standards Section of the West Virginia State Police. Only those employees identified in 81 W.Va. C.S.R. 10 are permitted access to the information requested and even then, it is under the control of the officer in charge of the section.

4. Whether the information was given with an expectation of confidentiality

The information contained in the requested documents was initially received by the Professional Standards Section of the West Virginia State Police in confidence, was maintained by the Professional Standards Section in confidence and has not been disclosed unless pursuant to Court Order which provides for the protection and return of the documents. All of the information contained within these documents was given with the expectation of confidentiality. Beginning with the actual complaint through the investigation and conclusion of the matter all investigative materials are to be treated with the strictest of confidence. As stated in *Manns*, "the information was obviously given with an expectation of confidentiality as the appellants' policy and procedural manuals require all investigative reports to be 'treated with the strictest of confidence.' Furthermore, expectation of confidentiality is crucial to continued reports of possible misconduct." *Manns* at 604 and 626. The manner in which Professional Standards investigations within the West Virginia State Police are conducted is set out in Legislative Rule 81 W.Va. C.S.R. 10, West Virginia State Police Professional Standards Investigations, Employee Rights, Early Identification System, Psychological Assessment and Progressive Discipline.

Legislative Rule 81 W.Va. C.S.R. 10 is replete with references to confidentiality of the records maintained by the Professional Standards Section. "The OIC shall ensure the

confidentiality of all documents and reports relating to the investigation of any complaint through strict control of the Section's files." 81 W.Va. C.S.R. 10 § 3.3 "Investigators assigned to internal investigations or inquiries shall report directly to the OIC, and shall not discuss the investigation with anyone not assigned to the Section or specifically authorized by the OIC or Superintendent to receive the information." 81 W.Va. C.S.R. 10 § 4.2 As to Personnel Complaint Forms received by employees not assigned to the Professional Standards Section, the Rule states "The employee shall forward the completed form via facsimile to the Section as soon as possible, and mail the original directly to the Section." 81 W.Va. C.S.R. 10 § 5.2 "Employees taking complaints shall not make or retain any copies of the Personnel Complaint Form or any related documents other than those kept in the normal course of business in order to ensure the confidentiality of the investigative process." 81 W.Va. C.S.R. 10 § 5.6 In order to reiterate the importance of this rule, at the bottom of the West Virginia State Police Personnel Complaint Form is printed the following:

> Distribution: Fax to Professional Standards at 746-2408
> Mail original to PSS, 725 Jefferson Road
> South Charleston, WV 25309-1698
> No Copies kept by State Police Employees

In order to ensure confidentiality and limit the number of people who have knowledge of complaints, section 5.5 advises "Employees receiving complaints shall advise complainants that they may contact the Section directly in order to file a complaint in lieu of registering the complaint at the local State Police office. The complainant may contact the Section by calling (304) 746-2110 or by writing to or appearing at the Section's offices." 81 W.Va. C.S.R. 10 § 5.5 The address for the Section's offices is also listed in the CSR for ease of reference.

The location and access to Professional Standards Section documents is addressed by the Rule as follows:

> "The Section shall store case files in a secured environment, with access restricted to the Superintendent, the OIC and members and civilian employees of the Section. Investigators or any other employee working with the investigator and outside of the Section office shall store and handle documents, evidence and other items related to the investigation or inquiry in a manner that shall ensure their confidentiality and integrity. 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."

81 W.Va. C.S.R. 10 § 6.2

These confidentiality concerns are further highlighted by setting out exactly what information should be made available to the public, "The OIC shall prepare an annual statistical report concerning the Section's activities which shall be available to employees and members of the public." 81 W.Va. C.S.R. 10 § 3.5 "The Section shall make information available to the general public regarding the procedures to be followed in registering complaints against the State Police or its employees." 81 W.Va. C.S.R. 10 § 3.7 "Copies of the original tapes or transcriptions shall be made available only to the employee who made the statement with the understanding that the employee shall not disclose the contents of either; unless the employee is required to disclose the contents as a means of defending himself or herself. Any breach of this procedure is an offense that may subject the employee to disciplinary action." 81 W.Va. C.S.R. 10 § 8.4 "The results of a polygraph examination of an employee are confidential and shall be available only to the employee, the Superintendent, the OIC, the investigator and grievance evaluators participating in the State Police employee grievance procedure." 81 W.Va. C.S.R. 10 § 8.9.7

The news media was even specifically considered in the following section of the rule. "As a part of an internal investigation or inquiry, the State Police shall, to the degree possible, protect an employee from exposure to the news media with or without the employee's written

consent." 81 W.Va. C.S.R. 10 § 8.12 Further, an employee facing pending discipline who requests a copy of the case file "shall sign a receipt indicating that he or she has taken possession of the case file material, and execute a confidentiality agreement with the State Police agreeing to not disclose any of the material contained in the case file for any purpose other than to defend himself or herself. An employee who violates this procedure may be subject to disciplinary action." 81 W.Va. C.S.R. 10 § 8.14

When a psychological assessment of an employee is warranted confidentiality is especially important. The Rule provides as follows:

> Communications between the Superintendent and the State Police psychotherapist or outside consultants, regarding test results, written opinions, recommendations, notes, reports and action taken are confidential provided that the employee who is subject to a fitness for duty evaluation, upon written request to the Superintendent within thirty days of an evaluation, may review the written recommendation submitted to the Superintendent from the psychotherapist. The Section shall secure these documents in the Section's office in locked cabinets or secure magnetic media, and shall be released only by order of a court of competent jurisdiction.

81 W.Va. C.S.R. 10 § 10.5.5

An individual who is complaining about the conduct of a member of the West Virginia State Police has a right of privacy. Petitioner has stated that there is not an expectation of privacy if the complainant can be criminally prosecuted for giving false information to the West Virginia State Police or if the complainant can tell whomever they please about the allegations they have made. These facts in no way alleviate the West Virginia State Police of its responsibility to hold all information concerning Professional Standards Section investigations, the Early Identification System, and the information provided to the Internal Review Board in the strictest of confidence.

5. **Whether it is possible to mould relief so as to limit the invasion of individual privacy.**

The only way to mould the relief so as to limit the invasion of individual privacy is to provide only the generalized statistical information contained in the annual statistical report which is a generalized culmination of the quarterly, bi-annual and yearly reports produced by the Early Identification System which contain the statistical information from the central log of complaints. There is no way to mould the relief so as to limit the invasion of individual privacy as it relates to the request for the data provided to the Internal Review Board to assist it in determining whether subordinates of certain supervisors tend to be employees frequently identified by the system because that information is so varied and can encompass large amounts of personal and private information. Additionally, the viewer would certainly be able to determine which employees were the subjects of specific complaints.

The Legislature and this Court have already determined how to provide this information to the public so as to limit the invasion of individual privacy. The Annual Statistical Report which the West Virginia State Police is mandated to create and make available to the public provides that information. Those who wrote the legislative rule relating to the professional standards system and the manner investigations would occur and be recorded knew that the public had the right to know certain information about how the members of the West Virginia State Police are conducting themselves. In order to insure that the public can determine that the WVSP and the Professional Standards Section are doing their jobs in processing professional standards complaints against its employees, investigating those complaints, closing the complaints and imposing discipline when allegations are sustained the statistical information is provided to the public. The statistical information shows that the West Virginia State Police is carrying out its responsibility to the public to take and investigate complaints and to impose

discipline when warranted. To provide the information in any manner other than generalized statistics, would allow the public to garner personal information. The viewer could cross reference the information to determine who made or was the subject of particularly embarrassing allegations. Anything other than generalized statistics fails to give the whole story as to whether there existed misconduct and how egregious or minor it was and can paint a picture of a bad officer where none exists. A vicious and unfair cycle is created. Giving specific officer numbers of alleged misconduct without explanation can impugn the character of a fine officer by implication. Further explanation of the numbers reveals information designed to be kept confidential by the Rules, FOIA exemptions and West Virginia case law.

Based upon the above five factors and the holding in *Manns*, it is clear that disclosure of the anything more than the annual generalized statistical report would result either in a substantial invasion of privacy essentially requiring disclosure of all claims of misconduct no matter how egregious, unfounded or potentially embarrassing or in an essence of misinformation relating to the officer. Further, the entire process from the filing of a complaint through the appeal of imposed discipline is confidential and all parties, complainant, employee and witnesses are made aware that the information they are providing will remain confidential. The fact remains that the "expectation of confidentiality is crucial to continued reports of possible misconduct" by employees of the West Virginia State Police. Therefore, the public interest is satisfied by the annual statistical report and does not require disclosure of the quarterly, bi-annual or yearly reports of the Early Identification System, the data provided to the Internal Review Board or the Professional Standards Section central log of complaints.

B. The public interest in accountability does not require the disclosure of the records requested.

Petitioner argues that the Court should take notice of the "great majority of courts" which have held that the public interest in disclosure of records relating to the investigation of alleged police misconduct is substantial and far outweighs any privacy interest. While many courts have so held, this Court holds that W.Va. Code §29B-1-4(a)(2), the privacy exemption applies to records of professional standards investigations. *Manns v. City of Charleston Police Department*, 209 W.Va. 620, 550 S.E.2d 598 (2001)

Petitioner states "the public interest in accountability far outweighs the speculative possibility of an invasion of privacy by the disclosure of the records requested." There is not a "speculative possibility." Should these documents be released there will be an unreasonable invasion of privacy. The information contained in the central log of complaints alone is information of a personal nature because it contains the employee who is the subject of each complaint, the investigator who investigated or is investigating each complaint, the supervisor of the employee against whom the complaint was made, the employee's unit number, the location code where the employee is assigned to duty, the exact date(s) of the incident complained of, the date the complaint was made, narratives concerning the complaint, closure, and any disciplinary action taken. It would certainly be an invasion of privacy to release the information provided to the Internal Review Board which includes the Professional Standards Investigations and may also include medical or psychiatric records, financial records, and information about any personal issues which may be causing stress that could affect the employee's work.

The Court decided *Manns* on May 15, 2001 and had at its disposal, the vast majority of the cases Petitioner cites in its brief. The cases cited by Petitioner in its section concerning the public interest in accountability include cases decided in 1966, 1975, 1976, 1980, 1981, 1984,

1985, 1986, 1989 and 1996. Each and every one of those cases could have been considered by this Court when deciding *Manns*. It is clear that this Court did not find these cases persuasive at the time *Manns* was decided. Two recent cases are cited by Petitioner, *Cox v. New Mex. Dept. of Pub. Safety,* 242 P.3d 508 (N.M. Ct.App. Aug 16, 2010) and *Bainbridge Island Police Guild v. City of Puyallup*, 2011 Wash. LEXIS 660 (Wash. 2011) The issue in *Cox* concerned whether the following two exemptions applied to exempt an internal investigations of the New Mexico Department of Public Safety from disclosure, first, letters or reference concerning employment, licensing or permits and second, letters or memorandums that are matters of opinion in personnel files or students' cumulative files. Neither of these exemptions applies in this matter and would not assist in determining whether the quarterly, bi-annual and yearly reports of the Early Identification System, the data provided to the Internal Review Board or the central log of complaints are exempt from disclosure under the West Virginia Freedom of Information Act.

The *Bainbridge* Court ordered disclosure of a criminal investigation and an internal investigation into allegations of a police officer's sexual misconduct with the officer's name redacted. Two investigations were conducted into the allegations of sexual misconduct against the police officer, an internal investigation and a criminal investigation. Each investigation was conducted by different outside agencies. The Bainbridge facts and issues are distinguished from the facts and issues in this matter. The documents requested in *Bainbridge* were the actual reports which were authored by the outside agencies as opposed to the central log of complaints, quarterly, bi-annual and yearly reports of the Early Identification System and the data provided to the Internal Review Board all of which is maintained by the West Virginia State Police Professional Standards Section in accordance with 81 W.Va. C.S. R. 10 which was promulgated with the intention that all information would remain confidential. The manner in which

complaints are taken, investigated, reviewed, closed and discipline instituted has been set out very clearly with approval by the Legislature and even with the input of this Court in *State ex rel. Billy Ray C. v. Skaff*, 194 W.Va. 178, 459 S.E.2d 921 (1995). The rules which govern the professional standards investigations of the West Virginia State Police specifically set out what documents and information are to be protected to maintain the confidentiality of the system and what data will be provided to the public in order for the public to be assured that the West Virginia State Police are performing their duties as it relates to Professional Standards Investigations, Employee Rights, Early Identification System, Psychological Assessment and Progressive Discipline. This taken with personal information exemption to FOIA contained in W.Va. Code §29B-1-4(a)(2) necessitates that the requested documents in this matter not be disclosed.

Accountability includes sending a letter to the complainant acknowledging receipt and processing of the complaint, providing the complainant with the individual case number and the name of a person who can relate the status of the investigation and the sending of closing letters to all concerned parties upon completion of each investigation. 81 W.Va. C.S.R. 10 §3.4 This entire process is about accountability. This accountability is specific to the complainant so that he/she may be assured that the Professional Standards Section is handling their allegations pursuant to the process set out in 81 W.Va. C.S.R 10.

The employees of the West Virginia State Police are accountable to the public in ways that work contemporaneously with the professional standards section. This includes the responsibility of the agency to provide to the prosecuting entity information that is responsive to *Giglio v. United States,* 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) and *Brady v. Maryland,* 373 U.S. 83; 83 S.Ct. 1194; 10 L.Ed.2d 215 (1963). Further, individual's may report

allegations of civil rights violations to the FBI or they may file civil actions alleging civil rights violations and seeking monetary damages related to the alleged conduct. Individuals may also report criminal violations by any employee of the West Virginia State Police to the prosecuting attorney, United States Attorney or another law enforcement agency who has authority in the particular jurisdiction.

Petitioner compares the employees of the West Virginia State Police to doctors and lawyers and the review of their disciplinary procedures. Members of the West Virginia State Police whose statutory mission is "the statewide enforcement of criminal and traffic laws with emphasis on providing basic enforcement and citizen protection from criminal depredation throughout the state and maintaining the safety of the state's public streets, roads and highways" W.Va. Code §15-2-12(a) provide completely different services than doctors and lawyers. The public has a right to know information regarding lawyers and doctors because they are able to pick and choose who they hire for those services. The public is not able to pick and choose which officer responds to their call for an emergency or which officer is investigating a crime they committed. The public wants to make an informed decision as to which doctor or lawyer they hire for a specific purpose and therefore there is a valid interest in releasing the information concerning those disciplinary procedures. Law enforcement officers deal with people who are charged with crimes and may make allegations of misconduct hoping to assist their criminal defense.

Petitioners are trying to put employees of the West Virginia State Police in the same category as doctors and lawyers, however the manner in which they do their jobs is quite different. For instance lawyers and doctors are in many instances private practitioners. While they have their own mechanism for handling complaints, they may not have the day to day

oversight that the West Virginia State Police does with its employees. The West Virginia State Police work within the framework of a paramilitary organization where even the highest ranking officer, the Superintendent must answer to the Secretary of the Department of Military Affairs and Public Safety and the office of the Governor. This framework alone provides vast oversight and controls that are not necessarily provided to doctors and lawyers. Further, the documents requested are those that assist the senior staff of the West Virginia State Police in determining whether external or internal stressors are affecting the employee's ability to perform their duties through the Early Identification System and Internal Review Board. This is a proactive system aimed at recognizing stressors before they become problems and such a system deserves confidentiality. The central log of complaints includes allegations of conduct which occur on or off the job and should also remain confidential.

In addition to Legislative review of the rule, this Court has reviewed the then proposed rule and made certain findings in *State ex. rel. Billy Ray C. v. Skaff.* The Court specifically held that a civilian review panel was not required because the ultimate decision as to misconduct is to be made by the Superintendent. *State ex. rel. Billy Ray C. v. Skaff*, 194 W.Va. 178, 182, 459 S.E.2d 921, 925 (1995). The Court responded to the relator's objection that the annual report was not thorough enough by finding that "a copy of an annual report has been furnished and we find that it is adequate." This report included "data on complaints filed, investigations, dispositions and discipline." Id. at 184, 926.

The West Virginia Legislature has looked into whether the public interest would best be served with a different avenue of conducting investigations into the alleged misconduct of law enforcement officers during several legislative sessions over the last few years. Studies have been conducted and cited concerning the manner in which other law enforcement agencies and

other states make such inquiries. All options have been thoroughly investigated yet the Legislature has not changed the manner in which Professional Standards Section investigations are conducted nor has it changed the manner in which the records of that section are maintained and most importantly the strict adherence to confidentiality of the process and its records has not been altered in any way.

C. The public interest in disclosure of the requested records does not outweigh the government interest in confidentiality.

Society's interest in reviewing these documents does not outweigh the government's interest in keeping them confidential. The West Virginia State Police's interest is to preserve the confidentiality that has already been promised to both the public and the employees who are involved in a Professional Standards Section investigation whether as the complainant, the subject of the complaint or witnesses to the alleged misconduct. Employees who are interviewed in connection with a Professional Standards Section investigation have limited rights. These rights are set out in 81 W.Va. C.S.R. 10 § 8 entitled "Employee Rights and Conduct during an Internal Investigation or Inquiry." Employees are read their *Garrity* rights and are required to respond to questions. Employees may be required to be photographed, participate in a line-up or submit financial disclosure statements. Employees may be dismissed for refusing to take a polygraph examination when ordered to do so. Additionally employees may be required to submit to medical, psychological or laboratory examinations. 81 W.Va. C.S.R. 10 §§ 8.1 through 8.16. To require that of employees necessitates that the process remain confidential. If it is held that such information is no longer confidential but will be subject to FOIA requests, employees may prefer to leave employment than to provide any information in connection with

these investigations. Additionally, citizens may resist lodging complaints with the Section if the process is not confidential.

Confidentiality encourages honest reporting. It is the responsibility of the West Virginia State Police that when a member of the public makes a complaint against an employee of the West Virginia State Police the information is confidential and remains so.

The public's interest in obtaining this information is outweighed by the stated purpose of analyzing the data pertaining to complaints lodged against employees in an effort to identify employees who may be experiencing stress or other problems which may adversely affect job performance. This process should remain unimpeded by the self-censoring that would occur during investigations and during the information gathering process for the Internal Review Board if employees, complainants and witnesses knew the information would be subject to public dissemination. The public's interest is served by a system aimed at identifying the root of why an employee has complaints made against him or her so that the appropriate assistance can be provided.

D. The exemptions under FOIA taken in concert with 81 CSR 10 clearly show the legislature's intent to exempt the requested documents from disclosure because to release the requested documents would result in an unreasonable invasion of privacy.

Pursuant to W.Va. Code §15-2-25, the superintendent may make and promulgate proper rules for the "government, discipline and control of the West Virginia State Police." Further, the Court in *State ex rel. Billy Ray C. v. Skaff,* 190 W.Va. 504, 438 S.E.2d 847 (1993), directed the Superintendent to promulgate formal written investigation procedures for allegations misconduct by employees of the West Virginia State Police. The West Virginia State Police Professional Standards Section, the Early Identification System and the Internal Review Board are created

through legislative rule 81 W.Va. CSR § 10. This legislative rule sets out exactly how these three items work together to ensure that all employees of the West Virginia State Police are working free from undue problems and stressors. The fact that the West Virginia State Police takes these extra steps to try to identify stressors or problems before they manifest themselves in an adverse manner should be applauded not torn apart by taking away the confidentiality of the system. The reason and the only way these systems can work is due to the confidential nature of the procedures and the continued confidentiality of the records as has been put in place with the enactment of legislative Rule 81 W.Va. C.S.R. 10.

The W.Va. Code states that a "Legislative rule means every rule, as defined in subsection (i) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law...Every rule which, when effective is determinative on any issue affecting private rights, privileges or interests is a legislative rule." W.Va. Code §29A-1-2(d). Legislative rule 81 W.Va. C.S.R. 10 certainly affects the private rights, privileges and interests of every employee of the West Virginia State Police and those individuals who make complaints against employees of the West Virginia State Police as well as those individuals who are witnesses to incidents subject to review under the rule. This rule specifically provides them with a right to privacy concerning professional standards investigations and the internal review board's assessment and decisions concerning the early identification system. "A regulation that is proposed by an agency and approved by the Legislature is a 'legislative rule' as defined by the State Administrative Procedures Act, W.Va. Code §29A-1-2(d) and such a legislative rule has the force and effect of law." Syl. Pt. 5 *Smith v. W.Va. Human Rights Commission*, 216 W.Va. 2, 602 S.E.2d 445 (2004).

"Once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious." Syl. Pt. 2, *W.Va. Health Care Cost Review Authority v. Boone Memorial Hospita,l* 196 W.Va. 326, 472 S.E.2d 411 (1996). Petitioner is specifically requesting information concerning the Early Identification System. This is referred to in the Scope of the Rule as "internal systems aimed at evaluating and addressing employees suffering from either job-related or non-job related stress." Legislative Rule 81 W.Va. C.S.R. 10 §1.1 The system is then defined as "A system designed to analyze data pertaining to complaints lodged against employees and employee uses of force in an effort to identify employees who may be experiencing stress or other problems which may adversely affect job performance." 81 W.Va. C.S.R. 10 § 2.8. The Early Identification System is maintained and administered by the Professional Standards Section of the West Virginia State Police. An Internal Review Board is charged with the responsibility to review and evaluate employees who are identified by the Early Identification System. This review and evaluation is conducted in order to make a determination as to whether an employee is suffering from job related or non-job related stress. Such a determination is a very private matter and it would be a completely unreasonable invasion of privacy for anyone, other than those designated individuals, to be reviewing the information that is at the core of making such a decision.

Further, this legislative rule works in concert with the privacy exemption of FOIA. There is no better way to determine that the requested records are exempt from disclosure under W.Va. Code §29B-1-4(a)(2) than to look to this rule which consistently repeats that the information is

gathered in confidence and the records of the professional standards section are and will remain confidential. The rule further provides that none of that information is to be disseminated without the specific authorization of the Superintendent or by Order of a Court of competent jurisdiction. Therefore, the legislative rule mirrors the finding of this Court in *Manns*. The information contained within the Professional Standards Section files is protected by the invasion of privacy exemption to the Freedom of Information Act in order to protect individuals from injury and embarrassment.

E. Disclosing the requested records with names redacted will not limit the invasion of individual privacy.

Redacting the names from the requested records will still leave enough personal information for the Petitioner to know the identity of the employees involved or to cross reference the information in order to discern which employee is the subject of the complaint or investigation. Once this information is out in the public, there is no way to oversee how that information is used or misused. The only way to protect individual privacy is to not release that information. As previously explained, there is no way to mould relief so as to limit the invasion of individual privacy, including redaction of names. The least restrictive way to provide the information requested without invading the individual privacy of the complainant, the employee or any witnesses is to provide the annual statistical report which shows the number of complaints, the resolution and discipline and a comparison to previous years. Giving minimal complaint numbers by officer is also improper because it can be misleading without explanation and explaining gives information designed to be exempt by FOIA. Thus, the appropriate means of dissemination is the generalized annual statistical report which has been provided to Petitioner.

F. The requested information is exempt from disclosure because it may contain "records of law enforcement agencies that deal with the detection and investigation of crime and internal records and notations of such law enforcement agency with are maintained for internal use in matters relating to law enforcement."

The requested records may certainly contain "records of law-enforcement agencies that deal with the detection and investigation of crime and 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(a)(4) The majority of the employees subject to professional standards investigations, Early Identification System and the Internal Review Board are law enforcement officers whose job it is to investigate crimes. Therefore, it stands to reason that many of the professional standards complaints received will be related to one or more criminal investigations. Given the time it takes for some criminal investigations to be completed, the individual to be charged and the criminal matter to reach a conclusion, it is likely that there will be some professional standards investigations complaints that are logged, investigated and closed, are part of an identifying complaint in the Early Identification System and will be reviewed by the Internal Review Board before the attendant criminal matter has reached its conclusion. Consequently, even though an internal investigation may be closed that does not mean that any or all criminal investigations associated with the internal investigation are closed. In addition, as previously stated, the Internal Review Board reviews information concerning employees who have two or more **complaints** in a quarter. The complaint will not necessarily be closed when the Early Identification System labels it as one of two or more complaints received by an employee in a quarter. It is not unusual for the investigation into a professional

standards complaint to be pending when the individual is evaluated by the Internal Review Board.

Professional standards investigations of law enforcement officers often stem from criminal investigations and prosecutions. Complaints are logged upon receipt and may be identified by the Early Identification System brought before the Internal Review Board before either the criminal investigation or prosecution is complete and even before the Professional Standards Section investigation is complete. Because the central log of complaints is a fluid document that changes as each complaint is added and proceeds through to closure how many open investigations, either criminal or internal, will change as well. The records requested by Petitioner may therefore contain information concerning open criminal investigations and pending Professional Standards Section investigations. Those records are exempt from disclosure pursuant to W.Va. Code §29B-1-4(a)(4).

G. Some of the requested records may be exempt from disclosure because they contain "internal memoranda or letters received or prepared by any public body."

Some of the documents provided to the Internal Review Board may be exempt from disclosure pursuant to W.Va. Code §29B-1-4(a)(8) which provides that "internal memoranda or letters received or prepared by any public body" are exempt from being disclosed to the public. As more fully set forth above, the Internal Review Board reviews each individual identified by the Early Identification System to determine whether employees are experiencing job-related or non-job related stress that may adversely affect their job performance. In order to evaluate each situation, the Board may request any information necessary to make a determination as to what, if any, action is required to assist the employee. Because the Board may request any type of information, it stands to reason that some of that information will include "written internal

government communications consisting of advice, opinions and recommendations which reflect a public body's deliberative, decision-making process; written advice, opinions and recommendations from one public body to another; and written advice, opinions and recommendations to a public body from outside consultants or experts obtained during the public body's deliberative, decision-making process" and such documents are exempt from disclosure. *Syl. Pt. 4 Daily Gazette Company v. West Virginia Development Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996). This exemption meant to "promote frank and open discussions during an agency's deliberative process." Id at 189, 572. There is no more important deliberative process than one that is meant to evaluate any problems an employee may be having and to then provide assistance to that employee. The documents at issue are used for the administrative purpose of determining what, if any difficulties the employee is undergoing whether in their job, their personal or family life, their finances or health, and how to best address the needs of the employee to ensure they are working to their full potential.

CONCLUSION

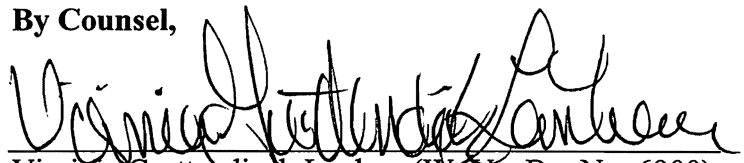
The quarterly, bi-annual and yearly reports produced by the Early Identification System, the data provided to the Internal Review Board, and the central log of complaints all of which are maintained by the West Virginia State Police Professional Standards Section are exempt from disclosure under the West Virginia Freedom of Information Act. These documents contain information that is personal and private and has been gathered with the expectation of confidentiality. In order to be accountable to the public, the least restrictive method of providing the information sought by the Petitioner is through the Annual Statistical Report of the West Virginia State Police Professional Standards Section and that document has been provided to

Petitioner. Therefore, Respondent respectfully requests that the Court **DENY** Petitioner's Appeal in its entirety.

Respectfully submitted,

Colonel Timothy S. Pack, Superintendent of the West Virginia State Police,

By Counsel,



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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, I served the foregoing ***Response to Brief of Appellant*** on all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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