

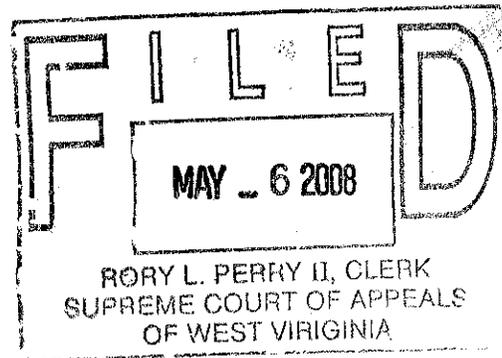
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

NO. 33812

IN RE: CHARLESTON GAZETTE FREEDOM OF INFORMATION ACT REQUEST

RESPONSE BRIEF OF THE CHARLESTON GAZETTE



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TABLE OF CONTENTS

INTRODUCTION.....1

STATEMENT OF FACTS.....2

STANDARD OF REVIEW.....2

IV ARGUMENT.....5

 A THIS COURT SHOULD REMAND THIS CASE WITH DIRECTIONS TO
 THE CIRCUIT COURT TO ORDER THE CITY TO DISCLOSE THE
 PUBLIC RECORDS AT ISSUE PURSUANT TO THE WEST VIRGINIA
 FREEDOM OF INFORMATION ACT.....5

 1 BECAUSE BOTH THE WEST VIRGINIA FREEDOM OF
 INFORMATION ACT AND REQUESTS FOR DECLARATORY RELIEF
 UNDER RULE 58 CONTEMPLATE SPEEDY DISPOSITION, THIS
 COURT SHOULD ADDRESS THE MERITS OF THE UNDERLYING
 ISSUE.....5

 2 THE WEST VIRGINIA FREEDOM OF INFORMATION ACT REQUIRES
 DISCLOSURE OF THE REQUESTED PUBLIC RECORDS.....7

 3 THE PAYROLL RECORDS AT ISSUE ARE NOT EXEMPT UNDER
 W.Va. CODE § 29B-1-4(2).....8

 4 THE PAYROLL RECORDS AT ISSUE ARE NOT EXEMPT UNDER
 W.VA. CODE § 29B-1-4(4).....13

 5 THE PAYROLL RECORDS ARE NOT EXEMPT UNDER *W.VA. CODE* §
 8-14A-1, *et seq.*.....14

 6 THE PROTECTIVE ORDERS ISSUED IN CLOSED CASES CAN NOT BE
 USED TO DENY PLAINTIFF'S RIGHT TO THE DOCUMENTS UNDER
 FOIA.....15

V CONCLUSION16

TABLE OF AUTHORITIES

CASES

<i>Whitlow v. Board of Educ. of Kanawha County</i> , 190 W.Va. 223, 226-227, 438 S.E.2d 15, 18-19 (W.Va.1993).....	6
<i>Sands v. Security Trust Co.</i> , 143 W.Va. 522, 102 S.E.2d 733 (1958).....	6
<i>Hechler v. Casey</i> , 175 W.Va. 434, 333 S.E.2d 799 (1985).....	8
<i>Queen v. West Virginia University Hospitals, Inc.</i> , 179 W.Va. 95, 365 S.E.2d 375 (1987).....	8
<i>Child Protection Group v. Cline</i> , 177 W.Va. 29, 350 S.E.2d 541 (1986).....	9
<i>Alaska Wildlife Alliance v. Rue</i> , 948 P.2d 976 (Alaska 1997).....	9
<i>Clymer v. City of Cedar Rapids</i> , 601 N.W.2d 42 (Iowa 1999).....	9
<i>State ex rel. Jones v. Myers</i> , 581 NE2d 629 (Ohio1991).....	10
<i>Sapp Roofing Co., Inc. v. Sheet Metal Workers' Intern. Ass'n, Local Union No. 12</i> , 552 Pa. 105, 713 A.2d 627 (1998).....	10
<i>Cleveland Newspapers, Inc. v Bradley County Memorial Hospital, Bd. of Director</i> , 621 SW2d 763 (Tenn.App.1981).....	10
<i>Tiberino v. Spokane County</i> , 13 P.3d 1104 (Wash. Ct. App. Div. 3 2000).....	11
<i>Tacoma Public Library v. Woessner</i> , 951 P.2d 357 (Wash.App. 1998).....	11
<i>Caple v Brown</i> 323 So 2d 217 (La.App.1975)	11
<i>Moak v Philadelphia Newspapers, Inc.</i> , 336 A2d 920 (Pa.App.1975).....	11
<i>Hastings & Sons Publishing Co. v City Treasurer of Lynn</i> , 375 NE2d 299 (Mass. 1978)	12
<i>Office of Governor v. Washington Post Co.</i> , 759 A. 2d 249 (Md. 2000).....	12
<i>Burton v. York County Sheriff's Dept.</i> , 594 S.E. 2d 888 (S.C. 2004).....	13
<i>Painting Industry of Hawaii Market Recovery Fund v. U.S. Dept. of Air Force</i> , 26 F. 3d 1479 (9th Cir. 1994).....	13
<i>International Broth. of Elec. Workers Local Union No. 5 v. U.S. Dept. of Housing and Urban</i>	

<i>Development</i> , 852 F. 2d 87 (3rd Cir. 1988).....	13
<i>Pennfeather v. Tessler</i> , 431 F. 3d 54 (2nd Cir. 2005).....	13
<i>News Group Boston Inc. v. Nat'l R.R. Passenger Corp.</i> , 799 F. Supp. 1264 (D. Mass. 1992).....	13
<i>Daily Gazette Co., Inc. v. West Virginia Development Office</i> , 198 W.Va. 563, 570, 482 S.E.2d 180, 187 (1996).....	14
<i>Anderson v. Department of Health and Human Services</i> , 907 F.2d 936, 945 (10thCir. 1990).....	15

STATUTES

<i>W.Va. Code</i> § 29B-1-1.....	5, 7
Rule 57 of the <i>W.Va.R.Civ.P.</i>	5
<i>W.Va. Code</i> § 29B-1-3(1).....	8
<i>W.Va. Code</i> § 29B-1-4(2).....	8
<i>W.Va. Code</i> § 29B-1-4(4).....	13
<i>W.Va. Code</i> § 8-14A-1, <i>et seq.</i>	14

I INTRODUCTION

This case comes to the Court in an extremely unusual procedural posture. In the Summer of 2007, with a public controversy and criminal allegations against police officers as its backdrop, rudimentary public records concerning police officer time sheets was requested from the Appellant City of Charleston ("City") under the West Virginia Freedom of Information Act by the *Charleston Gazette* ("*Gazette*"). The City denied the public records request. Only *after* denying the public records request did the City seek declaratory judgment from the Circuit Court of Kanawha County, apparently in an effort to have a court approve its denial decision *after it already had been made*.

At the time the City filed for declaratory judgment, the party seeking the public records, the *Gazette*, had not filed a lawsuit under FOIA. Nevertheless, the City attempted to make the *Gazette* a party to its declaratory judgment lawsuit, and served it summons. However, before the *Gazette* ever appeared in this case to respond to the summons, the trial court, *sua sponte*, dismissed the City's Complaint. The City then petitioned this Court for appeal, and this Court accepted the appeal. Therefore, the filing of this Response Brief is the first opportunity the *Gazette* has had to appear in this matter substantively.

While not so framed by the City, this case presents the Court with an opportunity to address and clarify the law in a number of areas. The least important issue, by far, is the sole focus of the City's Brief, that addresses only on the procedural issue of when a Court may *sua sponte* dismiss a case. But the public records issues here are far more important than those addressed in the City's Brief, and the Court should take this opportunity to end further delay by the City, and order the release of the records sought by the *Gazette*.

The important issues presented to the Court include:

- (1) the statutory right of the public to know if public employees, paid with tax dollars, are actually performing work for their pay;
- (2) when can an agreement of two parties to litigation to “seal” an otherwise public document in that litigation, such as some of the public employee time records at issue in this case, allow a non-party to that litigation, such as the City here, to refuse its duty to follow the statutory disclosure requirements of the West Virginia Freedom of Information Act;
- (3) are “time records” of public employees in general and police officers in particular, showing days and hours the public employee was paid for work with tax dollars, exempt from the statutory disclosure requirement of the West Virginia Freedom of Information Act?

The primary reasons the Court should address the merits of this case now, rather than send this matter back to the circuit court, are that (a) further delay benefits the City and prejudices the Public, and (b) there are no facts in dispute, only straightforward legal issues. Beyond further delay, there is no conceivable reason to send this case back to Circuit Court. Rather, this Court should address the substantive legal question concerning the production of the public records sought by the *Gazette* on the merits, and provide guidance to citizens and government officials whether West Virginia stands apart from the rest of Country in allowing government officials conceal how it spends tax dollars, or whether the law of this State mandates transparency in government in all but the narrow and expressly stated exceptions to the rule of open government stated in the West Virginia Freedom of information Act.

II STANDARD OF REVIEW

There is no dispute that this Court’s review is *de novo*.

III STATEMENT OF FACTS

The underlying facts are glossed over by the City. Certain employees of the City of Charleston, who happen to be police officers, have been the subject of criminal investigation and

prosecution for so-called “double-dipping,” that is, obtaining payment from the City with tax dollars, when in fact, the officers were working elsewhere for private entities for the very same time they were being paid by the City with public tax dollars. The criminal investigations and prosecutions have been the subject of heightened public attention and scrutiny. One of the public employees who was prosecuted, a police officer, publically stated that other City police officers engaged in the same conduct, that it was a common occurrence, but those other public employees were not being prosecuted.¹ A reporter for the *Charleston Gazette*, acting in the public interest, sought to inspect the public records showing the times worked and paid for by public dollars for other police officers to see if other police officers had in fact been double-dipping. See July 6, 2007 FOIA request, Ex. A. The City, apparently bowing to pressure from the police officer’s union, denied the clearly justified public records request. See July 18, 2007 denial letter, Ex. B. The Gazette then requested a reconsideration by the City. See August 1, 2007 letter, Ex. C. The City filed the underlying declaratory judgment action on August 9, 2007. On August 22, 2007, the Circuit Court dismissed the Complaint, *sua sponte*. On August 24, 2007, the City asked for reconsideration under Rule 59(e). And on August 27, 2007 the Circuit Court entered an Order denying that request.

The City now claims its reason for refusing to comply with the freedom of information act was because it was in an “untenable position.” App. Br. at 2. That argument is absurd. The law requires disclosure of public records unless those records expressly fall within narrow exceptions in the statute. The first argument the City makes is nonsense. It asserts that the time

¹ “Working other jobs while still on duty as a city cop was common, former Charleston Police officer James ‘Chip’ Nowling testified in court.” April 19, 2007 *Charleston Daily Mail* (2007 WLNR 7659089).

records “pertain to an ongoing criminal investigation.” *Id.*² The time records were not created as part of a criminal investigation. Just because a public record might possibly be used as evidence in a criminal investigation does not provide any basis for turning it from a public record into one exempt from disclosure.

The second reason the City cites is equally unavailing. Apparently, in criminal cases where the *Gazette* was not a party, “protective orders” were entered over some of the time records. The Freedom of Information Act was not in issue in those cases, and there is no exemption in the statute for public records barred from disclosure *in a case* to turn an otherwise public record into an exempt one. To so hold would allow a government official to avoid the statutory disclosure requirements of FOIA simply by placing them under the purview of a protective order.

The third reason for nondisclosure given by the City equally is unavailing. The City argues the “Fraternal Order of Police . . . has sent correspondence to the City of Charleston requesting that the City not produce these records absent a court order.” *Ap. Br.* at 4. While this pressure by the police officer’s union may indeed be why the City has refused to comply with the statutory disclosure requirements, it is not a justifiable basis to refuse a FOIA request.

The only reason the City found itself between “a rock and a hard place” is that it failed to comply with its duty under FOIA. If it really questioned whether the records sought were exempt, the City could have and should have filed for a declaratory judgment *before* it denied the

² The City admits the fact that the public records sought by the *Gazette* may have bearing on the criminal investigation(s) “may not in and of itself be determinative[.]” Not only is it not determinative, it is entirely irrelevant and has no bearing on the City’s statutory requirement to disclose public records.

records request. It had no right to seek declaratory relief *after* it made its decision to refuse to release the public records.

IV ARGUMENT

A THIS COURT SHOULD REMAND THIS CASE WITH DIRECTIONS TO THE CIRCUIT COURT TO ORDER THE CITY TO DISCLOSE THE PUBLIC RECORDS AT ISSUE PURSUANT TO THE WEST VIRGINIA FREEDOM OF INFORMATION ACT

1 BECAUSE BOTH THE WEST VIRGINIA FREEDOM OF INFORMATION ACT AND REQUESTS FOR DECLARATORY RELIEF UNDER RULE 58 CONTEMPLATE SPEEDY DISPOSITION, THIS COURT SHOULD ADDRESS THE MERITS OF THE UNDERLYING ISSUE

This case stems from a request made under the West Virginia Freedom of Information Act. *W.Va. Code* § 29B-1-1, *et seq.* Recognizing the importance of timely record disclosure, the Legislature mandated that courts must assign dates for hearing and trial of FOIA proceedings, “at the earliest practicable date.” Likewise, Rule 57 of the *W.Va.R.Civ.P.* states, “[t]he court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar.” Simply put, by the time this matter is set for argument on this appeal, over a year will have elapsed since the *Gazette* made its FOIA request and the City requested declaratory relief. That period of time is too long, and the Court should speed this process up by deciding the merits of the underlying issue now. If it chooses not to do so, by the time the matter is returned to the circuit court and addressed there, and appealed and returned to this court, years will have passed. That delay may benefit the City, but it will highly prejudice the Public and the *Gazette*.

Because of the foregoing considerations, this case presents an exception to this Court’s

usual practice of not considering questions the lower court has not addressed.³ For example, in , this court considered the merits of the issue presented even though it was not addressed by the lower court. This court explained:

“The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

In this case, we are confronted with very limited and essentially undisputed facts. The constitutional issue raised for the first time on appeal is the controlling issue in the resolution of the case. If the statute is unconstitutional, the case should not be dismissed. Furthermore, the issue is one of substantial public interest that may recur in the future. These two considerations are in line with our basic standards for deciding when to examine matters in a prohibition proceeding. *See Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).”

Whitlow v. Board of Educ. of Kanawha County, 190 W.Va. 223, 226-227, 438 S.E.2d 15, 18-19 (W.Va.1993).

In the case at bar, like *Whitlow*, there are no disputed material facts. The underlying issue controls the outcome of the case, and is one of substantial public import that may recur in the future. The difference here, of course, is that the legal issue is statutory, not constitutional. But this is not a case where the issue was not raised below - clearly, the issue of disclosure is at the heart of the case and is squarely raised by the Complaint - the problem is that the trial court did

³ “This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.” *Syllabus Pt. 2, Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958).”

not address the substantive issue presented. Sending this case back to the trial court under these circumstances works substantial prejudice, and will cause further delay, and likely will only end up with these parties back before this Court years later with nothing substantial different in the record, and a completely *de novo* review. Thus, the *Gazette* requests this Court consider this Response Brief to be a *Writ of Prohibition* or *Mandamus*, and consider addressing the underlying issue on the merits on those standards.

2 THE WEST VIRGINIA FREEDOM OF INFORMATION ACT REQUIRES DISCLOSURE OF THE REQUESTED PUBLIC RECORDS

When the *Gazette* requested public records from the City, it was acting in the public interest, and acting according to its statutory right inspect and copy, “full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” The policy behind the West Virginia Freedom of Information Act was well stated by the Legislature:

“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).

The FOIA statute mandates, "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 of this article." *W.Va. Code* § 29B-1-3(1). There is no dispute over the broad applicability of the foregoing disclosure requirement. "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." *Syl. Pt. 4, Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985). The simple question for the Court is whether it is "otherwise expressly provided" in a narrow, strictly construed exemption, that gives the City the right to not comply with the *Gazette's* public records disclosure request. The burden is on the City to make such a showing: "[t]he party claiming exemption from the general disclosure requirement under West Virginia Code § 29B-1-4 has the burden of showing the express applicability of such exemption to the material requested." *Syl. Pt. 7, Queen v. West Virginia University Hospitals, Inc.*, 179 W.Va. 95, 365 S.E.2d 375 (1987).

3 THE PAYROLL RECORDS AT ISSUE ARE NOT EXEMPT UNDER *W.Va. CODE* § 29B-1-4(2)

The City takes the position that the time records of police officers are exempt from disclosure pursuant to *W.Va. Code* § 29B-1-4(2), that states:

"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: Provided, That nothing in this article shall be construed as precluding an individual from inspecting or copying his or her own personal, medical or similar file[.]"

As noted above, all exemptions must be construed narrowly. *Syl. Pt. 4, Hechler v. Casey, supra.*

This Court has instructed that,

“[i]n deciding whether the public disclosure of information of a personal nature under *W. Va. Code* § 29B-1-4(2) (1980) would constitute 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.”

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

While this Court has not had the opportunity to address whether payroll records of public employees must be disclosed under the WVFOIA, other states overwhelmingly have construed their open records laws as requiring disclosure of public employee payroll records, and concomitantly have held they are not exempt from disclosure as “information of a personal nature.”

In *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976 (Alaska 1997), the Supreme Court of Alaska held that time sheets indicating hours worked for public employer are properly included in definition of “public records” under that State’s Public Records Act and are not subject to confidentiality provisions for “state personnel records.” *Citing* AS 39.05.080.

In *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999) the Supreme Court of Iowa held that compensation allocated to and used by individual city employees, whether for

salary, sick leave or vacation, was a matter of legitimate concern to the public, so long as the information disclosed did not reveal personal medical conditions or professional evaluations, and, thus, was subject to disclosure to newspaper publisher under the Iowa Open Records Act. *Citing, I.C.A. 22.1 et seq.*

In *State ex rel. Jones v. Myers*, 581 NE2d 629 (Ohio 1991), it was held that a county sheriff was entitled to disclosure of county payroll records including employee's names, designations, employee numbers, and earnings; statutorily withheld federal, state and city taxes, and retirement deductions; vacation and sick leave records; amounts for purchase of retirement service credit and deductions for medical or hospitalization insurance; and garnishments and court-ordered support payments. It was held the public records subject to disclosure.

It was been held that, under the Pennsylvania Right to Know Act, a labor union could access school district records to obtain wage information of private roofing contractor's employees, but union could not access employees' personal information. *Sapp Roofing Co., Inc. v. Sheet Metal Workers' Intern. Ass'n, Local Union No. 12*, 552 Pa. 105, 713 A.2d 627 (1998), *citing* 65 P.S. §§ 66.1, 66.2.

In an action by a plaintiff seeking to inspect payroll records of a defendant hospital, it was held that the 1953 Privacy Act did not give board of directors authority to designate their personnel records confidential, and the court resolved the issue of whether records of defendant were of public nature and within the disclosure requirement applicable a state, county or municipality under the Tennessee Public Records Act. The court held that with respect to the issue of the status of records of the defendant hospital, those records were within the provisions of that state's Public Records Act and were subject to public inspection. *Cleveland Newspapers*,

Inc. v Bradley County Memorial Hospital, Bd. of Director, 621 SW2d 763 (Tenn.App.1981).

As to whether payroll records are a matter of public concern, it was held in *Tiberino v. Spokane County*, 13 P.3d 1104 (Wash. Ct. App. Div. 3 2000), that generally, records of governmental agency expenditures for employee salaries, including vacation and sick leave, and taxpayer-funded benefits are of legitimate public interest and therefore not exempt from disclosure under the State of Washington's public records act. See *Tacoma Public Library v. Woessner*, 951 P.2d 357 (Wash.App. 1998).

In *Caple v Brown* 323 So 2d 217 (La.App.1975), the court held that under the state's public records statute an elector and taxpayer of the state was entitled to inspect the financial records relating to a sheriff's salary fund. The pertinent statute provided for a broad right of inspection, by any elector or taxpayer, of all records, writings, accounts, letters, memoranda, papers, etc., used in the performance of any business performed under the authority of the state. The plaintiff, a candidate for sheriff, was entitled to inspect these records in the manner provided by the public records law, the court held, notwithstanding that the sheriff had published audit reports covering a 10-year period. Accordingly, the court affirmed the judgment of the trial court ordering the sheriff to produce for examination the payroll records requested.

In *Moak v Philadelphia Newspapers, Inc.*, 336 A2d 920 (Pa.App.1975), the court held that a police department's payroll records were available to public inspection under the state's "Right to Know Law." It appeared that a newspaper and a reporter sought access to the payroll records of a police department in order to identify the police officers referred to in a crime commission report as having been involved in corrupt and improper conduct. The crime commission report identified the officers only by rank, first name, last initial and badge or payroll

number. The payroll records of the police department contained each employee's full name, class and department, payroll number, sex, date of birth, annual salary, and various other personnel data. Access to the payroll records was refused, on the grounds that they came within the statutory exclusion from the disclosure requirement as being records whose disclosure would impair a person's reputation. The court, however, finding that the payroll records were not, in themselves, records which would operate to impair a person's reputation, rejected the argument that it was required to consider whether the payroll records might be used in combination with the crime commission report in such a way as would impair the policemen's reputations. Finding no support in the statute for this interpretation of the exclusion provision, and noting that to so enlarge the exclusion would be contrary to the right to know law's central objective to make public records available to all citizens, the court said that the payroll records sought were not excepted from disclosure. It also rejected the claim that the records came within the city's charter provision exception for records whose disclosure would invade privacy. The court explained that the state home-rule statute forbade the exercise of powers contrary to, or in limitation or enlargement of, powers granted by legislative acts. Concluding that the charter provisions restricting access to city records were more restrictive than the state statute on the subject, the court said that the charter provisions were of no effect. Accordingly, the court affirmed the order of the trial court, which granted access to the records.

In *Hastings & Sons Publishing Co. v City Treasurer of Lynn*, 375 NE2d 299 (Mass. 1978) it was held that the trial court properly permitted disclosure of police department payroll records where they fell within scope of statutory definition of "public record." See *Office of Governor v. Washington Post Co.*, 759 A. 2d 249 (Md. 2000)(governor's scheduling records not exempt,

except for material constituting wholly personal or family engagements); *Burton v. York County Sheriff's Dept.*, 594 S.E. 2d 888 (S.C. 2004)(employment records including date of employment, title, rank, pay schedule, copies of disciplinary letters, or records of suspension not exempt from disclosure under FOIA); *Painting Industry of Hawaii Market Recovery Fund v. U.S. Dept. of Air Force*, 26 F. 3d 1479 (9th Cir. 1994)(records reflecting hours worked at job site not exempt from disclosure); *International Broth. of Elec. Workers Local Union No. 5 v. U.S. Dept. of Housing and Urban Development*, 852 F. 2d 87 (3rd Cir. 1988)(number of hours worked at job site not protected from disclosure); *Pennfeather v. Tessler*, 431 F. 3d 54 (2nd Cir. 2005)(disclosure of employee's work schedule not an invasion of privacy); *News Group Boston Inc. v. National R.R. Passenger Corp.*, 799 F. Supp. 1264 (D. Mass. 1992)(payroll information not exempt from disclosure under FOIA).

As can be seen from the plethora of caselaw cited above, it is difficult to see how the time records of police officers, upon which their compensation is based, is information of such a personal nature that it is exempt from disclosure under the WVFOIA. The fact that the information sought is of high public interest, that the information is unavailable from other sources, that there has been no suggestion that there was any expectation of privacy concerning the time records, all adds to this conclusion. Moreover, the exemption must be construed narrowly. Taking all of the foregoing into consideration, it is obvious that the time records are not exempt from the disclosure requirements of the WVFOIA.

4 THE PAYROLL RECORDS AT ISSUE ARE NOT EXEMPT UNDER W.VA. CODE § 29B-1-4(4)

The City also suggests the time records are exempt under *W.Va. Code* § 29B-1-4(4). That

provision articulates an exemption for criminal investigations as follows:

“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[.]”

Id. Time records have nothing to do with “the detection and investigation of crime,” and they are not “maintained for internal use in matters relating to law enforcement.” Rather, they are administrative records of time used solely for the purpose of calculating compensation. All sorts of employees, public and private, keep time records for the purpose of calculating compensation. Even its denial letter, the City stated, “exemption (4) typically doesn’t exempt records generated in the normal course of business, such as payroll records[.]” Ex. B.

**5 THE PAYROLL RECORDS ARE NOT EXEMPT UNDER
W.VA. CODE § 8-14A-1, et seq.**

The City further argues the time records of police officers was exempt pursuant to *W. Va. Code* § 8-14A-1, *et seq.* That Article outlines the procedure to be followed for administrative investigations of police officers and firefighters. There is nothing within the Article that exempts time records from disclosure under the WVFOIA. It is hornbook law that the public body advocating nondisclosure has the burden of showing the “express” application of the exemption claimed:

“the burden of proof falls on the public body asserting the exemption to demonstrate that the public record should be protected from disclosure:
“[t]he party claiming exemption from the general disclosure requirement under West Virginia Code § 29B-1-4 has the burden of showing the express applicability of such exemption to the material requested.” *Syl.* pt. 7, *Queen, supra.* See *W. Va. Code*, 29B-1-5(2) [1977].”

Daily Gazette Co., Inc. v. West Virginia Development Office, 198 W.Va. 563, 570, 482 S.E.2d

180, 187 (1996). There is nothing express or implied in the Article cited by the City that requires nondisclosure of police officer time records. Therefore, that Article provides no ground for nondisclosure.

**6 THE PROTECTIVE ORDERS ISSUED IN CLOSED CASES
CAN NOT BE USED TO DENY PLAINTIFF'S RIGHT TO
THE DOCUMENTS UNDER FOIA**

The City cites to certain protective orders entered in cases in which the *Gazette* was not a party as a basis for withholding the otherwise non-exempt time records. Simply because a non-exempt public record has been made the subject of a protective order does not make the document privileged under the WVFOIA. Other courts have addressed this issue and clearly held that disclosure or nondisclosure must be based on whether or not an express exemption applies. For example, in *Anderson v. Department of Health and Human Services*, 907 F.2d 936, 945 (10th Cir. 1990), the Court of Appeals for the 10th Circuit held rejected the argument that documents subject to a protective order must be considered exempt, and instead held that under the federal FOIA, determination of disclosure must be made “by applying the express exemption[:.]”

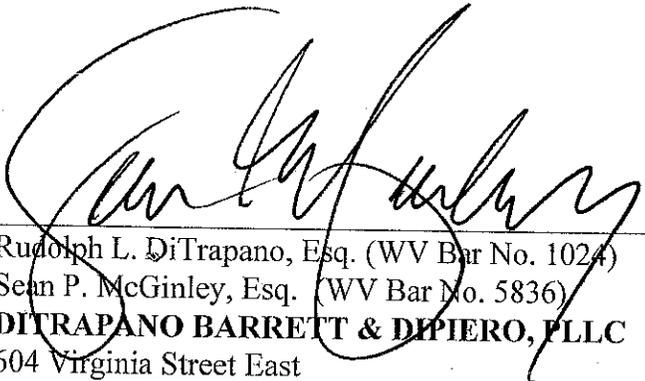
“we hold that materials which are the subject of a protective order under rule 26(c)(7) are not privileged for purposes of FOIA Exemption 4 because the determination of whether documents contain trade secrets under Exemption 4 is to be made solely by applying the express exemption for trade secrets and confidential commercial or financial information found in the exemption itself.”

While that case concerned the exemption for trade secrets, the same principle concerning construing public records subject to protective orders generally should be applied here. Because there is no express exemption that applies, the Court should reject the City's efforts at

nondisclosure.

V CONCLUSION

Based upon all of the foregoing, this Court should remand this case with directions to the Circuit Court to order the City of Charleston to produce the time records requested by the *Charleston Gazette*.



Rudolph L. DiTrapano, Esq. (WV Bar No. 1024)
Sean P. McGinley, Esq. (WV Bar No. 5836)
DITRAPANO BARRETT & DIPIERO, PLLC
604 Virginia Street East
Charleston, WV 25301
304-342-0133

Counsel for the Charleston Gazette

the ^{Charleston} Gazette

The State Newspaper

1001 Virginia St., East
Charleston, W.Va. 25301

July 6, 2007

Paul Ellis, Esq.
Charleston City Attorney
501 Virginia Street E.
Charleston, WV 25301

Dear Mr. Ellis,

Please consider this a request made under the West Virginia Freedom of Information Act, W.Va. Code 29B-1-1, et seq.

Please make available for my inspection and copying all records related to:

1. Charleston Police Department weekly payroll timesheets for the following dates: December 1, 2001 to November 30, 2003, inclusive; for the following officers: Randy Young, Rich Ingram, Brent Webster, Carl Hammons, George Jarrett, Aaron James, Eric Hodges, James Rollins, Dana Rowsey, Tom Ranson, Mark Abbott, Chip Nowling, Mike Chapman, Jeff Miller, B.W. Jones, Terry Hedrick, Tony Hazelett, Bobby Eggleton, Eric Eagle, Steve Cooper, Robert Brown, Brad Rinehart, Scot Blankenship, James Sands, Keith Peoples, Thomas Sheppard, Lola Hart, and William Winkler.
2. Charleston Police Department Officer Activity Logs for the following dates: November 5, 2003 through November 7, 2003, inclusive; for Criminal Investigation Division officers: Randy Young, Rich Ingram, Brent Webster, Carl Hammons, George Jarrett, Aaron James, Eric Hodges, James Rollins, Dana Rowsey, Tom Ranson, Mark Abbott, Chip Nowling, Mike Chapman, Jeff Miller, B.W. Jones, Terry Hedrick, Tony Hazelett, and Bobby Eggleton.

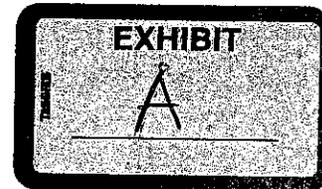
If your office maintains any records in computer or electronic format responsive to my request, please make those available in electronic format.

If you choose to withhold any records which are responsive to my request, please provide me with an index of those documents. The index should describe each document and the claimed exemption, provide a relatively detailed justification as to why each document is exempt, and specifically explain the basis for the claimed exemption. See *Daily Gazette Co. v. West Virginia Development Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996).

If any records in your agency's custody contain both exempt and non-exempt material, please provide redacted copies of these documents. See *Ogden Newspapers Inc. v. City of Williamstown*, 192 W.Va. 648, 453 S.E. 2d 631 (1994).

As I am sure you are aware, the disclosure provisions of the state FOIA are to be liberally construed, and the withholding provisions strictly construed. The party claiming exemption has the burden of showing the express applicability of such exemption to the material requested. See *Queen v. West Virginia University Hospitals*, 179 W.Va. 95, 365 S.E. 2d. 375 (1987).

Because my use of these records will benefit the public interest, through the publication of newspaper articles concerning possible police misconduct, please waive any applicable copying fees or costs. If you choose not to waive the fees, and the cost of producing these materials will exceed \$25, please contact me before you proceed.



I assume you will, within 5 days, provide me with the records I have requested, advise me of the time and place at which I may inspect and copy the materials, or deny my request, stating in writing the reasons for such denial.

If you have any questions about this request, please contact me at (304) 348-1723. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Clevenger', with a long, sweeping flourish extending to the right.

Andrew Clevenger
Staff Writer
348-1723 phone
348-1233 fax
aclevenger@wvgazette.com



OFFICE OF THE CITY ATTORNEY

City of Charleston | P.O. Box 2749, Charleston WV 25330 | 304-348-8031
Writer's Fax: 304-348-0770 | Writer's email: paul.ellis@cityofcharleston.org

Paul D. Ellis
The City Attorney of Charleston

July 18, 2007

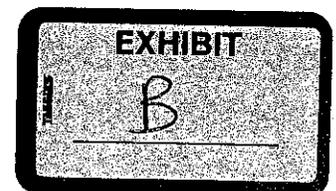
Andrew Clevenger
The Charleston Gazette
1001 Virginia Street, East
Charleston, WV 25301

Re: July 6, 2007 Request for information under the West Virginia Freedom of Information Act

Dear Andrew:

This letter is in response to your request (the "Request") under the West Virginia Freedom of Information Act ("FOIA") of July 6, 2007, seeking information from the Charleston Police Department ("CPD"). Pursuant to our conversations and agreement, the CPD's response to the Request is due on or before Wednesday, July 18, 2007.

In response to item #2 of the Request, you, the Chief of Police and I met on Friday, July 13, 2007, to discuss the requested information. As we discussed at that time, based on a review of the records for the Criminal Investigation Division ("CID") and after discussing your request with the custodian of records and several officers who work in CID, Officer Activity Logs are not used by officers while working in CID. An Officer Activity Log is a form used by officers when working on a patrol shift. Thus, the CPD does not have possession, custody or control of Officer Activity Logs for CID officers because those documents do not exist. During our July 13, 2007, discussion we indicated to you that CID does take attendance at roll call and generates a record for that purpose. We also provided you with an example of that record and reviewed it with you. Although that record is something different than what you requested, the CPD will provide you with information from the roll call attendance record for CID for the dates of November 5, 2003 through November 7, 2003, if that is something that would be helpful to your inquiry. Please let me know at your convenience if you are requesting that information and we will send it to you or make it available for your review.



Andrew Clevenger

July 18, 2007

Page 2

With regard to item #1 of your Request, based on the stated purpose of your Request, i.e., to publish newspaper articles concerning possible police misconduct, and consistent with your conversations with us related to the Request, it is our understanding that you are seeking payroll timesheets (the "payroll records") for twenty eight current and former CPD officers so that you can investigate whether other officers engaged in "double-dipping." As we have discussed on more than one occasion since receiving the Request, for several reasons the CPD does not believe it can lawfully provide you with the requested payroll records. More specifically: (1) disclosure of some or all the requested information would violate the express terms and/or the intent of existing Circuit Court Orders sealing and protecting payroll records of individual police officers; (2) the requested information is exempt under W.Va. Code §29B-1-4(2); (3) disclosure of the requested records may result in a violation of the privacy and statutory rights of the officers who are the subject of your request, and may subject the city to civil liability (4) the requested information may be exempt under W.Va. Code §29B-1-4(4).

(1) As you are aware, in response to subpoenas served on the CPD by the Human Rights Commission ("HRC") and counsel for Mr. Nowling seeking payroll records for individual officers of the CPD, the issue of disclosure of payroll records of CPD officers has recently been considered and ruled on by two Circuit Court Judges as well as an administrative law judge. See *State v. Nowling*, Case No. 04-F-318 (Judge Walker); *City v. Human Rights Commission*, Case No. 04-MISC-518 (Judge Kaufman); *Nowling v. Charleston Police Department*, Docket No. ER-314-04 (Judge Carter). The Capitol City FOP Lodge 74 moved to intervene in both circuit court proceedings to assert, *inter alia*, that the requested payroll records were confidential and exempt from disclosure.

Although Judge Kaufman ordered limited disclosure of certain payroll records to the HRC, he placed those records under a Protective Order (see March 4, 2005, Order, as amended by April 11, 2005, Order, attached hereto), and then later placed those payroll records under seal (see January 25, 2006, Order, attached hereto) ordering that they remain confidential and that they not be disclosed. Judge Walker similarly found payroll records of CPD officers to be confidential in nature (see July 29, 2005, Order, attached hereto) and reviewed those records subject to the seal entered by Judge Kaufman (see December 14, 2006, Order, attached hereto). Similarly, when Judge Walker requested a Special Master to review and compare sealed payroll records of CPD officers, she placed the report generated from that information under seal (see Orders of March 16, 2007, and March 27, 2007). Finally, in the HRC matter, Judge Carter placed all payroll records of CPD officers, whether disclosed by the CPD or otherwise obtained by the HRC, under a protective order (see Orders of December 14, 2005, and February 3, 2006, attached hereto).

The information subject to the court ordered seal and protective orders consists of several boxes of records and include payroll records of CPD officers produced by the CPD and gathered by other entities. Some of the exact payroll records you have requested are currently the subject of the court ordered seal and protective orders and it would be a violation of those court orders to provide you with that information. In some

instances, it would require a review of the entirety of the sealed records (which are voluminous) to determine which of the records requested by you are expressly subject to that order. It also appears clear that the intent of the Courts' orders is to preclude disclosure of CPD payroll records or information generated from those records to third-parties. The CPD cannot violate the courts' orders or the intent thereof and must therefore deny your request to the extent disclosure would result in a violation of the express terms and/or intent of those orders.

(2) W.Va. Code §29B-1-4(2) exempts from disclosure "[i]nformation 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...." As you know, and as discussed earlier, the issue of whether payroll records of CPD officers are considered to be a "similar file" and subject to confidentiality and exemption under §29-B-1-4(2) and related West Virginia case law has been considered by at least one Circuit Court Judge. In her Order of July 29, 2005, Judge Walker held "this Court finds that the type of information requested by Defendant [i.e., payroll records of CPD officers], some of which would have to be obtained from personnel files, together with the proffer of the CPD about that information, would trigger the protections afforded under *Manns* and *Maclay*." Under those cases, and at a minimum, an in camera review by a court would be required prior to disclosure of any CPD payroll records.

Capitol City FOP Lodge 74 (the "FOP") has become aware of your Request and, on behalf of the individual officers who are the subject of your Request and through its legal counsel, has served us with a letter, attached hereto, requesting that the CPD observe the findings and protections previously recognized by Judge Walker.

(3) The FOP has also put the CPD on notice that disclosure by the CPD of the requested payroll records would violate the privacy and statutory rights of the officers who are named in your Request (see July 16, 2007, letter from John Dascoli, attached hereto). The letter from the FOP speaks for itself. Some of the issues raised in the letter have recently been litigated and at least one court has found colorable the FOP's assertion that providing an officer's payroll records to a third-party for the purpose of comparing those payroll records with other payroll records is "tantamount to a de facto investigation of the CPD without affording officers the protections under W.Va. Code 8-14A-1 et. seq." (see Judge Walker's Order of July 29, 2005). The CPD is willing to provide notice to each officer named in your Request and allow them the opportunity to consult with counsel and/or raise or waive any individual rights or objections they may have to the Request. To do otherwise, will likely subject the CPD to litigation and potential liability. In the short time frame of your Request and our required response, however, that has not yet occurred. We are willing to discuss that possibility with you at your convenience.

(4) W.Va. Code 29B-1-4(4) exempts "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 matter relating to

law enforcement.” The purpose of the exemption is to prevent premature disclosure of investigatory materials that may be used in a law-enforcement action or that may otherwise compromise an ongoing criminal investigation. As you are aware from your several discussions with the Chief of Police and others, the CPD is currently conducting a criminal investigation to determine whether other officers engaged in “double-dipping.” You have indicated that you want to perform similar comparisons at the same time the CPD conducts its investigation. While exemption (4) typically doesn’t exempt records generated in the normal course of business, such as payroll records, premature disclosure of records that are the subject of an ongoing criminal investigation may compromise the investigation and the County Prosecutor’s ability to prosecute any wrongdoing that may be exposed by the investigation. The CPD is willing to discuss ways that it can provide information to the Gazette related to the Request that will fulfill the public interest, but it is not required to disclose information prematurely that may compromise an ongoing criminal investigation, and the primary purpose of exemption (4) is to prevent that result.

To the extent item #1 of your Request seeks payroll records for Mr. Nowling, it is my understanding that those records were provided to the County Prosecutor at the conclusion of the CPD’s criminal investigation and the indictment of Mr. Nowling. My further understanding is that Mr. Nowling’s payroll records were used as evidence by the Assistant Prosecutor in the public trial against Mr. Nowling. Copies of those records should be part of the public record and maintained in the court file. If you do not already possess copies of those records, please let me know and we will attempt to obtain copies of the payroll records introduced at the trial against Mr. Nowling.

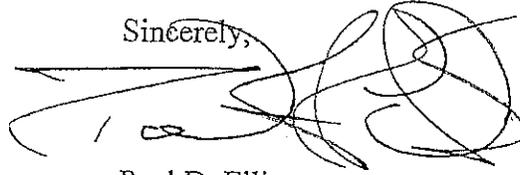
With regard to your request that the CPD waive any costs associated with production of any documents, and as we previously discussed, the costs of locating and copying the requested materials would be substantial. The CPD spent approximately \$4,000 to locate and reproduce payroll records of sixteen officers disclosed under a protective order (and now sealed) pursuant to Judge Kaufman’s prior order. If it is later determined through discussion, a change in circumstances or court order that some of the requested documents can be disclosed, the CPD would request that some or all of the costs associated with the reproduction be reimbursed to the City.

While the CPD has denied item #1 of your Request and, for purposes of FOIA, considers its responsibility to produce those records at an end, we are willing to discuss this matter further at your convenience and to consider any and all suggestions you may have to reach a resolution that takes into consideration the several interests, rights and legal barriers existing in this matter. While you are not required to do so, and consistent with our discussion yesterday, please call me if you determine further discussion is not advantageous from your perspective or if it is determined that the Gazette will institute litigation as afforded under FOIA.

Andrew Clevenger
July 18, 2007
Page 5

As you know, I am leaving for my previously scheduled family vacation August 23 through August 31. If you need to reach me while I am gone, please call my assistant, Susan, at 348-8031.

Sincerely,

A handwritten signature in black ink, appearing to be "Paul D. Ellis", written over a horizontal line. The signature is stylized and somewhat messy.

Paul D. Ellis
The City Attorney of Charleston

PDE/sde

enclosures

cc w/o enclosures: Brent Webster, Chief of Police, Custodian of Records

the ^{Charleston} Gazette

The State Newspaper

1001 Virginia St., East
Charleston, W.Va. 25301

Aug. 1, 2007

Paul Ellis
City Attorney
City of Charleston
501 Virginia St., East
Charleston, W.Va. 25301

Dear Mr. Ellis,

Thank you for your July 18, 2007, letter in which you responded to my Freedom of Information Act request for certain records from the City of Charleston. As you recall, Item 2 of my request sought weekly payroll timesheets for certain city police officers for certain dates.

You denied this portion of my request, citing what you believe are existing court orders prohibiting the release of this material, two exemptions to the state FOIA which you maintain apply to these records, and a separate West Virginia law which you also believe protects these records from disclosure.

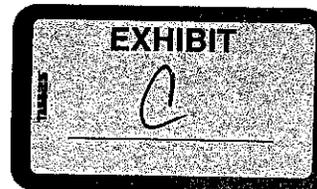
I am writing to respectfully suggest that your denial was in error, and to encourage you to reconsider and promptly provide the requested records.

Overall, your denial seems to suggest the existence of controlling court rulings or statutes that would -- if you are correct -- create a broad waiver of public disclosure responsibilities for payroll records of public employees. In fact, no such court rulings exist which apply to the requested records. Further, the clear statutory language makes these records publicly available, and this statutory language is backed up by controlling Supreme Court rulings and by similar rulings in other jurisdictions.

I will take the basis for denial in the order in which you presented them in your July 18, 2007, letter:

1. Existing court orders:

You state that you cannot provide the requested records because "the issue of disclosure of payroll records of CPD officers has recently been considered and ruled on by two Circuit Court Judges as well as an administrative law judge." In fact, the court orders you cite are not nearly as broad, and do not contain such sweeping legal conclusions, as you claim.



None of the three orders from Judge Kaufman (the March 4, 2005, April 11, 2005, or Jan. 25, 2006) contain any legal conclusions as to the applicability of the West Virginia FOIA to the records requested in my request. In fact, each of these orders related to the release of certain city records during the discovery process. Whether the records are public records that must be produced under the FOIA is a completely different issue. See *Macclay v. Jones*, 208 W.Va. 569, 542 S.E. 2d 83 (2000).

You also argue that Judge Walker "similarly found payroll records of CPD officers to be confidential in nature." Again, the record indicates otherwise.

First, the July 29, 2005, order from Judge Walker contains no protective order of any kind. In fact, the judge in that instance agreed to quash a subpoena for payroll records (on the ground of relevancy to the case at hand), and therefore found no need to issue a protective order. While Judge Walker opined that "the type of information requested ... would trigger the protections afforded under *Manns and Macclay*," the order does not contain any legal prohibition against providing the records requested in my FOIA, because it contains no protective order. The city is hiding behind this order, as if you would gladly provide the records if not for a court order, when in fact it was the city that sought a protective order from Judge Walker in the first place. But again, because Judge Walker did not issue a protective order, her ruling in this situation is simply not dispositive of the legal issues in my FOIA request.

Next, Judge Walker's March 16 and March 17 orders are also irrelevant to my FOIA request. These orders dealt with potential disclosure of the report prepared by Special Master Michael D. Payne. My FOIA request does not seek a copy of that report. Incredibly, the city seeks to cite this in denying my FOIA request, even though the contents of the Special Master's report has already been made public in an April 20, 2007, newspaper story. The city no longer has any legal interest in maintaining the confidentiality of a report that was published on the front page of the newspaper.

The Dec. 14, 2005, and Feb. 3, 2006, Human Rights Commission orders are likewise irrelevant. They concerned the release not of simple city payroll records, but of the commission's investigatory file. I am not seeking a copy of that file, which could arguably contain work product of commission investigators that might have some privilege from public disclosure under FOIA or other relevant law.

Finally, it is important to note that, for the most part, I am seeking different records than those payroll records covered by the orders from Judges Kaufman and Walker and the Human Rights Commission. I sought weekly payroll time sheets for 28 officers for a period from Dec. 1, 2001, through Nov. 30, 2003. Only six of these officers -- Abbott, Eagle, Sands, Peoples, Hart and Winkler -- also had records that were part of the order from Judge Kaufman or the Special Master's report.

You state that, "it would require a review of the entirety of the sealed records (which are voluminous) to determine which of the records

requested ... are expressly subject" to court orders. This is clearly erroneous. The records for the 22 officers that I sought payroll documents for who are not part of the order from Judge Kaufman or the Special Master's report could easily be obtained from the city's payroll clerks. It appears to me that these records are maintained in some computer file. Those files could easily be printed, or better yet, copied onto a CD-ROM and provided. (See W.Va. Code 29B-1-3(3), stating, in part, "If the records requested exist in magnetic, electronic or computer form, the custodian of the records shall make such copies available on magnetic or electronic media, if so requested).

2. Are the records covered by an exemption for personal privacy?

You claim that the weekly payroll timesheets requested are covered by Exemption 2 of the state FOIA, which protects, "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."

First of all, as discussed above, Judge Walker may have opined about the applicability of the *Manns* and *Mcclay* cases to city police payroll records. But, because her ruling did not contain any sort of protective order, it simply does not establish controlling law that would govern your response to my FOIA request.

In addition, it is abundantly clear that neither of these cases are applicable. In both *Mcclay* and *Manns*, the records requested were citizen complaints and internal investigations concerning possible wrongdoing by police officers. My FOIA does not seek such records, but simply weekly payroll timesheets. In *Macclay*, Ronald and Karen Mcclay sought records of internal investigations of complaints filed against former State Police Trooper Ronald C. Jones (Karen Mcclay's ex-husband), as part of a civil lawsuit alleging mistreatment by Trooper Jones. In *Manns*, Laura Manns sought certain records of internal investigations of citizen complaints against police officers as part of a civil rights lawsuit against the City Police Department.

And in fact, neither of these cases provided the broad privacy protections, even for these complaint records and internal review documents. In *Macclay*, the Court held that "records and information compiled by an internal affairs division of a police department are subject to discovery in civil litigation arising out of alleged police misconduct if, upon an *in camera* inspection, the trial court determines that the requesting party's need for the material outweighs the public interest in maintaining the confidentiality of such information." Further, the Court held that, "Before a circuit court is required to engage in an *in camera* inspection of records and information compiled by an internal affairs division of a police department to make a determination regarding the production of such documents through discovery, the party opposing disclosure must first make a substantial showing that specific harms are likely to result from the disclosure of the requested materials." And, while *Macclay* found that the state's FOIA was not intended to shield law enforcement investigatory materials

from a legitimate discovery request when such information is otherwise subject to discovery in the court of civil proceedings, the court also specifically declined to rule on whether any of the FOIA exemptions would apply to police complaint and internal investigatory materials -- let alone the mere payroll records I am requesting. And, while the Court did hold that the records in *Manns* fell within the privacy exemption of the state FOIA, it is important to note that the records requested were not simply payroll sheets, but records concerning allegations of misconduct and investigations into that misconduct.

In addition, it is clear that the release of mere payroll timesheets -- indicating the hours that public employees are on duty -- simply does not constitute an unreasonable invasion of privacy under West Virginia law. Our Legislature has recognized that certain information about individuals is routinely disclosed as public record and does not rise to such a level that a balancing test would be applied. By "unreasonable," the Legislature means a "substantial" invasion of privacy, i.e., more than what the average person would normally expect the government to disclose about him. In weighing extent of invasion of privacy for purposes of invasion of privacy exemption of the Freedom of Information Act, courts must look at what extent to which release of the information would cause an ordinary man in the time and place of the individual involved, embarrassment or harm. See *Child Protection Group v. Cline*, 177 W.Va. 316, 352 S.E. 2d 66 (1986).

Courts in other jurisdictions have held that the release of police and other public employee payroll information does not constitute an invasion of privacy, much less an unreasonable one.

In Massachusetts, records of salaries of public employees, including overtime paid, are public. *Hastings & Sons Publ'g v. City Treasurer of Lynn*, 374 Mass. 812, 375 N.E. 2d 299 (1978) (municipal payroll records, including records of payments to police for off-duty work details, are public). The court in this case found that "disclosure of payroll records of policemen would not be an 'invasion of privacy' within meaning of provision exemption from disclosure 'data relating to a specifically named individual, the disclosure of which may constitute an invasion of personal privacy.'" Further, the court found that "disclosure of payroll records of policemen would not infringe on policemen's constitutionally guarded zone of privacy." Interestingly, the court also ordered the release of records, maintained by the city treasurer, of monies received by the city for work performed by municipal employees on off-duty work details or on special detail work.

In Ohio, payroll records of public employees are open. *State ex rel. Petty v. Wurst*, 49 Ohio App. 3d 59, 550 N.E. 2d 945 (1989).

In Pennsylvania, police payroll records, disclosure of which would not themselves harm an officer's reputation, were held to be public under the Right to Know Act. *Moak v. Philadelphia Newspapers Inc.*, 336 A. 2d 920 (Pa. Cmwlth. 1975).

The Pennsylvania case is most instructive to the FOIA request at hand. In the case, the Philadelphia Inquirer sought an order to gain access to payroll records of the Philadelphia Police Department.

Reporter Aaron Epstein sought the records after the release of a report by the Pennsylvania Crime Commission alleging ongoing, widespread and systematic corruption on all levels of the police department. The report did not include complete names of the officers mentioned, and reporter Epstein wanted the payroll records in order to compare payroll numbers -- which were part of the commission report -- and identify the named officers by correlation. The Court held that the payroll records "themselves would not operate to the prejudice or impairment of the police officers' reputations" and therefore were not exempted from disclosure, "even though correlation of the information contained in the records with a crime commission report could result in the identification of some officers as having been accused by the commission of involvement in corrupt and improper conduct."

Finally, even if the payroll records I have requested would constitute an unreasonable invasion of privacy, the city has failed to perform its duty under the statute to conduct -- and explain in any denial -- the balancing test required. Our Court has found that the West Virginia FOIA requires a balancing test when there has been an "unreasonable invasion of privacy." Also, the Court has found that there must be a balancing of the individual's right of privacy against the public's right to know. See *Robinson v. Merritt*, 180 W.Va. 26, 375 S.E. 2d 204 (1988); and *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E. 2d 66 (1986).

The first test is the value of the public interest. The interest may be pecuniary, or the public may have an interest because their legal rights or liabilities are affected.

In this instance, the public has both a pecuniary interest in knowing how its money is spent paying police officers, and a very great interest in knowing whether there has been any improper "double-dipping" by city officers.

The second test also concerns the purpose for which the information is sought. If the information is sought to provide for something which would be useful to the public, then the courts will weigh this favorably.

In this instance, the goal is to publish newspaper articles that would educate the public about any wrongdoing -- if any exists -- or to exonerate the officers from allegations of wrongdoing if that indeed is the case.

3. Would disclosure violate W.Va. Code 8-14A-4?

You argue that, based apparently at least in part on a letter from the police officers' union, that this statute prohibits the release of the records I have requested. This is absolutely absurd, and totally without any legal foundation.

This section of code was simply not intended -- and on its face does not -- create a separate exemption to the state FOIA for police officer payroll records. Rather, this is part of a separate statute that spells out the procedure to be used by municipalities in West

Virginia in conducting their own investigations of possible misconduct by police officers. Rather than intended to seal off public information from taxpayers, it is intended to protect officers from improper harassment by their employers.

As 8-14A-2 clearly states, this article deals with situations when "...any police officer or fireman is under investigation and subjected to interrogation by his commanding officer, or any other member of the employing police or fire department, which could lead to punitive action, such as interrogation..

The Gazette is not a commanding officer or any other member of the employing police department. The protections afforded by this statute simply do not apply.

Further, the plain language of the section cited by the city makes this even clearer.

It states that "No officer or fireman shall be required or requested for purposes of job assignment or other personnel action to disclose any item of his property, income, assets, source of income, debts or personal or domestic expenditures, unless such information is obtained through proper legal procedures or is necessary for the employing agency to ascertain the desirability of assigning the police officer to a specialized unit in which there is a strong possibility that bribes or other improper inducements might be offered."

First of all, no officer is being required or requested to provide anything. The city's police or payroll department are being asked to provide simple payroll timesheets.

Second, even if this section were to apply, a FOIA request is exactly the type of "proper legal procedure" that is afforded the public to obtain such clearly public information as police officer weekly payroll timesheets.

Counsel for the FOP opines that "it sounds like the Gazette is trying to conduct its own internal investigation of various officers." It is not entirely clear how a newspaper -- not part of the city government -- could conduct an "internal investigation" of police officers.

However, the Gazette certainly is entitled under the First Amendment of the U.S. Constitution to conduct its own journalistic investigation of city government matters such as "double-dipping" by police officers. Indeed, it was exactly this type of use of public records that the state's Freedom of Information Act was meant to encourage.

Further, while the FOP may wish to make threats about potential liability or litigation the city could face by releasing these records, it is worth noting that any citizen who is forced to file a civil lawsuit to obtain public records can then seek payment of appropriate attorneys fees and costs by the government agency that withheld the records requested.

4. Are the materials exempt under Exemption 4 of the state FOIA?

Again in this instance, you are attempting to create a broad FOIA exemption where one simply does not exist.

Our Supreme Court has offered important rulings that defined both sections of Exemption 4. First, the Court held that the language "internal records and notations ... which are maintained for internal use in matters relating to law enforcement" refers to confidential investigative techniques and procedures. See *Hechler v. Casey*, 175 W.Va. 434, 333 S.E. 2d 799 (1985). Second, the Court held that "Records that deal with the detection and investigation of crime," 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. See *Hechler v. Casey* and *Ogden Newspapers Inc. v. City of Williamstown*, 192 W.Va. 648, 453 S.E. 2d 631 (1994).

You have failed to explain the "express applicability" of either of these portions of Exemption 4 to the payroll records I have requested. See *Daily Gazette Co. v. Withrow*, W.Va. 350 S.E. 2d 738 (1986). Your "conclusory assertions" that the materials I have requested fall under Exemption 4 "do not meet this burden." See *Queen v. WVU Hospitals*, 179 W.Va. 95, 365 S.E. 2d 375 (1987).

In fact, employee payroll records are clearly not "internal records and notations ... which are maintained for internal use in matters relating to law enforcement." Further, they are not "information compiled as part of an inquiry into specific suspected violations of the law, but rather are just the sort of "information generated pursuant to routine administration or oversight" that the Court has held do not fall within Exemption 4. While you claim that the release of the requested records would hinder an ongoing investigation, you do not describe how this would happen in any detail. As stated above, your "conclusory assertions" that this would occur are simply not adequate.

My request simply sought weekly payroll timesheets, records which are clearly public. Simply because your agency may be reviewing such time sheets as part of investigation does not allow you to sweep them under the protection of Exemption 4. If this were the case, then any government body could block release of any public records simply by declaring that it is using them for an ongoing investigation.

Conclusion

Finally, it is worth repeating that our Legislature has mandated that openness is the general rule for all government agencies. To that end, the disclosure provisions of the state FOIA are to be liberally construed. See *W.Va. Code 29B-1-1*. In interpreting the statute the Supreme Court has mandated "the fullest possible disclosure" of information concerning government." See *Hechler v. Casey*.

I would encourage you to promptly review this information, and then provide me with the records I have requested. At a minimum, I expect a response from you, in writing, within 5 days.

Thank you for your prompt attention to this matter.

Sincerely,

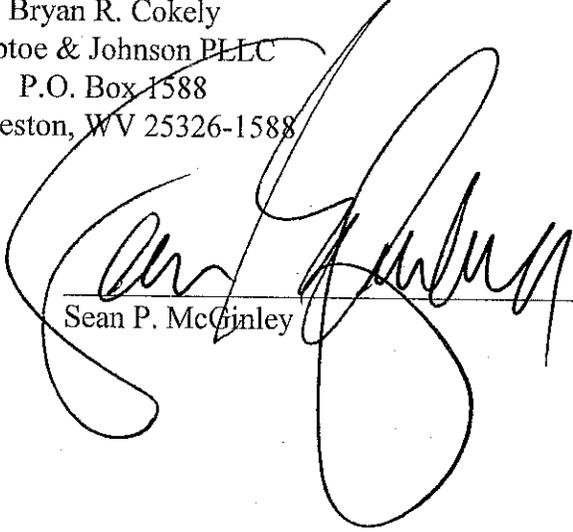
A handwritten signature in black ink, appearing to read 'Andrew Clevenger', with a long, sweeping flourish extending to the right.

Andrew Clevenger
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CERTIFICATE OF SERVICE

I, Sean P. McGinley, Counsel for The Charleston Gazette, hereby certify that on the 5TH day of May, 2008, I served the foregoing **RESPONSE BRIEF OF THE CHARLESTON GAZETTE** upon all counsel by depositing true and correct copies thereof in the United States Mail, first class postage pre-paid addressed as follows:

Scott E. Johnson
Bryan R. Cokely
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326-1588



Sean P. McGinley