IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-ICA-283

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

Petitioner,

v.

West Virginia Department of Health and Human Resources,

Respondent.

RESPONDENT'S BRIEF

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INTRODUCTION

In enacting West Virginia's Freedom of Information Act, the Legislature enshrined the public's right to information about the government entities "they have created" and that work for them. W. VA. CODE § 29B-1-1. But in the same statutory breath the Legislature named the other interests that matter in this context, too. After all, public records span the gamut: from test questions to trade secrets and security system codes to national security records. *Id.* § 29B-1-4(a)(1), (3), (12), (16). The Legislature thus provided that certain sensitive data is not part of FOIA's general pro-disclosure rule. "Information of a personal nature" that would constitute "an unreasonable invasion of privacy" if released falls in that category. W. VA. CODE § 29B-1-4(a)(2).

So the lower court applied *all* of FOIA—including its express and long-recognized exemptions—when it held that FOIA did not reach a letter describing the circumstances around a government worker's termination from the West Virginia Department of Health and Human Resources. The letter is a public record, yes. But it also contains sensitive personal information about a specific, readily identifiable individual. Termination letters have a high potential to embarrass, harm reputations, and hurt future job prospects if widely released. And they are part of personnel files, which must be kept "under strictest confidentiality and released only upon proper written authorization." W. VA. CODE R. § 143-1-20. So the circuit court was right in finding the termination letter squarely in the zone of an exemption designed to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Syl. pt. 6, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985).

On appeal, WSAZ cannot get past the letter's personally identifying and sensitive nature. So it leans hard on a relevant but not dispositive factor—the former employee's rank—and argues the public's interest in the employee's purported wrongdoing somehow limits the privacy

intrusion. But FOIA's Subsection 4(a)(2) exception treats the individual's and the public's interests separately. Documents like the termination letter that substantially invade personal privacy and carry serious consequences if released are "specifically exempt" in the absence of a particularized, evidence-based showing that the public interest "requires" a different result. W. VA. CODE § 29B-1-4(a)(2). WSAZ did not make that showing below, or here. It advances a largely generalized interest in the public's right to know—which may be enough for FOIA requests generally, but not to clear Subsection 4(a)(2)'s clear and convincing evidence hurdle. *E.g.*, *Robinson v. Merritt*, 180 W. Va. 26, 31, 375 S.E.2d 204, 209 (1988). Nor can WSAZ draw inferences from an inadvertently released *draft* letter to presume what the final letter does and doesn't say. Drafts often change before getting to final, sometimes dramatically. Here, the circuit court reviewed the actual document at stake, and WSAZ does not contest the court's findings about what's inside.

So in the end, all the factors courts use in applying Subsection 4(a)(2) support respecting the former employee's privacy. The circuit court rightly found that the termination letter contains information of a personal nature that the Legislature carved out of FOIA's otherwise strong "presumption of public accessibility to all public records." W. VA. CODE § 29B-1-4(a). This Court should affirm.

ASSIGNMENT OF ERROR

Did the circuit court correctly find that Jeremiah Samples's termination letter falls within the Freedom of Information Act disclosure exception for information of a personal nature?

STATEMENT OF THE CASE

1. West Virginia's Freedom of Information Act recognizes that because the "government is the servant of the people," the people are "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." W. VA. CODE § 29B-1-1. But in enacting FOIA, the Legislature also understood that the "public disclosure of governmental records is not limitless." *Smith v. Tarr*, No. 13-1230, 2015 WL 148680, at *5 (W. Va. Jan. 12, 2015) (memorandum decision). So it built twenty-three exceptions into the general disclosure rule to balance other important interests, too. For example, trade secrets, licensing test questions, internal memoranda, and individually identifiable customer data are all exempt from disclosure. W. VA. CODE § 29B-1-4(a)(1), (3), (8), (23).

One of these exceptions protects "[i]nformation of a personal nature such as that kept in a personal, medical, or similar file," if disclosure "would constitute an unreasonable invasion of privacy." W. VA. CODE § 29B-1-4(a)(2). The West Virginia Legislature recognized that the "unnecessary disclosure of personal information" could cause "injury and embarrassment" to individuals. Syl. pt. 6, *Hechler*, 175 W. Va. 434, 333 S.E.2d 799. So FOIA does not compel releasing sensitive personal information "unless the public interest by clear and convincing evidence *requires* disclosure in [the] particular instance." W. VA. CODE § 29B-1-4(a)(2) (emphasis added); *see also Hechler*, 175 W.Va. at 444, 333 S.E.2d at 810 (applying this provision to balance an individual's privacy interests against "the public's right to know").

West Virginia courts consider five factors when evaluating whether a public body's FOIA response appropriately found that the public interest does not require disclosure. The first factor looks at "whether disclosure would result in a substantial invasion of privacy" and how severe that invasion would be. *Child Prot. Grp. v. Cline*, 177 W. Va. 29, 32, 350 S.E.2d 541, 543 (1986). The second factor looks at the "value of the public interest" and the "purpose" of the individual seeking disclosure. *Id.* at 33, 350 S.E.2d at 544. The third factor tests "whether the information is available from other sources." *Id.* The fourth asks "whether the information was given with an

expectation of confidentiality." *Id.* And the fifth and final factor looks at "whether it is possible to mould relief so as to limit the invasion of individual privacy." *Id.* at 33, 350 S.E.2d at 545.

West Virginia courts have applied these *Cline* factors several times over the last decades, though none of the decisions have said how many factors need to be met in a given case. The Supreme Court of Appeals has held, though, that the first or second factor alone can be dispositive. *Highland Min. Co. v. W. Va. Univ. Sch. of Med.*, 235 W. Va. 370, 390, 774 S.E.2d 36, 56 (2015) ("Because WVU fails to meet the first prong of [*Cline*], our analysis stops here; we need not proceed to address the second prong to balance or weigh the individual's right of privacy against the public's right to know." (internal quotations removed)); *Cline*, 177 W. Va. at 35, 350 S.E.2d at 546 (finding public interest in the case was "a factor of overriding importance, tipping the scales clearly and convincingly toward disclosure").

2. In April 2022, the West Virginia Department of Health and Human Resources terminated Deputy Secretary Jeremiah Samples. PA.1. Samples then issued a brief public statement, thanking all the people he had worked with and explaining that his termination was due to different views between him and the Department's Secretary. PA.123-24.

Shortly after, local television station WSAZ submitted a FOIA request to the Department seeking records connected to Samples's termination—including emails between Samples and Secretary Crouch and all communications and documents relating to Samples's termination. PA.1, 74. The Department searched and reviewed "all of the public records in its custody" within the scope of the request. PA.76. Eventually, the Department denied the request, explaining to WSAZ that—as relevant here—the documents fell under Subsection 4(a)(2)'s information of a personal nature exemption. PA.76-77.

Unhappy with the Department's response, WSAZ sued to get the documents. PA.1-9. A key document at issue was the letter the Department gave Samples to memorialize his termination. The Department defended its decision to withhold the termination letter because it was an important part of its employment records and disclosing that part of Samples's personnel file would (in Subsection 4(a)(2) terms) be an unreasonable invasion of privacy. PA.339. In part because Samples wasn't "accused of wrong doing in the public," PA.298, the Department argued that no clear and convincing evidence compelled disclosure.

3. After reviewing the unredacted documents at issue—including the termination letter—the circuit court found that several documents should be disclosed, but that the Department was justified withholding many others. PA.339-48. On the termination letter, it agreed with the Department's decision because the letter contained "personal confidential information" protected under Subsection 4(a)(2). PA.377. The court applied the five *Cline* factors and found that the Department met all of them—which meant that releasing the termination letter would substantially invade Samples's privacy interests and that the public interest did not compel disclosure anyway. PA.339-47.

Specifically, the Department satisfied the first factor by showing that disclosure would result in a substantial invasion of privacy as it could cause injury and embarrassment for Samples. PA.340. Turning to the second factor, the circuit court found that the public interest was minimal because the letter did "not constitute the type of information or implicate the public's legal rights or liabilities" in a way that could outweigh Samples's privacy interests. PA.342. Important to the circuit court was that no evidence existed "of any investigation of internal or external complaints of misconduct" against Samples. PA.347-48. For the third factor, the circuit court found that Samples could provide the letter, yet the court had "not been provided with evidence showing that

[WSAZ] has made any attempt to obtain the letter [from] Mr. Samples himself." PA.342. So on that record, factor three favored the Department, too. *Id.* The fourth factor also supported the Department, the circuit court reasoned, because West Virginia law requires "state agency employee personnel files … to be kept confidential" and so "the information contained in the letter came with an expectation of confidentiality." PA.343. The limited number of Department personnel involved in the termination process and their actions throughout it also "demonstrate[d] that the letter was to remain confidential." PA.344. Finally, the circuit court found, given the nature of the letter, that it was "not possible to mould relief so as to limit the invasion of Mr. Samples's individual privacy." PA.347. Thus, the circuit court held that the termination letter was "exempt from disclosure." PA.348.

Two months after its initial order, the circuit court reached the same conclusion again in its Final Order. PA.390-91 (explaining that its "ruling as to the termination letter and reasoning in support of its previous finding remains unchanged").

4. Following the circuit court's decision, counsel for the Department inadvertently sent WSAZ's counsel an unredacted draft of the termination letter—not the final letter itself—in a batch of other documents. PA.419. The draft letter discussed Secretary Crouch's dissatisfaction with Samples's job performance and communication with him. PA.423-24. The Department quickly sought a court order directing WSAZ's counsel "to destroy and/or delete any copies" of the draft letter and not to "discuss or disseminate the contents of the draft letter with anyone, including their client." PA.413-14. After initially issuing a temporary injunction, the circuit court ultimately denied the Department's motion. It found that requiring WSAZ not to publicize information it had inadvertently, but lawfully, received would be a prior restraint, and the First Amendment bars prior

restraints "absent a 'state interest of the highest order.'" PA.481 (citation omitted). WSAZ published the draft letter shortly after the court's decision. Opening.Br.5.

WSAZ filed this appeal from the circuit court's Final Order as to just one document: Samples's final termination letter.

SUMMARY OF THE ARGUMENT

The circuit court was right that FOIA's public disclosure of a personal nature exemption covers the termination letter. All of the *Cline* factors are on privacy's side: Releasing the letter would substantially harm Samples's privacy while providing little value to the public.

I. The letter is private and releasing it would cause serious harm. It contains sensitive and non-ministerial information about a specific employee that could be embarrassing if publicly known. West Virginia and federal courts alike recognize that FOIA laws exempt information about job performance like this on privacy grounds. The fact Samples had a high-level position in the Department weakens his privacy interests only somewhat; it does not erase them. Nor does Samples's decision to acknowledge that the termination happened waive his interest in keeping the details around it private.

II. In response to those serious privacy concerns, WSAZ cannot show clear and convincing evidence that the public interest requires disclosure anyway. The press plays a critical role advancing public transparency, but general news gathering and reporting interests do not overcome FOIA's specific exemption for individual privacy. The termination letter doesn't involve issues like how the Department spends public funds. Internal disagreement between Department officials does not reflect on matters that reach the public's legal rights or liabilities. And speculating that the final letter might be similar to a draft does not clear the clear and convincing evidence standard the Legislature set.

III. Samples and the Department also had reasonable expectations that the letter would remain confidential. By legislative rule, information in a personnel file *must* be kept confidential. And though a pro-privacy public policy can be outweighed in cases—unlike this one—where the other *Cline* factors point toward disclosure, here it swings this factor to the Department's side, too.

IV. Finally, WSAZ cannot insist the letter is unavailable elsewhere when it has not even tried to get it from another source first—Samples himself. The circuit court was right that, at least on the record before it, that factor does not favor disclosure. And the lack of any meaningful way to cabin disclosure while still protecting Samples's privacy is a final mark in favor of the Department's decision not to disclose the letter.

STATEMENT REGARDING ORAL ARGUMENT

This case does not meet the criteria for oral argument because the dispositive issues have been authoritatively decided, the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

STANDARD OF REVIEW

This Court reviews questions of law in FOIA rulings de novo. *Charleston Gazette v. Smithers*, 232 W. Va. 449, 460, 752 S.E.2d 603, 614 (2013). But the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. *Associated Press v. Canterbury*, 224 W. Va. 708, 712, 688 S.E.2d 317, 321 (2009).

ARGUMENT

FOIA expressly *protects* information of a personal nature "if the public disclosure of the information would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure." W. VA. CODE § 29B-1-4(a)(2). So when reviewing whether the Department correctly withheld Samples's termination letter, the Court should compare 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. And this is no ordinary balancing: If disclosure would unreasonably invade an individual's privacy, then that invasion is proper only if clear and convincing evidence proves that the public interest "requires" it. W. VA. CODE § 29B-1-4(a)(2).

Here, three of the five factors courts use in approaching that question, syl. pt. 2, *Cline*, 177 W. Va. 29, 350 S.E.2d 541, strongly favor affirmance. The critical first and second factors certainly do: Disclosing details about an individual's termination is a serious invasion of privacy, and the public has little interest in that information beyond generalized curiosity. So does the fourth; as a sensitive aspect of Samples's personnel file, the letter carries an expectation of confidentiality that other law also supports. The remaining factors point the same way, too. WSAZ has not tried to get the letter from Samples himself, so the Court should not rely on its assertion that it is unavailable from other sources. And because WSAZ wants a single document that is entirely personal, it's not possible to mold relief through a more limited disclosure. The circuit court thus got it right. This Court should affirm.

I. Disclosure Would Seriously Invade Samples's Privacy.

The details of an individual employee's termination are personal, and they are private. Releasing Samples's termination letter would substantially invade his privacy by making this sensitive information public. And the consequences of the invasion in terms of professional harm and personal embarrassment could be severe. So *Cline*'s first factor is on the lower court's (and the Department's) side.

A. When evaluating whether disclosure would invade Samples's privacy, the Court should look to see if the letter is of a private or intimate nature. *Cline*, 177 W. Va. at 32, 350 S.E.2d at 543. FOIA itself helps define the contours of "private": It includes personal information "as that kept in a personal, medical, or similar file." W. VA. CODE § 29B-1-4(a)(1); *see also Highland Min.*

Co., 235 W. Va. 370, 388, 774 S.E.2d 36, 54 (an invasion of privacy occurs when the "records in question are 'personal,' 'medical,' or 'similar' files"). Personnel files count. *See Manns v. City of Charleston Police Dep't*, 209 W. Va. 620, 625, 550 S.E.2d 598, 603 (2001) (noting that personnel files are considered personal).

To be sure, not everything in a personnel file is protected from disclosure. Releasing information involving "ministerial payroll information"—payroll, timesheet, and attendance records—is not an invasion of privacy. *In re Charleston Gazette FOIA Request*, 222 W. Va. 771, 779, 671 S.E.2d 776, 784 (2008). But releasing much of the rest of a typical personnel file would be. Human Resources records often deal with deeply personal information that could be embarrassing if publicly known. And Subsection 4(a)(2)'s "primary purpose" "is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Manns*, 209 W. Va. at 624, 550 S.E.2d at 602.

Hechler's discussion of "intimate" information helps further darken the line between the "ministerial" and the "private" parts of a personnel file: The concept covers "detailed Government records on an individual which can be identified as applying to that individual." 175 W. Va. at 444, 333 S.E.2d at 809 (internal quotation marks omitted). In *Cline*'s terms, it reaches records that "affect[] or belong[] to private individuals as distinct from the public generally." 177 W. Va. at 32, 350 S.E.2d at 543. And in *Smith v. Bradley*, the Supreme Court of Appeals built on all those principles to find that releasing employee evaluations "would clearly constitute a substantial invasion of privacy." 223 W. Va. 286, 291, 673 S.E.2d 500, 505 (2007). Central to the Court's analysis was that employees' job performance evaluations are "an important part of their employment records" and that, if generally known, they could be used "to personally attack employees." *Id.*

Here, the termination letter is in the heartland of FOIA's privacy exemption. It's part of Samples's personnel file. PA.340. It deals with Samples's actions while he worked at the Department—"personal information which can be identified as pertaining specifically" to him, PA.340—not "the details of a public employees' pay records," Opening.Br.11. And it's hard to see how a document memorializing the involuntary end of an employment relationship is not an "important" part of that employee's file. So the circuit court was right in finding that disclosing this nonpublic, intimate information posed a substantial threat of "injury and embarrassment." PA.340.

And though West Virginia courts have not expressly addressed a termination letter before, the D.C. Circuit has—and held that disclosure would substantially invade the individual's privacy. *See Bloomgarden v. U.S. Dep't of Just.*, 874 F.3d 757, 761 (D.C. Cir. 2017). There, an attorney had a "quite substantial" privacy interest in a potential termination letter because he "would undoubtedly be quite embarrassed by disclosure of a proposed discipline letter." *Id.* The letter contained untested allegations that could cause professional and personal harm. *Id.* So too here. And unlike *Bloomgarden*, which involved a termination letter "from many years ago," Samples's termination letter is only from 2022—so it has a greater potential for professional consequences than if it were decades old and Samples could dilute it by pointing to his track record since. So the "close relationship between the federal and West Virginia FOIA," *Daily Gazette Co. Inc. v. W. Va. Dev. Off.*, 198 W. Va. 563, 571, 482 S.E.2d 180, 188 (1996), should lead this Court to recognize what the court in *Bloomgarden* did: disclosing a termination letter substantially invades a person's privacy because of its high potential for personal embarrassment and professional harm.

WSAZ's attempts to cast the termination letter as non-private fall short. For one thing, WSAZ argues that the circuit court "placed undue weight on the simple fact that the Termination

Letter identifies Samples and relates to his employment." Opening.Br.13. But WSAZ does not explain what was "undue" about the lower court's approach. It wasn't the only factor the circuit court considered; the court looked to the private nature of the letter *and* that it applied specifically to Samples in finding that it "clearly contains personal information." PA.340. In fact, ignoring the letter's personally identifiable nature would have been error: It matters whether records "can be identified as applying to that individual." *Hechler*, 175 W. Va. at 444, 333 S.E.2d at 809; *see also Highland Min. Co.*, 235 W. Va. at 390, 774 S.E.2d at 56 (finding no substantial invasion of privacy in peer reviews where the comments did not contain any "personal identifying information at all"). Yet instead of engaging that caselaw, WSAZ argues an issue no one here challenges—that "the identity of a person as a government employee is not a private fact." Opening.Br.13. Agreed. But the question before the circuit court was whether substantial privacy interests attach to personal details about that government employee that can be tied to him or her specifically. West Virginia law says yes.

Perhaps recognizing the trouble for its position that *Smith*'s performance evaluation holding poses, WSAZ next accuses the circuit court of turning *Smith* into a blanket rule. Opening.Br.14. The court did no such thing. It looked at what *Smith* said—that performance evaluations are personal and could be used to hurt employees, 223 W. Va. at 292, 673 S.E.2d at 505—and applied that logic to this termination-letter context. Not a far leap: Both involve personal aspects of individually identifiable employees' job performances. Here, the circuit court looked at the specific letter in question and found it "contains personal information which can be identified as pertaining specifically to Mr. Samples" and could potentially "injur[e] and embarrass[]" him. PA.340. That's enough to find a substantial invasion of privacy in *Smith* terms and under Subsection 4(a)(2) more generally.

In short, releasing the termination letter would be a substantial invasion of privacy in a quintessentially personal arena.

B. Courts also look at "the seriousness of the invasion"—measured "relative to the customs of the time and place" and "determined by the norm of the ordinary man." *Cline*, 177 W. Va. at 32, 350 S.E.2d at 543. Harm to an individual's "professional and personal dignity" is a serious invasion of privacy, for example. *Robinson*, 180 W. Va. at 31, 375 S.E.2d at 209. As is information with a high potential for embarrassment. *Cline*, 177 W. Va. at 34, 350 S.E.2d at 545 (holding that a driver's medical records would be embarrassing if released); *Manns*, 209 W. Va. at 626, 550 S.E.2d at 604 (holding that records regarding outcome of police department's internal investigations would be potentially embarrassing).

It is no surprise then that the circuit court found that releasing the letter would seriously invade Samples's privacy. PA.340. The letter contains personal information specific to the circumstances that led to Samples's termination. Making that information public for anyone curious to see could be a highly embarrassing hit to Samples's "personal dignity." *Robinson*, 180 W. Va. at 31, 375 S.E.2d at 209. Samples also faces substantial "professional" harm, *id.*, because potential future employers could see precisely why his former employer cut ties.

WSAZ is wrong that Samples's high-level position sacrificed his privacy interest in the letter. Opening.Br.12. Yes, some federal FOIA cases have found that public officials "have a somewhat diminished privacy interest." *Quinon v. FBI*, 86 F.3d 1222, 1230 (D.C. Cir. 1996). But somewhat diminished is not nonexistent. Rather, "public officials do not surrender all rights to personal privacy when they accept a public appointment." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 746 F.3d 1082, 1092 (D.C. Cir. 2014) (cleaned up). Even former First Lady, former United States Senator, and then-current Secretary of State Hillary Clinton still maintained

a privacy interest for FOIA purposes despite her career in high-level public positions. *Jud. Watch, Inc. v. Nat'l Archives & Recs. Admin.*, 876 F.3d 346, 349 (D.C. Cir. 2017).

WSAZ's cases follow a similar path: They consider the official's position as one of several factors when weighing individual privacy against the public's interest in disclosure. Like the D.C. Circuit in *Quinon*, for instance, the Second Circuit held in *Perlman* that a government employee's rank was one data point among several in the analysis—and concluded that the privacy interest was only "somewhat diminished" by his status. *See, e.g.*, *Perlman v. U.S. Dep't of Just.*, 312 F.3d 100, 107 (2d Cir. 2002), *cert. granted, judgment vacated sub nom., Perlman v. Dep't of Just.*, 541 U.S. 970 (2004). Further, most of the cases WSAZ cites involved malfeasance in areas with high relevance to the public. The censure letter in *Stern* dealt with covering up illegal FBI surveillance. *Stern v. F.B.I.*, 737 F.2d 84, 93-94 (D.C. Cir. 1984). The official in *Sullivan* misused government property and misappropriated public funds. *Sullivan v. Veterans Admin.*, 617 F. Supp. 258, 259 (D.D.C. 1985). And circling back to *Perlman*, that employee engaged in improper preferential treatment. 312 F.3d at 107. In other words, "somewhat diminished" privacy interests combined with serious malfeasance affecting public interests may tip the scales toward disclosure. That's not this case. As the circuit court found, Samples's termination did not involve "a complaint of misconduct." PA.347. Nor did it involve information that "implicate[d] the public's legal rights or liabilities." PA.342. Samples's relatively senior, at-will position thus is not enough to erase the otherwise substantial privacy interests at stake.

Samples did not "erode[]" his privacy interests by issuing a statement after his termination, either. Opening.Br.14. True, the statement undermined an interest in keeping the fact of his termination private. But it did not weaken his second, distinct interest in not publicizing the circumstances and reasons behind it. WSAZ cites no cases showing how it would. And federal

cases, again, go the other way: Publicly acknowledging an action does not waive the more specific interest in the details of that action. For example, the D.C. Circuit held that while an employee's statement confirming an FBI investigation waived his privacy interest in keeping secret that he was the subject of an investigation, it did not waive a "second, distinct privacy interest in the *contents* of the investigative file." *Citizens for Resp. & Ethics in Wash.*, 746 F.3d at 1091 (emphasis in original); *see also Kimberlin v. Dep't of Just.*, 139 F.3d 944, 949 (D.C. Cir. 1998) (similar). In other words, "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information" behind it. *U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. 749, 770 (1989) (internal quotation marks omitted). Here, Samples acknowledged his termination, noted the circumstances in general terms (different "views" about issues facing the Department), and thanked all the people he worked with. PA.123-24. So while Samples waived whatever interest he may have had in keeping his termination confidential, he did not give up his interest in keeping the reasons for it private.

C. Finally, inadvertently disclosing a draft termination letter did not change anything. To be clear, WSAZ does not argue it should. And for good reason: Not only did the disclosure happen after the circuit court's order, but it involved a different document. Drafts and final versions usually bear some commonalities, but they are not the same. (WSAZ knows this, too. Otherwise, now that it has the draft, there would be no need to pursue this appeal to compel handing over the final.) The fact "specific information [is] in the public domain" can undermine a privacy interest, but only when it "duplicates that being withheld." *Public Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993) (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983)); *Davis v. U.S. Dep't of Just.*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (same); *Am. Immigr. Laws. Ass'n v.*

U.S. Dep't of Homeland Sec., 852 F. Supp. 2d 66, 74 (D.D.C. 2012) (same). The logic is that "where information requested 'is truly public, the enforcement of an exemption cannot fulfill its purposes.'" *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (quoting *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999)). Not so here. The draft is now public, but Samples's significant privacy interests in the final termination letter remain.

II. The Public's Interest In The Termination Letter Does Not Compel Disclosure.

The second factor—the value of the public interest—also supports the Department's decision to exempt the letter. Information that unreasonably invades personal privacy *does not go out* under FOIA unless, "by clear and convincing evidence," the public interest "requires" disclosure in that "particular instance." W. VA. CODE § 29B-1-4(a)(2). In other words, once the Department gets past factor one, the burden shifts to WSAZ to mount evidence in support of factor two. The circuit court was right that WSAZ's generalized interests here fall short of clear and convincing evidence that could require disclosure.

The public has an interest in information if it is "pecuniary"—how their tax dollars are spent—or if "their legal rights or liabilities are affected." *Cline*, 177 W. Va. at 33, 350 S.E.2d at 544. For example, in *Smithers* the Supreme Court of Appeals applied the legal rights and liabilities doctrine to find a "legitimate interest in how a police department responds to and investigates" internal complaints, even though the complaints described on-the-job conduct, because that information promotes the "important issue of police accountability." 232 W. Va. at 465, 752 S.E.2d at 619 (cleaned up). Similarly, in *Cline*: The Court found that the public had great interest in a school bus driver's psychiatric reports because his "actions in front of the children raise serious concerns about his ability to safely pilot his school bus," and "[t]he safety of school children is

always of great importance." 177 W. Va. at 34, 350 S.E.2d at 546. At bottom, the requested information was "useful to the public" in a particularized way. *Id.* at 33, 350 S.E.2d at 544.

What doesn't count? Public interest is low for Subsection 4(a)(2) purposes where it satisfies "mere curiosity." *Cline*, 177 W. Va. at 33, 350 S.E.2d at 544. For example, the *Robinson* Court found that a generalized the "public has a right to know" interest is *not* sufficient in a case with significant privacy concerns. 180 W. Va. at 31, 375 S.E.2d at 209. It may win the day in other FOIA claims, but it is not enough to get past the legislatively protected interest in personal privacy. Instead, courts require a specific and "legitimate interest." *Id.*; *see also Resp. Comm. For Freedom of Press*, 489 U.S. at 774 (applying federal FOIA privacy exception despite "unquestionably, *some* public interest in providing" information about an individual's criminal history that was "in some way related to the subject's dealing with a public official or agency" (emphasis in original)). Courts are also cautious not to require releasing information that could be misused. *Manns*, 209 W. Va. at 626, 550 S.E.2d at 604. In *Maclay v. Jones*, for instance, the Supreme Court of Appeals was concerned that "compelled disclosure of police investigatory materials might result in 'fishing expeditions' and thereby encourage frivolous litigation." 208 W. Va. 569, 576, 542 S.E.2d 83, 90 (2000).

Here, the public has a limited interest in the termination letter. Like in *Robinson*, the public interest WSAZ asserts is a generalized one: "the public has a significant stake in learning about the actions and conduct of the government." Opening.Br.16 (internal quotations omitted). WSAZ also says it seeks a copy of the letter "to report important news to the public on the operations of their state's government." Opening.Br.16. The Department and the circuit court, PA.342, recognized that these interests matter. They just are not strong enough to clear the hurdle the Legislature set in Subsection 4(a)(2). *Smithers*, for instance, found that "[t]he press has a vital role

in disseminating to the public *the type of information at issue* in this case"—complaints lodged against police officers and State Police Internal Review Board reports with "redacted" employee names. 232 W. Va. at 458, 466, 752 S.E.2d at 612, 620 (emphasis added). WSAZ is not asking about Department policies and procedures. It wants details about one former employee's termination. Yet if heightened public attention during periods "of intense scrutiny over the Department's operations and concern about its future" were enough to get that request past the second *Cline* factor, Opening.Br.15, then that rationale could justify releasing sensitive personal information for a large swath of Department and other state employees. And to be sure, the Legislature enacted FOIA with respect for the public's valid interest "in remaining informed so that they may retain control over the instruments of government they have created." Opening.Br.16 (quoting W. VA. CODE § 29B-1-1). But again, the same Legislature also wrote Subsection 4(a)(2) into that same law.

In contrast to the generalized interests WSAZ asserts, what's missing here are particularized, heightened interests like those in *Smithers* and *Cline*. Samples's termination did not involve public misconduct or threats to public safety. So releasing it will not promote public accountability like releasing the misconduct reports in *Smithers* could, nor would it help the public make more informed decisions like in *Cline*.

WSAZ's argument to the contrary is that the draft termination letter focused on "misconduct." Opening.Br.17. But the circuit court reviewed the *final* letter and found that "the information contained in the termination letter at issue here does not constitute the type of information or implicate the public's legal rights or liabilities that would outweigh Mr. Samples's privacy interest." PA.342; *see also* PA.347 (the final letter is "not a complaint of misconduct filed against Mr. Samples nor is it a document providing findings and conclusions of an investigation").

WSAZ points to nothing in the record to show those findings are clearly erroneous; it says only that the circuit court's "characterization" of the final letter is "inconsistent with" the draft letter. Opening.Br.17; *see also, e.g.*, Opening.Br.13 (arguing that because "the Draft Termination Letter reveals that Crouch accused Samples of 'misconduct' in the performance of his duties" that the *final* "Termination Letter's disclosure therefore cannot constitute a 'substantial invasion of privacy'"). Reasoning that because information appears in a preliminary draft it must necessarily appear in the final version, too, relies on faulty premises. WSAZ does not know what—if anything—survived the editing and review process from draft to final letter. And because WSAZ can only overcome FOIA's bar against substantially invading Samples's privacy based on "clear and convincing evidence," W. VA. CODE § 29B-1-4(a)(2), speculating what the final letter might say is not enough.

Finally, WSAZ argues that the circuit court recognized the public interest when it allowed WSAZ to publish the accidentally disclosed draft. Opening.Br.18. But there the circuit court was dealing with a request for a prior restraint, and it knew that "the [United States] Supreme Court has never approved of any prior restraint brought before it." PA.482. In that unusual context, un-ringing the bell would have required showing a "clear and present danger" of harm to a "state interest of the highest order." PA.481. So the circuit court's conclusion was driven by a very different legal standard. In *this* context, the same circuit court readily concluded that WSAZ failed to marshal clear and convincing evidence of a public interest compelling enough to outweigh a serious invasion of privacy.

III. The Letter Carries An Expectation Of Confidentiality.

The fourth *Cline* factor also favors respecting Samples's privacy because he had a reasonable, law-based expectation the Department would keep the letter confidential.

The letter's location in Samples's personnel file matters for more than just determining whether it is private in a *Cline* factor-one sense. It also matters because agency employee personnel files *must* be kept confidential under legislative rule. West Virginia's Rule Section 143-1-19 requires agencies to "establish and maintain a personnel record for each employee." This personnel record includes information like the employee's name and title, as well as "changes in status, performance evaluations, and such other personnel information as may be considered pertinent." W. VA. CODE R. § 143-1-19.1. With limited exception, this record "shall" "be held confidential." *Id.* The agency must keep it "under strictest confidentiality and release[] [it] only upon proper written authorization." *Id.* § 143-1-20. Termination is a "change[] in status"—or at the very least, information "pertinent" to an employee's relationship with the agency. *Id.* § 143-1-19.1. So given the State's policy of confidentiality memorialized in the rule, it was fair for the circuit court to conclude that the Department gave Samples the termination letter with an expectation of confidentiality.

Indeed, when the Supreme Court of Appeals evaluates the expectation-of-confidentiality factor, it routinely looks to see if any legislative rule requiring confidentiality applies. *See Smithers*, 232 W. Va. at 458, 468, 752 S.E.2d at 612, 622 (starting with legislative rule in its analysis); *Manns*, 209 W. Va. 626, 550 S.E.2d at 604 (noting legislative rules prohibit disclosure). More than that, *Smithers* confirms that a legislative rule requiring confidentiality is enough to decide the fourth factor. There, the Court considered the interplay between FOIA and a legislative rule that required confidentiality for documents and reports relating to the investigations of any complaints with the West Virginia State Police. *Smithers*, 232 W. Va. at 466-68, 752 S.E.2d at 620-22. And the Court held that when considering a FOIA claim, courts may consider "the policy disfavoring the release of information … as one of the factors set forth in *Cline*." *Id.* So while a

confidentiality rule is "not dispositive" when it comes to the *ultimate* question of whether Subsection 4(a)(2) applies—*Smithers* said the information should be disclosed based on other factors that pulled harder—a legislative rule governing disclosure can still create an expectation of confidentiality sufficient to satisfy *this* factor. *Id.* And in a case like this where factors one and two also favor privacy, adding the fourth factor to the scale is only more confirmation the lower court's decision was right.

In its first attempt to beat this factor back, WSAZ says it applies only to information supplied by "third-party public citizens" and not to information from a "government official." Opening.Br.22. Yes, a classic example of this factor comes from *Cline*'s attention to protecting an employee's personal information when he gave his medical records to the school board with a "justifiable expectation of confidentiality." 177 W. Va. at 34, 350 S.E.2d at 546. But the Court hasn't distinguished in its reasoning based on the confidential information's source. Instead, it asks whether circumstances—legislative rules or other context—show that the information was expected to be kept confidential. Take *Smith*: There the Court found an expectation of confidentiality in performance evaluations in part because "a vindictive supervisor could use the public nature of the performance evaluations to personally attack employees whom he or she dislikes." 223 W. Va. at 291, 673 S.E.2d at 505. So it's factually accurate that third parties provide confidential information in some cases. But internal, employer-created records can come with an expectation of privacy, too.

WSAZ also makes some hay over the Department's decision to disclose records related to a different high-ranking official's departure. Opening.Br.23. Yet different circumstances leading to different results is hardly unusual in a fact-bound context like this. That individual resigned, PA.81-82, and amid the State's response to the once-in-a-generation COVID-19 pandemic, Caity

Coyne & Phil Kabler, *Dr. Slemp ousted as state health officer following Justice rant*, CHARLESTON GAZETTE-MAIL (June 24, 2020), https://tinyurl.com/4w37prj2. In any event, even when it comes to "the same subject"—not the case here—courts have "repeatedly rejected the argument that the government's decision to disclose some information prevents the government from withholding other information." *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 625 (D.C. Cir. 2011) (citing *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Just.*, 331 F.3d 918, 930-31 (D.C. Cir. 2003); *see also Citizens United v. U.S. Dep't of State*, 460 F. Supp. 3d 12, 23 (D.D.C. 2020) (same). Agencies handle FOIA requests case-by-case. And they're certainly litigated that way: WSAZ points to nothing from a court suggesting that disclosure was required in that earlier case or otherwise supporting an inference it could be required here.

Lastly, WSAZ is wrong that "any expectation of confidentiality" under these circumstances "would be contrary to the law." Opening.Br.23. It leans heavily on the idea that "FOIA presumes public records will be disclosed." Opening.Br.23. Not always: "[P]ublic disclosure of governmental records is not limitless." *Tarr*, 2015 WL 148680, at *5 (memorandum decision). And especially not where FOIA itself says that the State's public policy favoring disclosure gives way where "otherwise expressly provided by law." W. VA. CODE § 29B-1-1. WSAZ elides this language from its argument here, just as the circuit court called it out for doing below. PA.343; *see also* PA.344 (explaining that "the FOIA privacy exemptions that protect the termination letter from disclosure are expressly provided by law under W. VA. CODE § 29B-1-4(a)(2) and W. VA. CODE R. § 143-1-19").

WSAZ also overreaches in its claim that West Virginia Code Rule Section 143-1-19.1 "is flatly contradicted by the Supreme Court of Appeals' explanation." Opening.Br.23. As explained above, the fact that some cases ordered disclosure shows only that factor four is not dispositive

standing alone, not that it should fall out of the analysis altogether. WSAZ also minimizes cases like *Smith*, which held that performance evaluations with personally identifying information are distinct from ministerial, non-exempt personnel materials. 223 W. Va. at 291, 673 S.E.2d at 505. So it cannot be true that personnel information like "an employee's name, title, unit, salary, changes in status, and *performance evaluations*" has no reasonable expectation of privacy. Opening.Br.23 (emphasis added). In short, though the legislative rule is not an ironclad promise of confidentiality against every FOIA request, it still informs Samples's and the Department's reasonable expectation that a distinctly personal document would remain private.

IV. The Remaining Factors Don't Support Disclosure.

The three *Cline* factors discussed above all point strongly in the direction of individual privacy over generalized public disclosure. The remaining two do less work under the specific facts here. But they support the Department, too—or at a minimum do not, as WSAZ insists, point its way instead.

A. The third factor, whether the information is available from other sources, does not help WSAZ. In analyzing this factor, the circuit court relied on the Supreme Court of Appeals's holding that "where an adequate source of information is already available, the records will not be released." PA.342 (quoting *Robinson*, 180 W. Va. at 27-28, 375 S.E.2d at 205-06). Pairing the categorical "will not be released" language with a lack of "evidence showing that [WSAZ] has made any attempt to obtain the letter" from Samples—who everyone agrees has it—the circuit court refused to find that this factor, on this record, favors disclosure. PA.342.

Critically, the court did not go further. It *also* said that if WSAZ tries Samples and "he refuses to disclose" the letter, then the only adequate source for purposes of this factor might well be the Department. PA.343. But nothing has changed since the lower-court proceedings. Even

now, WSAZ is not arguing that it tried to get the letter from its recipient. Instead, it says that if Samples gave up the letter it would still seek the Department's copy under FOIA to verify its authenticity. Opening.Br.21. The Department would have been happy to address that scenario if it came; the privacy interests admittedly would have been weaker because the individual in question would have chosen to release the information. But WSAZ cannot use the changed privacy balancing from that hypothetical to show that disclosure is required *now*. The circuit court was right that WSAZ may not refuse other options to help itself and also claim that factor three supports its case.

Other courts agree. Some say that the "public interest in disclosure is minimal"—in other words, factor two is weaker—when a requester has an "alternative, less intrusive means of obtaining the information." *L.A. Unified Sch. Dist. v. Superior Ct.*, 228 Cal. App. 4th 222, 242, 175 Cal. Rptr. 3d 90, 104 (2014). Others say that the requesting party must at least try to get the desired information through alternative, less intrusive methods before "having the government disgorge private information from its files." *Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1485 (9th Cir. 1994); *see also Sheet Metal Workers Int'l Ass'n, Loc. Union No. 19 v. U.S. Dep't of Veterans Affs.*, 135 F.3d 891, 904 (3d Cir. 1998) (same). In affirming a government body's decision not to violate its workers' privacy, for instance, the court in *Painting Industry* discussed various options the requesting party could have used—from passing out fliers to posting signs soliciting information—before requiring the government to give up the information. *Painting Indus.*, 26 F.3d at 1485. All of those options were more burdensome than calling Samples or knocking on his door. And none of them involved entities "legally entitled" to give up information. Opening.Br.21. Yet they were adequate alternatives, nonetheless.

In avoiding all this, WSAZ swings too hard. It argues that factor three always "favor[s] disclosure." Opening.Br.18. If that's so, then this factor would be meaningless. It also misses *Cline*: When information is available in another way, then courts should require the requesting party to use that method because it would be "less intrusive to individual privacy." *Cline*, 177 W. Va. at 33, 350 S.E.2d at 544. It is only where "there is absolutely no other place or method to gather the information than from the particular Freedom of Information Act request before the court" that factor three favors disclosure. *Id.* As the circuit court explained, at least as the record stands now, that is not this case.

B. So that just leaves the fifth factor—whether it is possible to mold relief to limit the privacy invasion. It isn't.

To begin, courts only apply this factor if disclosure is required. For example, the Supreme Court of Appeals did not reach the fifth factor in either *Smith* or *Manns* where it found that disclosure was unnecessary. As that Court said in *Robinson*, "there is no need to discuss alternate forms of relief" because the documents were "exempt from disclosure." 180 W. Va. at 31, 375 S.E.2d at 209. But when the Court found that disclosure *was* required, like in *Cline* or *Smithers*, it applied the fifth factor. This factor, then, is not a way for parties like WSAZ to get at least a little information even when the other factors push against disclosure. It's about minimizing the damage to personal privacy *even when* the public interest requires some publicity. So here—where all the factors support privacy—the Court has nothing to mold. And if the Court disagrees, then it should apply this factor to find that the draft letter WSAZ already received appropriately balances the public interest.

In truth, releasing any part of the final letter would invade Samples's privacy. Unredacted disclosure would show the "deliberative process between the draft's creation and the final

document's issuance." *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983). Currently, what parts of the draft letter made it into the final letter remain confidential. So in the end, inability to mold effective relief supports the Department's—and the lower court's—conclusion that no public interest requires disclosing this sensitive, personally identifiable, and confidential aspect of an employee's personnel file. Public disclosure matters. But so does individual privacy. The termination letter is one of the records the Legislature enacted West Virginia Code § 29B-1-4(a)(2) to make clear FOIA would *not* reach it.

CONCLUSION

This Court should affirm the circuit court's decision.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-ICA-283

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

Petitioner,

v.

West Virginia Department of Health and Human Resources,

Respondent.

CERTIFICATE OF SERVICE

I, Spencer J. Davenport, do hereby certify that the foregoing **Response Brief** is being served on counsel of record by File & Serve Xpress or email this the 16th day of November 2023.

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