IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE CHARLESTON GAZETTE
d/b/a **DAILY GAZETTE CO.,**

Plaintiff,

vs. Civil Action No. 10-C-1971
(Hon. Jennifer Bailey, Judge)

COLONEL TIMOTHY S. PACK,[1]

Defendant.

THE CHARLESTON GAZETTE'S
MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Now comes Plaintiff, *The Charleston Gazette* d/b/a Daily Gazette Company ("*Gazette*"), by counsel, and submits the following Memorandum in Support of its Motion for Summary Judgment.

I INTRODUCTION

The instant case concerns the West Virginia State Police's refusal, in violation of the *West Virginia Freedom of Information Act*, to provide the public with any substantive information or documents concerning its secret internal review of complaints made against State Police officers. The State Police's insistence that it has the power to keep secret all details of complaints made against officers as well as the findings and conclusions of its internal review of those complaints, is antithetical to a fundamental tenet of constitutional democracy and to the public policy of the State of West Virginia, that holds that the public is, "entitled to full and

[1] On March 16, 2011, Col. Pack retired as Superintendent of the West Virginia State Police and was replaced by Col. C.R. "Jay" Smithers. While the State Police have not moved to substitute Col. Smithers for Col. Pack in this case, nor have they amended their answer or agreed to provide the requested documents. Therefore, if and to the extent necessary, the Plaintiff moves to have Col. Smithers substituted for Col. Pack as Defendant in this case.

complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees[.]"

While the principle of government transparency to a democracy should be self-evident, the West Virginia Legislature, in enacting the Freedom of Information Act, *W.Va. Code* § 29B-1-1 ("WVFOIA"), mandated transparency in West Virginia government, declaring that transparency in government and public officials is the "**public policy**" of the State:

> "Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared 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. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy."

W.Va. Code § 29B-1-1 (emphasis added).[2]

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[2] The "public policy" of transparency in a democracy has deep historical roots. As British historian Lord Acton stated,

> "Every thing secret degenerates, even the administration of justice; nothing is safe that does not show it can bear discussion and publicity."

The Founding Fathers clearly agreed with that principle, and this Country was formed on the basis of governmental openness. The great early patriot Patrick Henry wrote,

> "[t]he liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them."

President James Madison, another Founding Father, stated that,

> "[k]nowledge will forever govern ignorance; and a people who mean to be

The mandatory public policy of transparency, with its roots in "the fundamental philosophy of the American constitutional form of representative government," unequivocally applies to the State Police and all who exercise the police power of the State. Indeed, transparency is especially important where government officials, like the State Police, operate without any outside oversight of complaints made against it. Transparency is necessary to create a bond of trust between the public and those who exercise the police power; therefore, the process of investigation and decision-making regarding complaints against police officers must be as transparent as possible.

West Virginia is not the first state to deal with assertions by police officers that complaints against them should not be subject to public review, or that their internal process of investigation should be done in secret. Other states have dealt with this issue and perhaps predictably, have held that transparency must prevail over assertions of secrecy. The Supreme Court of Alaska, addressing public records concerning citizen complaints against police officers, held that there was, "perhaps no more compelling justification for public access to documents" than for those "regarding citizen complaints against police officers, because public access to such records guarantees the, [preservation of] democratic values and foster[s] the public's trust in those charged with enforcing the law." *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990). The Supreme Court of Appeals of West Virginia has been particularly mindful that "the lawfulness of police operations is a matter of great concern to the state's citizenry." *Maclay v. Jones*, 208

> their own governors must arm themselves with the power which knowledge gives."

And from the judiciary, U.S. Supreme Justice Louis Brandeis famously concurred, stating: "sunlight is . . . the best disinfectant[.]" L. Brandeis, Other People's Money 62 (1933).

W.Va. 569, 576, 542 S.E.2d 83, 90 (2000). It further held that, "'[t]he notion that police departments should be able to completely shield their internal affairs investigatory process from the public offends basic notions of openness and public confidence in our system of justice.'" *Id.* (quoting *Soto v. City of Concord*, 162 F.R.D. 603, 612 (N.D. Cal. 1995)).

In the case at bar, by withholding the public records requested, the State Police seek to subvert this democratic principle, and by doing so, erode the public trust in it as an agency. In many other states and municipalities, "Civilian Review Boards," consisting of members of the general public, often are appointed to assess complaints made against law enforcement personnel more transparently. In West Virginia, by contrast, the West Virginia State Police acts internally, and solely through its own employees on an "Internal Review Board." *See generally* 81 *W.Va.C.S.R.* § 10. The State Police's internal review of complaints against police personnel lacks any transparency, and takes place in secret. Far from being provided "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees" as mandated by the Legislature, *W.Va. Code* § 29B-1-1, the public is provided no records or information to judge or gauge how the State Police conducts or resolves complaints beyond generic, non-specific statistics concerning the numbers of complaints made, investigated and resolved.[3]

Against this backdrop of total secrecy, lack of transparency and attention-grabbing

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[3] Public questions and concern abound regarding the State Police's secret, internal handling of serious complaints about its troopers. "Since 2006, State Police troopers have been accused of police brutality at least seven times and sexual assault at least twice. None of the allegations have resulted in charges against a trooper." (11-3-10 *Gazette* Article, attached hereto as **Exhibit 1**). Further, the FBI apparently has started at least two investigations into possible civil rights violations by State Troopers. (*Id.).*

statistics, the *Charleston Gazette* requested specific public records concerning the State Police's handling of reports or complaints of abuse and misconduct by its members. The State Police's own administrative regulations, 81 *W.Va.C.S.R.* § 10, requires it to keep such records, but Defendant refused and continues to refuse to allow any public inspection or review. To justify this secrecy and lack of lack of transparency, Defendant responded with contrived assertions that its non-disclosure of records of its secret investigation of complaints of abuse and wrongful conduct by its employees somehow is justified by WVFOIA's very limited exceptions. As shown below, the Defendant's non-disclosure of public records clearly violates the public policy of the State of West Virginia, the specific mandates of the WVFOIA, and lacks legal justification. Therefore, the Court should order the public records requested concerning State Police internal investigations be disclosed.

II THE *GAZETTE'S* PUBLIC RECORDS REQUESTS

A THE FOIA REQUESTS

On May 25, 2010, the *Charleston Gazette*, by its reporter, Gary A. Harki, requested public records from Defendant pursuant to WVFOIA.[4] *See* Answer ¶¶ 7-8, admitting Compl. ¶¶ 7-8; 5-25-10 Letters from Harki to Pack, attached to Compl. as Exs. A and B. The FOIA requests sought, *inter alia*, the following items:

(1) Quarterly, Bi-Annual and Yearly Reports of the Internal Review Board for the last five years, with the names of the employees identified by the Early Identification

[4] One request sought four items; another request sought three items; and a final request sought two items. Defendant withheld certain items responsive to each of the three requests.

System[5] redacted;

(2) Data provided to the Internal Review Board that was used to assist it in determining if subordinates of certain supervisors tend to be employees frequently identified by the internal review system; and

(3) A copy of the central log of complaints maintained by the West Virginia State Police Professional Standards section.

See Answer ¶ 1, admitting Compl. ¶ 1.[6]

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[5] The administrative regulation defines the Early Identification System:

> 2.8. Early Identification System: A system designed to analyze data pertaining to complaints lodged against employees and employee uses of force in an effort to identify employees who may be experiencing stress or other problems which may adversely affect job performance.

81 *W.Va.C.S.R.* §§ 10-2.8.

[6] Each of the three categories of public records requested are for documents the State Police are required to create. 81 *W.Va.C.S.R.* §§ 10-9.1, 9.5, 3.3. Since April 1, 2008, State Police administrative regulations have required (1) the Internal Review Board to compile reports on their review of those State Troopers who have been the source of multiple complaints or been involved in multiple use-of-force incidents*, id.* § 9.1; (2) the Professional Standards Section to provide data to the Internal Review Board so that the Board may identify supervisors potentially employing ineffective or inappropriate techniques causing trooper misconduct, *id.* § 9.5, and (3) the Officer-In-Charge to "have all complaints recorded in a central log and assigned an individual case number." *Id.* § 3.3.

The full text of 81 *W.Va.C.S.R.* § 10-9.1 states:

> "The [Early Identification] system shall produce quarterly, bi-annual, and yearly reports for review by the Internal Review Board naming employees who have entered the system based on external citizen complaints, internal complaints, or use of force incidents. Employees who have received two or more complaints (internal and/or external) or who have been involved in three or more use of force incidents during a three-month period are subject to review by the Internal Review Board. The Board may determine that no further action is required, that the employee be referred to the employee assistance program, that the employee be referred for remedial training, or that the employee be subject to review by the employee's immediate supervisor to attempt to determine the reasons for the employee's conduct or any circumstances that may have contributed to the conduct

B THE STATE POLICE'S REPEATED REFUSALS TO COMPLY WITH WVFOIA

Defendant, by letter dated June 2, 2010, denied the May 25, 2010 requests by the *Gazette* for the foregoing documents. *Id.* ¶ 9, admitting Compl. ¶ 9. The letter concludes, "[p]ursuant to West Virginia Code § 29B-1-3(c) *et seq.*, the responsibility of the custodian of any public records or public body to produce the requested records for documents is at an end. You may institute proceedings for injunctive or declaratory relief in the circuit court in the country where the public record is kept." *Id.*

Thereafter, in person and by email, *Gazette* reporter Harki requested the State Police reconsider its position, and had further discussions with Joe DeLong, the Deputy Secretary Military Affairs & Public Safety. *Id.* Then, by email dated August 18, 2010, Mr. DeLong again refused to provide any further information, and stated Defendant's refusal to disclose requested documents even in redacted form, stating in pertinent part,

> "The state police have reviewed further their information and determined that they will not be able to break the information down any further. As I stated in the email below there are several factors that must be taken into account when determining what information is in the public interest and what is protected personnel file information."

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and evaluate the employee's current performance."

The request labeled (2) above is directed towards public documents created under 81 *W.Va.C.S.R.* § 10-9.5, that provides:

> "The Section shall also provide data to the Internal Review Board that will assist that body in determining if subordinates of certain supervisors tend to be employees frequently identified by the system. The board may use the data in order to identify supervisors who may be employing ineffective or inappropriate management techniques. The names of any supervisors identified shall be forwarded to the Superintendent for review and action."

Id. In other words, without explanation or discussion, the State Police take the position that complaints against its employees are "protected personnel file information" that outweighs the public interest. In a hallmark staple of public officials who believe themselves to be above the open records law, the State Police has decided that it, and it alone, will decide what is, and what is not, in the public interest, and has refused even to discuss its rationale in coming to that self-serving conclusion.

On September 24, 2010, the *Charleston Gazette*, by undersigned counsel, made one final effort to discuss Defendant's FOIA obligations in an effort to get the State Police to reconsider its non-disclosure position. The September 24, 2010 letter specifically stated that it should be considered a separate FOIA request. *Id.* ¶ 11. The letter requested that if, as it appeared from Mr. DeLong's email, the State Police took the position that the privacy rights of officers who are the subject of complaints are at issue, then the State Police should redact the records and produce them in that form:

> "This letter is a follow-up to the June 2, 2010 letter from Mr. Hoyer to Mr. Harki, and the August 18, 2010 email from Joseph DeLong to Mr. Harki, both refusing to produce public records requested under the *West Virginia Freedom of Information Act*, WV Code §29-B-1-1, et seq."
>
> This purpose of this letter is to request that the refusal to provide the requested public records be reconsidered, but you should consider this letter a separate request under the Act for public records. The request is as follows:
>
> > **Please produce for inspection and copying the following public records: All Quarterly, Bi-Annual and Yearly Reports of the Internal Review Board for the last five years, with the names of the employees identified by the Early Identification System redacted.'"**

Id. (emphasis added).

In response, by letter dated October 4, 2010, the State Police's John A. Hoyer wrote again denying the *Gazette's* public records request, and refused to discuss redaction as an alternative to complete non-disclosure. *Id.* ¶ 12. That denial letter concludes, "[p]ursuant to the West Virginia Code§ 29B-1-3(c) *et seq.*, the responsibility of the custodian of any public records or public body to produce the requested records for documents is at an end. You may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept." *Id.*.

On November 3, 2010, the *Charleston Gazette* filed its Complaint in this Court. The State Police Defendant filed an Answer on November 24, 2010, and therein again repeated its refusal to disclose the requested public records.

III SUMMARY JUDGMENT STANDARD IN WVFOIA CASES

FOIA cases often can be decided by way of dispositive motions, without the need for discovery or taking evidence. The Supreme Court of Appeals has held, "'[s]ummary judgment is the preferred method of resolving cases brought under FOIA.'" *Farley v. Worley*, 215 W.Va. 412, 418, 599 S.E.2d 835, 841 (2004) *quoting Evans v. Office of Personnel Mgt.*, 276 F. Supp.2d 34, 37 (D.D.C. 2003).

When a summary judgment is filed in a FOIA case, the burden falls on the defendant governmental official to present a legal justification for non-disclosure. "FOIA summary judgment is viewed through the evidentiary burden placed upon the public body to justify the withholding of materials." *Id.* (internal citation omitted). Here, the State Police have not and can

not meet the burden placed on it to justify the withholding of the requested public records.[7]

There is no dispute on the material facts concerning the FOIA request. The Answer of the State Police admits the substance of the factual allegations in the Complaint, including the content of the records requests and the refusal to disclose those public records. Answer ¶¶ 1-3, 5-12. The only issues are legal ones for resolution by the Court. Therefore, the Court can and should apply *Farley* and resolve this case on the instant Motion for Summary Judgment.

IV ARGUMENT

A FOIA MUST BE LIBERALLY CONSTRUED

Justice Ketchum recently reiterated that the WVFOIA's disclosure provisions (relied on by the *Gazette)* must be liberally construed in favor of disclosure, and its exemptions (relied on here by the State Police) must be strictly construed against non-disclosure:

> "[i]n addition to setting forth a clear statement of the public policy behind the Act, the Legislature also guided us in how to interpret disputes arising under that Act when it mandated that 'the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.' W.Va. Code, 29B-1-1. We recognized this mandate of liberal construction in Syllabus Point 4, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985), where we held that:
>
> > 'The disclosure provisions of this State's Freedom of Information Act, W.Va. Code, 29B-1-1 et seq., as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed. W.Va. Code, 29B-1-1 [1977].'"

Shepherdstown Observer, Inc. v. Maghan, — W. Va. — , 700 S.E.2d 805, 810 (2010) (Ketchum, J.) (emphasis added). *Accord Syl*. Pt. 4, *In re Gazette FOIA Request*, 222 W. Va. 771, 671 S.E.2d

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[7] The party claiming exemption, here the State Police, has the burden of showing the express applicability of such exemption to the material requested. *See*, *e.g.*, *Daily Gazette Co. v. West Virginia Dev. Office*, 198 W. Va. 563, 573, 482 S.E.2d 180, 190 (1996); *Queen v. West Virginia University Hospitals*, 179 W. Va. 95, 103, 365 S.E.2d 375, 383 (1987).

776 (2008); Syl. Pt. 4 *Farley*, 215 W. Va. 412, 599 S.E.2d 835. This most recent explication of West Virginia's Open Records law is nothing new. It has been interpreted consistently throughout its history:

> "'Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.'"

Farley, 215 W. Va. at 420, 599 S.E.2d 835.

Indeed, "[t]he general policy of the [WVFOIA] act is to allow as many public records as possible to be available to the public." *AT & T Communications of West Virginia, Inc. v. Public Serv. Comm'n of West Virginia*, 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992) (footnote omitted)). Said another way, "'the following two salient points must be remembered in any FOIA case, regardless of which exemption is claimed to be applicable. First, the *fullest responsible disclosure*, not confidentiality, is the dominant objective of the Act.'" *Ogden Newspapers v. City of Williamstown*, 192 W. Va. 648, 654, 453 S.E.2d 631, 637 (1994) (quoting *Hechler v. Casey*, 175 W.Va. at 445, 333 S.E.2d at 810 (1985)) (emphasis in original).[8]

B THE INFORMATION IN THE PUBLIC RECORDS REQUESTED BY THE *GAZETTE* IS NOT EXEMPT FROM DISCLOSURE

The plain text of WVFOIA, and the cases applying it, conclusively demonstrate disclosure of public records is favored strongly, and concomitantly, non-disclosure is strongly disfavored. Nonetheless, the State Police here asserts it is not required to follow WVFOIA's mandate, and

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[8] "WVFOIA . . . was enacted to fully and completely inform the public 'regarding the affairs of government and the official acts of those who represent them as public officials and employees.'" *Daily Gazette Co. Inc. v. W.Va. Development Office*, 198 W.Va. 563, 574, 482 S.E.2d 180, 191 (1990) (quoting W.Va. Code, 29B-1-1 [1977], in part).

attempt to rationalize the non-disclosure with three equally un-compelling arguments. *See* 6-2-10 Letter, attached as Ex. C to Compl.; 10-4-10 Letter from Hoyer to Harki, attached as Ex. E to Compl.

WVFOIA requires public documents be released unless the statutory exemptions expressly mandate otherwise. WVFOIA states: "(1) Every person has a right to inspect or copy any public record of a public body in this state, except as otherwise expressly provided by section four [§ 29B-1-4] of this article." W. Va. Code § 29B-1-3(1) (emphasis added).

The Supreme Court of Appeals has made clear: "West Virginia's FOIA provides for the disclosure of public records unless the requested information falls under one of eight exceptions." *Gazette FOIA Request*, 222 W. Va. at 779 (citing W.Va. Code §§ 29B-1-1, 29B-1-4); *see also Ogden*, 192 W.Va. at 651, 453 S.E.2d at 634; *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1484 (11th Cir. Fla. 1992) ("The [federal Freedom of Information] Act requires federal agencies to release requested information unless the information is covered by at least one of nine statutory exemptions.").[9]

The first asserted justification for non-disclosure is a citation to an administrative regulation promulgated by the State Police. While WVFOIA recognizes a limited exception to its "full and complete" disclosure requirements in instances where the information requested is specifically exempt from disclosure under a separate "statute," *W.Va. Code* § 29B-1-4(a)(5), the

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[9] The Supreme Court of Appeals has "looked to federal FOIA cases for guidance in interpreting the West Virginia Freedom of Information Act." *Farley*, 215 W. Va. at 420 (citing *Daily Gazette Co. v. West Virginia Develop. Office*, 198 W. Va. 563, 571, 482 S.E.2d 180, 188 (1996)). In particular, "[t]he exemptions in W.Va. Code § 29B-1-4 are similar to those in the Federal Freedom of Information Act." *Gazette FOIA Request*, 222 W. Va. at 779 (citing *Sattler v. Holliday*, 173 W.Va. 471, 318 S.E.2d 50 (1984)).

administrative regulation the State Police cite, 81 *W.Va.C.S.R.* § 10.6.2, is not a "statute." By contrast, WVFOIA obviously is a "statute," and while it allows the Legislature the leeway to carve out non-disclosure exemptions by so specifying in enacted legislation (a *statute*), it does not remotely suggest a mere administrative regulation promulgated by an agency can vitiate WVFOIA's mandate of full and complete disclosure. This style of exemption is common in many state open records laws, and uniformly is interpreted as *not* including administrative rules, as advocated here by the State Police.

The other two justifications for non-disclosure put forward by the State Police are assertions that WVFOIA itself, *W.Va. Code* § 29B-1-4(2) and (4), allows the State Police to withhold the requested records. The State Police ignore the fact that the scope of those two exemptions is narrow and limited (exemptions for (1) privacy and (2) ongoing criminal investigations) and clearly are inapplicable to the requested public records. While the public records requested are not the kind of "personal" or "medical" file records that may be exempted from disclosure, even if they were, any privacy interest of personnel is *de minimis* and is outweighed heavily by the public interest in disclosure of those records. The last assertion is that the requested records fall within a non-disclosure exemption for "[r]ecords of law enforcement agencies that deal with the detection and investigation of crime." This assertion borders on the disingenuous, as the caselaw is clear that when an investigation of a crime is closed, as is the case with virtually all the investigations for which records were sought, then the interest in non-disclosure based on the closed criminal investigation (as to one that is open) is far outweighed by the public interest, and the exemption is inapplicable.

Accordingly, and taking each of the asserted non-disclosure justifications in turn below,

summary judgment should be granted to the *Gazette*, and the public records requested should be disclosed.

1 THE STATE POLICE ADMINISTRATIVE RULE PROFFERED TO JUSTIFY NON-DISCLOSURE IS NOT A STATUTORY EXEMPTION, AND CAN NOT SUPERSEDE WVFOIA

The State Police's first attempt at rationalization of its denial of the *Gazette*'s request for public records wholly ignores *W.Va. Code* 29B-1-3(1).[10] Instead of citing anything, "expressly provided" in § 4 of WVFOIA, as required by the law, the State Police instead cite to an *administrative rule* that it apparently believes supercedes the statutory disclosure requirement.[11]

Despite the obvious and direct inconsistency with *W.Va. Code* § 29B-1-3(1), in its letter attempting to justify non-disclosure, the State Police assert that, "pursuant to 81 *W.Va.C.S.R.* § 10.6.2 'Documents, evidence, and other items related to complaints, internal investigations,

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[10] As noted above, the WVFOIA gives every person, "a right to inspect or copy **any public record** of a public body in this State[.]" *W.Va. Code* § 29B-1-3(1) (emphasis added). There is no dispute that the requested State Police records are, "public records of a public body." Therefore, WVFOIA only allows requested public records to be withheld, "as otherwise **expressly** provided by section four [§ 29B-1-4] of [WVFOIA]." *Id.* (Emphasis added). Concomitantly, unless WVFOIA **expressly** exempts requested public records from disclosure, the records must be disclosed.

[11] In *Syllabus* Points 5 and 6 of *Lovas v. Consolidation Coal Co.*, 222 W. Va. 91 (2008), the Supreme Court of Appeals reiterated that an administrative rule can not be inconsistent with, alter or limit a statute, and,

> "'The judiciary is the final authority on issues of statutory construction, and **we are obliged to reject administrative constructions that are contrary to the clear language of a statute**.' *Syl*. Pt. 5, *CNG Transmission Corp. v. Craig*, 211 W.Va. 170, 564 S.E.2d 167 (2002)."

(Emphasis added).

internal inquiries and/or contained in case files shall not be released, disseminated or disclosed, except by the direction of the Superintendent or by order of a court with competent jurisdiction.'" (10-4-10 Letter from Hoyer to Harki, attached as Ex. E to Compl.). Simply put, the administrative rule proffered by the State Police to justify non-disclosure is not an exemption, "expressly provided by section four [§ 29B-1-4] of [WVFOIA,]"as required by *W.Va. Code* § 29B-1-3(1). There is no blanket exemption, express, implied or otherwise in *W.Va. Code* § 29B-1-4 for all "items related to complaints, internal investigations, internal inquiries and/or contained in case files," whether it be express, implied or otherwise.

While not asserted as a basis for non-disclosure, it is a fact that WVFOIA's Section 4 exemptions include, "[i]nformation specifically exempted from disclosure by statute[.]" *W.Va. Code* § 29B-1-4(a)(5). Thus, if another *statute* allowed the State Police to withhold the requested public records, they would be justified under that exemption. Of course, the reason the State Police does not cite to the "other statute" exemption in its denial letter is that administrative rules, such as 81 *W.Va.C.S.R.* § 10.6.2, are not statutes.[12]

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[12] The statute that gives the State Police the power to promulgate 81 *W.Va.C.S.R.* § 10.6.2 likewise can not be construed to excuse the State Police from complying with WVFOIA. *West Virginia Code* § 15-2-5(b) is titled, "Career progression system; salaries; exclusion from wages and hour law, with supplemental payment; bond; leave time for members called to duty in guard or reserves," and says absolutely nothing about withholding or exempting records from disclosure, let alone the "specific exemption" required by the law:

> "(b) The superintendent may propose legislative rules for promulgation in accordance with article three, chapter twenty-nine-a of this code [or W. Va. Code § 29B-1-3, which deals with rule making under the West Virginia Administrative Procedures Act,] for the purpose of ensuring consistency, predictability and independent review of any system developed under the provisions of this section."

W.Va. Code § 15-2-5(b) (emphasis added). This statute may generally enable the State Police to

It also is instructive that other courts uniformly have rejected the idea that an agency regulation may serve to stifle a FOIA request. *See*, *e.g.*, *Anderson v. Health & Human Servs.*, 907 F.2d 936, 951 n. 19 (10th Cir. 1990); *Reporters Committee v. United States Dept. of Justice*, 816 F.2d 730, 735 (D.C. Cir. 1987) ("we must find a congressional purpose to exempt matters from disclosure in the actual words of the statute (or at least in the legislative history of the FOIA) – not . . . an agency's interpretation of that statute.").

Logically, the reasoning underlying other courts' holdings is that public bodies are not disinterested parties to the decision of whether to disclose their own public records. *See, e.g., Retired Railroad Workers Assoc. v. Railroad Retirement Board*, 830 F.2d 331, 334 (D.C. Cir. 1987) ("no single agency is entrusted with FOIA's primary interpretation, and agencies are not necessarily neutral interpreters insofar as FOIA compels release of information the agency might be reluctant to disclose."). Simply put, the State Police's attempt to rely upon its own administrative regulation to avoid compliance with the statutory disclosure obligation under WVFOIA is unavailing. *Id.*[13]

More generally, it is basic hornbook law that an agency cannot usurp the authority of the Legislature by adding restrictions to a statute which are not there. *See*, *e.g.*, *Ann Jackson Family*

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promulgate administrative rules, but it clearly does not specifically exempt any document from disclosure under WVFOIA.

[13] Were the foregoing not enough, it likewise is clear that, "[a] basic policy of [the] FOIA is to ensure that Congress and not administrative agencies determines what information is confidential. Given the court's responsibility to ensure that agencies do not interpret the exemptions too broadly . . . deference appears inappropriate in the FOIA context." *Lessner v. U.S. Dept. of Commerce*, 827 F.2d 1333, 1335 (9th Cir. 1987); *see also Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075, 62 L. Ed. 2d 757, 100 S. Ct. 1021 (1980).

Found. v. Commissioner, 15 F.3d 917, 920 (9th Cir. 1994). The foregoing caution is true especially where, as here, the Legislature specifically has indicated WVFOIA is to be **broadly construed to promote disclosure**. If a state agency is permitted to promulgate a rule allowing it to ignore or reject a FOIA request, the emphatic public policy articulated in *W.Va. Code* § 29B-1-1 of open, transparent government would be frustrated. Using Defendant's logic, all agencies simply could promulgate their own rules making all public records exempt from disclosure, follow their internal regulations, and WVFOIA quickly would be rendered a nullity.

In sum, given that 81 *W.Va.C.S.R.* § 10.6.2 is not a statutory exemption found in *W. Va. Code* § 29B-1-4, the administrative regulation is an invalid basis for withholding the records requested and the inquiry ends there. Courts do not defer to agency interpretations of what is or is not permissible to withhold under FOIA because the agency generally is an interested party (as is the case here) and further, an agency may not usurp the legislative prerogative and policy by creating new exemptions to the statute that the Legislature did not enact. The State Police's argument that 81 *W.Va.C.S.R.* § 10.6.2 excuses compliance with WVFOIA plainly fails.

2 DISCLOSURE OF THE PUBLIC RECORDS REQUESTED DOES NOT CONSTITUTE AN UNREASONABLE INVASION OF PRIVACY

Defendant next claims the public records at issue are exempt from disclosure under the "unreasonable invasion of privacy" exemption in *W.Va. Code* § 29B-1-4(2). This exemption excludes from disclosure:

> "Information of a personal nature such as that kept in a personal, medical or similar file, *if the public disclosure thereof would constitute an unreasonable invasion of privacy*, unless the public interest by clear and convincing evidence requires disclosure in the particular instance[.]"

W.Va. Code § 29B-1-4(2) (emphasis added). Of course, the public records requested are not "kept in a personal, medical or similar file," but even if they were, disclosure is not unreasonable, and the public interest requires disclosure.

Even assuming *arguendo* that the records requested are similar to "personal file" records, the law is clear that not all personal file information is exempt from disclosure – only records that if released would constitute an "unreasonable" invasion of privacy. Even then, again assuming *arguendo* that the records requested were not only similar to "personal file" information, *and* the Court determines the release of the information would constitute an "unreasonable" invasion of privacy, the Court then would have to move to the third step of the inquiry and undertake an analysis that balances the weight of the "public interest" against the asserted unreasonable invasion of privacy concern. *See id.* The three steps of the "personal information" test thus set forth in this statutory exemption found at *W.Va. Code* § 29B-1-4(2) are:

> [1] the "personal nature" inquiry,
>
> [2] the "unreasonable[ness]" inquiry, and
>
> [3] the public interest-unreasonable invasion of privacy balance.

These three separate inquiries have been conflated by some courts, but it is clear application of this exemption requires (consistent with the strict construction against non-disclosure), that State Police bear the burden of proving all three elements before the Court may permit non-disclosure. *See id.*[14] Here, Defendant cannot prevail on any of the three required steps. Each is addressed

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[14] The Supreme Court of Appeals has held,

> "[t]he primary purpose of the invasion of privacy exemption to the Freedom of Information Act, *W.Va. Code*, 29B-1-4[a](2) [1977], is to protect individuals from the injury and embarrassment that can result from

seriatim below.

a State Police records of investigations of complaints against officers are not records of a personal in nature like that kept in a personal, medical, or similar file

The first element of the "personal information" exemption test is whether the public record is "of a personal nature such as that kept in a personal, medical or similar file[.]" *W.Va. Code* § 29B-1-4(2). An examination of relevant caselaw shows clearly that the records at issue, because they relate to state police officers' conduct while working as police officers - that is, in their public position, as opposed to any other role they may have outside of their work as police officers – are not of a personal nature under the exemption, and therefore they are not exempt.

Conclusively, the Tenth Circuit Court of Appeals held in *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981) that **police officers have no privacy interest in documents related solely to the officer's work as police officers**. In the WVFOIA context, "[p]rivate information is something which affects or belongs to private individuals as distinct from the public generally . . . [and] information of a non-intimate or public nature may be disclosed." *Child Protection Group v. Cline*, 177 W. Va. 29, 32, 350 S.E.2d 541, 544 (1986)

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the **unnecessary** disclosure of personal information."

Syl. Pt. 6, *Hechler*, 175 W.Va. 434, 333 S.E.2d 799; *Gazette FOIA Request*, 222 W. Va. at 779 (emphasis added). That is certainly not to suggest, however, that any and all public records that may portray governmental employees in an embarrassing and unfavorable light are exempt under this section. *See, e.g.*, *Gazette FOIA Request*, 222 W. Va. at 782 (citing *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 47-48 (Iowa 1999)); *Perkins v. Freedom of Info. Comm'n*, 228 Conn. 158, 174 (1993). Rather, one must be mindful that the overarching purpose of WVFOIA is to provide "full and complete information regarding the affairs of government and the official acts of those who represent . . . [the people] as public officials and employees" so that people remain informed. *See* W. Va. Code § 29B-1-4(2); *see also Hechler*, 175 W. Va. at 445, 333 S.E.2d at 810 (internal citation omitted). Exposing governmental mistakes or incompetency, and thereby fostering good government, is a goal of WVFOIA. *See*, *e.g.*, *id.*

(citing, in part, *Black's Law Dictionary* 1076 (5th ed. 1979); *Hechler*, 175 W.Va. at 445, 333 S.E.2d at 810

"Several jurisdictions employ a common law analysis of invasion of privacy to interpret the privacy exceptions in the jurisdictions' public records statutes." *State Org. of Police Officers v. Society of Professional Journalists-University of Haw. Chapter*, 83 Haw. 378, 398 (1996); *see also Perkins*, 228 Conn. at 173. Those courts have looked to the *Restatement (Second) of Torts* § 652D and its comments. *See id.*; *see also Cline*, 177 W. Va. at 32, 350 S.E.2d at 544. The *Restatement* provides,

> "'one who gives publicity to a matter concerning the **private life** of another is subject to liability to the other for invasion of his [or her] privacy, if the matter publicized is of a kind that (a) would be regarded as highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.'"

Society of Professional Journalists, 83 Haw. at 399 (quoting *Restatement (Second) of Torts* § 652D, 383 (1977)) (emphasis added).[15] Drawing upon the *Second Restatement* and its comment

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[15] Its comment b further states:

> 'Every individual has some phases of his [or her] life and his [or her] activities and some facts about himself [or herself] that he [or she] does not expose to the public eye, but keeps entirely to himself [or herself] or at most reveals only to his [or her] family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's [or woman's] life in his [or her] home, and some of his [or her] past history that he [or she] would rather forget. When these intimate details of his [or her] life are spread before the public gaze in a manner highly offensive to the ordinary reasonable [person], there is an actionable invasion of his [or her] privacy, unless the matter is one of legitimate public interest.'

State Org. of Police Officers v. Society of Professional Journalists-University of Haw. Chapter, 83 Haw. 378, 399 (1996) (quoting Restatement (Second) of Torts § 652D, at 386, comment b (1977)).

b, *inter alia*, the Supreme Court of Hawaii recognized,

> "[i]nstances of **misconduct** of a police officer while on the job are not private, intimate, personal details of the officer's life."

Id. (internal citation omitted and emphasis added).

Applying the privacy criteria of the *Restatement* and its comments, the *Gazette*'s public records requests do not touch upon the "private life" of State Police officers – the requests seek only public records concerning complaints about their official conduct while working. The *Gazette* is not asking for private information in a personal file, such as records concerning an officer's off-duty sexual relations, family quarrels, illnesses, or home life. Rather, the requests clearly are directed at complaints about officers' *public* conduct – "records detailing how the agency handles allegations of [trooper] abuse and misconduct." (**Exhibit 1**). As a matter of law, such records concern *public*, not private conduct.

Other courts to address the personal-public distinction in the tort context similarly have concluded that allegations regarding a police officer's alleged misconduct on-the-job falls on the "*public*" side of the personal-public dividing line. *See White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990) (stating that drug use or administering of tests to detect drug use among police officers can never be regarded as mere "private facts"); *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 603 F. Supp. 377, 385-390 (E.D. Pa. 1985) (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-95, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975) and Restatement, *supra*, § 652D)), aff'd, 780 F.2d 340 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1187, 106 S. Ct. 2927, 91 L. Ed. 2d 554 (1986)); *Rawlins v. Hutchinson Publishing Company*, 218 Kan. 295, 543 P.2d 988 (Kan. 1975) (finding no invasion of privacy where newspaper published

account of police officer's alleged misconduct in office because facts did not concern the "private life' of the officer and "a truthful account of misconduct in office cannot form the basis of an action for invasion of privacy."); *Spokane Police v. Liquor Control Board*, 769 P.2d 283, 286-87 (Wash. 1989) (citing *Restatement*, *supra*, § 652D) (holding that disclosure of investigative report into liquor law violations at bachelor party held at private police guild club and attended by police officers did not implicate right to privacy, which "is commonly understood to pertain only to the intimate details of one's personal and private life.").

In *Coughlin*, *supra,* the federal district court granted summary judgment against a police officer who claimed, *inter alia*, that a television broadcast portraying his alleged misconduct *on the job* invaded his privacy. The *Coughlin* court disagreed, holding that because "the broadcast dealt with [the officer's] public activity as a police officer. **A police officer's on-the-job activities are matters of legitimate public interest, not private facts.**" 603 F. Supp. at 390 (emphasis added). Like in *Coughlin*, courts uniformly have concluded a police officer's alleged misconduct is decidedly public in part because of the importance of their governmental role:

> "[police officers] 'have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs,' . . . and their position 'has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . .' . . . The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss."

Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir.1981) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85-86, 86 S. Ct. 669, 675-76, 15 L. Ed. 2d 597 (1966)) (citations omitted). There is thus a "**strong public interest in ensuring open discussion and criticism of" the police officer's**

"qualifications and job performance." *Id.* (emphasis added).

That the requested records are "public" in nature further is indisputable, but nevertheless is further supported by the fact that the records requested must be created in compliance with the State Police's own regulations. 81 *W.Va.C.S.R.* §§ 10-9.1, 9.5, 3.3. The records sought by the *Gazette* – reports and information concerning the public agency's internal review of alleged trooper misconduct as well as a copy of the central log of complaints[16] – all are public records that must be maintained by the State Police pursuant to its own regulations adopted.[17] (Answer ¶ 1, admitting Compl. ¶ 1). It is simply beyond cavil that the requested documents are "public," dealing with issues of public officers while working for the public, and are not of the kind of "personal" information that is exempt from disclosure under "exemption 2" of the WVFOIA.

The *Gazette* is not requesting personnel file records of individual officers. As explained in the pre-litigation letter from Plaintiff's counsel, "[t]he requested specific public records are reports that are compilations of information." (10-24-10 Letter from McGinley to Hoyer, attached as Ex. D to Compl.). The possibility that the reports may contain information that also could be placed in a personnel or similar file does not create a blanket exemption of the reports from disclosure. In *Obiajulu v. City of Rochester*, 625 N.Y.S.2d 779, 780 (N.Y. App. Div. 1995), for

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[16] The "Personnel Complaint Form" used by the State Police now "advises the complainant that providing false information to the State Police is a violation of W. Va. Code § 15-2-16, and that the State Police may pursue criminal and/or civil sanctions if the investigation determines the complaint or any statements made are without foundation, basis, false or not factual." 81 *W.Va.C.S.R.*§ 10-5.3.

[17] Indeed, the *Gazette's* requests identify the documents sought by using precisely the same words used in the State Police administrative regulations (*see* 81 *W.Va.C.S.R.* §§ 10-9.1, 9.5, 3.3) to describe the public records being requested. Thus, the *Gazette*'s FOIA requests are tailored narrowly to those records the State Police is obliged to create and maintain in the ordinary course of its oversight and administration of alleged misconduct by its officers.

example, a New York appellate court found that,

> "disciplinary files containing disciplinary charges, the agency determination of those charges, and the penalties imposed . . . are not exempt from disclosure" because they were not "'personal and intimate details of an employee's personal life.'"

Id. While the State Police here seek refuge in failed arguments rejected out-of-hand in most other jurisdictions, the well-established and accepted public records case-law rejects these attempts to re-categorize public records concerning a public official's acts as exempt because the records discuss allegations of misconduct. Taken to its logical outcome, applying the exemption to records of alleged state police officer misconduct likewise would exempt any public record concerning public official misconduct – a conclusion antithetical to the clear public purpose of WVFOIA.

b Production of Plaintiff's requested documents does not constitute an unreasonable invasion of privacy.

Notwithstanding the foregoing, assuming *arguendo* that the State Police somehow could meet its burden of proving the requested public records are "personal" in nature, as opposed to "public," the next step in the legal analysis under WVFOIA is for the Court to address and determine whether the State Police has proved that disclosure would result in an "unreasonable" invasion of privacy. *W.Va. Code* § 29B-1-4(2); *see Gazette FOIA Request*, 222 W. Va. at 779, 671 S.E.2d at 784 (quoting *Cline*, 177 W.Va. at 34 n. 8, 350 S.E.2d at 546 n. 8 (1986)).

The "privacy" argument the State Police put forth appears to be that any accusation of official misconduct against a police officer is, *ipso facto*, an unreasonable invasion of privacy. Not surprisingly, other courts have found *no privacy interest whatsoever* in such public records, let alone a privacy interest so strong that disclosure would be unreasonable. For example, as held

by the New Mexico Court of Appeals:

> "although DPS is the keeper of the information contained in the citizen complaints, the information continues to belong to the citizen who made the complaint. Unlike other materials in the personnel file, **the officer does not have a reasonable expectation of privacy in a citizen complaint because the citizen making the complaint remains free to distribute or publish the information in the complaint in any manner the citizen chooses**.
>
> DPS also argues that police officers are "lightening [*sic*] rods for complaints by disgruntled citizens" and, therefore, information in the complaint may be untrue or have no foundation in fact. **The fact that citizen complaints may bring negative attention to the officers is not a basis under this statutory exception for shielding them from public disclosure**."

Cox v. New Mex. Dept. Of Pub. Safety, 242 P.3d 501, 507, 2010 NMCA 96, 25-26, 2010 N.M. App. LEXIS 101, *17 (N.M. Ct. App. Aug. 16, 2010) (emphasis added).

Likewise, in West Virginia, an "unreasonable" invasion of privacy has been equated with a "'substantial'" invasion, "'*i.e.*, more than what the average person would normally expect the government to disclose about him.'" *Gazette FOIA Request*, 222 W. Va. at 779 (quoting *Cline*, 177 W.Va. at 34, n.8, 350 S.E.2d at 546, n.8) (emphasis added). The Connecticut Supreme Court explained,

> "we note that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties. The public has a right to know not only who their public employees are, but also when their public employees are and are not performing their duties."

Perkins, 228 Conn. at 177. By accepting public employment as a State Police officer, a person does not become exempt from public scrutiny. To the contrary, government officials such as police officers are accountable to the public, and the public who pays these officers' salaries has a

right to know not only who their State Police officers are, but also when and how their police officers are, and are not, performing their duties. It is clear that disclosure of the public records requested by the *Gazette* concern information about how police officers do their jobs, and thus disclosure of those records promotes accountability and could not be unexpected to any reasonable public official.

The Supreme Court of Appeals set forth a more detailed, five-factor analysis for evaluating whether an invasion of privacy rises to the level of "unreasonable." "In deciding whether the public disclosure of information of a personal nature under *W.Va. Code* § 29B-1-4(2) (1980) constitutes an unreasonable invasion of privacy, this Court will look to five factors:

> "1. Whether disclosure would result in a substantial invasion of privacy and, if so, how serious.
>
> 2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.
>
> 3. Whether the information is available from other sources.
>
> 4. Whether the information was given with an expectation of confidentiality.
>
> 5. Whether it is possible to mould relief so as to limit the invasion of individual privacy."

Syl. Pt. 5, *Gazette FOIA Request*, 222 W. Va. 771, (quoting *Syl.* Pt. 2, *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986)).

Under an analysis of the five *Cline* factors, the *Gazette*'s requests do not constitute an unreasonable invasion of privacy. *See Syl.* Pt. 2, *Cline*, 177 W.Va. 29, 350 S.E.2d 541. All five factors either favor disclosure or have no bearing on the analysis.

- The first factor was discussed in the preceding section, and as explained therein, no

substantial or serious invasion of privacy would occur were the public records released. Indeed, most courts addressing this issue have concluded that police officers have no cognizable privacy in complaints about their conduct while working.

- *Cline* fleshed out the list of factors, and in doing so, pointed out the second factor contains components of both the "value" and the "purpose" of the public interest. *Id.* at 177 W.Va. at 33, 350 S.E.2d at 544. In the case *sub judice*, the value of the public interest is high because disclosure promotes accountability by the public, and the people have the right to know whether State Police officers, who hold public positions of authority in the community and who are permitted by law to exercise force, are performing their duties lawfully and not abusing their unique power. *See id.*

- As to the third factor, it was explained, "if there is absolutely no other place or method to gather the information than from the particular Freedom of Information Act request before the court, this is a factor in favor of disclosure." *Id.* It is undisputed that the information in these public records is not available elsewhere, and therefore this element of the test favors disclosure.

- The Supreme Court of Appeals discusses the fourth factor in terms of the government maintaining confidentiality with respect to "information of a very personal nature," "private information," and "private secrets." *Id.* The fourth element appears to have no bearing on the analysis, because complaints of police misconduct made by third parties, who are free to discuss the information in the complaints with whomever they choose, hardly could be deemed "confidential."

- Lastly, assuming *arguendo* the Court were to conclude the disclosure of the

information somehow amounts to an unreasonable invasion of privacy, any potential "unreasonable" invasion of privacy could be reduced if the State Police were to redact the names of the employees whose privacy (*i.e.*, regarding sexual relations, family quarrels, illnesses, or home life, *etc.*) allegedly would be unreasonably invaded by disclosure.

While the Supreme Court of Appeals has not had occasion to address FOIA's applicability to complaints of misconduct made against police officers, it has applied FOIA to similar citizen complaints investigated by other public bodies, and strongly held that records of citizen complaints and investigations of those complaints must be disclosed under FOIA. For example, complaints against private attorneys, and complaints against medical doctors both must be disclosed as soon as the investigation results in charges or is closed. *Syl*. Pts. 5 and 6, *Daily Gazette Co. v. Committee on Legal Ethics of the W. Va. State Bar*, 174 W. Va. 359, 326 S.E.2d 705 (1984) (holding the public has a right to access records relating to disciplinary charges against an attorney following completion of the investigation, regardless of whether the disciplinary charges are dismissed for a lack of probable cause or not); *Syl*. Pts. 1-3, *Daily Gazette Co. v. W. Va. Bd. of Medicine*, 177 W. Va. 316, 352 S.E.2d 66 (1986) (extending same logic for disciplinary allegations against doctors).

Perhaps most decisive insofar as the State Police's assertion of the privacy exemption is concerned is the fact that the Supreme Court of Appeals already has held that complaints about misconduct, even where dismissed, pose "no real threat" to the reputations of those accused. As held in *Daily Gazette Co. v. Committee on Legal Ethics of the W. Va. State Bar*, 174 W. Va. at 367:

> "information regarding complaints dismissed without formal charges [. . .] is a necessary and vital component of the whole public process. While we

> recognize that there are reputational and investigatory justifications to restrict disclosure of information pertaining to complaints during the initial investigatory stage, those justifications are limited."

The Supreme Court of Appeals continued:

> "The reporting of the existence of groundless or frivolous complaints after there has been a decision to dismiss them as such **poses no real threat to the reputations of attorneys**. Moreover, information on the disposition of all complaints not only serves the objective of accountability, but also promotes a greater flow of information from the most substantial source of information pertaining to ethical violations, the public."

Id., 174 W. Va. at 367, n.17, *citing* Steel & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 Am. Bar Found. Research J. 919, 1004. The Supreme Court of Appeals further explained the important public function of accountability that *disclosure* of records concerning the investigation of complaints of misconduct serves:

> "Accountability for all decisions can only bolster confidence in this self-regulatory process, and at the same time, increase the likelihood of receiving information concerning attorney misconduct."

Id.

The reasoning of the Supreme Court of Appeals in *Daily Gazette Co.* applies with equal, if not more force, to the case at bar. Disclosure of the public records of State Police investigations of misconduct allegations clearly would enhance, "[a]ccountability for all decisions [that] can only bolster confidence in this self-regulatory process, and at the same time, increase the likelihood of receiving information concerning [State Police officer] misconduct." *See id.* In light of the fact that courts uniformly have concluded the purported privacy interests of police officers and other government officials in keeping secret complaints about their conduct as public officials is negligible at best, it can not be gainsaid that those negligible privacy interests are outweighed heavily by the clear and strong public interest in accountability and confidence in the

regulatory process that disclosure of the requested records promotes.[18]

c The public's right to know strongly outweighs whatever *de minimis* privacy interests are at stake.

The test the State Police must meet to prove the records are exempt is not an easy one. As discussed above, assuming *arguendo* the State Police first prove the records are (1) personal, as opposed to "public" in nature, and also prove the records (2) constitute "an unreasonable invasion of privacy," it then must be proved that the public interest in disclosure is not as significant as the purported privacy interest. It is apparent the State Police can not meet the first two parts of the test, but even if it could, there is no question it could not show that the public's right to know about complaints of officer misconduct, and how the State Police investigates its own officers, outweighs the truly negligible privacy interest asserted.

Again, while our Supreme Court has not had occasion to address this issue, the Supreme Court of Hawaii, balancing the same interests, found the purported privacy interests of officers to be "slight' as compared to the public interest in accountability:

> "'If the off duty acts of a police officer bear upon his or her fitness to perform public duty or if the activities reported in the records involve the performance of a public duty, then the interest of the individual in "personal privacy" is to be given slight weight in the balancing test and the appropriate concern of the public as to the proper performance of public duty is to be given great weight. **In such situations <u>privacy considerations are overwhelmed by public accountability</u>**.'"

Society of Professional Journalists, 83 Haw. at 399 (internal quotation omitted).

As compared to the Hawaii case, the balance of interests in the case at bar weighs even

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[18] There is no legal or logical reason that records of investigations of State Police officer misconduct should be exempt from disclosure while records concerning misconduct of lawyers and doctors is not. Public records relating to the State Police carry an even greater public interest. *See*, *e.g.*, *Gray*, 656 F.2d at 591.

heavier in favor of the public interest because the information subject to disclosure concerns State Troopers' performance of public duties. Thus, the asserted "personal privacy" interest here is far slighter still, and the public interest of even greater weight. Indeed, it is hard to conceive of a more compelling public interest than the people's right to know of complaints of misconduct of a public officers and the State Police's handling of those complaints of misconduct or abuse against its employees. The public interest is significant in all matters of alleged misconduct by State employees, but it is even higher here, because officers of the State Police operate in a position of power and authority and are given authority to restrict citizens' liberty and to carry weapons, *etc.* *See Gray*, 656 F.2d at 591. Raising the public interest higher still is the fact that these requests are directed at the State Police's internal, secret investigation and oversight of alleged trooper misconduct. The public interest in accountability in these circumstances could not be higher, and the public's right to know why allegations of misconduct do, or do not, result in charges or disciplinary action.

In weighing the competing interests in the context of attorneys reviewing citizen complaints about fellow attorneys, our Supreme Court of Appeals in *State Bar* easily arrived at the conclusion,

> "if the legal profession's practice of self-regulation is to remain viable, the public must be able to observe for themselves that the process is impartial and effective. We cannot simply expect the public to blindly accept that justice is being done. 'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.'"

Id. at 174 W. Va. at 365, 326 S.E.2d at 711-712 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572, 100 S. Ct. 2814, 2825, 65 L. Ed. 2d 973, 986 (1980)); *see also State Bd. of Medicine*, 177 W. Va. 316, 352 S.E.2d 66. *State Bar* continued,

> "The Committee on Legal Ethics is dominated by lawyers, who are charged with the responsibility of scrutinizing the conduct of other lawyers. Carrying on this process in secrecy 'denies the public information that would demonstrate the profession's concern for effective disciplinary enforcement and show the steps taken by the bar to maintain its integrity.'"

Id. To reiterate, groundless complaints pose no real threat to attorneys, and by contrast, accountability bolsters confidence in this self-regulatory process increases the likelihood of receiving information from the public concerning misconduct. *See supra* pp. 29.

Similarly, the State Police's secret, internal handling of citizen complaints against its force shields the public from viewing this important information and thus demeans confidence in the self-regulatory process. Certainly, if the balance of the competing interests requires disclosure in the context of private attorneys, *see State Bar*, *supra*, and doctors, *see State Board of Medicine*, *supra*, then the same balance requires disclosure in the context of public official-State Troopers. As explicitly held by the New Mexico Court of Appeals:

> "We see no reason why citizen complaints against police officers should be treated any differently than citizen complaints against other professionals licensed by the state for which disclosure is required."

Cox, 242 P.3d at 508. *See Maclay v. Jones*, 208 W.Va. 569, 576, 542 S.E.2d 83, 90 (2000) (quoting *Soto v. City of Concord*, 162 F.R.D. 603, 612 (N.D. Cal. 1995)) ("'[t]he notion that police departments should be able to completely shield their internal affairs investigatory process from the public offends basic notions of openness and public confidence in our system of justice.'"); *Gray*, 656 F.2d at 591 (concluding there is a "strong public interest in ensuring open discussion and criticism of" police officer's "qualifications and job performance.").[19]

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[19] Finally, it should be noted that the public records requests in this case stand in stark contrast to those in *Manns v. City of Charleston Police Dep't*, 209 W. Va. 620, (2001) (*per*

d Even if the Court concluded the disclosure of the requested public records would be an unreasonable invasion of privacy, the State Police can and must redact the name of the person whose privacy would be unreasonably invaded and disclose the remainder of the public records

If a privacy interest is deemed by the Court to be unreasonably invaded by disclosure of a given public record and outweighs the public's interest in knowing the names of the individuals (*i.e.*, by referring to an individual's sexual relations, family quarrels, illnesses, or home life, as opposed to allegations of official capacity misconduct), disclosure must still be made by redacting the name of the person and instead placing assigned numerical designations in place of the name. Redaction in this way is *required* because privacy interests only rise to the level of unreasonable

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curiam). There, the FOIA requests by an individual who had a simultaneous § 1983 lawsuit pending, were for a "broad 'any complaint' personnel file inspection," *Id.* 209 W. Va. at 627 (Starcher, J. concurring), or, in other words, ""access to all of the police department's investigation and/or complaint records (this includes notes, letters, phone slips, *etc.*) regarding all of its current officers." *Id.* Before explaining that WVFOIA requires the disclosure of documents not information, Justice Starcher's concurrence to the *per curiam* opinion "emphasize[d]" *Manns* was a "narrow holding." *Id.* at 626. Justice Starcher's concurrence in *Manns* was careful to note:

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

Id. (emphasis added). Here, the narrowly-tailored FOIA requests, tracking the language of the 2008 State Police regulations requiring them to compile certain records, seek the State Police-generated records demonstrating their oversight and administration of alleged trooper misconduct. A request has been made for public records, if necessary, with the names redacted (a "different kettle of fish" from *Manns*). That is a far cry from the open-ended request for all individual officers' personnel records at issue in *Manns*.

intrusion if and when, "'detailed Government records on an individual which can be identified as applying to that individual'" are requested. *Hechler*, 175 W. Va. at 444 (internal quotation omitted). If the State Police's real concern is about the privacy interests of individual troopers, that concern is resolved easily by an appropriate redaction. *See* Syl. Pt. 5, *Farley*, 215 W. Va. 412, 599 S.E.2d 835; *Obiajulu*, 625 N.Y.S.2d at 780.[20] Of course, as noted above, the *Gazette* alternatively requested the public records with names redacted where necessary, rather than non-disclosure of the documents in their entirety. The State Police's repeated refusal to take the reasonable step of redaction shows it is unwilling to follow the law in this regard, and frankly, that

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[20] To the extent the Court finds an exemptions applicable to the records requested, blanket non-disclosure is not permitted because the exemption could be satisfied easily by redacting that limited information. Indeed, the State Police is required to redact under such circumstances. "[I]n response to a proper . . . [WVFOIA] request, a public body has a duty to redact or segregate exempt from non-exempt information contained within the public record(s) responsive to the FOIA request and to disclose the nonexempt information unless such segregation or redaction would impose upon the public body an unreasonably high burden or expense." Syl. Pt. 5, in part, *Farley*, 215 W. Va. 412, 599 S.E.2d 835. "If the public body refuses to provide redacted or segregated copies because the process of redacting or segregating would impose an unreasonably high burden or expense, the public body must provide the requesting party a written response that is sufficiently detailed to justify refusal to honor the FOIA request on these grounds." *Id.* The State Police has not asserted that cost or burden is a reason for not redacting. Nor has it provided a detailed written response explaining the refusal to redact. To be sure, such an explanation would be difficult to make in any coherent manner. If redactions were necessary, for example redacting names of officers accused, such a redaction could not be said to impose an unreasonable burden.

An example of a public defendant improperly failing to redact or segregate exempt information so that the non-exempt portions of the public records could be disclosed is found in *Ogden*, 192 W. Va. at 656, 453 S.E.2d at 639, where the identity of juveniles contained in a police report were at issue. The Supreme Court of Appeals found the circuit court erred in allowing the entire report to be withheld simply because the identity of the juveniles were contained in the report. The Supreme Court of Appeals held that the names could have been redacted and the redaction satisfied the concerns for protecting the juvenile's identity. *Id.* If redactions are required here, the same logic would apply and show that the exemption at issue can be satisfied easily by redacting the name of the officer involved without imposing an unreasonable burden on Defendant.

the assertion of the privacy exemption is not valid and non-disclosure is the real goal of the State Police.

e THE FOREGOING DISCUSSION CONCLUSIVELY SHOWS "UNREASONABLE INVASION OF PRIVACY" EXEMPTION IS INAPPLICABLE TO THE RECORDS REQUESTED BY THE *GAZETTE*

The foregoing analysis shows that the State Police has a number of high hurdles to overcome to prove that the requested public records fall within the limited confines of the "unreasonable invasion of privacy" exemption. The State Police, far from meeting its burden on all three elements of the exemption, can not meet its burden on *any* of the elements. While it is clear that information concerning a public officer's sexual relations, family quarrels, illnesses, home life, and the like are exempt, it is likewise clear that records that concern allegations of on-the-job misconduct are not exempt because that information is public and is a matter of heightened public interest and concern. It is simply beyond cavil that the State Police's investigation, oversight and investigation of alleged misconduct of its officers is "public," as opposed to "personal" in nature. Even if these public records somehow could be construed as "personal," the disclosure of the records relating to the State Police's handling of allegations of misconduct of its force would not be unreasonable. And moreover, even if the disclosure of the requested records could be said to be unreasonable, the significant public interest in the State Police, the alleged misconduct of its officers, and how it polices itself far outweighs any negligible, *de minimis* privacy interest that may be asserted. Finally, if there is unreasonable invasion of privacy that outweighs the public interest in disclosure of a specific record, those records can be redacted and the remainder of the document disclosed. The exemption in *W.Va. Code* § 29B-1-4(2) most assuredly does not apply.

3 THE STATE POLICE'S *THIRD* BASIS FOR WITHHOLDING (*W.VA. CODE* § 29B-1-4(4)) IS INAPPLICABLE BECAUSE THE PUBLIC RECORDS AT ISSUE CONCERN CLOSED INVESTIGATIONS

The State Police claim last that the public records of misconduct complaints and the outcome of its investigation are exempt from disclosure pursuant to the "law enforcement exemption" stated in *W.Va. Code* § 29B-1-4(4):

> "Records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement[.]"

W. Va. Code § 29B-1-4(4). While there are a number of reasons why exemption (4) is inapplicable to the records requested, the most obvious reason for its inapplicability is that virtually all of the investigations for which records have been requested are closed.

The State Police itself deems the misconduct allegation investigations that the requested records address to be "**closed**." (*See* 09-24-10 Letter from McGinley to Hoyer, attached as Ex. D to Compl.). As such, the documents clearly fall outside of the law enforcement exemption and must be disclosed. *See W.Va. Code* § 29B-1-4(4); *Syl*. Pt. 11, *Hechler*, 175 W. Va. 434, 333 S.E.2d 799. The Supreme Court of Appeals requires a balancing test for the law enforcement exemption similar to the test used to determine the applicability of the "unreasonable invasion of privacy" exemption discussed above:

> "Once a document is determined to be a law enforcement record, it may still be disclosed if society's interest in seeing the document outweighs the government's interest in keeping the document confidential."

Id. at 192 W. Va. at 653; *see also Sattler v. Holliday*, 173 W. Va. 471, 318 S.E.2d 50 (1984). In explaining the proper balance, *Syllabus* Point 1 of *Ogden* explains that the exemption applies only to "an ongoing law enforcement investigation:"

> "To the extent that information in an incident report dealing with the detection and investigation of crime will not compromise an **ongoing law enforcement investigation**, we hold there is a public right of access under **the West Virginia Freedom of Information Act**."

Syl. Pt. 1, *Ogden*, 192 W. Va.648, 453 S.E.2d 631 (emphasis added).

Ogden is simply applying the law enforcement exemption the same way as federal case law applies the similar exemption under the federal FOIA. As the United State Supreme Court explained in regard to the analogous federal exemption, the agency asserting the law enforcement exemption must show the records relate to an ongoing or future investigation, not one that is closed:

> "where an agency fails to '[demonstrate] that the . . . documents [sought] relate to any **ongoing investigation** or . . . would jeopardize any future law enforcement proceedings,' Exemption 7 (A) would not provide protection to the agency's decision. 1975 Source Book 440 (remarks of Sen. Kennedy). [T]he Court of Appeals was correct that the amendment of Exemption 7 was designed to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes[.]"

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 235-236 (U.S. 1978). In *Foster v. United States DOJ*, 933 F. Supp. 687, 692 (E.D. Mich. 1996), the federal district court explained concisely:

> "In order to invoke [the law enforcement exemption], an agency must show (1) that a law enforcement proceeding is pending or prospective and (2) that release of information regarding the proceeding could reasonably be expected to cause some articulable harm. *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978). The exemption applies when release of law enforcement information would harm the government's case in court. *Id.* at 232."

Once a law enforcement investigation is closed, the public agency no longer may assert the law enforcement exemption to FOIA as a basis for withholding documents. *See*, *e.g.*, *Coastal States*

Gas Corp. v. Department of Energy, 617 F.2d 854, 870 (D.C. Cir. 1980) (rejecting application of the analogous federal FOIA exemption in 5 U.S.C. § 552(b)(7) stating, "[t]here is no reason to protect yellowing documents contained in long-closed files.").

While law enforcement records may be exempt from disclosure if the investigation is ongoing, that is not the case here. Additionally, however, the State Police's assertion of the privacy interests of officers raises the issue of whether these records are law enforcement records at all, or whether they are simply internal agency investigation records which are not exempt under the law enforcement exemption. For example, in *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W. Va. 648, 652, 453 S.E.2d 631, 635 (1994), the West Virginia Supreme Court of Appeals reiterated *Hechler's* clarification of the "law enforcement exemption," holding:

> "'Records . . . that deal with' the detection and investigation of crimes, within the meaning of *W.Va. Code* §29B-1-4(4) [1977], do not include information generated pursuant to routine administration or oversight, but is limited to information compiled as part of an inquiry into specific suspected violations of the law."

Id. (quoting *Syl.* Pt. 11, *Hechler*, 175 W. Va. 434, 333 S.E.2d 799).

`In arriving at its conclusion in *Syllabus* Point 11, *Hechler* cited *Stern v. FBI*, 737 F.2d 84, 89-90 (D.C. Cir. 1984). In *Stern,* the Court of Appeals for the District of Columbia held, "[i]nternal agency investigations present special problems in the [law enforcement] Exemption." *Id.* In this context, "it is necessary to distinguish between those investigations conducted 'for a law enforcement purpose,' and those in which an agency, acting as the employer, simply supervises its own employees." *Stern*, 737 F.2d at 88-89. The *Stern* court held, "an agency's general internal monitoring of its own employees to insure compliance with the agency's statutory mandate and regulations is not protected from public scrutiny under" the law enforcement

exemption. *Id.* (citing *Rural Housing Alliance v. U.S. Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). Otherwise, the exemption would "devastate FOIA" because, if it is interpreted broadly, the exemption would eviscerate the general policy of FOIA. *Id.*

Ogden also echoed another earlier sentiment in *Hechler* that the "primary purpose of the law enforcement exemption is 'to prevent **premature** disclosure of investigatory materials which might be used in a law enforcement action.'" *Id.* at 192 W. Va. at 652; 453 S.E.2d at 635 (citing *Hechler*, 175 W. Va. at 447; 333 S.E.2d at 812) (emphasis added). The documents requested pertain to oversight and review of the officers' allegedly past wrongful behavior, not information relative to an ongoing criminal investigation or detection of crime.

In the case at bar, there is no ongoing law enforcement investigation. Indeed, the State Police do not assert the existence of an ongoing investigation, and its own report states that virtually all of its investigations from prior years have been closed. For example, the State Police's own May 2010 'Professional Standards Section' 2009 Report states that all of the internal investigations for the years 2007, 2008 and 2009 are now 'closed.'

In short, the law enforcement exemption refers only to confidential techniques and can not be asserted, as the State Police attempt to do here, as a "blanket exemption" of anything conceivably related to law enforcement. *See Hechler*, 175 W. Va. 434, 333 S.E.2d 799. The records requested pertain to administration and oversight of the State Police force, not pending criminal investigations. *Id.* at *Syl.* Pt. 11. Even assuming, for the sake of argument, the records were found to resemble criminal investigations, rather than oversight and administration of the police force, the undisputed fact that the investigations are closed overwhelmingly tips the scales in favor of disclosure when balancing the public's right to know about the State Police's handling

of police misconduct. Syl. Pt. 1, *Ogden*, 192 W. Va. 648, 453 S.E.2d 631. Therefore, the exemption in *W. Va. Code* § 29B-1-4(4) plainly does not apply.

V CONCLUSION

WVFOIA must be construed liberally in favor of disclosure of public records, and the exemptions asserted by the State Police must be construed narrowly against nondisclosure. It is abundantly clear that the State Police have no legal basis to withhold the requested records. Therefore, the *Gazette* respectfully requests the Court grant its motion for summary judgment and order the records requested be disclosed forthwith.

Respectfully submitted,

THE CHARLESTON GAZETTE d/b/a **DAILY GAZETTE COMPANY**

By counsel,

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Rudolph L. DiTrapano (WV Bar# 1024)
Sean P. McGinley (WV Bar# 5836)
Robert M. Bastress III (WV Bar# 9616)
DiTRAPANO BARRETT & DiPIERO, PLLC
604 Virginia Street, East
Charleston, WV 25301
Phone: 304-342-0133
Fax: 304-342-4605
http://www.dbdlawfirm.com

Counsel for Plaintiff