NO. 22-491

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TAX ANALYSTS,

Petitioner,

v.

MATTHEW IRBY, West Virginia State Tax Commissioner,

Respondent.

(ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, CIVIL ACTION NO. 22-8-80)

PETITIONER'S BRIEF

Counsel for Petitioner:

Zachary J. Rosencrance
(W. Va. Bar No. 13040)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25325-1386
Tel: (304) 347-1100 / Fax: (304) 343-3058
E-mail: zrosencrance@bowlesrice.com

Cornish F. Hitchcock
(W. Va. Bar No. PHV-48420)
HITCHCOCK LAW FIRM PLLC
5614 Connecticut Avenue, NW No. 304
Washington, DC 20015-2604
Tel: (202) 489-4813/ Fax: (202) 315-3552
E-mail: conh@hitchlaw.com

Counsel for Respondent:

Patrick Morrissey, Attorney General
Katherine A. Schultz (W. Va. Bar No. 3302)
Senior Deputy Attorney General
William C. Ballard (W. Va. Bar No. 9557)
Assistant Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Tel: (304) 558-2522/ Fax: (304) 558-2525
E-mail: Kathy.A.Schultz@wvago.gov
E-mail: William.C.Ballard@wvago.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN DISMISSING THIS FREEDOM OF INFORMATION ACT ("FOIA") COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION.

A. Contrary to the applicable standards for ruling on a motion to dismiss, the trial court failed to take the allegations of Tax Analysts' complaint as true and did not give Tax Analysts the benefit of all reasonable inferences.

B. The trial court's decision is inconsistent with the FOIA's canons of construction, which neither the Tax Department nor the trial court cited or discussed.

C. Reversal is required because there is an unresolved question of fact as to whether non-exempt portions of the requested records may be released.

D. Judicial deference to an agency's interpretation of a statute has no place in FOIA litigation.

II. STATEMENT OF THE CASE

The trial court erred by granting a motion to dismiss the complaint under W. Va. R. Civ. P. 12(b)(6). The facts alleged in the complaint are as follows:

Plaintiff-petitioner Tax Analysts is a nonprofit corporation based in Falls Church, Virginia. Founded in 1970, Tax Analysts' publications serve 100,000 tax professionals in law firms, accounting firms, corporations and government agencies, including readers in West Virginia. Through its weekly periodical, *Tax Notes State*, and its daily online periodical, *Tax Notes Today State*, Tax Analysts reports on developments affecting the tax laws and policies of West Virginia and the other 49 states. (J.A. 8, ¶ 1).

Defendant-respondent Matthew Irby is State Tax Commissioner. He is sued in his official capacity as chief executive officer of the State Tax Department (the "Department"), which is a "public body" under the Freedom of Information Act; he is therefore the custodian of the public records at issue here. (J.A. 8, ¶ 2). *See* W. Va. Code § 29B-1-3.

In July 2021 Tax Analysts requested the following records from the Department:

> The current version of all field audit manuals and audit training materials in the formats (electronic or otherwise) in which they are maintained. The request covers not only

> manuals that are designated as such, but also training materials or continuing education materials related to audits.

(J.A. 9, ¶ 4; J.A. 13-14). The request stated Tax Analysts' view that the requested records were not exempt from disclosure, but added that if the Department concluded otherwise, "we specifically request that any non-exempt portions of these records be provided to us after deletion of those portions that are exempt from disclosure." (J.A. 13).

Tax Analysts made this request as part of its newsgathering and reporting activities and has made similar requests for such manuals from revenue departments in all other states. To date, the tax departments in 40 other states (as well those in several large cities and multistate tax organizations) either make their manuals available online or have provided Tax Analysts with such manuals, either with no or limited redactions. (J.A. 9, ¶¶ 5-6).[1]

By letter dated November 1, 2021, the Department's General Counsel advised Tax Analysts that the Department denied the FOIA request. (J.A. 9, ¶ 7). This letter stated that under the exemption in W. Va. Code § 11-10-5d(b)(5)(B), the Department is not required to disclose "standards used or to be used for the selection of returns for examination or data used or to be used for determining such standards . . ." and that the requested records "contain such information." (J.A. 9, ¶ 8; J.A. 16-17). For brevity, this brief will refer to this exemption as the "Standards Exemption."

The Department's denial letter added that disclosure could "reasonably be expected to educate potential tax evaders" by revealing "techniques and procedures used by auditors in reviewing taxpayer records to verify if a taxpayer has remitted the proper amount of tax to the Tax Department." (J.A. 9-10, ¶¶ 7--9; J.A. 17). The Department's letter did not state why, if the

[1] Online audit manuals include those published by the California Department of Tax and Fee Administration, https://www.cdtfa.ca.gov/taxes-and-fees/staxmanuals.htm (last visited October 18, 2022), and the Massachusetts Department of Revenue, https://www.mass.gov/doc/field-audit-procedures-manual-0/download (last visited October 18, 2022).

requested records "contain" information that can lawfully be withheld, the Department is not disclosing the portions that do *not* "contain" such information. (J.A. 9, ¶ 8; J.A. 17).

Tax Analysts responded by filing a complaint seeking declaratory and injunctive relief in the Circuit Court for Kanawha County, as provided under W. Va. Code § 29B-1-5. (J.A. 8-25). In lieu of an answer, the Commissioner filed a motion to dismiss for failure to state a cause of action under W. Va. R. Civ. P. 12(b)(6). That motion abandoned the Department's argument that the records may be withheld because they "contain" exempt material. Instead, the Department offered a novel argument, stating:

> The Tax Department, however, has interpreted the language of West Virginia Code § 11-10-5d(b)(5)(B) to protect all of its field audit manuals from disclosure, because the methods by which tax returns are selected for audit and the process by which returns are to be audited cannot be logically separated.

(J.A. 31). The Department did not state when, how or by whom this "interpretation" had been reached, nor did the Department cite any document setting forth that interpretation. Nonetheless, the Department argued that the trial court should grant deference to this broad reading of the Standards Exemption as a reasonable interpretation of that statute. (J.A. 32).

In opposing the motion to dismiss, Tax Analysts cited the high legal standard for a defendant to prevail on such a motion and opposed the Department's deference argument as inconsistent with the canons of construction to be used in an FOIA case, which require that exemption statutes should be construed narrowly. In addition, even if portions of the requested records contain "standards" that are exempt from disclosure, an agency has the evidentiary burden of submitting a "*Vaughn* index" as required by this Court in FOIA cases, which specifically identifies the portions claimed to be exempt from disclosure, along with a supporting affidavit from a knowledgeable agency official that explains specific withholdings. Thus, Tax Analysts argued, a motion under Rule 12(b)(6) cannot be granted because there is a question of fact as to

whether the requested records contain any non-exempt portions that must be disclosed. (J.A. 35-45). The Commissioner filed a reply memorandum (J.A. 46-52), but not a *Vaughn* index, affidavit or other factual evidence to support withholding the requested records in their entirety.

The circuit court heard argument (J.A. 53-65) and granted the Department's motion. The Department submitted a draft order (J.A. 66-74), which the circuit court approved and signed without any changes. (J.A. 1-7). That Order, which is the subject of this appeal, endorsed the Department's interpretation of the Standards Exemption as reasonable, thus allowing the Department to withhold the requested records in their entirety.

That Order did not address the canons of construction that govern FOIA cases, nor did the Order acknowledge that a question of fact exists as to whether the requested records contain non-exempt portions that must be disclosed. Instead, the trial court accepted the Department's "interpretation" of the Standards Exemption at face value, explaining that courts should "examine [such] regulatory interpretations with appropriate deference to agency expertise and discretion." (J.A. 5, ¶ 19) (internal citation omitted). The trial court added that:

> . . . the Tax Department has reasonably interpreted West Virginia Code § 11-10-5d(b)(5)(B) to mean that the methodologies by which it selects returns for auditing is within the same category of information as the methodologies by which the Tax Department carries out its audits (i.e., the requested audit manuals) – and therefore protects from disclosure all documents related to the Tax Department's auditing processes, including those requested by Plaintiff.

(J.A. 5, ¶ 21). The case was thus dismissed with prejudice. This appeal followed. (J.A. 75-84).

III. SUMMARY OF THE ARGUMENT

At the outset, it may be helpful to state what is and is not at issue in this case.

Tax Analysts has never contested the ability of the Department, upon a proper evidentiary showing, to redact and withhold those portions of the requested records that meet the criteria in the Standards Exemption cited by the Department. There is no dispute on that point.

What is at issue here is whether the trial court properly dismissed the case on the pleadings when there is an unresolved question of fact as to whether the Department has released all non-exempt portions of the requested records. This question of fact exists in all FOIA cases, which can be resolved only if the agency, which has the burden of proof in FOIA cases, submits what this Court has termed a "relatively detailed justification" for any withholding, not merely conclusory statements that nothing can be redacted and disclosed. *Farley v. Worley*, 215 W.Va. 412, 425, 599 S.E.2d 835, 848 (2012). Such a "justification" is to consist of a *Vaughn* index that identifies exempt portions, along with supporting affidavit(s) that explain and justify any withholding. A requester may then challenge the sufficiency of that showing, and the trial judge may, if warranted, review the withheld records *in camera*. These procedures are important to allow the trial judge to make a finding, based on a full record, that all non-exempt portions are being released.

But none of that happened here. Instead, the trial court dismissed the case on the pleadings, deciding that it was appropriate to defer to the Department's unsupported, one-sentence assertion that the exempt portions of the requested records cannot be "logically separated" from the non-exempt portions that must be disclosed.

This ruling was error for multiple reasons. The trial court never cited this Court's decisions that set a very high standard for dismissal under Rule 12(b)(6), nor did the Order cite any of the specific canons of construction that govern FOIA cases and that tilt in favor of disclosure and require that exemptions be read narrowly. Moreover, there is no FOIA case that allows a court to defer to an agency's interpretation of an exemption, and in any event, the Standards Exemption appears in a statute that expressly contemplates the release of records with redactions of sensitive information.

The decision should therefore be reversed with instructions for the trial court to resolve the case on the basis of a proper evidentiary record, *i.e.*, a *Vaughn* index with a supporting affidavit or affidavits that explains why the withheld portions qualify for withholding, and, if needed, an *in camera* review of the documents.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be appropriate under Rule 19 because the trial court erred in the application of settled law by dismissing a Freedom of Information Act case on the pleadings (a) without requiring the Tax Department to submit a "*Vaughn* index" and affidavits in support of any withholding of records and (b) without making a finding, on the basis of record evidence, that all non-exempt portions of the requested records are being disclosed to the requester.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING THIS FREEDOM OF INFORMATION ACT ("FOIA") COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION.

A. Contrary to the applicable standards for deciding a motion to dismiss, the trial court failed to take the allegations of Tax Analysts' complaint as true and did not give Tax Analysts the benefit of all reasonable inferences.

The standards for granting a motion to dismiss under W. Va. R. Civ. P. 12(b)(6) are very strict. Dismissal should not be granted unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. pt. 2, *Highmark West Virginia, Inc. v. Jamie*, 221 W. Va. 487, 491, 655 S.E.2d 509, 513 (2007) (internal citation omitted). Under W. Va. R. Civ. P. Rule 8(f), the policy in this state "is to decide cases upon their merits," and a motion to dismiss should be denied "if the complaint states a claim upon which relief can be granted under any legal theory." *Cantley v. Lincoln County Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007). In light of this policy, and the liberal rules of pleading with regard to a plaintiff's complaint, a motion under Rule 12(b)(6) "should be viewed with disfavor

and rarely granted"; the burden that a plaintiff must meet to overcome such a motion "is a relatively light one." *Mandolidis v. Elkins Industries, Inc.*, 161 W. Va. 695, 718, 246 S.E.2d 907, 920 (1978),

In this case, however, the trial court never mentioned this standard or attempted to explain why Tax Analysts' complaint failed to satisfy this minimal requirement. Tax Analysts' complaint and supporting exhibits were more than sufficient to meet this standard: Of particular note is the statements in the complaint that (a) Tax Analysts has already acquired similar records from 40 other state tax departments, generally with few or no redactions, and (b) some state tax departments publish comparable manuals online. (J.A. 9, ¶¶ 5-6). In addition, Tax Analysts' memorandum opposing the motion to dismiss cited federal cases where the Internal Revenue Service raised similar concerns about disclosure of investigative techniques, yet the IRS was able to release significant numbers of records with only minimal redactions. (J.A. 41 & n.4).[2] Construing the complaint liberally and in favor of Tax Analysts, it is a "fair inference" that the Department will be able to disclose the records requested here, possibly with some redactions. The motion to dismiss should have been denied.

This failure to mention, much less adhere to, the strict standards for dismissal under Rule 12(b)(6) is sufficient to warrant reversal. Moreover, as discussed in the next section, the trial court compounded the error by failing to address the standards governing cases under the FOIA, including canons of construction in such cases. A consideration of these principles also makes it impossible to conclude, on the pleadings, that relief could not be granted to Tax Analysts "under any legal theory." *Cantley v. Lincoln County Comm'n*, *supra*..

[2] These federal cases are pertinent in this case, given this Court's statement that because "the exemptions in our statute are similar to those in the federal [FOIA] . . , federal precedent and legislative history , . . are pertinent" to construing West Virginia FOIA exemptions. *Daily Gazette Co, Inc.. v. W. Va. Development Office*, 198 W.Va. 563, 571, 482 S.E.2d 180, 188 (1996).

B. The trial court's decision is inconsistent with the FOIA's canons of construction, which neither the Tax Department nor the trial court cited or discussed.

The Freedom of Information Act is unusual among statutes in that the Act comes with its own canon of constructions to guide agencies and courts in FOIA cases. The opening provision of the Act sets forth these guiding principles:

> Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people and not the master of them, it is the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.

W. Va. Code § 29B-1-1. These principles find expression in the following requirements to be applied in all FOIA cases.

• The Act is to be construed broadly in favor of disclosure, with the statutory exemptions from disclosure to be construed narrowly. See Syl. pt. 3, *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752 S.E.2d 603 (2013); Syl. pt 3, *Town of Burnsville v. Cline*, 188 W.Va. 510, 511, 425 S.E.2d 186, 187 (1992); Syl. pt. 4, *Hechler v. Casey,* 175 W. Va. 434, 333 S.E.2d 799 (1985); Syl. Pt. 1, *Daily Gazette Co. v. Caryl,* 181 W. Va. 42, 380 S.E.2d 209 (1989).

• The burden of proof is on the agency to establish that the requester is not entitled to relief. W. Va. Code § 29B-1-5(2). Syl. pt. 4, *Charleston Gazette v. Smithers*, *supra.*

• The presumption of public access extends "to all public *records*, subject only to the following [23 enumerated] categories of *information* which are specifically exempt from disclosure under this article." W. Va. Code § 29B-1-4(a) (emphasis added).

• A question of fact exists in each case as to whether the requested record contains portions that can be made public, even if there are portions that can be redacted and withheld. "[T]o the extent that segregable, factual data may be extracted, that information should be disclosed." *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 482 S.E.2d 180, 190 (1996), quoted in *Farley v. Worley, supra,* 215 W. Va. at 422, 599 S.E.2d at 844.

• In responding to an FOIA request, a public body is generally obliged to disclose any non-exempt portions of a record, even if the requester does not explicitly request non-exempt portions. *Farley, supra*, 215 W. Va. at 421, 599 S.E.2d at 844.

• A court considering the denial of an FOIA request reviews the matter *de novo*. W. Va. Code § 29B-1-5(2).

• In any litigation over denial of an FOIA request, the public body must meet its burden of proof by providing evidence – not simply argument of counsel – in the form of a "*Vaughn* index," which this Court has said is a "relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply," along with an affidavit or affidavits from an agency official explaining the withholdings. Syl. pts. 5 & 6, *Farley v. Worley, supra*, 215 W. Va. at 426-27, 599 S.E.2d at 849-50. Accord *St. Mary's Medical Center, Inc. v. Steel West Virginia*, 240 W.Va. 238, 809 S.E.2d 708, 713 n.6, 240 S.E.2d 238, 243 n.6 (2018).

Such an evidentiary showing allows a FOIA case to be litigated with something approaching the normal adversarial process. The requester can challenge the adequacy of that *Vaughn* index under applicable evidentiary standards, and the trial court can decide the question of segregability, as well as the legal merits of the agency's exemption claim, on the basis of a full evidentiary record, which may include an *in camera* review of the records. W. Va. Code § 29B-1-5(2). Syl. pt. 14, *Daily Gazette v. Smithers, supra,* 232 W. Va. at 472, 752 S.E.2d at 625; Syl.

pt. 1, *Associated Press v. Canterbury* , 224 W. Va. 708, 713, 688 S.E.2d 317, 322 (2009). Differently put, a question of fact exists in every FOIA case as to whether the public body has separated the exempt portions from all non-exempt portions of the requested records, and a trial court is required to make a factual finding as to whether all of the "segregable," non-exempt portions have been disclosed. The existence of such a question of fact should have been sufficient to warrant denying the Department's motion to dismiss for reasons discussed in in the next section.

C. Reversal is required because there is an unresolved question of fact as to whether non-exempt portions of the requested records may be released.

The Department here withheld the requested records in their entirety, even though the exemptions provision in the Act is quite clear that a public body can withhold only "information," not entire "records" that may contain exempt "information." Specifically, the statute states: "There is a presumption of public accessibility to all public *records*, subject only to the following categories of *information* which are specifically exempt from disclosure under this article. W. Va. Code § 29B-1-4(a) (emphasis added).

The distinction between "records" and "information" is pivotal. As this Court put it, "an entire document is not exempt merely because an isolated portion need not be disclosed." *Farley v. Worley*, *supra*, 215 W.Va. at 421, 599 S.E.2d at 844 (internal quotation omitted).

But how is a court to determine which portions are exempt and which portions must be disclosed? FOIA litigation is unusual in that one party has a monopoly on knowledge about the contents of the requested records and whether the records contain any non-exempt portions. To remedy this imbalance, and to provide a factual record for trial judges and appellate courts to consider, this Court requires public bodies to defend any proposed deletions with a so-called *Vaughn* index, which is named after the requester in the seminal case of *Vaughn v. Rosen,* 484

F.2d 820 (D.C. Cir. 1973), *cert. denied* 415 U.S. 977 (1974). As this Court summarized the requirements:

> 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 *Vaughn* index need not be so detailed that it compromises the privilege claimed. The public body must also submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt.

Farley v. Worley, *supra*, 215 W. Va. at 427, 599 S.E.2d at 850 (brackets in original). A *Vaughn* index can allow "courts to determine the validity of the Government's claims without physically examining each document.'" *Daily Gazette Co., Inc. v. West Virginia Development Office, supra,* 198 W. Va. at 574, 482 S.E.2d at 191 (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C .Cir. 1980)). *Accord Associated Press v. Canterbury*, *supra*, 224 W. Va. at 713, 688 S.E.2d at 322. A *Vaughn* index and supporting affidavit(s) serve to identify the portions claimed to be exempt, make public all non-exempt portions, and explain which specific portions may be withheld under a specific exemption. If a *Vaughn* index is not sufficiently detailed to carry the agency's burden, a court may order the agency to file a more detailed index. If a factual issue remains even after the filing of a *Vaughn* index, W. Va. Code § 29B-1-5(2) empowers a court to conduct an *in camera* review of the documents to see if the exemptions are properly asserted. *Associated Press v. Canterbury, supra,* 224 W. Va. at 713-14, 688 S.E.2d at 322.

As this Court put it in *Farley*, the FOIA imposes on public bodies a "*sua sponte* duty to segregate or redact" exempt material; even if the requester never raises the issue of redaction, "an agency must adequately demonstrate to the court that all reasonably segregable, non-exempt information ... was disclosed." *Farley v. Worley, supra,* 215 W. Va. at 421, 599 S.E.2d at 844 (internal citation omitted).

This requirement aligns with the practice under the federal FOIA. See, *e.g., PHE, Inc. v. Department of Justice*, 983 F.2d 248, 252 (D.C. Cir. 1993) (a trial court "clearly errs when it approves the government's withholding of information under the FOIA without making an *express* finding on segregability") (emphasis in original); *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (discussing a court's "affirmative duty" to make a finding on segregability).[3] This Court has repeatedly emphasized the importance of a public body providing a sufficiently "detailed justification" for any withholding of portions of a document.. *Highland Mining Co. v. West Virginia University School of Medicine*, 235 W.Va. 370, 378 n.3, 774 S.E.2d 36, 44 n.3 (2015); *Associated Press v. Canterbury, supra,* 224 W. Va. at 713, 688 S.E.2d at 322.

These cases thus establish that, at a minimum, there is always a question of fact as to whether any portions of the requested records may be released. For that reason, among others, FOIA cases are generally decided not on a motion to dismiss, but on summary judgment motions after the public body has filed a *Vaughn* index and supporting affidavit, the requester has had an opportunity to challenge the sufficiency of those documents, and the trial judge has had an opportunity to consider the need for an *in camera* review.

How did the Department address the issue of segregability in this case? The issue was relegated to a single sentence in the Department's legal memorandum, which asserted, without explanation or evidence, that:

> The Tax Department, however, has interpreted the language of West Virginia Code § 11-10-5d(b)(5)(B) to protect all of its field audit manuals from disclosure, because

[3] This Court has recognized an exception if the requested record contains exempt and non-exempt material that are "inextricably intertwined" or if the redaction process would be unduly burdensome. The Department has not made either argument in this case; even if it had done so, the Department would still bear the burden of providing proof on the issue and cannot rely on "conclusory or cursory" claims of burden, but on affidavits with specific evidence of a genuine burden, *e.g.*, a showing that identifying all non-exempt portions would require eight work years. *Farley v. Worley, supra*, 215 W. Va. at 424, 599 S.E.2d at 847, cited with approval in *Hurlbert & Sage Information Services v. Matkovich*, 233 W. Va. 583, 596, 760 S.E.2d 152, 165 (2014).

> the methods by which tax returns are selected for audit and the process by which returns are to be audited cannot be logically separated.

(J.A. 31). This is plainly insufficient under applicable law. To prevail in FOIA cases, agencies must submit affidavits from knowledgeable officials who provide sufficiently "detailed justifications" for any withholding; agencies cannot rely on "conclusory statements" that nothing can be redacted and disclosed. See *Hurlbert & Sage Information Services v. Matkovich*, *supra*, 233 W. Va. at 596, 760 S.E.2d at 165 (2014) (rejecting Tax Commissioner's "vague reference to the complexity of redacting this information" and faulting the Commissioner for not submitting a *Vaughn* index.). *See also Mead Data Central, Inc. v. U.S. Department of Air Force*, 566 F.2d 244, 261 (D.C. Cir. 1977); *Davin v. Department of Justice*, 60 F.3d 1043, 1052 (3d Cir. 1995) (rejecting as insufficient a declaration stating that "[e]very effort has been made to provide the plaintiff with all reasonably segregable portions on [sic] the sampled material").

Moreover, Tax Analysts cited federal FOIA cases in which the IRS raised similar concerns about disclosure of IRS investigative techniques and guidelines, which, if disclosed, could be used to evade taxes. (J.A. 41 & n.4). In those cases, the IRS was able to disclose many documents while making a particularized showing to protect a small number of them.[4]

Rather than address this issue head-on, the trial court accepted at face value the Department's unsupported, one-sentence assertion of counsel that no portion of the requested

---

[4] The federal FOIA allows agencies to withhold "techniques and procedures" and "guidelines" for law enforcement investigations if disclosure would risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E). The cited cases are *Trucept v. IRS*, 2018 WL 4628366 (S.D. Cal. 2018) (2,319 pages released in full and 617 pages released in part; only five pages withheld in full and four pages in part in order to protect IRS's calculation of the taxpayer's "risk score," a standard that helps the IRS prioritize its enforcement practices); *Goldstein v. IRS*, 174 F. Supp.3d 38 (D.D.C. 2016) (upholding release of 2000 pages, except for a certain "score" in a taxpayer's examination file that, if known, could be manipulated to evade taxes); *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009) (upholding disclosure of all but a "small class of records" detailing how much the IRS is willing to accept to settle a deficiency claim).

records could be separated. (J.A. 4, ¶ 15; J.A. 69, ¶ 15). The trial court compounded this error by deciding that this assertion was sufficient to warrant judicial deference to the Department's position. This decision is plainly incorrect as a matter of law. Deference has no role to play in an FOIA case.

D. Judicial deference to an agency's interpretation of a statute has no place in FOIA litigation.

In granting the Department's motion to dismiss, the trial court uncritically accepted the following assertion in the memorandum portion of the Department's motion to dismiss:

> The Tax Department, however, has interpreted the language of West Virginia Code § 11-10-5d(b)(5)(B) to protect all of its field audit manuals from disclosure, because the methods by which tax returns are selected for audit and the process by which returns are to be audited cannot be logically separated.

(J.A. 31). Accepting that "interpretation" as an established fact, the trial court deferred to this reading of the Standards Exemption for the following reasons, as provided by the Department:

> 18. Agencies are empowered to perform administrative and executive functions. To do so, they often must construe and interpret their statutory and regulatory authority to fit the circumstances of a particular case. Of course, the Tax Department may not modify or rewrite statutes "under the guise of `interpretation." Syl. pt. 5, *Steager v. Consol Energy, Inc.*, 242 W.Va. 209, 213, 832 S.E.2d 135, 137 (2019).
>
> 19. Courts should "examine [such] regulatory interpretations" with "appropriate deference to agency expertise and discretion." *W. Va. Emp'rs' Mut. Ins. v. Bunch Co.*, 231 W. Va. 321, 332, 745 S.E.2d 212, 223 (2013).
>
> 20. As long as the agency has acted "consistent with the plain meaning of [its]" statutes, id., its "longstanding, consistent interpretation[s]" are "entitled to judicial deference." *Amedisys W. Va. v. Pers. Touch Home Care of W. Va.*, 245 W. Va. 398, 859 S.E.2d 341. 358 (2021).

(J.A. 5, and compare J.A. 70). This analysis is fatally flawed for multiple reasons.

First, the Department's deference argument is essentially a plea to defer to the Department's view that non-exempt portions cannot be "logically separated" from exempt portions. This is the sort of "vague" assertion that this Court rejected in *Hurlbert & Sage Information Services v. Matkovich,*

supra. We deal here with a question of fact that can be resolved only after the filing of a suitable Vaughn index and, if necessary, *in camera* review of the requested records.

Second, the cases cited in this Order are not FOIA cases. Whatever deference may be warranted to the Department's interpretation of a statute or rule in a tax case, those principles have no application in an FOIA case, given the requirements in the Act to construe an agency's obligations broadly, to read the exemptions narrowly, and to review denial of a FOIA request *de novo.* See pp. 8-10, *supra.* The Department can point to no FOIA case in which a court has deferred to an agency's interpretation of an exemption.

Third, even if this were a tax case in which principles of deference might apply,[5] the threshold question is always whether the statute being interpreted is ambiguous. Syl. pt. 4, *Appalachian Power Co. v. State Tax Department,* 195 W. Va. 573, 581, 466 S.E.2d 424, 432 (1995). As this Court stated in *Steager v. Consol Energy, supra,* a reviewing court is not obligated to defer to an agency's view when one is dealing with "clear, simply-stated" language that is given a "common-sense reading." 242 W.Va. at 223, 832 S.E.2d at 149 (internal citation omitted).

Here, the Department never argued that the Standards Exemption was ambiguous, and there was an excellent reason for that -- there is nothing ambiguous about the phrase "the standards used or to be used for the selection of returns for examination or data used or to be used for determining such standards." W. Va. Code § 11-10-5d(b)(5)(B). That language cannot be stretched to permit withholding portions that do *not* set forth standards or criteria for selecting returns for examination and the like, for example, chapters discussing specific tax statutes or court decisions.

---

[5] We add this qualifier because questions of deference normally arise in situations where a court is reviewing an agency regulation or official statement, not a one-sentence "interpretation" set forth for the first time in a legal memorandum. (J.A. 31). See generally *Cookman Realty Group v. Taylor,* 211 W. Va. 407, 586 S.E.2d 294 (2002).

Moreover, the interpretation that the Department proffered to the trial court contradicts the reason given for denying Tax Analysts' request in the first place, *i.e.*, that the requested records "contain" standards that are exempt from disclosure. (J.A. 9, ¶ 8; J.A. 16-17). Fairly read, that statement seems to acknowledge that the requested records "contain" portions that are *not* covered by the Standards Exemption.

Fourth, the Department's "interpretation" of the Standards Exemption conflicts with the remainder of the statute containing that exemption, which plainly contemplates that the Department will publish or make public documents while making redactions of sensitive portions.

The Standards Exemption appears as a single sentence in subsection(b)(5)(B) of W. Va. Code § 11-10-5d, entitled *Confidentiality and disclosure of returns and return information* ("Section 11-10-5d"). That sentence states that no provision of the tax code "shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination or data used or to be used for determining such standards." W. Va. Code § 11-10-5d(b)(5)(B). An examination of the text and structure of Section 11-10-5d discloses why the Department's broad interpretation of the Standards Exemption is inconsistent with Section 11-10-5d.

Section 11-10-5d seeks to advance two important (and potentially conflicting) policy goals. The statute (a) affirms the Department's ability to issue "written determinations" that provide guidance to taxpayers about how the Department interprets provisions of the tax code in specific factual settings,[6] while (b) protecting the privacy of individual taxpayers. Section 11-10-5d protects privacy by restricting disclosure of:

---

[6] A "written determination" is "a ruling, determination letter, technical advice memorandum, or letter or administrative decision issued by the Tax Commissioner." W. Va. Code § 11-10-5d(b)(9).

Thus, the Department periodically issues "technical assistance advisories" at a taxpayer's request for the "position of [the Commissioner's] office on the tax consequences of a stated transaction or event, under existing statutes, rules or policies." W. Va. Code 11-10-5r(a). These

• a "return" that is filed by the taxpayer, W. Va. Code § 11-10-5d(b)(4); and

• "return information," which is information of the sort that could be included in a return and be used to identify the taxpayer, such as the taxpayer's "identity; the nature, source, or amount of his or her income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing. . .." W. Va. Code 11-10-5d(b)(5)(A).

After identifying these two protected categories, Section 11-10-5d adds language addressing the Department's disclosure obligations, including the Standards Exemption at issue here:

> "Return information" does not include, however, data in a form which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer. *Nothing in the preceding sentence, or in any other provision of this code, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination or data used or to be used for determining such standards.*

W. Va. Code § 11-10-5d(b)(5)(B) (emphasis added).

In a nutshell, then, Section 11-10-5d does several things:

• It affirms the Department's ability to issue "written determinations" to provide guidance to taxpayers about the interpretation of the tax code;

• It protects taxpayer privacy by barring the disclosure of "tax returns" and "return information," but allows the Department to disclose "data" that could not be associated with or identify a taxpayer; and

---

advisories provide useful guidance about the Department's analysis of the tax consequences in that situation, although the Department is to redact any "identifying characteristics or facts about the taxpayer." W. Va. Code § 11-10-5r(e). See, *e.g.*, Technical Assistance Advisory 11-02 (April 1, 2011), available at https://tax.wv.gov/Documents/TAA/taa.2011-002.pdf (last visited October 18, 2022); Technical Assistance Advisory 19-01 (April 4, 2019), available at https://tax.wv.gov/Documents/TAA/taa.2019-01.pdf (last visited October 18, 2022).

• It states that the Department's disclosure obligations do not "require the disclosure of standards used or to be used for the selection of returns for examination or data used or to be used for determining such standards."

This reading is supported by this Court's opinion in *Town of Burnsville v. Cline, supra,* which held that taxpayers alleging selective enforcement of local tax laws could not gain access to tax returns; however, the Court saw no basis to deny access to the names of the local taxpayers, if not the returns themselves. 188 W. Va. at 515, 425 S.E.2d at 191.

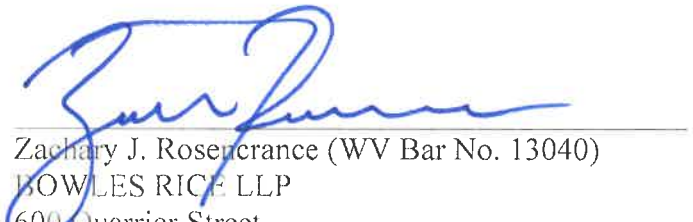
The text and structure of Section 11-10-5d thus indicate that the legislature wanted the Department to redact and withhold *portions* of documents, *i.e.,* "return information," in order to protect taxpayer privacy, and "standards," in order to protect effective tax administration. If the legislature wanted the Department to withhold records their entirety, it knew how to say so, as it did with respect to tax "returns." [7]

IV. CONCLUSION

For the foregoing reasons, Tax Analysts respectfully asks this Court to reverse the decision of the circuit court and to remand the case for evidentiary proceedings required in Freedom of Information Act cases, including the need for the State Tax Department to file a *Vaughn* index with supporting affidavits that make the requisite "detailed justification" for any withholding and, if appropriate, an *in camera* inspection of the requested records.

[7] Indeed, if the legislature wanted the Department to withhold records in their entirety and without redactions, it could easily have said so. Section 11-10-5d allows the withholding of "tax returns" in their entirety, adding that it would be "unlawful for any officer, employee, or agent of this state or of any county, municipality, or governmental subdivision to divulge or make known in any manner the tax return, *or any part thereof,* of any person." W. Va. Code 11-10-5d(a) (emphasis added).

TAX ANALYSTS
By Counsel



Zachary J. Rosencrance (WV Bar No. 13040)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1100 / Facsimile: (304) 343-3058
zrosencrance@bowlesrice.com

Cornish F. Hitchcock (WV Bar No. PHV 48420)
HITCHCOCK LAW FIRM PLLC
5614 Connecticut Avenue, NW No. 304
Washington, DC 20015-2604
Telephone: (202) 489-4813 / Facsimile: (202) 315-3552
conh@hitchlaw.com

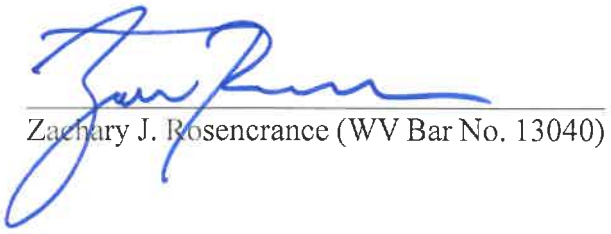
Counsel for Tax Analysts

CERTIFICATE OF SERVICE

I, Zachary J. Rosencrance, counsel for Petitioner Tax Analysts, do hereby certify that on **October 24, 2022**, I served the foregoing **Petitioner's Brief** upon the following party via U.S. Mail and email:

Counsel for Respondent:

Patrick Morrissey, Attorney General
Katherine A. Schultz (W. Va. Bar No. 3302)
Senior Deputy Attorney General
William C. Ballard (W. Va. Bar No. 9557)
Assistant Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Tel: (304) 558-2522/ Fax: (304) 558-2525
E-mail: Kathy.A.Schultz@wvago.gov
E-mail: William.C.Ballard@wvago.gov



Zachary J. Rosencrance (WV Bar No. 13040)