No. 23-ICA-283

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 APPENDIX

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

CERTIFICATION

I, Erica M. Baumgras, certify that the contents of this appendix are true and accurate copies of items contained in the record of the lower tribunal; and (2) the petitioner has conferred in good faith with all parties to the appeal in order to determine the contents of the appendix.

Dated 2nd day of October, 2023.

/s/Erica M. Baumgras
Erica M. Baumgras

TABLE OF CONTENTS

Page

No. 23-ICA-283

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 OPENING 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

Page(s)

Cases

Statutes

ASSIGNMENTS OF ERROR

1. The Freedom of Information Act ("FOIA"), W. Va. Code § 29B-1-1, *et seq.*, provides that writings relating to the public's business must be disclosed in response to a FOIA request unless the material requested falls within one of the FOIA's limited statutory exemptions, which the courts narrowly construe. Respondent West Virginia Department of Health and Human Resources (the "Department") has refused to disclose to Petitioner Gray Media Group, Inc. d/b/a WSAZ ("WSAZ") a copy of a letter from the Department's Secretary terminating the employment of its former Deputy Secretary. The Circuit Court erred in concluding that the termination letter falls within the narrow FOIA exemption for "information of a personal nature" and that the Department need not disclose it.

STATEMENT OF THE CASE

A. A Department under intense legislative scrutiny causes a public stir when it fires its second-highest ranking public official and declines to explain why.

In early April 2022, the Department fired its Deputy Secretary, Jeremiah Samples, amid intense scrutiny over the Department's operations and future. Lawmakers had recently passed legislation to split the Department into two agencies over concerns that the agency had grown too unwieldy and inefficient. *See, e.g.*, PA 104; PA 114-33.[1] And while he vetoed the bill, Governor Jim Justice joined the chorus of critics, emphasizing that the Department "affects the lives of our most vulnerable West Virginians" but was riddled with "issues, bottlenecks, and inefficiencies" while "people's lives hang in the balance." *Id.*

With that backdrop, Samples' firing prompted substantial coverage in the news media and was discussed publicly by lawmakers, Samples, and the agency official who fired him. PA 114-33. One news outlet described it as the "political news of the week" and wondered if

[1] References to "PA" are to the Petitioner's Appendix filed concurrently with this brief.

lawmakers might "somewhat avenge Samples" by forcing the Department to split into two agencies. PA 114-15. Another reported that Samples' departure "is a lightning rod" drawing further attention to Department issues and quoted lawmakers calling Samples' firing "an example of the dysfunction within DHHR," asserting that Samples "will be missed," and characterizing his departure as "a huge loss" and "incalculable." PA116-21. The Department itself was closely monitoring public discussion of Samples' termination, with a Department staff member notifying Crouch of commentary asserting that the firing "lit a match" with lawmakers who had worked closely with Samples over the years and respected him and that the termination was "a loss of key personnel." PA 436.

B. WSAZ sues the Department pursuant to the FOIA to obtain access to public records relating to Samples' termination.

When WSAZ learned of Samples' departure, it immediately submitted a FOIA request to the Department seeking copies of public records relating to Samples' termination. PA65-66; PA 72. The Department refused, forcing WSAZ, on May 31, 2023, to file the action underlying this appeal to vindicate its rights. PA 74-77; PA 1-9.

As the proceedings in the Circuit Court revealed, WSAZ's FOIA request implicated scores of public records.[2] *See* PA 349-79 (records at issue in March 31, 2023, Order); PA 393-411 (records at issues in May 31, 2023, Order). This appeal, however, pertains to just one document: an April 2022 letter from William Crouch, then the Department's Secretary, notifying Samples of his termination and explaining the reasons for that decision (the "Termination Letter"). Despite the fact that the Department had recently disclosed public records relating to a

[2] The Department did not search for any public records responsive to WSAZ's FOIA request until the station sued. Ultimately, most of the public records responsive to the FOIA request were disclosed, in whole or in part, as a result of the lawsuit.

different high-ranking official's departure from the Department,[3] the Department asserted that the Termination Letter is exempt from disclosure under W. Va. Code § 29B-1-4(a)(2) because it is "information of a personal nature" whose disclosure "would constitute an unreasonable invasion of privacy." *See* PA 76-77; PA 377.[4]

On November 1, 2022, the Circuit Court ordered the Department to provide it with a copy of the Termination Letter for *in camera* review. PA 139; PA 489 at Lines 35, 44, 47.[5] A few months later, during a March 9, 2023, hearing, the Department argued against disclosure of the Termination Letter on the ground that Samples had not been "accused of wrong doing in the public" or accused of doing "something against the agency." PA 298 at 26:10-13. Likewise, the Department asserted that the "internal decision of the Cabinet Secretary to decide that this Deputy Secretary" should be fired had "nothing to do with" the Department's work, which it acknowledged "touches the lives of almost every West Virginia" resident. PA 316 at 44:10-20. Thus, the Department represented, Samples' termination was unrelated to "DHHR's ability to carry [out] its own mission" and did not have any impact on the public. PA 316 at 44:21-24.

[3] In 2020, the Department received and complied with a FOIA request for public records regarding the resignation of the former Commissioner of the Bureau of Public Health. *see* PA 68-69; PA 81-82.

[4] The Department initially claimed that the letter, identified in the proceedings below with the Bates label A0030-32, also fell under the FOIA's "internal memoranda" exemption. PA 377 (index identifying Department's asserted exemptions in second column). It later withdrew that argument, however, acknowledging that the Termination Letter was not both pre-decisional and deliberative, as the exemption requires. PA 293 at 21:18-23.

[5] The Termination Letter was lodged in the Circuit Court record under seal and is thus part of the record on appeal. *See* PA 489 at Lines 35, 44, 47. Because WSAZ of course does not have access to that record, it is not part of the Petitioner's Appendix.

C. The Circuit Court erroneously rules that the Termination Letter constitutes "information of a personal nature" exempt from disclosure under the FOIA.

The Circuit Court on March 31, 2023, issued an Order regarding the Termination Letter, specially setting forth its analysis of the asserted exemption for "information of a personal nature." PA 339-348. The Circuit Court assessed various factors required by Supreme Court of Appeals precedent, then focused on the content of the Termination Letter and concluded that the information at issue did not rise to a sufficiently important level of public interest to outweigh Samples' privacy interests. PA 340, 342, 345-47.

In particular, the Circuit Court found that it had "not been presented with any evidence of any investigation of internal or external complaints of misconduct" against Samples. PA 347. The Court concluded that the Termination Letter (1) "is not a complaint of misconduct filed against Mr. Samples," (2) "is [not] a document providing findings and conclusions of an investigation," and (3) "does not contain information implicating the occurrence of a formal investigation nor the existence of factual findings and/or conclusions of an investigation." *Id*. Based on that narrow interpretation of the letter, the Circuit Court distinguished it from Supreme Court of Appeals precedent, interpreting the Termination Letter's contents as falling outside of the information required to be disclosed under FOIA. *Id*. The Circuit Court thus ruled that the Termination Letter is "information of a personal nature" exempt from disclosure under Section 29B-1-4(a)(2). PA 348.

Two months later, the Circuit Court's May 31, 2023 Final Order adopted the same analysis in ruling that a draft of the Termination Letter was exempt from disclosure. PA 390-91.

WSAZ timely filed its Notice of Appeal on June 30, 2023.

D. The Department discloses to WSAZ a draft of the Termination Letter, and the Circuit Court acknowledges its contents are of "public significance."

On July 10, 2023, the Department, by email, produced a batch of public records to WSAZ in compliance with the Circuit Court's May 31, 2023 Order. PA 418-419. The Department inadvertently included in that set of disclosures an unredacted copy of a draft of the Termination Letter (the "Draft Termination Letter"). PA 419; PA 423-24.

After WSAZ counsel notified the Department of its inadvertent disclosure, the Department moved for an order restraining WSAZ from disseminating the Draft Termination Letter. PA 412-14. The Circuit Court issued a temporary injunction, but after an August 23, 2023, hearing it dissolved that order and denied the Department's motion for a permanent restraint. PA 416-17. In its August 28, 2023 Order denying the Department's motion, the Circuit Court emphasized that the First Amendment protects the right of the news media to publish information it has lawfully obtained when the information, like that contained in the Draft Termination Letter, is "about a matter of public significance" and "public concern." PA 480. WSAZ included the Draft Termination Letter in its news coverage shortly after the Court rendered the Order.

In the draft, Crouch sharply criticizes Samples' performance of his public duties. He:

- Accuses Samples of conduct that "prevents or hinders the Department from meeting its objectives" in serving the public;
- Writes that he had repeatedly told Samples that communication between them "is critical to assure that the Department is moving in the right direction and fulfilling its role in the state;"
- Asserts that Samples' failure to adequately communicate with Crouch "is misconduct and insubordination which prevents, or at the very least, delays the Department in fulfilling its mission;"

- Accuses Samples of having actively opposed Crouch's policy decisions and of trying to "circumvent those policy decisions by pushing your own agenda," allegedly causing departmental "confusion" and resulting in "a slowdown in getting things accomplished in DHHR;"

- Informs Samples that his behavior violated the Department's official written policy governing employee conduct; and

- Concludes that Samples' termination was necessary to "maintain the Department's integrity, which provides its employees with a means to ensure its efficient and effective operation."

PA 423-424.

SUMMARY OF ARGUMENT

The Termination Letter is a public record regarding the firing of a high-ranking public official from a public agency due to allegedly poor performance of public duties. That does not involve a personal or private matter. Instead, it is precisely the type of record the Legislature had in mind when it established the FOIA.

As the Supreme Court of Appeals has repeatedly held, courts must expansively construe FOIA's disclosure provisions and narrowly interpret its exemptions. The sole exemption the Department asserts over the Termination Letter applies only if disclosure of the material would constitute an "unreasonable invasion of privacy." Each of the five factors relevant to that determination show that no such invasion would occur here and that, accordingly, the FOIA requires disclosure of the Termination Letter.

First, Samples' position as a high government official means that he has no privacy interest in the details of this job performance and termination, and disclosure of the Termination Letter cannot, therefore, constitute an unreasonable invasion of privacy, much less a "serious" one. Second, the public has a substantial interest in the letter's disclosure, especially in light of

the fact that, as revealed by the Draft Termination Letter, Secretary Crouch fired Samples amid accusations of "misconduct" that prevented the Department from executing its public duties. Third, the Department is the only adequate source of the Termination Letter, and the question of whether Samples could or would release the letter to WSAZ himself is irrelevant. Fourth, there is no basis to conclude that the Department gave Samples the Termination Letter with the expectation it would remain confidential, and any such expectation would not be reasonable under the law. Finally, because disclosure would not constitute any substantial or serious invasion of Samples' privacy interests, there is no need to consider whether and how to limit disclosure of the letter to protect those interests.

The Circuit Court's contrary analysis is legally and factually erroneous and rests on characterizations of the Termination Letter's content that are inconsistent with the Department's accusations against Samples. The Court should reverse that ruling, order the Department to disclose the Termination Letter, and remand the case to the Circuit Court for further consideration of WSAZ's attorneys' fees and costs incurred during this appeal.[6]

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

WSAZ requests oral argument as soon as the Court can set it. *See* W. Va. Code § 29B-1-5(3). This appeal is not frivolous, and the dispositive issues have not been authoritatively decided. Further, this appeal implicates what the Legislature has declared to relate to a fundamental principle of democracy—the right of access to public information regarding public affairs. Its resolution turns on the question of whether an exemption from the FOIA's mandatory disclosure requirement for "information of a personal nature" may be expansively stretched in

[6] Appellant has filed a motion in the Circuit Court for recovery its attorneys' fees and costs incurred before this appeal. PA 491 at Line 123. That motion remains pending.

the manner the Circuit Court did in contradiction of the requirement that FOIA exemptions must be narrowly construed. This matter should accordingly be set for oral argument under Rule 20.

STANDARD OF REVIEW

FOIA rulings are reviewed *de novo*. *See Farley v. Worley*, 215 W. Va. 412, 418, 599 S.E.2d 835, 841 (2004). Moreover, the burden of establishing the applicability of an exemption to the FOIA's mandatory disclosure requirements rests on the agency resisting disclosure. *Id.*; *see also* W. Va. Code § 29B-1-5(2).

ARGUMENT

I. THE FOIA MUST BE CONSTRUED LIBERALLY IN FAVOR OF DISCLOSURE OF PUBLIC RECORDS, WITH EXEMPTIONS NARROWLY CONSTRUED.

The "fundamental philosophy of the American constitutional form of representative government" holds that "government is the servant of the people, and not the master of them." W. Va. Code § 29B-1-1. The Legislature has accordingly "declared [it] to be 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." *Id.* To give that policy effect, the FOIA provides a presumptive right of access to all documents that relate "to the conduct of the public's business." *Id.* § 29B-1-2(5) (defining "public record"); *id.* § 29B-1-3 (providing "a right to inspect or copy any public record"); *id.* § 29B-1-4(a) (establishing "a presumption of public accessibility to all public records").

Public agencies are therefore obligated to disclose a requested public record unless the document falls within one of the limited statutory exemptions from disclosure. *Id.* § 29B-1-4(a). When an agency in a FOIA case invokes a statutory exemption, the court must construe the FOIA liberally in favor of disclosure and interpret the exemption narrowly. *See* Syl. pt. 4,

Hechler v. Casey, 175 W. Va. 434, 333 S.E.2d 799 (1985). In other words, "the fullest responsible disclosure, not confidentiality, is the dominant objective of the Act." *Id.* at 445, 333 S.E.2d at 810; *see also, e.g.*, *Sattler v. Holliday*, 173 W. Va. 471, 473, 318 S.E.2d 50, 52 (1984) ("We have been admonished to make decisions in favor of disclosure.").

II. THE FOIA REQUIRES DISCLOSURE OF THE TERMINATION LETTER, AND THE CIRCUIT COURT ERRED IN CONCLUDING OTHERWISE.

A. The "Information Of A Personal Nature" Exemption To FOIA's Mandatory Disclosure Requirement Turns On Whether Disclosure Of A Public Record Would Constitute An "Unreasonable Invasion Of Privacy."

One of the limited exemptions to the FOIA's mandatory disclosure requirement applies to "information of a personal nature" of the type "kept in a personal, medical, or similar file." W. Va. Code § 29B-1-4(a)(2). Such information is exempt only if "public disclosure of the information would constitute an unreasonable invasion of privacy" *and* (2) "the public interest by clear and convincing evidence requires disclosure in [the] particular instance." *Id.* Thus, for example, if disclosure of a public record would not constitute "an unreasonable invasion of privacy," the material must be disclosed upon request.[7]

The FOIA does not define what constitutes an "unreasonable invasion" of privacy or precisely what a government agency must show to meet its burden to invoke this exemption. The Supreme Court of Appeals, however, has instructed that the determination turns on the balance between "the individual's right of privacy against the public's right to know." Syl. Pt. 7, *Hechler*, 175 W. Va. 434, 333 S.E.2d 799 (1985). That analysis, in turn, is informed by the consideration of five factors first announced in *Cline*, 177 W. Va. 29, 350 S.E.2d 541. *See* Syl. Pt. 7,

[7] Only if the court finds that the disclosure would constitute an unreasonable invasion of privacy does it need to then determine whether there is "clear and convincing evidence" that the public interest in disclosure nonetheless outweighs the relevant privacy interests. W. Va. Code § 29B-1-4(a)(2); *see also Child Protection Grp. v. Cline*, 177 W. Va. 29, 34, 350 S.E.2d 541, 545 (1986).

Charleston Gazette v. Smithers, 232 W. Va. 449, 752 S.E.2d 449 (2013) (citing Syl. Pt. 2, *Child Protection Grp. v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986)).

In particular, courts assessing assertions of the privacy exemption consider (1) "[w]hether disclosure would result in a substantial invasion of privacy, and if so, how serious[;]" (2) the public interest in disclosure and purposes for which the information is being sought; (3) whether the information is available from other sources; (4) "[w]hether the information was given with an expectation of confidence;" and (5) "[w]hether it is possible to mould relief so as to limit the invasion of individual privacy." Syl. Pt. 7, *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752 S.E.2d 449 (2013) (citing Syl. Pt. 2, *Child Protection Grp. v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986)). A public record may be withheld as exempt under Section 29B-1-4(a)(2) only if the balance of these factors results in the conclusion that the disclosure would result in an unreasonable invasion of privacy.

B. The Disclosure Of The Termination Letter Would Not Constitute An Unreasonable Invasion Of Any Privacy Interests.

Each of these five factors favors disclosure of the Termination Letter. The Circuit Court's conclusion to the contrary, which this Court reviews *de novo*, is erroneous and should be reversed.

1. Disclosure of the Termination Letter cannot constitute a "substantial invasion of privacy" to any "serious" degree because high government officials have negligible privacy interests in the details of the performance of their public duties.

The first *Cline* factor asks whether disclosure would substantially invade a privacy interest and, if so, how serious that invasion would be. As to the first step of this analysis, the 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. In contrast, "[i]nformation of a non-intimate or public nature" does not

implicate privacy interests under the FOIA analysis. *Id.* Further, when considering the seriousness of an invasion of cognizable privacy interests, the question is whether the disclosure would cause "embarrassment or harm" to an "ordinary" person under the same circumstances. *Id.*

This factor favors disclosure because the Termination Letter does not implicate information that "belongs to private individuals." Instead it involves "non-intimate" and "public" information of the type the Supreme Court of Appeals has held must be disclosed under the FOIA.

Take for example, the details of a public employees' pay records. Because such information pertains to the performance of public business—and the costs of carrying it out—the Court has held that disclosure of public records revealing a public employee's time sheets, work attendance, earnings, sick leave, and retirement service credit does not implicate the type of "information of a private nature" that Section 29B-1-4(a)(2) was designed to protect. *See In re Charleston Gazette FOIA Request*, 222 W. Va. 771, 784 & n.4, 671 S.E.2d 776 (2008). Instead, such records "are clearly public records and subject to disclosure" under the FOIA. *Id.*

Likewise, the Supreme Court of Appeals has held that disclosure of records relating to the on-the-job conduct of state police officers cannot constitute a "substantial" or "serious" invasion of privacy. *See* Syl. Pt. 8, *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752 S.E.2d 603 (2013) ("Conduct by a state police officer while the officer is on the job in his or her official capacity . . . does not fall within the [FOIA] invasion of privacy exemption."). In *Smithers*, the Supreme Court of Appeals distinguished between public records relating to alleged misconduct by police officers for off-duty conduct and public records relating to alleged on-duty misconduct. *Id.* at 465, 752 S.E.2d at 619. It reasoned that disclosure of the former may, in some

circumstances, constitute an unreasonable invasion of privacy because the alleged wrongdoing would pertain only to private details unrelated to the performance of work as a police officer. *Id.* In contrast, records relating to accusations involving the officers' public duties, as a rule, cannot unreasonably invade officers' privacy interests because the records relate to the conduct of the public's business by public employees. *See id.*

For similar reasons, courts applying the comparable federal Freedom of Information Act provisions have repeatedly held that a public employee has minimized privacy interests in records relating to their performance—especially when the records relate to conduct of high-ranking officials. *See Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) ("censure letter" provided to high-ranking official not exempt because reduced privacy interests in the details of public employee performance is further diminished with increased level of responsibility);[8] *see also, e.g.*, *Perlman v. DOJ*, 312 F.3d 100, 107 (2d Cir. 2002), (emphasizing "level of responsibility held by a federal employee" is an "appropriate consideration" in assessing extent of privacy interests at stake), *vacated by* 541 U.S. 970 (2004), *reinstated after remand*, 380 F.3d 110 (2d Cir. 2004); *Cowdery, Ecker & Murphy, LLC v. Dep't of Interior*, 511 F. Supp. 2d 215, 218 (D. Conn. 2007) (fact that requested performance evaluations were of agency's "third in command" favored disclosure); *Sullivan v. Veterans Admin.*, 617 F. Supp. 258, 261 (D.D.C. 1985) (that government employees have diminished privacy interests in such records "is particularly true where, as here, the federal employee in question holds a high level position"); *Hardy v. DOD*, No. CV-99-523-TUC-FRZ, 2001 U.S. Dist. LEXIS 26628, at *23-25 (D. Ariz. Aug. 24, 2001)

[8] The Supreme Court of Appeals has repeatedly held that federal FOIA cases are "highly persuasive" when construing West Virginia's FOIA. *Farley v. Worley*, 215 W. Va. 412, 420 n.7, 599 S.E.2d 835, 843 (2004); *see also, e.g.*, *Daily Gazette Co. v. W. Va. Dev. Office*, 198 W. Va. 563, 571, 482 S.E.2d 180, 188 (1996) (same).

(finding agency director and associate director had "minimal" privacy interest in performance evaluations and ratings in large part due to their "high-level position[s]").

The reasoning of these decisions applies with equal force to the Termination Letter. That public record relays "non-intimate" reasons a high government official was fired from public service due to his on-the-job conduct. To the contrary, the Draft Termination Letter reveals that Crouch accused Samples of "misconduct" in the performance of his duties that "prevent[ed] or hinder[ed] the Department" from carrying out its responsibilities to the public. PA 423-24. The Termination Letter's disclosure therefore cannot constitute a "substantial invasion of privacy" because it directly relates to the performance not only of Samples' public duties but also to the Department's operations. This is "simply is not the kind of private facts that the Legislature intended to exempt from mandatory disclosure." *See In re Charleston Gazette FOIA*, 222 W. Va. at 784 n.4, 671 S.E.2d at 788. It is core public information that goes to the heart of the FOIA and the Legislature's insistence that the public is entitled to "complete 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.

The Circuit Court's analysis of the Termination Letter and FOIA contains multiple fundamental errors. For one, the Circuit Court placed undue weight on the simple fact that the Termination Letter identifies Samples and relates to his employment. PA 340. But the identity of a person as a government employee is not a private fact. *See, e.g.*, *In re Charleston Gazette FOIA*, 222 W. Va. at 788, 671 S.E.2d at 783. Moreover, the court ignored the fact that Samples issued a public statement to the news media about the circumstances of his termination. PA 123-24. That statement invited additional public scrutiny into the circumstances of and reasons for his termination and how his departure could impact the Department's future operations. *See* PA 117

(reporting that Samples' statement "set off a fresh swirl of concern by lawmakers"). That voluntary act further eroded the already diminished privacy interests Samples may have had in the Termination Letter, and the Circuit Court erred by declining to give it any weight in its analysis.

Further, the Circuit Court wrongly expanded the limited holding in *Smith v. Bradley*, 223 W. Va. 286, 673 S.E.2d 500 (2007), into a blanket determination that, as a rule, the disclosure of a public employee's performance evaluation would constitute a substantial invasion of privacy. PA 340. In *Smith v. Bradley*, a disgruntled former employee of Fairmont State University sought disclosure of the identities of every non-tenured faculty member the university had employed over a three-year period and every performance evaluation submitted for them by any supervisor, peer, or student over the same time. *Id.* at 289 & n.1. The Supreme Court of Appeals held that the evaluations had to be disclosed in redacted form, emphasizing that the plaintiff did not assert any particular public interest in the mass disclosure of unredacted versions of the evaluations, and it is clear that plaintiff sought the information to further his discredited personal legal claims against the university.[9] Under such circumstances, the Court concluded, the mass release of every evaluation of those low-level employees would constitute a substantial and serious invasion of privacy. *Id.* at 291. The Court expressly limited its holding to the facts of that case, *id.*, and nothing in its analysis suggests that the Court intended *Smith* to establish a rule that every public employee, of every rank and under every circumstance, has a significant privacy interest in their performance evaluations. But that is precisely what the Circuit Court has

[9] Smith's claims had been rejected by the university, the administrative law judge reviewing its decision, the court that reviewed that decision, and the West Virginia Human Rights Commission. *Bradley*, 223 W. Va. at 288-89. He then filed and withdrew lawsuits in two separate Circuit Courts over his non-retention and submitted his FOIA request in connection with the filing of yet another suit. *Id.* at 289.

suggested here.

Finally, and as further discussed below, *see* Section II.B.2, the Circuit Court grossly undervalued—as both a legal and factual matter—the extent of the public interest in disclosure of the Termination Letter, and it reached that issue unnecessarily. *See, e.g.*, *Cline*, 177 W. Va. at 34 n.8, 350 S.E.2d at 545 n.8 (balancing test required only when disclosure would constitute a substantial invasion of privacy).

The Termination Letter indisputably concerns a high government official's performance of his public duties and allegations that he violated Department policy. These are simply not "private facts," and the letter's release cannot constitute a substantial and serious invasion of privacy. This factor alone overwhelmingly favors disclosure of the Termination Letter, and the Circuit Court's conclusion otherwise should be reversed.

2. The public has a substantial interest in disclosure of the Termination Letter, and WSAZ's efforts to obtain it serve the fundamental goals of the FOIA.

The second *Cline* factor considers both the extent of the public interest in disclosure and the "purpose or object" of the FOIA requestor. *Cline*, 177 W. Va. at 32, 350 S.E.2d at 543. These considerations also overwhelmingly favor disclosure of the Termination Letter.

First, there is extensive public interest in the circumstances of Samples' termination. His departure came amid a period of intense scrutiny over the Department's operations and concern about its future. *See, e.g.*, PA 104-05 (March 30, 2022, statement by Gov. Justice expressing concern over "the very real issues within DHHR" and calling for "a top-to-bottom review of the DHHR" to "identify its issues, bottlenecks, and inefficiencies"). The firing of Samples, who had served in that role for five years and worked at the Department for nearly 20 years, understandably prompted substantial coverage in the news media, expressions of concern from lawmakers about the Department's leadership, and public comments by Samples and Crouch.

See PA 113-33. That public discussion reveals a significant interest in Samples' termination that substantially favors disclosure of the letter.

Further tipping the balance is the fundamental legal principle that the public has a significant stake in learning about "the actions and conduct of the government." *Smithers*, 232 W. Va. at 466, 752 S.E.2d at 620; *see also, e.g.*, *Davis v. DOJ*, 968 F.2d 1276, 1282 (D.C. Cir. 1992) ("It is well established that the only public interest relevant for purposes of [the federal FOIA privacy exemption] is one that focuses on the citizens' right to be informed about what their government is up to."); W. Va. Code § 29B-1-1 ("The people insist on remaining informed so that they may retain control over the instruments of government they have created.").

Second, the purpose for which WSAZ seeks a copy of the letter—to report important news to the public on the operations of their state's government—lies at the heart of the FOIA. As the Supreme Court of Appeals has emphasized, the "dissemination of public information by the press is an important cornerstone of a vivacious democracy." *Smithers*, 232 W. Va. at 466, 752 S.E.2d at 620. The news media thus plays a "vital role" in carrying out the goals of the FOIA, and its efforts to do so here weigh in favor of disclosure. *Id.*

The Circuit Court, however, discounted these substantial interests and goals, minimized their impact on the legal questions under FOIA, and erroneously applied *Smithers* to rule otherwise. PA 341-42. In particular, the court asserted that the Termination Letter (1) "is not a complaint of misconduct filed against Mr. Samples," (2) "is [not] a document providing findings and conclusions of an investigation," and (3) "does not contain information implicating the occurrence of a formal investigation nor the existence of factual findings and/or conclusions of an investigation." PA 347. It thus unfavorably compared the Termination Letter to the public records of investigations of on-the-job police misconduct that were at issue in *Smithers*. PA 346-

47. But that characterization of the Termination Letter is inconsistent with Crouch's written accusations against Samples in the draft letter, his presentation of reasons for firing him, and the conclusion that doing so was the only proper way to preserve the "integrity" of the Department in light of the "misconduct" undertaken in violation of Department policies. *See* PA 423-24.

The Circuit Court compounded that factual error with a legal one, construing *Smithers* too narrowly as holding that "disclosure of disciplinary information from personnel files is appropriate *only* when an investigation into alleged misconduct has taken place and some type of formal determination e.g., findings of fact and conclusions, have been made." PA 346 (emphasis added). The Supreme Court of Appeals held no such thing in *Smithers*. Instead, it held that once an investigation into complaints of misconduct by police officers has concluded and a determination reached regarding the allegations, "the public has a right to access the complaint" and "all documents in the case file." Syl. Pt. 11, *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752 S.E.2d 603 (2013). In reaching that pro-transparency outcome, the Court did not hold that public records of employee discipline may be released "only" when those records reflect formal investigations and findings, much less, as the Circuit Court appeared to believe, only when those investigations and findings relate to alleged police misconduct.

What *Smithers* actually demonstrates is the commitment to disclosure that the FOIA requires the courts of this state to serve when considering the applicability asserted exemptions. 232 W. Va. at 466, 752 S.E.2d at 620 (expressing importance of dissemination of public information so that the public may scrutinize the actions of government). The Circuit Court's interpretation of *Smithers* as a barrier to transparency is inconsistent with the rule that courts must narrowly construe FOIA exemptions and "to make decisions in favor of disclosure" to the fullest extent available under the law. *Sattler*, 173 W. Va. at 473, 318 S.E.2d at 52. "[The] fullest

responsible disclosure, not confidentiality, is the dominant objective" of FOIA. *Hechler*, 175 W. Va. at 445,333 S.E.2d at 810.

Indeed, as the Circuit Court later implicitly recognized in connection with the Department's attempt to prohibit dissemination of the Draft Termination Letter, Sample's termination is a matter of public significance. PA 480-81. In lifting its temporary injunction and denying the Department further relief, the Circuit Court held that upon receipt of the draft letter, the First Amendment protected WSAZ's right to publish it because the letter was a matter of public interest and WSAZ had lawfully obtained it. The Circuit Court, in its earlier rulings, did not adequately credit that same interest in connection with its FOIA analysis, and its determination that this *Cline* factor favors *nondisclosure* should be reversed.

3. The Department is the only adequate source of the Termination Letter.

The third *Cline* factor—whether the information is available from another source—typically plays out in one of three ways, all favoring disclosure. First, if the agency shows that the information is available from other sources, "the court should simply allow the plaintiff access to information which he would eventually get anyway." *See Cline*, 117 W. Va. at 33, 350 S.E.2d at 544; *see also Hechler*, 175 W. Va. at 446, 333 S.E.2d at 811 (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). Second, if the information is available in some other way that would be "less intrusive to individual privacy," relief should be provided in "the less intrusive format." *Cline*, 117 W. Va. at 33, 350 S.E.2d at 544. Finally, when the public agency is the only source of the material, "this is a factor in favor of disclosure." *Id.*

The Department did not provide any evidence relating to this factor, as was its burden. *See Farley*, 215 W. Va. at 418, 599 S.E.2d at 841; *Cline*, 177 W. Va. at 34, 350 S.E.2d at 545 ("the burden of proof is always on the agency resisting disclosure"). It merely argued that Samples, in theory, could release the letter to WSAZ himself or authorize the Department to do so and that, accordingly, WSAZ should not be able to obtain the Termination Letter from the Department under the FOIA until it asks Samples to provide the letter. *See* PA 177-78.[10]

Regardless of whether Samples would agree or refuse to disclose the Termination Letter, either answer supports disclosure of the letter by the Department pursuant to the FOIA. On one hand, had he been willing to disclose the Termination Letter to WSAZ, then Samples necessarily would have waived any privacy interests he might have had in its contents, thereby eliminating the sole basis the Department assets for its nondisclosure and thereby "strengthen[ing] the case for FOIA disclosure" here. *Hechler*, 175 W. Va. at 446, 333 S.E.2d at 811. On the other hand, if Samples declined to the release the Termination Letter to WSAZ, then the Department would be the only source of its disclosure, which, under this *Cline* factor, favors disclosure. *Cline*, 117 W. Va. at 33, 350 S.E.2d at 544-45.

The Circuit Court's Order does not explain how this factor influenced its analysis. It only notes that Samples could have chosen to provide WSAZ the letter or to refuse to do so. Meanwhile, it cited *Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988), without explaining how the case influenced the Circuit Court's analysis.

To be clear, any reliance on *Robinson* to conclude that this *Cline* factor weighs against disclosure would be erroneous. In *Robinson*, the FOIA requester was a lawyer who represented

[10] As the Circuit Court noted, the Department could have likewise asked Samples to authorize the letter's release and did not do so. PA 178.

injured workers before the Workers' Compensation Commission. 180 W. Va. at 28, 375 S.E.2d at 206. The state's Workers' Compensation Fund maintained a microfiche containing the names, addresses, Social Security numbers, financial information, claim history, and mental health and injury information of injured workers. *Id.* The lawyer requested copies of 1,424 public records covering the details of nearly 3.5 million workers' compensation claims. *Id.* at 28-29, 375 S.E.2d at 206-07. He argued that he needed the information to assist generally with his representation of injured workers. *Id.* at 28, 375 S.E.2d at 206.

The Supreme Court of Appeals held that the requested trove of records unquestionably contained "sensitive information" and that the lawyer had failed to establish any legitimate interest in the mass disclosure of such material. *Id.* at 31, 375 S.E.2d at 209. It further held that rather than provide copies of records pertaining to millions of claims, and thereby unnecessarily disclosing sensitive material irrelevant to his clients' claims, the lawyer was entitled by law either to ask the agency to provide copies of the portions of the microfiche relevant to his clients or to visit the agency in person to review the microfiche himself. *Id.* Thus, as the Court held, the agency properly denied the request because the FOIA requester had failed to provide a legitimate reason to overcome the privacy exemption *and* already had an adequate source from which he could get the information he wanted. Syl. Pt. 3, *Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988).

Here, in contrast, WSAZ has provided uncontroverted evidence of the public interest in disclosure that far outweighs any purported privacy interests. Further, there is no evidence that Samples is an "adequate source" of the Termination Letter. In *Robinson*, for example, the other "adequate source" of the requested information was a state agency legally obligated to provide the requester the information. WSAZ, in contrast, is not legally entitled to obtain the Termination

Letter from anyone—except, pursuant to the FOIA, the Department. Moreover, in the hypothetical scenario in which Samples would have consented to provide a copy of the letter to WSAZ, the station would still require the Department to confirm the authenticity of the document as a legitimate copy of the actual public record relating to Samples' termination and the reasons provided for it. WSAZ thus has provided legitimate grounds to overcome the asserted privacy exemption and *does not* have an adequate source from which it can obtain the letter. *Robinson* accordingly has no application here, and the Circuit Court's conclusion is erroneous to the extent it determined otherwise.

This factor accordingly favors disclosure of the Termination Letter.

4. There is no evidence of any relevant, reasonable, or lawful expectation of confidentiality in the creation and delivery of the Termination Letter.

In holding that an "expectation of confidentiality" may be relevant to whether disclosure of a public record may constitute an unreasonable invasion of privacy, the *Cline* Court explained that "[o]ften in the course of its duties a government agency will *receive* information of a very personal nature which was given with a legitimate expectation that" it would remain private. *Cline*, 177 W. Va. at 33, 350 S.E.2d at 544 (emphasis added). Consideration should be given to such expectations, the Court explained, or "people will be reluctant to surrender information to" the government that it needs—for example to learn about and investigate misconduct. *See id.*

Cline makes clear that the underlying purpose of this factor is to take into account the government's occasional need to "receive information of a very personal nature" that it otherwise would have difficulty gathering without an expectation that the material could remain confidential. When the information is created by the government, in contrast, the purposes for which this factor was judicially crafted are nonexistent. *See, e.g.*, *In re Charleston Gazette FOIA Request*, 222 W. Va. at 779, 671 S.E.2d at 784 (distinguishing between provision of information

by "third-party public citizens" about police misconduct from information created "by public employees" not involving sensitive personal material).

Here, the Termination Letter does not constitute information supplied by "third-party public citizens" or any information from those sources who might be reticent to disclose the information absent the expectation of confidentiality. This is a letter written *by* a government official expressing his views for why he was firing his high-ranking subordinate. Moreover, the Department did not provide any evidence to the Circuit Court that anyone actually harbored an expectation that the Termination Letter would be kept in confidence. This factor strongly favors disclosure.

The Circuit Court's conclusion to the contrary rests on two flawed premises.

First, the court over-emphasized that a state regulation provides that "personnel records" are to be held in confidence by each agency. PA 343-44 (citing W. Va. C.S.R. § 143-1-19.1). As the Supreme Court of Appeals has held, however, such regulations must give way to the analysis required under the FOIA. *Smithers*, 232 W. Va. at 468, 752 S.E.2d at 622 (a 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."). In *Smithers*, the Court held a state rule requiring confidentiality of certain information could not categorically preclude disclosure of public records under the FOIA; rather, when an agency invokes such a rule to resist disclosure, the FOIA governs the question of whether the record should be disclosed. *Id.* The Circuit Court, however, erroneously applied W. Va. C.S.R. § 143-1-19.1, which purports to require confidentiality of files showing an employee's name, title, salary, changes in status, and performance evaluations, as a categorical bar against disclosure. PA 344 (incorrectly characterizing the rule as an express exemption from the FOIA's disclosure requirement).

Second, the Circuit Court wrongly assumed that "the letter was given with the expectation of confidentiality." PA 344. Again, the Department provided no evidence whatsoever relating to support the court's conclusions that (1) "a very limited number of DHHR personnel . . . were involved in the termination process," (2) unspecified "actions of those involved with the termination" show the letter "was to remain confidential," and (3) "the letter is not made available for individuals other than Mr. Samples to access." *Id*. The only evidence the Department presented was an affidavit of its General Counsel attached to its Answer to WSAZ's Complaint. *See also* PA 36-37. That statement says nothing about any person's expectation of confidentiality, the number of people or identities of the people "involved in the termination process," or what actions (if any) were taken to ensure confidentiality. *Id.* The Circuit Court's factual premise is thus unsupported, and it erroneously relieved the Department of its evidentiary burden. *See Farley*, 215 W. Va. at 418, 599 S.E.2d at 841 ("the evidentiary burden [is] placed upon the public body to justify the withholding of materials"). Moreover, it is hard to square any supposed expectation of confidentiality regarding the Termination Letter with the Department's 2020 decision to grant another news organization's FOIA request for documents and communications regarding the resignation of the former Commissioner of the Bureau of Public Health. PA 68-69; PA 81-82.

Further, any expectation of confidentiality the Department might have had would be contrary to the law. The FOIA presumes public records will be disclosed. Meanwhile, any presumption that W. Va. C.S.R. § 143-1-19.1 provided mandatory confidentiality of certain personnel information—*i.e.*, an employee's name, title, unit, salary, changes in status, and performance evaluations—is flatly contradicted by the Supreme Court of Appeals' explanation that such information must be disclosed under the FOIA. *See In re Charleston Gazette FOIA*

Request, 222 W. Va. at 783 n.4, 671 S.E.2d at 788 n.4. Similarly, since *Smithers* was decided in 2013, agencies have been on notice that the FOIA analysis will apply to every public record regardless of the existence of a state regulation favoring confidentiality. The Department, or for that matter, Samples, therefore had no reasonable expectation that the Termination Letter would be kept in confidence.

Accordingly, as the Department provided no evidence that there was any actual expectation of confidentiality in its creation and delivery of the Termination Letter, and any such expectation would be contrary to the law, this factor also favors disclosure of the Termination Letter.

5. There is no need to mould relief to limit an invasion of privacy because there are no substantial privacy interests at stake and because the Draft Termination Letter is public.

This *Cline* factor considers whether the public information at issue can be disclosed in a way that minimizes the invasion of privacy interests. *Cline*, 177 W. Va. at 33, 350 S.E.2d at 544. For the reasons discussed above, there are no privacy interests at stake in the disclosure of the Termination Letter, and even if there were, they would be negligible in comparison to the significant public interest in disclosure. This factor thus weighs in favor of disclosure.

The Circuit Court's Order erroneously concluded otherwise based on its mistaken characterization of the Termination Letter and erroneous interpretation of *Smithers* as a rule limiting disclosure. *See supra* at 16-18. This factor accordingly favors disclosure as well.

CONCLUSION

The Termination Letter is a public record, sent by a Cabinet Secretary, informing another high-ranking government official that he was being terminated due to alleged "misconduct" that harmed the "integrity" of the Department and hindered its operations on behalf of the public. There is nothing remotely private about the letter, and each of the *Cline* factors relevant to the

question of whether it should be disclosed overwhelmingly requires disclosure. For these reasons, the Court should reverse the order below, require the Department to disclose the Termination Letter to WSAZ, and remand this action to the Circuit Court for proceedings to determine an award of reasonable fees and costs for this appeal.

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 2nd day of October, 2023, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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