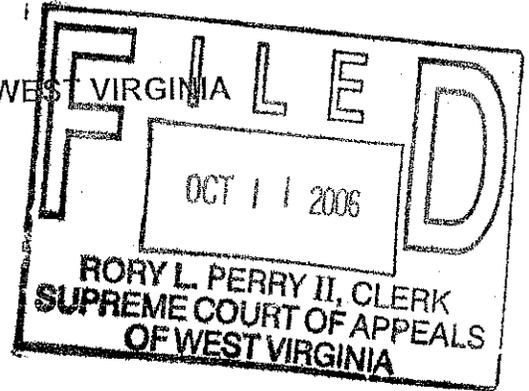


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JOHN SMITH,

Petitioner Below, Appellant,

v.

SUPREME COURT NO. 33156

DR. D.J. BRADLEY, PRESIDENT
FAIRMONT STATE UNIVERSITY,

Respondent Below, Appellee.

BRIEF ON BEHALF OF THE APPELLEE

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I. STATEMENT OF FACTS

Appellee, Fairmont State College (hereinafter "FSU"), employed Appellant, John Smith (hereinafter "Smith"), as an Assistant Professor of Mechanical Engineering Technology during the 2001-2002 academic year. Smith was a member of the School of Technology¹ faculty. FSU employed Smith as a probationary, full-time tenure-track, year to year employee. FSU did not renew Smith's faculty appointment beyond the 2001-2002 academic year.

Pursuant to FSU's evaluation practice and procedure, a faculty evaluation is composed of a self evaluation completed by the faculty member being evaluated, and Peer Evaluation Forms completed by a colleague of the faculty member's own choosing and a faculty member chosen by the Department Chair (School Chair prior to Fall 2003). The Department Chair also completes a Chair Evaluation Form for each faculty member. Faculty members are evaluated on teaching effectiveness and performance, consistency of effort, rapport with students, preparation, attitude, personality, personal qualifications, integrity, cooperation with other employees, professional organizations, and service to the institution and community. (See Ex. A, "Respondent's Response to Petitioner's Motion to Compel", Exhibit 1)

Each semester, FSU students also evaluate faculty performance. From 2000-2003, students answered evaluation questions by filling in responses on a computer bubble sheet. Students rated instructors using a five point scale and responses ranged from

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In August 2003, FSU consolidated the School of Technology and the School of Science and Mathematics. The two merged into the College of Science and Technology with the Department of Science and Mathematics and the Department of Technology. The two departments are headed by separate Department Chairs. The College is headed by the Dean of the College of Science and Technology. In the Fall of 2003, FSU divided the Department of Science and Mathematics into the Department of Biology and Chemistry and the Department of Physics, Math and Computer Science.

strongly agree to strongly disagree or not applicable. Students were also given the opportunity to submit written comments. (*Id.*) FSU compiles summary sheets of the results of the student response surveys (hereinafter "evaluation summaries") for each course taught by each faculty member. Pursuant to procedure, FSU returns individual student response surveys to each faculty member after grades are distributed for the semester of the evaluation but retains the evaluation summaries.

FSU uses chair, peer, student evaluations and evaluation summaries to rate and improve the job performance of its faculty members, to make promotion and tenure decisions and since 2005 has used the performance evaluations in its merit raise calculation formula. (Ex B. "Respondent's Response to Petitioner's Motion to Compel", Ex. 2) The Academic Affairs Office keeps the peer and chair evaluations and evaluation summaries in individual faculty files. FSU considers the peer, chair, student evaluation written comments and evaluation summaries confidential. (*Id.*) At the time of Smith's request, the faculty member, administrators in his or her chain of command and promotion and tenure committee members were the only individuals permitted to see individual peer, chair and student evaluations and evaluation summaries².

In April 2004, Smith filed a request pursuant to the West Virginia Freedom of Information Act (hereinafter "WV-FOIA") seeking the names and titles of all non-tenured faculty in the School of Technology from 2000-2003 as well as seeking disclosure of all

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FSU established the Center for Teaching Excellence in 2002. The purpose of the Center for Teaching Excellence is to improve the quality of teaching at the institution. The Director of the Center for Teaching Excellence processes all faculty evaluations but does not view individual evaluations unless a faculty member voluntarily chooses to show the evaluation to her.

peer, chair and student evaluations and evaluation summaries for those same faculty for the same years. Smith requested the evaluations and summaries so that he could prepare a discrimination complaint to be filed against FSU. FSU provided Smith with the names and titles of the faculty members for the years requested but denied Smith's request for the peer and chair evaluations and student evaluation summaries based upon the personal records and business records exemptions³ to the WV-FOIA. During its search for the peer and chair evaluations, FSU discovered that the former Chair of Technology had not returned some student evaluation written comments of some faculty members. Based upon the same exemptions, FSU also denied Smith's request for the student evaluation written comments still in its possession.

Smith filed an action pursuant to W. Va. Code § 29B-1-5 in the Circuit Court of Marion County (hereinafter "Circuit Court") and FSU filed a Motion for Summary Judgment.

After an *in camera* review of the peer, chair, student evaluation written comments and evaluation summaries, the Circuit Court denied FSU's Motion for Summary Judgment finding that the job performance evaluations were not covered by the internal business memoranda exception to the WV-FOIA. The Circuit Court further held that although the peer, chair, student evaluation written comments and evaluation summaries contained information of a personal nature contemplated by the personal records exemption, the disclosure of redacted versions of the documents would not result in an invasion of privacy.

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Because FSU alleged the documents Smith requested were exempt pursuant to the business records exemption. FSU provided Smith with the information contained in the peer, chair and student evaluations not covered by the exemption. FSU provided Smith with blank copies of the student evaluation response surveys and with blank copies of the faculty and chair evaluation forms

Pursuant to the Circuit Court's order, FSU disclosed to Smith redacted peer, student and chair evaluations and student response survey summaries⁴ he requested.

Smith appealed the Circuit Court's order to this Honorable Court alleging the Circuit Court erred in finding that the job performance evaluations contained personal information covered by the personal records exemption and in the alternative that the Circuit Court erred in finding that the disclosure of unredacted versions of the documents would result in an invasion of individual privacy.

II. DISCUSSION OF LAW

A. Standard of Review

Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, [this Court] applies a *de novo* standard of review. *Syllabus Point 1, Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

B. Job performance evaluations contain personal information the disclosure of which would result in a substantial invasion of privacy

The WV-FOIA provides for the disclosure of public records unless the requested information falls under one of eight exceptions. W. Va. Code §§ 29B-1-1, 29B-1-4. The disclosure provisions of the WV-FOIA are to be liberally construed while the exemptions are to be strictly construed. *Daily Gazette Co. Inc. v. W. Va. Development Office*, 198 W.

used by FSU from 2000-2003. *Id.*

⁴ The Circuit Court ordered the redaction of all personally identifying information that could link the faculty member to the evaluations which included, the instructor's name, index number, class name, number enrolled in the course, response rate, evaluator's name and department, working relationship between the two employees and the length of that relationship, workshops/conferences attended, committee/program work at the institution, local/national organizations, articles published, work history, date of the evaluation, number of students advised, graduate work, courses taught

Va. 563, 482 S.E.2d 180 (1996)(internal citations omitted). The burden of proof "falls on the public body asserting the exemption to demonstrate that the public record should be Va. 563, 482 S.E.2d 180 (1996)(internal citations omitted). The burden of proof "falls on the public body asserting the exemption to demonstrate that the public record should be protected from disclosure." Daily Gazette, 98 W. Va. 563, 569, 482 S.E.2d 180, 186 (citing Queen v. W. Va. University Hospitals, 179 W. Va. 95, 365 S.E.2d 375 (1987)).

The personal information exemption to the WV-FOIA 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).

Whether student, peer and chair evaluations of higher education faculty members constitute information of a personal nature exempt from the WV-FOIA is a matter of first impression. This Honorable Court must determine if job performance evaluations contain "personal information" "kept in a personal...or similar file", and if so, whether disclosure of the personal information therein results in a substantial invasion of individual privacy not outweighed by the public's interest in the information. Hechler v. Casey, 175 W. Va. 434, 333 S.E.2d 799 (1985); Child Protection Group v. Cline, 177 W. Va. 29, 350 S.E.2d 541 (1986); Manns v. City of Charleston, 209 W. Va. 620, 550 S.E.2d 598 (2001).

and/or in development and community involvement. See Circuit Court Order, paragraphs 18-21.

i. Job performance evaluations are records of a personal nature that are kept in a "personal....or similar file"

The first question this Honorable Court must address is whether the job performance evaluations of higher education faculty members contain "information of a personal nature such as that kept in a personal, medical or similar file". W. Va. Code § 29B-1-4(2).

The Legislature did not define "personal" but this Honorable Court has determined that psychiatric records and the internal investigation records of complaints that reflect on an employee's job performance contain personal information contemplated by the statute but that the names and addresses of security guards employed by a private company but provided to the Secretary of State's Office in an official report are not considered personal information. Child Protection Group v. Cline, 177 W. Va. 29, 350 S.E.2d 541 (1986); Manns v. City of Charleston, 209 W.Va. 620, 550 S.E.2d 598 (2001); Hechler v. Casey, 175 W. Va. 434, 333 S.E.2d 799 (1985).

The facts and holding of Manns are of particular relevance to this case. In Manns, this Honorable Court held that records bearing on the fitness and competency of an individual to perform his or her job duties are personal in nature and are the type of records kept in personal or similar files. Manns v. City of Charleston, 209 W.Va. 620, 550 S.E.2d 598 (2001). In Manns, as part of a pre-suit investigation of alleged discrimination, a potential litigant requested disclosure of all complaints and investigations of complaints of misconduct made against members of the Kanawha County Police Department. The requesting party was specifically interested in information relating to "the performance or fitness of" police officers. See, Manns, 209 W.Va. 620, 626, 550 S.E.2d 598, 604.

Although the records sought were internal investigation records that were kept separate from employee personnel files, this Court found that because the documents contained information relating to how employees performed while on the job as well as were used by the employing agency to make personnel decisions, the requested records were information of a personal nature kept in a personal or similar file within the context of W. Va. Code § 29B-1-4(2).

It flows logically that if records bearing on the competency and fitness of county employees which are used to make personnel decisions are considered personal information kept in a personal or similar file for the purposes of W. Va. Code § 29B-1-4(2), the job performance evaluations of State employed higher education faculty members that are used by administrators to make promotion, tenure, retention and merit raise decisions likewise contain personal information for the purposes of W. Va. Code § 29B-1-4(2).

Assuming arguendo that the holding of Manns does not stand for the principle that job performance evaluations are "personal information kept in a personal medical or similar file", when interpreting the WV-FOIA and defining the term "personal", this Court can look to federal and other state jurisdictions for guidance. Daily Gazette Co. Inc. v. W. Va. Development Office, 198 W. Va. 563, 482 S.E.2d 180 (1996).

The Supreme Court of the United States defined "personal" in United States Dept. of State v. Washington Post Co., 456 U.S. 595 (1957), wherein it held that personal information is not limited to "intimate details of personal decisions" but includes any detailed public record "on an individual which can be identified as applying to that individual". Washington Post Co., 456 U.S. 595, 602 (1957) (internal citations omitted).

In Dept. of the Air Force v. Rose, (1976), the Supreme Court of the United States again held that personal information often found in employment and similar files for the purposes of the personnel records exemption to the federal FOIA⁵ includes an individual's birthplace, parent's names, former residences, high schools attended, criminal convictions, results of examinations *and* job performance evaluations. See Rose, 425 U.S. 352, 377 (summaries of Air Force Academy cadet Honor Board hearings published in limited areas on campus were not information kept in a personnel, medical or similar file for the purposes of the personal records exemption to the federal FOIA.)

Three years later in Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979), the United States Supreme Court reaffirmed its prior holdings that records bearing on an individual's competency contain personal information. In Detroit Edison, employees sought disclosure of the performance evaluations of colleagues so that they could file a grievance. The Supreme Court of the United States denied the request finding that:

[t]he sensitivity of any human being to the disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice.

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5 U.S.C. § 522(b)(6) exempts from disclosure: "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Although the federal FOIA exemption exempts personal information that is kept in a "personnel file" instead of a "personal file", in footnote 6 of Manns, this Court recognized that the words were interchangeable for the issues of that case. Because the issue in this case, as in Manns, is whether information commonly found in employment records is personal information covered by W. Va. Code § 29-1-4(2), FSU submits that the words are interchangeable for the issues in this case also.

Detroit Edison, 440 U.S. 301, 318 (1979). Although Detroit Edison addressed the issue of disclosure of the results of an aptitude used to predict job performance pursuant to the Fair Labor Standards Act and not under the federal FOIA, the ultimate conclusion is nevertheless applicable to the present case: records bearing on the fitness of an individual to perform his or her job duties are personal in nature.

State courts also have examined this issue and likewise have determined that "personal" information is not limited to details of an individual's private life and that job performance evaluations are "personal" records kept in "personal or similar files" as contemplated by personal records FOIA exemptions.

In Pawtucket Teachers Alliance Local, No. 920, AFT, AFL-CIO, and Resnick v. Brady, 556 A.2d 556 (R.I. 1989),⁶ the Superior Court of Rhode Island held that a report completed by an outside consultant detailing the job performance of a public school principal constituted a "personnel" record for the purposes of its FOIA exemption. See also, Providence Journal Co., et al, v. Kane, 577 A.2d 661 (1990) (personnel file information of State employees is personal information for the purposes of the personal records exemption).

In Board of Education of the Town of Somers, et. al, v. Freedom of Information Commission, 556 A.2d 592 (Conn. 1989)(overruled on other grounds, Chairman, supra.),

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RI ST § 38-2-2(d)(1) excludes from disclosure:

All records which are identifiable to an individual applicant for benefits, clients, patient, student, or employee; including, but not limited to, personnel, medical treatment, welfare, employment security, and pupil records and all records relating to

the Supreme Court of Connecticut determined that the job evaluations of public school teachers contained information of a "personal nature" contemplated by the Connecticut FOIA personnel information exemption⁷.

In Chairman, Criminal Justice Com'n v. Freedom of Information Com'n, 585 A.2d 96 (Conn. 1991), the Supreme Court of Connecticut again addressed its personal records exemption holding that an internal performance evaluation of a state attorney detailing his aptitude, attitude and basic competence contained personal information covered by its personal records exemption. See also, Connecticut Drug and Alcohol Abuse Commission v. Freedom of Information Commission, 657 A.2d 630, 638 (1995) ("a file containing information that would, be used in deciding whether an individual would be promoted, demoted, given a raise, transferred, reassigned, dismissed or subject to other such traditional personnel actions, should be considered 'similar' to a personnel file").

In Trenton Times, Corp. v. Bd. of Educ., 351 A.2d 30 (N.J. 1976), the Superior Court of New Jersey, Appellate Division, held that the performance evaluation portion of a principal's nonrenewal letter, otherwise subject to disclosure under the New Jersey FOIA, is information covered by New Jersey's then personnel records exemption.⁸ Recognizing

a client-attorney relationship and to a doctor-patient relationship.

⁷ C.G.S.A. § 1-19(b)(2)(1999) exempts "personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy."

⁸ N.J.C.A. 47:1A-2 [1963] excluded from the definition of a public document, all personnel records. New Jersey's current FOIA states the following:

Notwithstanding the provisions of P.L.1963, c. 73 (C.47:1A-1 et seq.) or any other law to the contrary, the personnel or pension records of any individual in the

the sensitive nature of personnel and employment records, the New Jersey FOIA excludes from the definition of public records all personnel file information including job performance evaluations.

In Montana Human Rights Division v. City of Billings, 649 P.2d 1283 (Mont. 1983), the Supreme Court of Montana held that job performance evaluations of university professors contain "personal information" protected by Montana's constitutional right to privacy.⁹ To aid its investigation of complaints of discrimination filed by four city employees, the Montana Human Rights Commission requested from the City of Billings the personnel files for employees other than the complainants. The personnel files included performance evaluations, disciplinary records, test scores and application materials. The Montana court found that although employment records and job evaluations may contain less sensitive information and often are kept by employers with no specific assurances of confidentiality, employees nevertheless had a reasonable expectation of privacy in such records because personnel records could contain damaging information which employees "do not wish to have and did not expect to be disclosed." See, City of Billings, 649 P.2d 1283, 1287.

possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be a government record... N.J.C.A. § 47:1A-10 (2002).

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Article 2, § 10 of the Montana Constitution states the following:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

In, Missoulian, a Div. of Lee Enterprises v. Board of Regents of Higher Education, 675 P.2d 962 (Mont. 1984), Montana again recognized the personal, private nature of employment and job performance records. The issue in Missoulian was whether the job performance evaluations of university presidents

“which elicit candid and subjective comments from Board members, anonymous interviewees, and the presidents themselves, are matters of individual privacy protected by the Montana Constitution or whether the privacy clause protects only matters of family or health not affecting job performance”

Missoulian, 675 P.2d 962, 963. The Supreme Court of Montana held that private matters covered by Montana's Constitutional right to privacy are not limited to matters of family or health and that an individual has an expectation of privacy in his or job performance information. The Supreme Court of Montana noted that although employment records could contain information not of a personal nature, such records could also contain sensitive items such as “past and present employer's criticisms and observations” as well many other things “which most individuals would not willingly disclose publicly”.

Missoulian, 675 P.2d 962, 968.

In Dawson v. Daly, 845 P.2d 995 (Wash.App. 1993), a former law enforcement officer who routinely appeared as a defense expert in sexual abuse criminal trials sought disclosure of a prosecuting attorney's personnel file, which included job performance evaluations, for the purpose of determining whether the attorney had defamed him or tortiously interfered with his business. Relying on Detroit Edison, supra., Missoulian, supra., and City of Billings, supra., the Washington Appellate Court held that “employee

performance evaluations qualified as personal information that bears on the competence of the subject employee" and that such information is covered by the personal records exemption to the Washington FOIA¹⁰. Dawson, 845 P.2d 995,1004.

In Brown v. Seattle Public Schools, 860 P.2d 1059, (Wash.App.Div. 1 1993), a parent teacher organization sought, among other things, the records of an elementary school principal relating to the "evaluation of, and efforts to improve the effectiveness and performance of her duties". Brown, 860 P.2d 1059, 1060. Relying on the holding of Detroit, supra., and its own holding in Dawson, supra., the Washington Appellate Court held that because the principal's job performance evaluations bear directly on the competence and fitness of the principal to perform her duties, the job evaluations are personal information for the purposes of the personal records exemption.

At least one state court has held that for the purposes of its FOIA personal records exemption¹¹, "personal information" is limited only to intimate or embarrassing details of an individual's private life See Bradley v. Saranac Community Schools Bd. of Educ. 565 N.W.2d 650 (Mich. 1997).

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RCW 42.17.310(1)(b) exempted from disclosure:

Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.

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M.C.L.A. § 115.243.13(1)(a)(a)exempts from disclosure:

Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."

The holdings of the Supreme Court of the United States and the Montana, Connecticut, New Jersey, Rhode Island and Washington courts, however, are more in line with this Court's holding in Manns, supra. This Court should find that sensitive information relating to the competence and fitness of higher education faculty members or any public employee, should be considered personal information contemplated by W. Va. Code § 29B-1-4(2).

Clearly a higher education faculty performance evaluation, or the job performance evaluation of any public employee, is a public document "on an individual which can be identified as applying to that individual". See, Washington Post Co., 456 U.S. 595, 602. (internal citations omitted). The chair and peer evaluations and comments written by students all contain candid, subjective, critical opinions of a faculty member's integrity, teaching ability, effectiveness, interpersonal relationships with colleagues and students, attitude and individual personality. The evaluation summaries likewise contain student ratings of the overall effectiveness, attitudes and classroom performance of instructors.

FSU uses all of the job performance evaluations to make personnel decisions such as promotion and tenure as well as uses them to improve the instruction students receive in the classroom. The evaluations are not publicly distributed and access is limited to the faculty being evaluated, to in-line supervisors and to the Director of the Center for Teaching Excellence.

Based upon the aforementioned, job performance evaluations of higher education faculty members qualify as "personal information kept in a personnel...or similar file" for the purposes of W. Va. Code § 29B-1-4(2). This alone, however, does not give job

performance evaluations a blanket protection from disclosure. Personal information is exempt from disclosure only if the disclosure would result in a substantial, invasion of privacy. Cline, 177 W. Va. 29, 350 S.E.2d 541 (1986).

ii. *The disclosure of job performance evaluations is a substantial invasion of privacy that is not outweighed by the public interest*

"The primary purpose of the invasion of privacy exemption to the Freedom of Information Act, W. Va. Code, 29B-1-4(2) [1977], is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Syllabus Point 6, Hechler v. Casey, 175 W.Va. 434, 333 S.E.2d 799 (1985).

"Under W. Va. Code § 29B-1-4(2) [1977], a court must balance or weigh the individual's right of privacy against the public's right to know." Syllabus Point 7, Hechler v. Casey, 175 W.Va. 434, 333 S.E.2d 799 (1985).

When determining whether a substantial invasion of privacy would occur if personal information is disclosed, this Court applies the following five part balancing test:

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.

Syllabus Point 2 Cline, 177 W. Va. 29, 350 S.E.2d 541 (1986) (internal citations omitted).

Although the burden of proof falls upon the agency asserting an exemption, in cases involving the personal records exemption, when the scales weigh heavily in favor of nondisclosure or weigh evenly among the parties, the WV-FOIA favors nondisclosure of personal information.¹² *Cline, supra*.

In *Cline*, parents concerned for the safety of their children requested disclosure of a bus driver's psychiatric records after he stopped a bus in the middle of his route and lectured school children about, among other things, the evils of the Easter Bunny and the impending end of the world. This Court held that the public's need to ensure the safety of its school children outweighed the individual's right to privacy in the highly sensitive psychiatric records but that disclosure should nevertheless be crafted so to limit the extent of the invasion of individual privacy.

This Court applied the *Cline* analysis in *Manns v. City of Charleston*, 209 W.Va. 620, 550 S.E.2d 598 (2001). After being arrested for failing to pay a bus fare, a woman requested disclosure of all complaints of misconduct and investigation of complaints of

¹² On the burden of proof in personal information exemption cases, the *Cline* court held:

"The West Virginia Code...exempts disclosure 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.' While the burden of proof is always on the agency resisting disclosure, the burden is different in the two codes. The Federal Code unambiguously favors disclosure of personal information, with the resisting party having to show clear evidence of an unwarranted invasion of personal privacy. The West Virginia Code, with some ambiguity, favors nondisclosure of personal information unless public interest clearly requires disclosure. The simplest explanation of these differences is as follows: If the scales weigh heavily in favor of disclosure both codes require disclosure; if the scales weigh heavily in favor of nondisclosure, both codes require nondisclosure; if the scales weigh even or near even, the Federal Code favors disclosure

misconduct made against Kanawha County Police Department employees. Relying upon the five part test of Cline, this Court found that the personal records exemption to the WV-FOIA exempted the internal complaint records from disclosure specifically holding that:

the disclosure of the information would result in a substantial invasion of privacy...the request in this case would require the disclosure of all claims of misconduct no matter how egregious, unfounded, or potentially embarrassing. In addition, the information was obviously given with an expectation of confidentiality as the appellant's policy and procedural manuals require all investigative reports to be "treated with the strictest of confidence." Furthermore, the expectation of confidentiality is crucial to continued reports of possible misconduct. This Court is certainly mindful that "the lawfulness of police operations is a matter of great concern to the state's citizenry." Maclay, 208 W.Va. at 575, 542 S.E.2d at 90. However, our concern in Maclay that "compelled disclosure of police investigatory materials might result in 'fishing expeditions' and thereby encourage frivolous litigation" leads us to conclude that the public interest does not require the disclosure of the requested information. *Id.*

Manns, 209 W. Va. 620, 626, 550 S.E.2d 598, 604.

For the case at bar, this Court must balance the competing interests of the faculty members' privacy rights and the State's interest in providing quality instruction against the public's interest in the fair implementation of the evaluation system. Other state courts have examined this question and have concluded that disclosure of information bearing on the competence and performance of educators results in a substantial invasion of privacy not outweighed by the public's interest in the information.

while the West Virginia Code favors nondisclosure." Cline at 545.

In Pawtucket Teachers Alliance, et al, v. Brady, 556 A.2d 556 (R.I. 1989), the Supreme Court of Rhode Island found that due to the personal nature of an elementary school principal's job performance evaluation, the potential harm of disclosure outweighed any perceived benefit that would accrue to the public. In Pawtucket, a teacher's union sought the disclosure of job performance evaluations completed by an outside consultant hired by the Board of Education in response to several complaints filed by teachers and parents against the principal. The teacher's union alleged the evaluation did not relate to the personnel records of the principal but instead contained things that were of interest to the public (such as information about school operations and educational concerns). See, Pawtucket, 556 A.2d 556, 558. The Rhode Island Supreme Court refused to disclose the job performance report finding that the public's need to know did not outweigh the privacy interest the principal had in her job performance information. Pawtucket, 556 A.2d 556, 558.

In Trenton Times Corp. v. Board of Education, 351 A.2d 30 (N.J. 1976), the Superior Court of New Jersey held that personnel records and evaluations of a school superintendent were personal, private matters not subject to the public's right to know. In Trenton, a newspaper requested a superintendent's nonrenewal letter which was subject to disclosure under New Jersey's version of the FOIA. In addition to the statement of nonrenewal, the letter also contained job performance evaluation information provided by the Board of Education as a means of explaining the nonrenewal. Considering the policy of keeping superintendent evaluations confidential as well as the effects of disclosure on the individual, the New Jersey Superior Court exempted from disclosure the job

performance evaluation information portion of the letter. Specifically, the Trenton Court held:

Personnel records...include employees' performance ratings. The policy to keep performance ratings confidential has been adopted: first, to protect the right of privacy of the government employee; second, because the evaluations are subjective opinions of the performance of the employee that vary with the person giving the rating; third, public disclosure would impede receiving candid evaluations; and fourth, a supervisor could use the public nature of these ratings as a vindictive mechanism against employees he disliked. The lack of objective criteria, the potential for vindictiveness, the lack of opportunity for the employee to rebut statements made in the rating, and a substantial potential for abuse leads to the conclusion that these ratings should be confidential.

Trenton, 351 A.2d 30, 33.

In Missoulian, a Div. of Lee Enterprises v. Board of Regents of Higher Education, 675 P.2d 962 (Mont. 1984), pursuant to the Montana open meetings act and the "right to know" provisions of the State's Constitution, a local newspaper requested that the Board of Regents change its policy of holding closed meetings when evaluating the performance university professors. The newspaper requested open meetings because the meetings would provide information of "news value to its readership." Missoulian, 675 P.2d 962, 964. The primary issue addressed in Missoulian was:

whether job performance evaluations of university presidents which elicit candid and subjective comments from Board members, anonymous interviewees [faculty, staff and students], and the presidents themselves, are matters of individual privacy

Missoulian 675 P.2d 962, 963. The Supreme Court of Montana upheld the Board of Regents closed evaluation meeting procedure finding that university president job evaluations were matters of individual privacy protected by the Montana Constitution and that the presidents' privacy interests and the Board's need to preserve the integrity of the evaluation process, exceeded the public's need for the evaluation information. The Supreme Court of Montana Board further held that the job evaluation process should not be broken up into its private and public parts.¹³

In Chairman, Criminal Justice Commission, et al. v. Freedom of Information Commission, et al., 585 A.2d 96 (Conn. 1991), the Supreme Court of Connecticut upheld a trial court's refusal to disclose a job performance evaluation of a state attorney requested by a newspaper. Although the Connecticut statute does not contain a balancing test as does W. Va. Code § 29B-1-4(2), the Connecticut Supreme Court found that because the job performance evaluation was given with an expectation of confidentiality and contained potentially embarrassing information about job competency, attitude, ethics, and aptitude, disclosure of the evaluation would result in a substantial invasion of individual privacy.

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On this point, the Supreme Court of Montana stated the following:

...one purpose of the confidential evaluation procedure is to encourage full uncensored comment by all involved. To alter the information in an attempt to protect identities would be to frustrate this purpose.

Missoulian, 675 P.2d. 962, 973.

In Dawson v. Daly, 845 P.2d 995 (Wash.App. 1993), the Supreme Court of Washington held that the disclosure of a state attorney's performance evaluation that does not discuss specific instances of misconduct could harm the efficient operation of government more than the public would be helped by its disclosure because evaluation responses would be chilled and employee morale would fall. Dawson, 845 P.2d 995, 1005.

The Supreme Court of Washington specifically held that:

Disclosure [of job performance information] could harm the public interest in efficient government in two ways. First, if public employees were aware that their performance evaluations were freely available to their co-workers, their neighbors, the press, and anyone else who cares to make a request under the act, employee morale would be seriously undermined. The likely result would be a reduction in the quality of performance by these employees.

[D]isclosure of even favorable information may well...incite jealousy in...co-workers...Disclosure will be likely to spur unhealthy comparisons among...employees and thus breed discord in the workplace. Ripskis v. Department of Housing & Urban Dev., 746 F.2d 1, 3 (D.C.Cir.1984). Second, disclosure could cause even greater harm to the public by making supervisors reluctant to give candid evaluations. Disclosure will be likely to chill candor in the evaluation process". Ripskis, at 3. See also Trenton Times Corp. v. Board of Educ., 138 N.J.Super. 357, 363, 351 A.2d 30 (1976) ([w]ere all personnel evaluations known to be subject to public disclosure, candor in making them might well be compromised. The quality of public employee performance would, therefore, suffer because the public employees would not receive the guidance and constructive criticism required for them to improve their performance and increase their efficiency.

Daswon, 845 P.2d 995, 1005 (ellipses in original).

In Brown v. Seattle Public Schools, 860 P.2d 1059 (Wash.App.Div. 1 1993), the Court of Appeals of Washington applied the reasoning of Dawson to the evaluations of public school employees. In Brown, the trial court ordered the school district to disclose the job performance evaluation of a school principal to the president of a parent teacher organization. The Court of Appeals of Washington reversed the trial court's order finding that the principal's job performance evaluation was personal in nature and that disclosure would not be of legitimate concern to the public. Citing its holding in Dawson, the Court of Appeals of Washington further held that because public education is a vital government function of which effective systems of teacher and administrator evaluations is a vital part, stripping the evaluation system of its confidentiality would harm the public by possibly chilling evaluation responses. See Brown, 860 P.2d 1059, 1062.

This Court should adopt the reasoning of New Jersey, Montana, Connecticut, Rhode Island and Washington by holding that disclosure of job performance evaluations that do not reference specific instances of misconduct results in a substantial invasion of privacy that would harm the efficient workings of government more than the public's interest would be served by the disclosure. Job performance evaluations are almost entirely composed of information that personally identifies individual employees. FSU submits that releasing job performance evaluations with all personally identifiable information redacted serves no public interest because virtually no useful information is left after the redaction.

In this case, the peer and chair evaluations, student written comments and evaluation summaries contain information relating to individual job competency, bear the potential for individual embarrassment and contain information which faculty members do

not want considered public. The release of this information would constitute a substantial invasion of individual privacy.

FSU's administrators consider the job performance evaluations part of the employment records of its faculty members and FSU uses the information to make retention, promotion and merit raise decisions as well as uses the evaluations to improve the teaching of its faculty members.

The job evaluation information was given with an expectation of confidentiality. The higher education system's need for an effective faculty evaluation system outweighs the public's interest in the fair implementation of evaluation procedures. Although Smith asserts that public evaluations will lead to a more effective evaluation system, FSU submits that the opposite would occur. A vindictive supervisor could use the public nature of the evaluations to personally attack employees whom he or she dislikes. Furthermore, sincere evaluators are less likely to be critical of their colleagues if evaluations can be viewed by the public and by co-workers. Evaluation information would be further chilled by the fact that evaluators and State agencies would be subject to libel lawsuits for any information found in the evaluations.

If evaluations are made public, the job performance of public employees would suffer because employees would not receive any meaningful guidance on how to improve their performance. Additionally, making job evaluations public means subordinates would have access to the evaluations of their superiors, and co-workers could look at the evaluations of their peers. As suggested by the Supreme Court of Washington in Dawson, supra., and Brown, supra., such access could lead to a breakdown in the chain of

command and jealousy among public employees, both of which could lead to decrease in employee performance and in this case would ultimately affect the quality of instruction delivered to students by the State's colleges and universities.

Finally, discrimination litigants can gain access to job performance evaluations through the civil discovery process. *Syllabus Point 2 Maclay v. Jones*, 208 W.Va. 569, 575, 542 S.E.2d 83, 89 (2000) (provisions of the state's FOIA statute protecting police investigation records addresses confidentiality as to the public generally but does not shield the information from a legitimate discovery request when the information is otherwise subject to discovery in the course of civil proceedings); *Manns v. City of Charleston*, 209 W. Va. 620, 623, 550 S.E.2d 598, 601 (2001) (the interests of the FOIA are different than those at issue when records requested are in conjunction with civil discovery). Pursuant to the discovery process, a trial court can determine whether the job evaluations are relevant to specific claims. The trial court likewise can fashion a protective order limiting the use of the job evaluation information¹⁴ to the specific case; whereas release of job performance evaluations pursuant to the WV-FOIA would have no such limitation. Furthermore, Smith obviously did not need the evaluations for his stated

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It should be noted that after FSU denied Smith's WV-FOIA request, he filed a civil action against FSU in the Circuit Court of Kanawha County which is still pending. *FSU v. Bradley*, Kanawha County Circuit Court Civil Action No. 05-C-881. In that case, Smith submitted discovery requests for the nonredacted performance evaluations. The Circuit Court of Kanawha County granted Smith's request. However, in order to protect the privacy of FSU's faculty members and over Smith's objection, the Kanawha County Circuit Court entered a protective order (originally proposed by Smith) limiting the use of the evaluations to the prosecution and defense of the claim before it.

purpose as he filed a civil action in the Circuit Court of Kanawha County after FSU denied his request. See, Footnote 14.

Smith cites University of Pennsylvania v. Equal Employment Opportunity Comm., 493 U.S. 182 (1990), to support his assertion that faculty job performance evaluations should be made public. However, University of Pennsylvania, can be distinguished from this case. The issue in the Pennsylvania case was whether a private institution was required to disclose the promotion and tenure records of five male employees pursuant to a subpoena *duces tecum* issued by the Equal Employment Opportunity Commission (hereinafter "EEOC") during its investigation of a discrimination claim filed pursuant to Title VII of the Civil Rights of 1964. Because the EEOC sought disclosure pursuant to its subpoena powers and not through the federal FOIA, the Supreme Court of the United States did not consider the individual privacy rights of the faculty members prior to ordering the disclosure of the promotion and tenure records. Furthermore, the interests of the FOIA are different than those at issue when records requested are in conjunction with the EEOC's subpoena powers. The EEOC's subpoena power serves a specific purpose namely the investigation of specific claims of discrimination. This purpose is markedly different from the public's "general need to know" purpose of the FOIA. University of Pennsylvania, therefore is inapplicable to the present case.

Smith also relies on State ex. rel James v. Ohio State University, 637 N.E.2d 911 (1994), EEOC v. Franklin and Marshall College, 775 F.2d (1985). Neither case is applicable to the issues before this Court. The Supreme Court of Ohio's ruling in Franklin, is inapplicable because Ohio's version of the FOIA has neither a "personal" nor "personnel"

records exemption. See R.C. § 149.43. The Third Circuit Court of Appeals' holding in James, likewise is inapplicable because that case did not address the release of information to the public in general but instead addressed the production of information pursuant to a subpoena *duces tecum* issued by the EEOC during its investigation of a charge of discrimination filed under Title VII of the Civil Rights Act of 1964. As in University of Pennsylvania, supra., because the personnel records exemption to the federal FOIA was not at issue, the Third Circuit was not required to apply any balancing test nor did it address the privacy rights of the faculty members. James, therefore, is inapplicable to the present case and Smith's argument must fail.

iii. In the alternative disclosure of job performance evaluations with all personally identifiable information redacted does not result in a substantial invasion of privacy

"The primary purpose of the invasion of privacy exemption to the Freedom of Information Act, W. Va. Code, 29B-1-4(2) is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Syllabus Point 6, Hechler v. Casey, 175 W.Va. 434, 333 S.E.2d 799 (1985).

Because job performance evaluations contain information that bears on the competence and fitness of an individual to perform his or her job duties and contain information that is personally identifiable to individuals, the release of nonredacted job performance evaluations would result in a substantial invasion of privacy. However, a "workable compromise between individual rights 'and the preservation of public rights to government'" is the redaction of any information linking individual faculty members to the evaluations. See Dept. of the Air Force, 425 U.S. 352, 381 (1976). See also, Syllabus

Point 5, Farley v. Worley, 215 W.Va. 412, 599 S.E.2d 835 (2004) ("a public body has a duty to redact or segregate exempt from nonexempt information contained within public record(s) responsive to a FOIA request"). The redaction of all personally identifiable information from FSU faculty performance evaluations discloses to the public all nonexempt information to which it is entitled to receive but at the same time protects the employees' privacy.

C. Nonattorney pro se FOIA litigants are not eligible to receive attorney fees

Any person who is denied access to public records requested pursuant to this article and who successfully brings a suit filed pursuant to section five of this article shall be entitled to recover his or her attorney fees and court costs from the public body that denied him or her access to the records.

W. Va. Code § 29B-1-7.

For a person to have brought a suit for the disclosure of public records under the West Virginia Freedom of Information Act (FOIA), as permitted by W. Va. Code § 29B-1-5 (1977) (Repl. Vol. 1998), so as to entitle him/her to an award of attorney's fees for "successfully" bringing such suit pursuant to W. Va. Code § 29B-1-7 (1992) (Repl. Vol. 1998), he/she need not have prevailed on every argument he/she advanced during the FOIA proceedings or have received the full and complete disclosure of every public record he/she wished to inspect or examine. An award of attorney's fees is proper even when some of the requested records are ordered to be disclosed while others are found to be exempt from disclosure or are released in redacted form. In the final analysis, a successful FOIA action, such as would warrant an award of attorney's fees as authorized by W. Va. Code § 29B-1-7, is one which has contributed to the defendant's disclosure, whether voluntary or by order of court, of the public records originally denied the plaintiff.

Syllabus point 7, Daily Gazette Co. v. West Virginia Development Office, 206 W. Va. 51, 521 S.E.2d 453 (1999) and *Farley v. Worley*, 215 W.Va. 412, 599 S.E.2d 835 (2004).

FSU does not dispute that Smith substantially prevailed in his FOIA litigation before the Circuit Court of Marion County and therefore concedes that he is entitled to recover his court costs for that proceeding. FSU, however, does not concede that Smith is entitled to recover any attorney fees for that proceeding or for proceedings before this Court (assuming *arguendo* that he substantially prevails on his claim).

Although West Virginia has not specifically addressed whether *pro se* litigants are entitled to an award of attorney fees, in order for any litigant to be entitled to an award of attorney fees, the relationship of attorney and client must exist. *Syllabus Point , 3 Weimer-Godwin v. Board of Education of Upshur County*, 179 W. Va. 423, 369 S.E.2d 726 (1988); *Footnote 16*¹⁵, *Daily Gazette v. Development Office*, 206 W. Va. 51, 521 S.E.2d 453 (1999).

In this case, no attorney client relationship existed. Smith therefore, is not entitled to recover the \$50.00 consultation fee he allegedly incurred. Even if an attorney client relationship exists during an initial consultation, the intent of W. Va. Code § 29B-1-7 is to

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Footnote 16 states in pertinent part:

"An attorney's gratuitous representation of a client does not prevent an award of reasonable attorney's fees." See also 2A Michie's Jurisprudence Attorney and Client § 38, at 629 (Repl. Vol. 1993) ("The award of reasonable attorney's fees is not precluded by the fact that the attorney may not have been actually paid by the litigant, or that the litigant did not obligate himself in advance to pay the attorney's fees or that the attorney had donated his services; all that is required is the existence of a relationship of attorney and client, a status which can exist without an agreement for compensation." (footnote omitted))(quoting *Weimer-Godwin v. Board*

compensate litigants for attorney fees incurred for actual representation during the prosecution of the claim, not for consultations.

Assuming arguendo the consultation fee is an attorney fee within the context of W. Va. Code § 29B-1-7, Smith is not entitled to recover any additional attorney fees for his *pro se* representation. As noted by the Circuit Court, the D.C. Circuit is the only federal circuit that declares *pro se* federal FOIA litigants who are not attorneys, eligible to recover attorney fees, “[t]he First, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have ruled that *pro se* litigants are ineligible for attorney fees.”, and the Second Circuit awards *pro se* litigants who are not lawyers, attorney fees only if the litigant can show that prosecuting the lawsuit detracted from income producing activity. Wolfel v. United States, 711 F. 2d 66, 68 (6th Cir. 1983)(citing Cox v. United States Dept. of Justice, 601 F.2d 1 (D.C.Cir.1979); Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C.Cir.1977); Owens-EI v. Robinson, 694 F.2d 941 (3rd Cir.1982); Pitts v. Vaughn, 679 F.2d 311 (3rd Cir.1982); Clarkson v. Internal Revenue Service, 678 F.2d 1368 (11th Cir.1982); Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir.1981), cert. denied, 455 U.S. 950, 102 (1982); Crooker v. United States Dept. of Justice, 632 F.2d 916 (1st Cir.1980); White v. Arlen Realty & Development Corp., 614 F.2d 387 (4th Cir.1980); Davis v. Parratt, 608 F.2d 717 (8th Cir.1979); Hannon v. Security National Bank, 537 F.2d 327 (9th Cir.1976); Burke v. United States Dept. of Justice, 559 F.2d 1182 (10th Cir.1977), aff'g, 432 F.Supp. 251 (D.Kan.1976); Crooker v.

of Education of Upshur County, 179 W. Va. 423, 369 S.E.2d 726 (1986)).

United States Dept. of the Treasury, 634 F.2d 48 (2d Cir.1980)). See also 5 U.S.C. § 552(a)(4)(E)¹⁶.

This Honorable Court should follow the majority federal rule and declare nonattorney *pro se* FOIA litigants ineligible for attorney fees regardless of whether the litigant can show prosecuting the suit detracted from income generating activity. The Legislature intended to allow for the payment of attorney fees when attorney fees are actually incurred. Smith incurred no attorney fees aside from the alleged initial consultation fee. Furthermore, the purpose of the FOIA is to inform the public. Smith in this case sought disclosure of the information to pursue a private civil action and not for the purpose of informing the general public about the workings of its government.

Should Smith substantially prevail in this proceeding, he is not entitled to reimbursement for any "costs that he would incur up to the point of compliance by"FSU. W. Va. Code § 29B-1-7 allows only for the recovery of attorney fees and court costs. An award by this Court of any other costs and indeed attorney fees for Smith's *pro se* representation would constitute a penalty for noncompliance not provided for in the WV-

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5 U.S.C. § 552(a)(4)(E) states in its entirety:

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

FOIA and would amount to punitive damages which cannot be assessed against the State of West Virginia. See, W. Va. Code § 55-17-4.

III. CONCLUSION

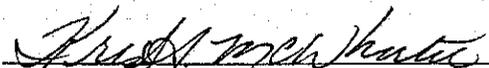
Job performance evaluations contain information of a personal nature the disclosure of which would result in a substantial invasion of privacy that is not outweighed by the public's interest. Non-attorney, *pro se* FOIA litigants who substantially prevail in their WV-FOIA claims are entitled to receive court costs but are not entitled to attorney fees.

Respectfully submitted:

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