No. 28743 -- Laura Manns v. City of Charleston Police Department and Jerry Riffe, in his official capacity as Chief of Police

FILED
July 24, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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July 25, 2001
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I write separately to clarify an important point about the FOIA request at issue in the instant case, and to emphasize what a narrow holding this Court's opinion in this case represents. I also write to explain further why this Court, which has issued many opinions that strongly support access to public records, has declined in the instant case to sustain the lower court's order that required compliance with the appellee's FOIA request.

First, it should be noted that there is some uncertainty with respect to exactly what the appellee's FOIA request was seeking. According to the circuit court's order that was appealed to this Court, the appellee's FOIA request asked for certain *information*, to-wit: (1) the *names* of any officers who were investigated or had a complaint made against them in any fashion, for any alleged conduct by the officer at work *or otherwise*; and (2) the *outcomes* of any such complaints or investigations.

Perhaps the circuit court's order did not correctly or fully quote the appellee's FOIA request. But from the language that is quoted in the circuit court's order, it appears that the appellee's request may not have been (technically) worded correctly. The request apparently requests *information* -- but it should have requested *records*.

This is because the West Virginia FOIA grants access to most public *records* -- but the Act does not grant access to or "cover" *information* that is not already in existing public records. "The

West Virginia Freedom of Information Act, *W.Va. Code* § 29B-1-1 *et seq*. does not require the creation of public records." Syllabus Point 1, *Affiliated Const. Trades Foundation v. Regional Jail and Correctional Facility Authority*, 200 W.Va. 621, 490 S.E.2d 708 (1997).[1]

The lower court's order (and this Court's opinion) essentially disregard this important information/records distinction. Instead, the appellee's request is construed by both courts as asking, not for information, but for access to **all of the police department's investigation and/or complaint *records* (this includes notes, letters, phone slips, etc.) regarding all of its current officers.**

So construed, there is no question in my mind that the appellee's FOIA request was over broad, and that the circuit court erred in requiring that the police department comply with the request.

Under the circuit court's order, for example, the appellee could read, copy, and disseminate phone log notes that were made when an upset family member called and complained that a police officer was cheating in their marriage -- or was drinking too much, or was gay, etc., etc.

Anyone can understand the potential for nosiness, mischief, and gross unfairness in allowing

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[1]*Cf. RGIS Inventory Specialists v. Palmer*, ___ W.Va. ___, ___, ___ S.E.2d ___, ___, 2001 WL 179830 (No. 28212, Feb 22, 2001, Slip. Op. at ___):

> In a case raising a similar issue, the Minnesota Supreme Court, in *Keezer v. Spickard*, 493 N.W.2d 614 (1992), concluded that the statutory term "data"-- in a state "Data Practices Act" -- did not apply to government-held information, until the information had been physically recorded in some fashion other than the mental impressions of the observer.
>
> In other words, government-held information did not become "data" for purposes of the Minnesota Data Practices Act, until a record of some sort that was based on the information, had been created.

such an unfettered inspection of a public employee's personnel files. Moreover, what is sauce for the goose is sauce for the gander. If we were to approve of this kind of broad "any complaint" personnel file inspection for police department employees, nothing could bar a similar examination of the personnel files of teachers, DOH employees, etc.

The simple lesson of the Court's opinion in the instant case is that broad FOIA requests that seek the right to go through people's personnel files and similar records are going to receive close judicial scrutiny. This is not a bad lesson.

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

I therefore concur in the Court's opinion and judgment.