No. 23-ICA-283

ICA EFiled: Dec 06 2023
12:42PM EST
Transaction ID 71558336

**IN THE INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA**

Gray Media Group, Inc., d/b/a WSAZ,

Plaintiff Below, Petitioner,

v.

West Virginia Department of Health and Human Resources,

Defendant Below, Respondent.

On Appeal From The Circuit Court of Kanawha County
Civil Action No. 22-P-197

PETITIONER'S REPLY BRIEF

Erica M. Baumgras (WV Bar No. 6862)
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street (25301)
P.O. Box 3843
Charleston, WV 25338-3843
304.345.0200
ebaumgras@flahertylegal.com

Matthew S.L. Cate (*pro hac vice*)
Charles D. Tobin (*pro hac vice*)
BALLARD SPAHR LLP
1909 K Street, NW, 12th Floor
Washington, DC 20006-1157
Telephone: 202.661.2200
Facsimile: 202.661.2299
catem@ballardspahr.com
tobinc@ballardspahr.com

Counsel for Petitioner Gray Media Group, Inc., d/b/a WSAZ

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF REPLY ARGUMENT 1

REPLY STATEMENT REGARDING ORAL ARGUMENT 2

REPLY ARGUMENT 3

I. THERE ARE MINIMAL PRIVACY INTERESTS ARISING FROM SAMPLES' TERMINATION 3

II. THE DEPARTMENT GROSSLY DEVALUES THE PUBLIC INTEREST IN DISCLOSURE, WHICH CLEARLY REQUIRES RELEASE OF THE TERMINATION LETTER 7

III. THE DEPARTMENT MISUNDERSTANDS THE "ALTERNATE SOURCE" FACTOR, WHICH SUPPORTS DISCLOSURE OF THE TERMINATION LETTER 10

IV. THE DEPARTMENT HAS NOT POINTED TO ANY EVIDENCE THAT ANYONE EXPECTED TO KEEP, AND HAS KEPT, THE REASONS FOR SAMPLES' TERMINATION CONFIDENTIAL 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Bloomgarden v. U.S. Department of Justice,
874 F.3d 757 (D.C. Cir. 2017) 5, 7

Charleston Gazette v. Smithers,
232 W. Va. 449, 752 S.E.2d 603 (2013) 7, 8, 14

Child Protection Group v. Cline,
177 W. Va. 29, 350 S.E.2d 541 (1986) .... *passim*

Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice,
746 F.3d 1082 (D.C. Cir. 2014) 6

Farley v. Worley,
215 W. Va. 412, 599 S.E.2d 835 (2004) 7, 13

Hechler v. Casey,
175 W. Va. 434, 333 S.E.2d 799 (1985) 11

Judicial Watch, Inc. v. National Archives and Records Administration,
876 F.3d 346 (D.C. Cir. 2017) 6

Kimberlin v. U.S. Department of Justice,
139 F.3d 944 (D.C. Cir. 1998) 5

Painting Industry of Hawaii Market Recovery Fund v. U.S. Department of the Air Force,
26 F.3d 1479 (9th Cir. 1004) 12

Robinson v. Merritt,
180 W. Va. 26, 375 S.E.2d 204 (1988) 8

Smith v. Bradley,
223 W. Va. 286, 673 S.E.2d 500 (2007) 4, 5

Statutes

W. Va. Code S.R. § 143-1-19.1 14

W. Va. Code § 29B-1-1 ....3, 8, 9, 10

W. Va. Code § 29B-1-2 3

W. Va. Code § 29B-1-4 ....4, 10, 11, 14

SUMMARY OF REPLY ARGUMENT

This case asks whether West Virginia will treat the firing of a high-ranking official for alleged misconduct as a matter of a "private nature." Given the strong public policy underlying the Freedom of Information Act and the West Virginia Supreme Court of Appeal's prior interpretation of it, the answer must be a resounding "no." The document in this case, setting out the reasons for the termination of the Deputy Secretary of the Department of Health and Human Resources (the "Department"), is the public's business and therefore should be a public record that must be disclosed.

The arguments to the contrary in Respondent's Brief fail for several reasons.

First, in asserting that former Deputy Secretary Jeremiah Samples has a substantial privacy interest in the Termination Letter, the Department wrongly treats Samples as no different from a low-level employee and acts as if the reasons he was fired are of no public importance. But it is clear from the record that Samples' high rank gave him significant sway over Department policy and that he was fired amid allegations of official misconduct for allegedly impeding the Department's work. In no sensible society, let alone one committed to government accountability to the people, is the rationale for Samples' firing a private matter in which he can have a substantial interest in shielding from the public.

Second, in arguing that there is no public interest in the disclosure of the Termination Letter, the Department wrongly dismisses the concept of the public's interest in government transparency as idle curiosity. The fundamental policy of this state, however, provides that the public has a significant interest in disclosure of public records, and that interest overwhelmingly outweighs any *de minimis* privacy interests under these facts.

Third, the Department advances the faulty notion that government officials can create public records with the presumption that they will remain confidential. As a matter of law, this

turns the FOIA on its head. And as a matter of fact, the Department fails to cite any evidence that anyone involved in Samples' termination held any expectation of confidentiality in the letter and refrained from discussing the reasons for his termination with anyone other than Samples. The Department's failure to meet its evidentiary burden on this point also requires disclosure of the Termination Letter.

Finally, the Department misunderstands the "alternative source" factor that is part of the privacy-exemption analysis under *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986). The Department argues, in effect, that FOIA requesters must exhaust every other non-governmental source of public information that might implicate privacy concerns before obtaining public records from their government. None of the Department's out-of-jurisdiction cases support that conclusion. And the correct understanding of the West Virginia Supreme Court of Appeals' rationale for this *Cline* factor clearly favors disclosure of the Termination Letter.

For these reasons, and those asserted in WSAZ's opening brief, the ruling below should be reversed.

REPLY STATEMENT REGARDING ORAL ARGUMENT

Despite the Department's assertion that "the dispositive issues have been authoritatively decided," Resp. Br. at 8, it acknowledges that the West Virginia Supreme Court of Appeals has never decided whether a public record of the rationale for firing a high government official may be withheld from disclosure on the ground that it is "information of a private nature," *see id.* at 11 ("West Virginia courts have not expressly addressed [mandatory disclosure of] a termination letter before."). This case, which turns on the construction and application of statutes of fundamental public importance, in a matter of core government transparency, is appropriate for oral argument.

REPLY ARGUMENT

I. THERE ARE MINIMAL PRIVACY INTERESTS ARISING FROM SAMPLES' TERMINATION.

Making the unremarkable observation that the Termination Letter is an "important" part of the file on his job performance, the Department's argument about substantial privacy interests rests on the potential for Samples' personal embarrassment. Resp. Br. at 11. But nowhere does the Department explain how the reasons for an official's termination—on grounds of alleged official misconduct, no less—could possibly constitute "nonpublic, intimate information." *Id.* They are nothing of the sort, as a matter of logic let alone FOIA law.

For one, the West Virginia Supreme Court of Appeals has explained that "[p]rivate information is something which affects or belongs to private individuals *as distinct from the public generally*." *Cline*, 177 W. Va. at 32, 350 S.E.2d at 543 (emphasis added). Information about a deputy cabinet secretary's misconduct, leading to his firing, in no sense "belongs to private individuals." The Legislature has explained, unmistakably, that as a general matter the public presumptively owns the "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees," and that they are generally entitled to information that "relates to the conduct of the people's business." W. Va. Code § 29B-1-1; *id.* § 29B-1-2(5).[1]

There is no way to reconcile the FOIA's expression of that policy with the Department's notion that the Termination Letter belongs to him individually and not to "the public generally."

[1] The Department tries to downplay the importance of these expressions of policy by noting that they appear "in the same statutory breath" as the limited exemptions from the FOIA's mandatory disclosure requirement. *See, e.g.*, Resp. Br. at 1-3. But these policy expressions are highly relevant to the fundamental question of whether information relating to the performance of public officials' duties and their termination for alleged misconduct constitute "nonpublic, intimate information" giving rise to some sort of privacy interest or, instead, of information that belongs to the public in which no meaningful privacy interest can lie.

Cline, 177 W. Va. at 32, 350 S.E.2d at 543. The Department's argument comes down to this: high-ranking officials should not have to face embarrassment when they are fired for reasons short of criminal wrongdoing or "serious malfeasance." Resp. Br. at 14. But Section 29B-1-4(a)(2) is not an embarrassment-avoidance exemption. It applies only to "information of a personal nature" where the disclosure would constitute "an unreasonable invasion of privacy." There is no *per se* exemption for "embarrassing" information about a government official—nor should there be in a society that values citizen oversight of its government. A high government official simply has little, if any, privacy interests that are sufficient to support hiding the details of the performance of the public duties he or she has been appointed to carry out. *See, e.g.*, Pet. Br. at 12-13 (citing cases).

The Department does not seriously dispute that Samples' rank is highly relevant to the analysis here. *See* Resp. Br. at 13-14. Instead, it attempts to hide from scrutiny the sharp assertions it made against Samples—and, to be clear, to shield the actions of former Secretary Crouch[2]— by analogizing to cases that involve low-level employees or public records relating to draft or unofficial accusations. *Id.* at 10-11, 13-14.

For example, the Termination Letter is nothing like the performance evaluations at issue in *Smith v. Bradley*, 223 W. Va. 286, 673 S.E.2d 500 (2007). *See* Resp. Br. at 12. The public employees in that case were non-tenured staff members at a small college. *See Bradley*, 223 W. Va. at 289, 673 S.E.2d at 503. The majority of the evaluations were written by students and peers, they did not constitute final employment determinations by a superior, much less

[2] The Termination Letter provides a window into how former Secretary Crouch justified and handled the dismissal of a high-ranking subordinate who was well respected by lawmakers. *See, e.g.*, PA 436. Disclosure thus informs the public about Crouch and *his* execution of public duties as much as it does about Samples and his work on the public's behalf.

terminations for alleged misconduct. *See id.* In contrast, Samples was a high-ranking, policy-shaping government official whose work could affect the entire course and scope of agency priorities, leadership strength, and effectiveness in executing programs that touch on the lives of thousands of people. *See, e.g.*, PA 423 (then-Secretary Crouch expressing disappointment in Draft Termination Letter that Samples had failed to "focus on child welfare" as instructed and had provided direction to division leaders contrary to Crouch's directions). A document informing such an official that he is being fired because his performance had prevented the agency "from meeting its objectives" and "fulfilling its mission," *see id.*, is simply nothing like the provision of employee evaluations to motivate performance improvement in the classroom. Rather, it is quintessentially the "public's business," and as such any privacy interests at stake are minimal, at best.

None of the Department's federal FOIA cases are relevant to the question before the Court, either.

For example, *Bloomgarden v. U.S. Department of Justice* involved a *proposed* termination letter that did not constitute a "final decision" of termination. 874 F.3d 757, 758-59 (D.C. Cir. 2017) (cited in Resp. Br. at 11); *see also id.* at 761 ("The aspect of the letter that concerns us the most is that it contains mere allegations; it was never tested, nor was it ever formally adopted by the deputy-attorney general's office."). Moreover, the potential termination was of a "staff-level attorney" working as an Assistant U.S. Attorney. *Id.*[3] Finally, the letter had

---

[3] *Kimberlin v. U.S. Dep't of Justice*, 139 F.3d 944 (D.C. Cir. 1998), briefly cited by the Department, *see* Resp. Br. at 15, also related to in investigation into an AUSA's conduct, is distinguishable for this reason as well. The court in *Kimberlin*, meanwhile, also recognized that "it will ordinarily be enough" to consider "the rank of the public official involved and the seriousness of the misconduct alleged" when assessing a privacy exemption assertion in connection with records relating to a government official's job performance. 139 F.3d at 949.

been provided to that junior employee “two decades” before the FOIA request was submitted; as such it did not relate to “present personnel policies” of the government agency. *Id.* at 759-60.

Likewise, *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice* related to “investigative records” concerning a politician rather than the records of the final and formal actions based on that investigation. 746 F.3d 1082, 1090-92 (D.C. Cir. 2014) (cited in Resp. Br. at 13). And, in *Judicial Watch, Inc. v. National Archives and Records Administration*, the U.S. District Court of Appeals for the D.C. Circuit did not hold, as the Department suggests, that Hillary Clinton possessed some generalized “privacy interest” in records relating to her work in “high-level public positions.” 876 F.3d 346, 347-48 (D.C. Cir. 2017) (cited in Resp. Br. at 13-14). Instead, that case involved an attempt to obtain through FOIA a *draft* indictment prepared, but never finalized, by the Independent Counsel against Clinton more about 20 years before the FOIA request. *Id.* at 347; *id.* at 349 (“Mrs. Clinton's privacy interest is heightened in the context of a draft indictment.”).

Here, again, the Termination Letter reflects the Department’s final determination of Samples’ fate as Deputy Secretary, and the reasons he was given, amid accusations of misconduct that impeded the agency’s delivery of services. Samples was not one of thousands of front-line staff attorneys; he was second-in-command at the state’s largest and arguably most consequential agency. And while personnel records may “often deal with deeply personal information that could be embarrassing if publicly known,” Resp. Br. at 10, there is no such information at issue here, and the Department does not argue otherwise.

Accordingly, the Termination Letter is a public record containing information about the public’s business that paradigmatically belongs to the public. There is little to nothing “of a

private nature" about it, and if the FOIA is to mean anything, the privacy interests Samples may have in the reasons for his termination are *de minimis*, at most.

II. THE DEPARTMENT GROSSLY DEVALUES THE PUBLIC INTEREST IN DISCLOSURE, WHICH CLEARLY REQUIRES RELEASE OF THE TERMINATION LETTER.

That minimal privacy interest is necessarily far outweighed by the public's interest in disclosure, for which—contrary to the Department's assertions—there are substantial legal and factual grounds.

First, the Department wrongly suggests that (1) WSAZ bears the burden to show that the public interest outweighs the asserted privacy interests and (2) that there must be some "particularized" or "specific" evidence of the public's interest. *See, e.g.*, Resp. Br. at 2. The Supreme Court of Appeals has clearly held that "the evidentiary burden [is] placed upon the public body to justify the withholding of materials." *Farley v. Worley*, 215 W. Va. 412, 418, 599 S.E.2d 835, 841 (2004); *see also, e.g.*, *Charleston Gazette v. Smithers*, 232 W. Va. 449, 470, 752 S.E.2d 603, 624 (2013) (same); *Bloomgarden*, 874 F.3d at 760 ("the government bears the burden of rebutting this presumption" that public records must be disclosed).

Second, the Department ignores the uncontroverted evidence that WSAZ provided establishing the substantial public interest in disclosure here. *See* Pet. Br. at 15-16. The Department was under intense scrutiny in the months leading up to Samples' termination, and in particular for being an inefficient and unwieldy agency. *See generally* PA 113-33. Samples was fired amid apparent concerns that he was engaging in misconduct that was contributing to the very problems—bureaucratic inefficiency and ability to "fulfill[] its mission"—that were keeping the agency under the microscope. *See* PA 423. Whether Samples was a part of the problem or a solution to it, the parties do not genuinely dispute that the Department was under public scrutiny and that Samples' firing raised serious concerns among those overseeing its operations. *See* PA

116-21 (quoting lawmakers calling the termination "an example of the dysfunction within DHHR" and "a huge loss" for the Department).

Instead of grappling with that evidence, the Department tosses aside the public's right to know what their public officials and public employees are doing in their name—a fundamental public policy of this state, *see* W. Va. Code § 29B-1-1[4]—as mere idle curiosity. Resp. Br. at 17-18. The Department's attempt to downgrade the interest in disclosure of public information by comparing this case to *Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988), widely misses the mark. *See* Resp. Br. at 17. In *Robinson*, the FOIA plaintiff was a lawyer who wanted health and other records kept by the state's workers compensation agency in connection with more than 3 million claims. 180 W. Va. at 28-29, 37 S.E.2d at 206-07. The lawyer sought the records to support his work representing plaintiffs injured on the job and never tried to assert a public interest in disclosure remotely related to the records. 180 W. Va. at 28, 37 S.E.2d at 206. Here, the press seeks to obtain information about the firing of a high government official accused of misconduct. And as the Supreme Court of Appeals has instructed, the public's interest in learning more, through the press, about the workings of their government institutions is critically important. *See Smithers*, 232 W. Va. at 466, 752 S.E.2d at 620 (holding that "dissemination of public information by the press is an important cornerstone of a vivacious democracy" which weighs the second *Cline* factor in favor of disclosure).[5]

---

[4] Again, the fact that the Legislature created exemptions from the FOIA's disclosure requirement does not undermine the overall purpose of the FOIA and its underlying policy that the people of this state are entitled to obtain information about public affairs.

[5] The Department, remarkably, argues that the press' "vital role" exists only to produce "complaints lodged against police officers and State Police Internal Review Board reports with 'redacted' employee names." Resp. Br. at 17-18. This, of course, would relegate to irrelevance the role of the press in keeping the people "informed so that they may retain control over the instruments of government they have created." W. Va. Code § 29B-1-1. And it violates the clear

Third, the Department wrongly argues that the public cannot have a valid interest in disclosure here because Samples was not fired for criminal wrongdoing or similar misconduct. This argument fails for at least two reasons. For one, as explained above, the FOIA unambiguously recognizes the public's fundamental, presumptive interest in obtaining *all information* "regarding the affairs of government and the official acts of those who represent them as public officials and employees." W. Va. Code § 29B-1-1. And the public must have a right to know if high government officials are insubordinate, corrupt, excessively absent, or otherwise performing in ways that are seriously deficient or obstruct the important work of an agency. Moreover, despite the Department's suggestion, *see* Resp. Br. at 16, Samples' alleged misconduct and the reasons for his termination unquestionably impact how tax dollars are spent and, not least given Samples' role at the Department, relate to the efficient provision of government services. These are precisely the matters in which the public has not only a cognizable interest in learning more about, but an interest of the type that is worthy of "the greatest protection." *Cline*, 177 W. Va. 33, 350 S.E. 23d at 544, n.3.

Further, the Department does not genuinely or directly dispute that the Termination Letter accused Samples of misconduct. Instead, it coyly suggests that perhaps the final letter differs from the draft. Resp. Br. at 2 ("Drafts often change . . . sometimes dramatically."); *id.* at 15 ("Drafts and final versions usually bear some commonalities, but they are not the same."). Either the Termination Letter contains allegations of misconduct that are substantially similar to those leveled in the draft or it does not. In the former case, the Department's suggestions regarding the final document are disingenuous and the public record at issue unquestionably

---

policy expression that the people "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." *Id.*

relates to how the public's "tax dollars are spent," *see* Resp. Br. at 16, because the Termination Letter asserts that Samples' alleged *misconduct* hindered agency operations. In the latter case, the public has an interest in learning whether, how, and why Secretary Crouch or others in the Department revised the letter in a way that may have obscured the real reasons for Samples' termination.

The public's interest in obtaining information about what government officials are doing is not a matter of mere curiosity. Resp. Br. at 9, 17. It is a fundamental principle of informed self-government. And advancing that knowledge is the core purpose of the FOIA. *See* W. Va. Code § 29B-1-1. The Department's insistence to the contrary is without merit. Because the public interest in disclosure vastly outweighs the minimal privacy interests at stake, the Termination Letter cannot lawfully be withheld as exempt under Section 29B-1-4(a)(2).

III. THE DEPARTMENT MISUNDERSTANDS THE "ALTERNATE SOURCE" FACTOR, WHICH SUPPORTS DISCLOSURE OF THE TERMINATION LETTER.

The Department misrepresents how *Cline* explained the application of this third factor. The *Cline* Court did not at all hold, as the Department represents, that this factor favors disclosure "*only where* 'there is absolutely no other place or method'" to obtain the information sought in the requested public record. Resp. Br. at 25 (emphasis added). The relevant passage in *Cline* states, in full:

> Third, the court asks whether the information is available from other sources.
>
> [¶] If the information sought is available in publicly obtainable books and records, then the court should simply allow the plaintiff access to information which he would eventually get anyway.
>
> [¶] If the information sought is available in a format which would be less intrusive to individual privacy, the courts should protect the privacy interests and force the plaintiff to use the less intrusive format.

> [¶] Finally, if there is absolutely no other place or method to gather the information than from the particular Freedom of Information Act request before the court, this is a factor in favor of disclosure.

Cline, 117 W. Va. at 33, 350 S.E.2d at 544.

The facts here show the question of whether Samples would or would not have disclosed the letter to WSAZ is legally irrelevant.

First, if there were any evidence that Samples would be willing to disclose the letter to WSAZ, as the Supreme Court of Appeals has made clear, the Court should "allow [WSAZ] access to information which [it] would eventually get anyway." *Cline*, 117 W. Va. at 33, 350 S.E.2d at 544; *see also Hechler v. Casey*, 175 W. Va. 434, 446, 333 S.E.2d 799, 811 (1985) (the fact that requested material is "otherwise available" "*strengthens the case for FOIA disclosure* by suggesting that disclosure will not seriously invade personal privacy") (emphasis added).[6]

Second, if Samples were not willing to disclose the letter, "there [would be] absolutely no other place or method to gather" the public record but from the Department that created it and maintains a copy in its files. *Cline*, 117 W. Va. at 33, 350 S.E.2d at 544. This, too favors, disclosure by the Department. *Id.*

Finally, the remaining possibility favors disclosure by the Department because the Termination Letter *is not* "available in a format which would be less intrusive to individual privacy." *Id.* The Department's suggestion otherwise, *see* Resp. Br. at 24-25, misunderstands the focus and purpose of this factor. Specifically, when considering whether the requested information is available in a "less intrusive format," courts examine why the requester seeks the

[6] Moreover, if Samples were willing to disclose the Termination Letter, then he necessarily would be waiving any privacy interests in it. And without any privacy interests at stake, the Department's attempt to invoke Section 29B-1-4(a)(2) falls apart.

information contained in the public record at issue and whether the requester's stated goal could be met in other ways that *preserve the asserted privacy interests*. If so, the information seeker will often be made to seek out those "less intrusive formats." If not, then this factor will generally support disclosure of the requested record.[7]

For example, in *Painting Industry of Hawaii Market Recovery Fund v. U.S. Department of the Air Force*, cited by the Department, FOIA requesters sought detailed records about employees of federal contractors that included information that indisputably is considered private. 26 F.3d 1479, 1481 (9th Cir. 1004). The requestors said they wanted the records so they could search for violations of federal law and thereby scrutinize government actions. *Id.* at 1484. The Ninth Circuit reasoned, however, that fulfilling that goal of identifying misconduct would still require the requestors to have "direct contact with the employees whose payroll records are being sought." *Id.* at 1485. And the government agencies had already provided information that would aid the requesters' goals. *Id.* at 1486. As such, it concluded, "the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'" could not favor disclosure of the redacted material constituting the workers' personal information. *Id.*

There is no way to obtain the Termination Letter in a *less intrusive format* that would allow the asserted privacy interests to remain protected: the desired public information and the allegedly private information *are the same* in this case (*i.e.*, the reasons for Samples' termination as stated in the letter). Obtaining the letter from Samples himself would no more preserve his

[7] In every instance, therefore, the courts are seeking to ensure that the requester has some sort of access to the public information contained in the public record. It is for this reason that all three *Cline* factors favor disclosure of public information in the requested public record, if not necessarily the document initially requested. *See* Pet. Br. at 18.

supposed privacy interests than getting the letter from the Department; in both instances, the rationale for his termination—the very information the Department asserts is private—would be publicly disclosed. Because Samples cannot give WSAZ a "less intrusive format" of the Termination Letter, he is not an adequate alternate source of the letter as envisioned by *Cline*—indeed, there is no source of a "less intrusive" revelation of the reasons for his termination. As such, this aspect of the "alternate source" analysis, like the others, also supports disclosure by the Department.

For these reasons, this *Cline* factor favors disclosure, and the Circuit Court's determination to the contrary was legally erroneous.

IV. THE DEPARTMENT HAS NOT POINTED TO ANY EVIDENCE THAT ANYONE EXPECTED TO KEEP, AND HAS KEPT, THE REASONS FOR SAMPLES' TERMINATION CONFIDENTIAL.

The Department admits that (1) the regulation generally purporting to require personnel material to remain confidential is not an "ironclad promise" of confidentiality, and (2) it has previously disregarded that rule to voluntarily disclose "personnel file" information of another high official's departure from the Department. Resp. Br. at 19-23. Given those admissions, the Department's failure to meet its evidentiary burden to support the contention that the Termination Letter was intended to be kept, and has been kept, confidential is all the more glaring. *See Farley*, 215 W. Va. at 418, 599 S.E.2d at 841 ("[T]he evidentiary burden [is] placed upon the public body to justify the withholding of materials.").

Yet, the Department has provided nothing more than mere *argument* that the letter was even placed in Samples' "personnel file," much less that the Department officials involved in its creation and dissemination intended the letter to remain confidential and have taken any steps to ensure the reasons for Samples' termination were kept secret from everyone other than Samples. *See* Pet. Br. at 23-24 (emphasizing lack of evidence from Department).

Unable to point to any such evidence, the Department instead argues against positions WSAZ has not taken.

For one, WSAZ does not and has not argued that W. Va. Code S.R. § 143-1-19.1 itself is "flatly contradicted by the Supreme Court of Appeals' explanation." *See* Resp. Br. at 22 (misleadingly characterizing WSAZ's brief). Rather, the point WSAZ has made is that, notwithstanding regulations requiring confidentiality, the Supreme Court of Appeals has held that certain information in a personnel file *must be disclosed* under the FOIA. *See* Pet. Br. at 23-24. That holding, and the existence of the FOIA generally, means that public officials cannot *presume* that the public record they are creating will be shielded from disclosure on the grounds that a state regulation generally requires things like employee addresses and test scores not to be publicly disclosed. *See, e.g.*, *Smithers*, 232 W. Va. at 468, 752 S.E.2d at 622 (regulation requiring confidentiality "is not dispositive of the issue, and the FOIA shall remain the proper analytical framework for issues of disclosure of public information"). So, even though there may be an applicable exemption, public officials should presume that public records will be disclosed, even if they believe that the material may be exempt from disclosure. That, in any event, is what the FOIA requires. *See* W. Va. Code § 29B-1-4(a) ("There is a presumption of public accessibility to all public records.").

Meanwhile, WSAZ raises the Department's prior voluntary release of the Slemp records not to argue that the prior disclosure automatically requires disclosure here. Resp. Br. at 21-22. WSAZ agrees that each FOIA request and case must be assessed on its own facts and evidence. But the Department's prior release of those records shows the Department has in the past disregarded the state regulation it now invokes. As such, there is no reason or justification, as the Department asks, for the Court simply to assume, without any evidence that everyone involved

in Samples' termination expected the reasons for it to be kept in confidence and has worked to keep it that way.

The Department does not address its evidentiary failure on this point. Instead, it hopes that the Court will improperly relieve the Department of its burden and take for granted that the letter was created and circulated with an expectation of confidentiality. The Circuit Court's willingness to do so was error. *See* PA 344. This Court should therefore weigh this factor, and the others, in favor of disclosure and reverse the decision below.

CONCLUSION

For the foregoing reasons, and those asserted in WSAZ's opening brief, the letter and spirit of the FOIA require the disclosure of the Termination Letter, and the Circuit Court erred in ruling otherwise. That decision should be reversed.

GRAY MEDIA GROUP, INC.
d/b/a WSAZ,

By Counsel,

/s/ Erica M. Baumgras
Erica M. Baumgras (WV Bar No. 6862)
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street (25301)
P.O. Box 3843
Charleston, WV 25338-3843
304.345.0200
ebaumgras@flahertylegal.com

Matthew S.L. Cate (*pro hac vice*)
Charles D. Tobin (*pro hac vice*)
BALLARD SPAHR LLP
1909 K Street, NW, 12th Floor
Washington, DC 20006-1157
Telephone: 202.661.2200
Facsimile: 202.661.2299
catem@ballardspahr.com
tobinc@ballardspahr.com

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2023, true and accurate copy of the foregoing **Petitioner's Reply Brief** has been filed via the West Virginia Supreme Court e-filing system, which will serve the following counsel of record:

Lindsay S. See, Esq.
Michael R. Williams, Esq.
Spencer J. Davenport, Esq.
Office of the West Virginia Attorney General
State Capitol Complex
1900 Kanawha Blvd. E.
Bldg. 1, Rm E-26
Charleston, WV 25305
Lindsay.S.See@wvago.gov
Michael.R.Williams@wvago.gov
Spencer.J.Davenport@wvago.gov

Counsel for Respondent
West Virginia Department of Health and Human Resources

/s/ Erica M. Baumgras
Erica M. Baumgras (WV Bar No. 6862)
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street (25301)
P.O. Box 3843
Charleston, WV 25338-3843
304.345.0200
ebaumgras@flahertylegal.com