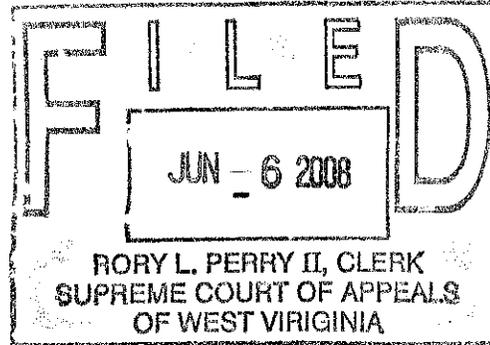

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33812

**IN RE: CHARLESTON GAZETTE
FOIA REQUEST**



REPLY BRIEF OF THE CITY OF CHARLESTON, APPELLANT

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I. INTRODUCTION

This is the reply brief of the Appellant, the City of Charleston ["City"], in support of its appeal from the decision of the Circuit Court of Kanawha County to dismiss the City's complaint for declaratory judgment regarding its obligations in responding to a West Virginia Freedom of Information Act ["FOIA"] request by the Appellee, the Charleston Gazette ["Gazette"], for "all records related to" weekly payroll timesheets and activity logs of twenty-eight Charleston police officers. The City sought declaratory judgment because:

(1) some of the documents sought by the Gazette pertain to an ongoing criminal investigation by the Charleston Police Department;

(2) in prior proceedings, the Honorable Jennifer Bailey Walker, Judge of the Circuit Court of Kanawha County, and the Honorable Tod Kaufman, Judge of the Circuit Court of Kanawha County, issued protective orders sealing the records, including payroll information, of six of the twenty-eight police officers named in the Gazette's FOIA request to prevent the unwarranted invasion of the officers' privacy interests;

(3) under *Manns v. City of Charleston Police Department*¹ and *Maclay v. Jones*,² the City was entitled to an *in camera*

¹ 209 W. Va. 620, 550 S.E.2d 598 (2001) (invasion of privacy exemption to FOIA applied to arrestee's request for disclosure of records regarding outcome of city police department's internal investigations of every officer against whom civil or criminal complaint had been filed regarding their behavior while in course of employment or otherwise; records contained personal information which if disclosed would constitute unreasonable invasion of privacy, and public interest did not outweigh officers' privacy interests, as request would require disclosure of all claims of misconduct no matter how egregious, unfounded, or potentially embarrassing, and expectation of confidentiality was crucial to continued reports of possible misconduct.).

inspection before being required to disclose the information sought in the Gazette's FOIA request, including information contained in personnel files, and a determination that the Gazette's need for the material outweighs the police officers' privacy interests or the public interest in maintaining the confidentiality of such information; and

(4) the Fraternal Order of Police threatened to sue if the City produced the records of the police officers named in the Gazette's FOIA request without notice to the affected officers, an opportunity to be heard, and a court order.

When the Circuit Court dismissed the City's declaratory judgment action on grounds that its intervention would not settle the controversy, the City petitioned this Court to reverse the dismissal order and remand the case to the Circuit Court for further proceedings and a decision on the merits. In its Appellee Brief, the Gazette agrees that this case should be remanded. It further and erroneously contends, however, that this Court should decide the merits of the case and direct the Circuit Court to order the release of the subject records pursuant to FOIA.³

² 208 W. Va. 569, 542 S.E. 2d 83 (2000) (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.).

³ With respect to the substantive issues raised in the Gazette's brief, it contends the following:

(1) the payroll records of the City's police officers are public records required to be disclosed under W. Va. Code § 29B-1-1, which states "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 City respectfully submits that this Court should not rule on the merits of the City's declaratory judgment action for five reasons: (1) the substantive issues under FOIA were not adjudicated by the Circuit Court below; (2) the substantive issues under FOIA were not raised on appeal by the City; (3) the substantive issues under FOIA were not cross-assigned as error in a separate portion of the Gazette's brief as required under R. App. P. 10(f); (4) the substantive issues under FOIA do not involve any error in the record as required under R. App. P. 10(f); and (5) ruling on the substantive issues without affording the parties, including the officers involved, an adequate opportunity to be

(2) the payroll records of the City's police officers are not exempt under W. Va. Code § 29B-1-4(a)(2), which provides a specific exemption for "[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, unless the public interest by clear and convincing evidence requires disclosure in the particular instance;"

(3) the payroll records of the City's police officers are not exempt under W. Va. Code § 29B-1-4(a)(4), which provides a specific exemption for "[r]ecords 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;"

(4) the payroll records of the City's police officers are not exempt under W. Va. Code 29B-1-4(a)(5), which provides a specific exemption for "[i]nformation specifically exempted from disclosure by statute," and W. Va. Code § 8-14A-1, *et seq.*, governing the procedure for administrative investigations of police officers and firefighters; and

(5) the protective orders entered by Judge Walker and Judge Kaufman sealing the records of six of the twenty-eight police officers named in the Gazette's FOIA request for the purpose of protecting the officers' privacy interests cannot serve as a basis for withholding the payroll records of the City's police officers because they are not exempt under FOIA.

heard, including necessary evidentiary proceedings, would be violative of their due process rights.

II. ARGUMENT

This case should be remanded to the Circuit Court for a decision on the merits, affording the parties all of the due process rights, including an evidentiary hearing, to which they are entitled.

The Gazette agrees that this case should be remanded, but contends that this Court should immediately decide the merits of the case, without any evidentiary hearing, and direct the Circuit Court to order the release of the subject records pursuant to FOIA. As the Gazette itself observes, however, this Court will not consider on appeal non-jurisdictional questions that have not been decided by the court below.⁴

The Gazette does cite *Whitlow v. Board of Education*⁵ for the proposition that this Court may address substantive issues that were not decided by the Circuit Court,⁶ but *Whitlow* is of no value here.

⁴ Appellee's Br. at 6, n.3 (quoting Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958) ("This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."). See also, e.g., *Whitlow v. Board of Education*, 190 W. Va. 223, 438 S.E.2d 15 (1993); *Farricielli v. Holbrook*, 215 F.3d 241, 246 (2d Cir. 2000) ("It is our settled practice to allow the district court to address arguments in the first instance."); *North Texas Production Credit Ass'n v. McCurtain County Nat. Bank*, 222 F.3d 800, 812 (10th Cir. 2000) ("As a general rule, we do not consider issues not passed on below, and it is appropriate to remand the case to the district court to address an issue first."); *Keeton v. Motorists Mut. Ins. Co.*, 2003 WL 1497976, 6 (Ohio Ct. App.) ("It is elementary that questions not passed upon by the lower courts will not be ruled upon by this court.").

⁵ 190 W. Va. 223, 438 S.E.2d 15 (1993).

⁶ Appellee's Br. at 6.

In *Whitlow*, this Court addressed a constitutional question raised for the first time on appeal -- whether W. Va. Code § 29-12A-6 violated equal protection to the extent that it denied minors the benefit of the broader tolling provisions of W. Va. Code § 55-2-15 for persons under disability. The Court recognized that it had the discretion to review a constitutional question raised for the first time on appeal if it is a controlling issue in resolving the case, involves limited and essentially undisputed facts, and is an issue of substantial public interest which is likely to recur in the future.⁷

First, unlike *Whitlow*, the substantive issues under FOIA addressed in the Gazette's brief have never been properly raised on appeal. The Gazette never appealed and the only assignment of error raised by the City in its appeal is whether the Circuit Court erred in dismissing the City's declaratory judgment complaint on grounds that it did not allege facts which demonstrated that there was a controversy that would be finally resolved by a declaration of the rights and obligations of the parties.⁸ Not only did the Gazette fail to file any appeal from the Circuit Court's order, it did not cross-assign any error in a separate portion of its brief as required under Rule 10(f) of the Rules of

⁷ 190 W. Va. at 226-27, 438 S.E.2d at 18-19.

⁸ See, e.g., *Lilly v. Taylor*, 151 W. Va. 730, 155 S.E.2d 579 (1967) (rulings of trial court excluding evidence not being jurisdictional in character and not having been assigned as error in the petition for appeal, will not be reviewed by the supreme court of appeals). In the interest of brevity, the City reasserts its statement of the facts, the assignment of error, the points and authorities, the discussion of law, and the requested relief contained in the Appellant's Brief as if fully stated herein.

Appellate Procedure.⁹ The substantive issues addressed in the Gazette's brief do not involve any error in the record as required under Rule 10(f) of the West Virginia Rules of Appellate Procedure.¹⁰ Likewise, these issues are non-jurisdictional questions that were never "refined, developed, and adjudicated" by the Circuit Court and, thus, cannot be considered for the first time on appeal.¹¹ The matter before this Court is an appeal, not an original jurisdiction case, and there were no substantive rulings below; rather, the case was summarily dismissed because of a ruling that there was no controversy.

Second, the Gazette does not contend that the substantive issues under FOIA are constitutional questions that are controlling in resolving the case. Rather, the Gazette unilaterally claims that the underlying facts are essentially undisputed and that this is a

⁹ Rule 10(f) provides that "Appellee, if he is of the opinion that there is error in the record to his prejudice, may assign such error in a separate portion of his brief and set out authority and argument in support thereof. . . ." (emphasis supplied).

¹⁰ *Id.* ("Appellee, if he is of the opinion that there is error in the record to his prejudice, may assign such error in a separate portion of his brief and set out authority and argument in support thereof.").

¹¹ *Whitlow*, 190 W. Va. at 226, 438 S.E.2d at 18 ("Our general rule . . . is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal. . . . 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.") (citations omitted). See also *O'Neal v. Peake Operating Co.*, 185 W. Va. 28, 404 S.E.2d 420 (1991) (though appellees may cross assign error on appeal by pleading or by presentation in briefs, Supreme Court of Appeals is limited in its authority to resolve assignments of non-jurisdictional errors to a consideration of those matters passed on by court below and fairly arising on portions of record designated for appellate review.); *Parker v. Knowlton Const. Co., Inc.*, 158 W. Va. 314, 210 S.E.2d 918 (1975) (same).

matter of substantial public importance that may recur in the future. Of course, there were no facts, let alone undisputed facts, developed and adjudicated on the record because no evidence was presented below. As the Gazette itself observes, the City's declaratory judgment action was dismissed *sua sponte* before the Gazette, as well as the 28 police officers named in the Gazette's FOIA request who were also served, had an opportunity to appear in the case and respond to the complaint.¹²

The suggestion that this case presents "only straightforward legal issues"¹³ is untenable, especially when FOIA expressly exempts "information of a personal nature" from disclosure where "the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure."¹⁴ All of the 28 police officers whose payroll records are being sought by the Gazette, which has the power to publicize their private information, have rights under FOIA that cannot just be swept aside.¹⁵

¹² Appellee's Br. at 1.

¹³ Appellee's Br. at 2.

¹⁴ W. Va. Code § 29B-1-4(a)(2) ("The following categories of information are specifically exempt from disclosure under the provisions of this article . . . 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[.]").

¹⁵ *Manns, supra* (the primary purpose of the invasion of privacy exemption to the Freedom of Information Act (FOIA) is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information); *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985)(same).

Moreover, this case might present a matter of public interest, but it certainly is not “substantial” and involves an ongoing criminal investigation into alleged double dipping by members of the City’s Police Department.¹⁶ Whether this same set of facts will recur is remote at best. Here, the pay records are *themselves* evidence (or at least potential evidence) of a crime. There should be very few situations where payroll records are the evidence (or, again, at least potential evidence) of a crime. Because of the *sui generis* nature of the facts of this case, the risk of reoccurrence is minimal.¹⁷

Finally, the Gazette complains about the length of time it will take for the Circuit Court to make a decision on the merits of this case upon remand. It should be noted, however, that the Trial Court Rules set timeframes within which cases should be decided. Rule 16.12 specifically provides that declaratory judgment actions should be decided within one month of submission. W. Va. Code § 29B-1-5 provides that “[e]xcept as to causes the court considers of greater importance,” proceedings arising under FOIA “shall be assigned for hearing and trial at the earliest practicable date.” And one of the inherent dangers in both expediting this type of action and ignoring procedural and evidentiary requirements is that incorrect representations are made that may escape appropriate scrutiny.

¹⁶ See Cheryl Caswell, *Third Officer Sentenced for Double Dipping*, Charleston Daily Mail (Dec. 6, 2007).

¹⁷ Cf. *State v. Brant*, 162 W. Va. 762, 767, 252 S.E.2d 901, 904 (1979) (because facts of case so unique, opinion was limited to that particular set of facts).

For example, the Gazette contends that there is no dispute that the records requested by the Gazette are “public records” and do not fall within any exception under FOIA. To the contrary, these issues are very much disputed as a matter of law and fact. Personnel records, which would include payroll information, of public employers and their employees are not “public records” under the Freedom of Information Act.¹⁸ A “public record” under FOIA concerns only “information relating to the conduct of the public’s business, prepared, owned and retained by a public body.”¹⁹ Requests seeking information from a public body about its individual employees’ payroll or other personnel information do not relate to the conduct of the public’s business or the performance of any governmental function.²⁰

¹⁸ *Rollins ex rel Rollins v. Barlow*, 188 F. Supp. 2d 660 (S. D. W. Va. 2002)(personnel records of public employees are not “public records” under the West Virginia Freedom of Information Act (FOIA) because they are “confidential” just as personnel records of any employer should be confidential to protect the privacy concerns of employees). See also *Copley Press, Inc. v. Board of Educ. for Peoria School Dist.*, 359 Ill.App.3d 321, 834 N.E.2d 558 (Ill. App. 3 Dist. 2005)(“personnel file,” within meaning of Illinois Freedom of Information Act, includes documents such as a resume or application, an employment contract, policies signed by the public employee, payroll information, emergency contact information, training records, performance evaluations, and disciplinary records).

¹⁹ W. Va. Code § 29B-1-2(4) (emphasis supplied).

²⁰ See, e.g., *Smith v. Okanogan County*, 99 Wash. App. 1028, 994 P.2d 857 (2000) (requests seeking information from government agency about an individual employee’s position, salary, and length of service relate neither to the conduct of government, nor to the performance of any governmental function, and thus do not come within scope of Public Records Act.); *Sanchez v. Board of Regents*, 82 NM 672, 486 P. 2d 608 (1971) (documents that are prepared and used as a matter of administrative convenience, as opposed to documents which present ultimate actions required by law to be prepared or preserved, are not public records subject to public inspection.).

Even if such records were “public records,” they are “confidential” just as personnel records of any employer are confidential to protect the privacy concerns of employees.²¹ Accordingly, such records would be exempt under W. Va. Code § 29B-1-4(a)(2), which provides a specific exemption for “[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, unless the public interest by clear and convincing evidence requires disclosure in the particular instance[.]”

This particular exemption was intended to cover government records on an individual that can be identified as applying to that individual.²² Indeed, the only cases discussed in the Gazette’s brief that actually address whether individual public employee payroll records, as opposed to budgetary records of a public body’s expenditures for employee salaries, are public records subject to public inspection under a FOIA or similar act, the definition of “public record” was not addressed, much broader, or different than West Virginia’s, there was no discussion whether such records related to the public’s business, *in camera* review of the records was mandated before the records could be

²¹ *Rollins, supra.*

²² See *U.S. Dept. of State v. Washington Post Co.*, 456 U.S. 595, 601-602 (1982) (information about an individual should not lose the protection of Exemption 6 of the federal Freedom of Information Act regarding “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” merely because it is stored by an agency in records other than “personnel” or “medical” files; rather, “[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual.”)(citation omitted).

disclosed, and/or the names and other personal information of individual employees were required to be redacted to protect their privacy interests.

The Gazette heavily relies on *Moak v. Philadelphia Newspapers, Inc.*,²³ wherein the court held that police officers' payroll records were not exempt from disclosure under a "Right to Know Act" because the records themselves would not operate to prejudice or impair the police officers' reputations even though correlation of the information with a crime commission report could result in the identification of some officers as having been accused of corrupt conduct. But *Moak* was so repeatedly criticized, disapproved, and ignored thereafter for failing to conduct any analysis of the individual police officers' privacy rights that it was subsequently abrogated by *Pennsylvania State Univ. v. State Employees' Retirement Board*.²⁴ *Moak* is simply not good law.

To the contrary, there is a strong public interest in protecting the privacy rights of police officers in their own personnel records²⁵ as well as protecting information compiled as part of an investigation into suspected violations of law which might be used in a law enforcement action.²⁶ In this regard, if such records are even "public records," the resolution of this case will require the admission of evidence and an *in camera* review

²³ 336 A. 2d 920 (Pa. App. 1975).

²⁴ 594 Pa. 244, 935 A. 2d 530 (2007).

²⁵ *Rollins, supra*.

²⁶ *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985)(Primary purpose of law enforcement exemption to Freedom of Information Act [Code, 29B-1-4(4)] is to prevent premature disclosure of investigatory materials compiled as part of inquiry into specific suspected violations of law and which might be used in law enforcement action.).

of the records sought by the Gazette for the Circuit Court to determine whether certain exemptions apply, including, for example:

(1) whether public disclosure of any of the police officers' payroll records "would constitute an unreasonable invasion of privacy;"²⁷

(2) whether "the public interest by clear and convincing evidence requires disclosure" of any of the police officers' payroll records;²⁸

(3) whether the police officers' privacy interests outweigh any public disclosure interest;²⁹

(4) whether any of the police officers' payroll records are materials compiled as part of the City Police Department's ongoing investigation into suspected violations of law which might be used in a law enforcement action;³⁰

²⁷ W. Va. Code § 29B-1-4(a)(2).

²⁸ *Id.*

²⁹ *Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988) (under Freedom of Information Act statute exempting from disclosure information of a personal nature, a court must balance or weigh individual's right of privacy against public's right to know; where individual fails to present, by clear and convincing evidence, legitimate reason sufficient to overcome Freedom of Information Act exemption from disclosure for information of a personal nature and where adequate source of information is already available, records will not be released.). See also *U.S. Dept. of State v. Washington Post Co.*, 456 U.S. 595, 601-602 (1982) (information about an individual should not lose the protection of Exemption 6 of the federal Freedom of Information Act, which provides that the Act's disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," merely because it is stored by an agency in records other than "personnel" or "medical" files; rather, "[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual.") (quoting H.R.Rep.No.1497, 89th Cong., 2nd Sess., 11 (1966), U.S. Code Cong. & Admin. News 1966,, p. 2428).

³⁰ W. Va. Code § 29-B-1-4(a)(4); *Hechler, supra* (primary purpose of law enforcement exemption to Freedom of Information Act is to prevent premature disclosure of investigatory materials compiled as part of inquiry into specific suspected violations of law and which might be used in law enforcement action.).

(5) whether the public's interest in seeing any of the police officers' payroll records outweighs the government's interest in keeping the records confidential;³¹ and

(6) whether any other statute specifically exempts such information from public disclosure.³²

Also, if, as the Gazette now suggests, "prejudice [to] the Public and the Gazette" will occur without expedited resolution,³³ then why did the Gazette never file suit under FOIA after its FOIA request was denied on July 18, 2007? Why did the Gazette never file a motion to alter or amend the Circuit Court's dismissal order? Why did the Gazette never file any motion to expedite the appeal? Why did the Gazette not raise the issue of alleged prejudicial delay until the City's appeal was accepted and the Gazette was required to finally respond and file a brief on May 5, 2008? It appears that the Gazette has delayed taking any action for ten months in order to create a false sense of undue delay or urgency, even requesting that this Court treat its brief as a petition for "Writ of

³¹ *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W. Va. 648, 453 S.E.2d 631 (1994) (fact that document falls within law enforcement records exception to Freedom of Information Act (FOIA) disclosure requirement does not automatically exclude it from disclosure under FOIA; once document is determined to be law enforcement record, it may still be disclosed if society's interest in seeing document outweighs government's interest in keeping the document confidential).

³² W. Va. Code § 29B-1-4(a)(5).

³³ Appellee Br. at 5.

Prohibition or Mandamus” without citing any legal basis or complying with any of the requirements for requesting such relief.³⁴

³⁴ Appellee Br. at 7. The Gazette cannot invoke the Court’s original jurisdiction in mandamus to compel the Circuit Court to order the release of the subject records because:

- (1) the Gazette has failed to comply with the requirements for requesting such relief outlined in Syllabus Point 6 of *State ex. rel. Allstate Insurance Co. v. Gaughn*, 203 W. Va. 358, 508 S.E.2d 75 (1998), R. App. P. 14, and W. Va. Code § 53-1-1 *et seq.*;
- (2) this case does not involve nondiscretionary statutory duties of the Circuit Court to release the records sought by the Gazette;
- (3) the Gazette does not have a clear legal right to the relief sought;
- (4) the Freedom of Information Act provides the Gazette an adequate remedy and, unlike the federal Freedom of Information Act, contains no express procedure for expedited consideration of FOIA requests;
- (5) it is well-established that prohibition and mandamus cannot be used to replace the functions of an appeal to review a decision within the discretion of a trial court; and
- (6) the Circuit Court has committed no undue delay that has prejudiced the Gazette’s ability to defend its position upon remand such that any proceeding in mandamus to compel a decision would be justified.

See, e.g., Duncan v. Tucker County Bd. of Ed., 149 W. Va. 285, 140 S.E.2d 613 (1965)(essential prerequisites relating to issuance of rule to show cause by judge of circuit court or of Supreme Court of Appeals must be followed for jurisdiction to hear matters arising on mandamus petition); Syl. Pt. 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W. Va. 636, 171 S.E.2d 545 (1969)(“[m]andamus lies to require the discharge by a public officer of a nondiscretionary duty.”); Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969) (“A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.”); *State ex rel. City of Huntington v. Lombardo*, 149 W. Va. 671, 143 S.E.2d 535 (1965)(writ of prohibition is purely jurisdictional; it does not lie to correct mere errors; and it cannot be allowed to usurp functions of appeal, writ of error or certiorari); *Barnes v. Warth*, 124 W. Va. 773, 22 S.E.2d 547 (1942) (the writ of “mandamus” must not be made a substitute for appellate process nor can it impair the discretion of judge of trial court.); *Gaymont Fuel Co. v.*

III. CONCLUSION

It has been said that “[t]he device of the declaratory judgment is an honored one.”³⁵ Being remedial legislation, the Declaratory Judgment Act should be liberally construed and administered.³⁶ This liberality extends to hearing declaratory judgment actions.³⁷ And a “Court cannot decline to entertain such an action as a matter of whim or personal disinclination.”³⁸ The Freedom of Information Act itself recognizes declaratory judgment as a remedy.³⁹

In this case, there was a real controversy between the parties arising from the City’s exposure to whipsaw liability – the individual officers with legitimate privacy interests on the one hand and the press with legitimate news interests on the other. Moreover, the City had its own interests to protect – the integrity of an ongoing criminal investigation. Courts are designed to resolve such competing interests, respecting and

Price, 138 W. Va. 930, 79 S.E.2d 96 (1953) (a court order dismissing action at law is in nature of final order reviewable in Supreme Court of Appeals on writ of error only); Syl. Pt. 2, in part, *Kanawha Valley Transp. Co. v. Public Serv. Comm’n*, 159 W. Va. 88, 219 S.E.2d 332 (1975) (“If a decision is unduly delayed, a proceeding in mandamus may be instituted to compel a decision....”).

³⁵ *Poe v. Ullman*, 367 U.S. 497, 510 (1961) (Douglas, J., dissenting).

³⁶ W. Va. Code § 55-13-12.

³⁷ *American Cas. Co. of Reading, Pa. v. Howard*, 173 F.2d 924, 928 (4th Cir. 1949); *American Nat. Property and Cas. Co. v. Weese*, 863 F. Supp. 297, 299 (S.D. W. Va. 1994).

³⁸ *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962).

³⁹ W. Va. Code § 29B-1-5(1) (“Any person denied the right to inspect the public record of a public body may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.”).

weighing each against the other, and fashioning appropriate remedies, after affording all interested parties an opportunity to appear and present evidence, under the applicable law.

WHEREFORE, the Appellant, the City of Charleston, respectfully requests that this Court reverse the judgment of the Circuit Court of Kanawha County, and remand this matter with directions to allow the matters raised herein to be promptly litigated, while affording all interested parties their substantive and procedural rights in accordance with the applicable constitutional, statutory, and decisional law.

City of Charleston

By Counsel



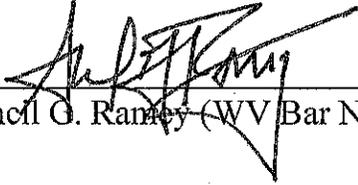
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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, do hereby certify that on June 6, 2008, I served the foregoing Reply Brief of the City of Charleston, Appellant upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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