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Inadvertent Disclosure of FOIA-Exempt Material Cannot Justify Prior Restraint

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A West Virginia trial court dissolved a temporary order prohibiting a TV station from publishing a public record accidentally disclosed by a state agency in a long-running state Freedom of Information Act lawsuit. [Gray Media Group, Inc. d/b/a WSAZ v. W.Va. Dep't of Health & Human Resources](#), No. 22-P-197 (Kanawha Cnty. Cir. Aug. 28, 2023).

The court—which months earlier had ruled that the record fell within the FOIA's privacy exemption—held that the agency's attempt to claw back the document and prohibit its dissemination would constitute a prior restraint in violation of the First Amendment. Moreover, it chastised the state agency for its carelessness, ruling that its failure to take reasonable steps to avoid inadvertent disclosure constituted a waiver of the FOIA exemption.

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The Public Records Request

On April 8, 2022, Gray Media Group station WSAZ submitted a request to the West Virginia Department of Health and Human Resources under West Virginia FOIA for public records relating to the termination of the Department's Deputy Secretary. The station was especially interested in the Department's letter terminating the official. The Department denied the FOIA request in full, and it insisted that the letter constituted "information of a personal nature" exempt from disclosure.

The Litigation

WSAZ sued for access to the letter and the other public records it requested, setting off a long and winding lawsuit that involved a motion to dismiss on procedural grounds (withdrawn by the Department the morning of the hearing), four versions of the Department's mandatory *Vaughn* index, and two rounds of recommended rulings by a court-appointed Special Commissioner. Throughout the case, the key dispute was over the termination letter.

The Circuit Court for Kanawha County ruled on March 31, 2023, that the letter was exempt as "information of a personal nature," notwithstanding the Department's admission that it reflected the Department Secretary's policy-related disputes with his highest-ranking subordinate. In the same order, the court ordered the Department to disclose various other public records.

On May 31, 2023, the court issued a second order relating to another batch of records responsive to WSAZ’s FOIA request. It required several of those records to be disclosed, but it ruled that a draft of the termination letter was exempt under the FOIA’s privacy exemption. WSAZ filed an appeal of the court’s determination that the termination letter is exempt.

A Costly Mistake

While the appeal was pending, on July 10, 2023, counsel for the Department provided WSAZ’s counsel a 54-page production of public records in compliance with the court’s final order. Before submitting the material to its client, counsel of WSAZ noticed the production included a fully unredacted copy of the draft termination letter.

West Virginia Rule of Professional Conduct Rule 4.4(b) requires a lawyer who knows or reasonably suspects it has received a document that was inadvertently disclosed to promptly notify the disclosing party. The rule imposes no other obligations, and it defers to other applicable law, if any, for what happens after the notification.

WSAZ’s counsel notified the Department that evening. The Department’s lawyer demanded that all copies of the mistakenly produced draft letter be destroyed. Emphasizing the First Amendment right to publish government information of public concern, even if mistakenly disclosed to the press, counsel for WSAZ declined the demand but allowed the Department time to seek court relief. Three days later, the Department filed a motion to restrain any dissemination of the draft letter. The court issued a temporary restraining order within hours and set the matter for a hearing.

Following that hearing, and on August 28, 2023, the court denied the Department’s motion for permanent relief, dissolved its temporary restraining order, and denied the Department’s request for a stay pending appeal.

First, and relying on *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)—a case that arose out of this same West Virginia court—and its West Virginia progeny, the court held that once the Department’s counsel sent the unredacted letter to WSAZ’s counsel, WSAZ had a First Amendment right to publish that information absent “a state interest of the highest order.” Notwithstanding the court’s prior FOIA ruling, it held that disclosure of the draft letter simply could not pass the test. Notably, the court also rejected the Department’s attempt to distinguish the case at hand from other First Amendment cases on the grounds that its disclosure was to WSAZ’s counsel, not WSAZ. Brushing aside the Department’s argument, the court noted that WSAZ is “merely a representative of its client” and that the rules of professional conduct (including West Virginia Rules 1.2 and 1.4) obligated WSAZ’s counsel to keep the client apprised of the litigation and act in the client’s interest. Thus, the First Amendment applied in full force and the ethics rules reinforced the court’s conclusion.

The court did not stop there. Perturbed by the Department’s counsel’s “clear[] fail[ure] to take any reasonable precautions to prevent the disclosure” of the termination letter, the court held that even if the First Amendment didn’t apply, the Department’s mishandling of the most important document in the case constitutes a waiver of its right to assert any protections over the letter.

Just hours after the court’s ruling, [WSAZ was finally able to publish its story](#) about why the Deputy Secretary was fired.

WSAZ still does not have the final version of the termination letter. The appeal of the court’s FOIA ruling remains pending. WSAZ has included the inadvertently disclosed draft letter—which WSAZ contends substantially undermines any notion that the final letter is a matter of only private concern—in the record on appeal.

Chuck Tobin and Matthew S.L. Cate of Ballard Spahr LLP and Erica M. Baumgras of Flaherty Sensabaugh Bonasso PLLC represented Gray Media Group, Inc. Defendant West Virginia Department of Health and Human Resources is represented by Steven R. Compton and Brittany N. Ryers-Hindbaugh of the state Attorney General’s Office.

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