

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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2023 AUG 28 PM 12:28

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

GRAY MEDIA GROUP, Inc., d/b/a WSAZ,

Plaintiff,

v.

Civil Action No. 22-P-197  
(Judge Ballard)

WEST VIRGINIA DEPARTMENT OF HEALTH  
AND HUMAN RESOURCES,

Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO PROTECT  
AND DISSOLVING TEMPORARY PROTECTIVE ORDER**

On August 23, 2023, came Plaintiff Gray Media Group, Inc., d/b/a WSAZ ("WSAZ"), by and through counsel, Charles D. Tobin, Esq. and Erica M. Baumgras, Esq., and Defendant West Virginia Department of Health and Human Resources ("DHHR"), by and through its counsel Steven R. Compton, Esq., for a hearing on the Defendant's *Motion to Protect* requesting the Court to seal or in the alternative, order Plaintiff to destroy the unredacted copy of an unsigned version of the termination letter of Jeremiah Samples (document Bates stamped C0051-0052) (the "draft Samples Termination Letter") that Defendant, through counsel, inadvertently produced to WSAZ's counsel.

The Court, having heard arguments of counsel, carefully reviewed the motion and opposition, pertinent legal authorities, and the record herein, hereby **DENIES** the *Motion to Protect*, **DISSOLVES** the Temporary Protective Order, and **DENIES** the stay requested orally by the Defendant at the hearing in this matter.

## I. FINDINGS OF FACT

1. On May 31, 2023, this Court entered its Final Order adjudicating the parties' dispute concerning WSAZ's April 8, 2022, request, and WSAZ's May 31, 2022 *Complaint for Declaratory and Injunctive Relief Pursuant to The West Virginia Freedom of Information Act* ("FOIA"), W. Va. Code ¶ 29B-1-1, *et seq.* WSAZ's FOIA request and lawsuit sought government records related to the resignation or termination of Jeremiah Samples, DHHR Deputy Secretary.

2. In its May 31, 2023 Final Order, the Court ordered that the version of the draft Samples Termination Letter identified at Bates stamp C0051-0052 was subject to the FOIA privacy exemption at W. Va. Code § 29B-4(a)(2), and that DHHR was entitled to withhold it from disclosure. The Court further ordered that DHHR disclose certain other records within the ambit of WSAZ's FOIA request and lawsuit.

3. On July 6, 2023, counsel for WSAZ notified counsel for DHHR that WSAZ had not yet received the materials that DHHR was ordered to disclose pursuant to the Court's Final Order and asked that DHHR provide those records promptly. Pl. Opposition, Ex. 1, ¶ 3.

4. On July 10, 2023, DHHR, through counsel, emailed to WSAZ, through counsel, a single PDF file containing the records that the Court ordered disclosed. That PDF file contained the draft Samples Termination Letter, unredacted. Pl. Opposition, Ex. 2.

5. Later that evening, on July 10, 2023, pursuant to Rule 4.4(b), West Virginia Rules of Professional Conduct, counsel for WSAZ promptly provided counsel for DHHR, by email, with notice that the Department had provided an unredacted copy of the draft Samples Termination Letter. *Id.*

6. On July 11, 2023, counsel for the DHHR responded requesting that WSAZ's counsel "delete that portion of the disclosure and do not disclose or disseminate any further pending the resolution of this matter." *Id.*

7. On July 11, 2023, counsel for WSAZ further responded to DHHR counsel noting that in the event of an inadvertent document disclosure: Rule 4.4(b) only requires counsel to provide notice of the disclosure; Comment 2 to the Rule specifically provides that whether the lawyer is then required to return or delete the document "is a matter of law beyond the scope of these Rules"; and Comment 3 to the Rule further provides that the decision of whether to return or delete the document "is a matter of professional judgment ordinarily reserved to the lawyer." WSAZ's counsel additionally cited to decisions of the United States Supreme Court and informed DHHR counsel that "[i]n our professional judgment, once the government releases information, inadvertently or otherwise, the First Amendment protects its publication." Finally, WSAZ's counsel informed DHHR counsel that, notwithstanding the Rule, they would temporarily refrain from providing the unredacted draft Samples Termination Letter to their client in order to provide DHHR with the opportunity to bring the matter before the Court.

8. On July 14, 2023, DHHR filed its *Motion to Protect* requesting that the Court order WSAZ's counsel "to destroy and/or delete any copies" of the draft Samples Termination Letter and "not to discuss or disseminate the contents of the draft letter with anyone, including their client."

9. On July 14, 2023, the Court issued its Order Granting Temporary Protective Order ordering that the unredacted draft Samples Termination Letter "shall not be disclosed to the parties or the public pending the resolution of this matter" and that counsel was to contact the Court's judicial assistant to set a hearing on the *Motion to Protect*.

10. At the August 23, 2023 hearing in this matter, the Court asked counsel for DHHR what, if any, reasonable precautions did counsel for DHHR take to prevent the inadvertent disclosure of the draft Samples Termination Letter before or during the transmission of the records that the Court ordered be disclosed to WSAZ pursuant to its May 31, 2023 Final Order.

11. Counsel for DHHR represented to the Court that, while the transmittal of the unredacted draft Samples Termination Letter was inadvertent, he personally had reviewed the group of documents that were contained in the PDF prior to its email transmittal to WSAZ's counsel, and that he had also overlooked the inclusion of the draft Samples Termination Letter. Counsel for DHHR did not have other co-counsel review the PDF prior to sending it to counsel for WSAZ to ensure that no protected documents were transmitted to counsel for WSAZ. Counsel for DHHR also stated at the hearing that it was possible that the error he committed in including an unredacted copy of the draft Samples Termination Letter could have been related to an erroneous belief that the final version of the PDF that he saved did not include any of the protected documents. Counsel for DHHR provided the Court with no further elaboration regarding any measures taken to prevent the inadvertent disclosure.

## II. CONCLUSIONS OF LAW

### A. *First Amendment Protections*

12. WSAZ argues that, because the immediate issue before the Court concerns the government's dissemination of information to the news media, the body of law concerning the First Amendment rights of the press to publish information that it lawfully obtains, and not the West Virginia FOIA, governs the Court's consideration. The doctrine WSAZ invokes originated in the unanimous West Virginia Supreme Court of Appeals decision *State ex rel. Daily Mail Publishing Co. v. Smith*, 161 W.Va. 684 (1978), which the United States Supreme Court

affirmed, also in a unanimous decision, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). In these decisions, both Courts held that a statutory prohibition against the publication of the name of an alleged juvenile offender was unconstitutional. The newspapers in that case had obtained the juvenile's name from witnesses, the police, and a prosecutor. The U.S. Supreme Court, mirroring language of the West Virginia Supreme Court of Appeals, held that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials cannot constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail*, 443 U.S. at 103.

13. The West Virginia Supreme Court of Appeals has invoked the law of the *Daily Mail* cases at least twice in favor of the news media's First Amendment rights since then. In *State ex rel. Register-Herald v. Canterbury*, 182 W.Va. 18 (1994), citing *Daily Mail*, the Court struck as an impermissible prior restraint a Circuit Court order prohibiting newspapers from publishing information provided to them by a prosecutor concerning the mental health history of minor convicted of a crime. In *Yurish v. Sinclair Broadcast Group, Inc.*, 246 W.Va. 91 (2021), the Court affirmed, in a liability case, that a law firm and the news media were entitled to publish a secret recording, allegedly made by a student's mother in violation of state law, that purported to show plaintiffs, who were teachers, abusing students.

14. The U.S. Supreme Court has repeatedly held, consistent with the *Daily Mail* case, that the news media has a First Amendment right, absent the government's demonstration of a "state interest of the highest order," to publish information about a matter of public concern that it has lawfully obtained, regardless of whether the news media's source violated the law in providing that information. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (unknown source provided secretly recorded telephone conversation, in violation of state law, to radio journalist);

*The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (sheriff's office inadvertently provided document to newspaper containing rape victim's name, in violation of state law); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (court clerk inadvertently provided television journalist with information about deceased rape victim, in violation of state law).

15. Based on binding precedent, this Court **CONCLUDES** that once DHHR counsel, who personally reviewed the disclosure in advance, sent the unredacted draft Samples Termination Letter to WSAZ's counsel, WSAZ had a First Amendment right to publish that information absent a "state interest of the highest order."

16. The relief DHHR seeks in the *Motion to Protect*, an order from this Court that WSAZ and its counsel refrain from publishing and to delete the unredacted draft Samples Termination Letter, would constitute a prior restraint. The party seeking a prior restraint against a publication faces "a heavy presumption against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Prior restraints inflict "particularly great" damage on the rights and principles protected by the First Amendment. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563 (1976). The First Amendment only permits a court to issue a prior restraint if the party seeking the measure makes a showing that the order is essential to serve a "clear and present danger" of harm to a "state interest of the highest order." *Id.*

17. The United States Supreme Court has rejected the following justifications offered by parties seeking prior restraints: a child's interest in anonymity when prosecuted for crimes (*Smith v. Daily Mail, supra; Oklahoma Pub. Co. v. District Court*, 430 U.S. 308 (1977)); the Sixth Amendment right of a criminal defendant after his confession was released to the media in the run-up to his trial (*Nebraska Press Assn. v. Stuart, supra*); the reputation of a judge who was the subject of a sealed disciplinary proceeding (*Landmark Newspapers v. Virginia*, 435 U.S. 829

(1978)); during the Vietnam War, the purported national security interest in a classified document containing the count of casualties (*New York Times v. United States*, 403 U.S. 713 (1971)); the reputation of community members smeared by racist lies (*Near v. Minnesota*, 283 U.S. 697 (1931)). In fact, the Supreme Court has never approved of any prior restraint brought before it.

18. DHHR, in this matter, has asserted the purported privacy interest of Mr. Samples in the draft Samples Termination Letter as the only substantive ground for its *Motion to Protect*. In light of the binding precedent, the Court **FINDS** that DHHR's assertion does not present a "clear and present danger" to a "state interest of the highest order" that would outweigh the heavy presumption under the First Amendment against the constitutionality of any prior restraint order.

19. DHHR makes two arguments why the facts of this case should factually distinguish all of this binding precedent:

- a. DHHR relies on the fact that its counsel inadvertently released the draft Samples Termination Letter. But the precedent makes no distinction between intentional or inadvertent disclosures. In fact, in *Cox Broadcasting v. Cohn*, *supra*, and in *The Florida Star v. B.J.F.*, *supra*, the clerk of the court and a sheriff, respectively, inadvertently supplied the information to journalists in violation of these officials' obligations under state law. In each case, the Supreme Court held the First Amendment protected the journalists' publications.
- b. DHHR relies on the fact that the draft Samples Termination Letter was disclosed to counsel for WSAZ and not to journalists directly. Counsel for WSAZ, however, is merely a representative of its client in this Court. Under Rule of Professional

Conduct 1.2, counsel is obligated to “abide by the client’s objectives of representation,” and under Rule 1.4, they are required to “inform the client of any decision or circumstance” requiring the client’s informed consent, “reasonably consult with the client,” and keep the client reasonably informed”. While DHHR’s counsel also argued that Rule 4.4(b) imposed additional obligations on WSAZ’s counsel in this matter, their only obligation under that rule, which they promptly complied with, was to provide notice to DHHR counsel of the disclosure.

20. The Court therefore **FINDS** that nothing in the inadvertence of the disclosure and nothing in the Rules of Professional Conduct alters the strong protection of the First Amendment to WSAZ once its counsel received the draft Samples Termination Letter, and nothing in the Rules alters DHHR’s failure to meet its “heavy burden” to overcome the presumption that the prior restraint it seeks would violate the First Amendment.

***B. Reasonableness of the Precautions Taken to Prevent the Inadvertent Disclosure***

21. Further, with regard to the inadvertence of the disclosure, even if the Court were to have found that First Amendment protections do not apply to this case, the underlying facts of the circumstances surrounding the inadvertent disclosure indicate to the Court that DHHR has waived any protections to the draft Samples Termination Letter.

22. Although the West Virginia Supreme Court of Appeals has not address this specific issue before this Court, i.e., a waiver of FOIA protection based on an inadvertent disclosure of records to the opposing party or their counsel, the West Virginia body of law governing waivers of attorney-client privilege, and persuasive authority from other jurisdictions provide helpful guidance to the Court.

23. Our Supreme Court of Appeals has held,



[W]hen attorney-client privileged documents are inadvertently disclosed during discovery, such disclosure does not in and of itself constitute a waiver of the privilege. In order to determine whether to apply the waiver doctrine to such disclosure trial courts must consider the following factors:

(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, (5) whether the overriding interest of justice would be served by relieving the party of its error and (6) any other factors found to be relevant.

*State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 363, 508 S.E.2d 75, 80 (1998)).

24. Similarly, the Supreme Court of Virginia has adopted the following factors to determine if an inadvertent disclosure constitutes a waiver of privilege:

(1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances.

*City of Chesapeake v. Thrasher*, 108 Va. Cir. 342 (2021) (citing *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 280 Va. 113, 127, 694 S.E.2d 545, 552 (2010)).

25. In *City of Chesapeake v. Thrasher*, the *City of Chesapeake*, Virginia (“the City”) objected to the introduction of email exhibits admitted at a deposition arguing that they were protected by attorney-client privilege. 108 Va. Cir. 342 (2021). On appeal, the City objected to the introduction of the exhibits, arguing that the City produced them inadvertently as part of a FOIA response. *Id.* Counsel for the City detailed the procedure by which the City responded to the FOIA requests. *Id.* The Court found that the precautions taken by the reviewing attorney were not reasonable, and that the City did not make timely efforts to correct its error. *Id.* The Court stated that was incumbent upon the City to recognize that the records in question were created for the purposes of this litigation, and had been inadvertently produced. *Id.* The Court

further found that the City presented no evidence that it had reviewed its FOIA response to determine whether protected documents were included in the email thread in which they were disclosed, that the City failed to identify the inadvertent production of the records, and that the volume of documents did not prevent counsel for the City from reviewing each of the 77 documents included in its FOIA request response, six of which were withheld. *Id.* Therefore, having weighed the factors, the Court ruled that the City waived any privilege attached to the exhibits.

26. Here, when asked by the Court what reasonable precautions counsel for DHHR took in order to prevent any inadvertent disclosures of protected documents before or while sending the disclosable records to counsel for WSAZ, counsel for DHHR represented that only he had personally reviewed the records, which were saved in one single PDF, prior to emailing the PDF to counsel for WSAZ. At the hearing, counsel for DHHR stated that that he had simply overlooked the inclusion of the draft Samples Termination Letter, and could not provide the Court with any further detail or mitigating facts surrounding the circumstances of the inadvertent disclosure. Counsel for DHHR did not have other co-counsel review the PDF prior to sending it to counsel for WSAZ to ensure that no protected documents were transmitted to counsel for WSAZ. Counsel for DHHR also stated at the hearing that it was possible that the error he committed in including an unredacted copy of the draft Samples Termination Letter could have been related to an erroneous belief that the final version of the PDF that he saved did not include any of the protected documents. Counsel for DHHR provided the Court with no further elaboration on steps he had taken to prevent the inadvertent disclosure.

27. Therefore, having weighed the factors above, the Court finds that DHHR waived any protections from disclosure attached to the draft Samples Termination Letter. Counsel for

DHHR clearly failed to take any reasonable precautions to prevent the disclosure by failing to have co-counsel or any other DHHR representative review the documents to ensure that protected documents were not included in the PDF emailed to counsel for WSAZ.

28. Further, the Court finds that the extent of the disclosure is significant. While the inadvertent disclosure was only one document, it is clearly the most significant document that the parties have been litigating in this matter. Out of the hundreds of records that have been addressed in the DHHR Vaughn Indices, the draft Samples Termination Letter was essentially the only document the parties have primarily focused this litigation on for more than a year.

29. Counsel for DHHR admitted that the error was likely due to an issue with saving the final version of the PDF, and if this was the case, counsel for DHHR clearly did not open and review the PDF that he had attached in his email to counsel for WSAZ, prior to sending the email. While the error was caught the same day, it was only because counsel for WSAZ notified counsel for DHHR after opening the PDF and reviewing the documents that evening; thus, it is impossible to say how prompt DHHR would have been in rectifying the error, or even noticing that counsel for DHHR had erroneously included the draft termination letter in the PDF emailed to counsel for WSAZ.

30. Although the inadvertent disclosure was limited to one document, the draft Samples Termination Letter was the most contentious document in this litigation, specifically of which DHHR has been making significant efforts to keep protected; thus, counsel for DHHR should have made it a primary focus when gathering the documents the Court had ordered to be disclosed and should have taken reasonable precautions specifically to prevent its disclosure. However, it failed to do so.

31. Accordingly, the Court **FINDS** that the overriding interest of justice would not be served by restraining counsel for WSAZ from providing the document to their client.

32. Accordingly, it is hereby **ORDERED** that the Court's Order Granting Temporary Protective Order, entered on July 14, 2023, is **DISSOLVED**. It is further hereby ordered that the *Motion to Protect* is **DENIED**.

33. Finally, at the hearing on the *Motion to Protect*, counsel for DHHR requested that, should the Court deny it relief, the Court stay its Temporary Protective Order pending appeal by DHHR. In general, a stay request requires that the applicant demonstrate: a strong showing that he is likely to succeed on the merits; that he will suffer irreparable injury absent a stay; that the issuance of the stay will substantially injure other parties interested in the proceeding; and that the public interest lies in favor of a stay. *Nken v. Holder*, 556 U.S. 418, 426 (2009); see also *E.H. v. Matin*, 2014 W.V. Cir. LEXIS 480, \*40 (Kanawha Cnty. Cir. Ct. Aug. 20, 2014).

34. The Court **FINDS** that DHHR has not demonstrated a likelihood that it will succeed in overcoming the heavy First Amendment presumption against its request for a prior restraint or that DHHR will be irreparably injured absent a stay. Further, there is no evidence before the Court that any third party will be substantially injured absent a prior restraint order. Moreover, as the Court already has found, the public interest favors the First Amendment right of the press under these facts. Indeed, as noted herein, every day that the news media operations under a restraint against the publication of information it lawfully obtains is an additional irreparable First Amendment injury. Finally, the overriding interest of justice would not be served by restraining counsel for WSAZ from providing the document to their client due to counsel for DHHR's failure to take any reasonable precautions from preventing the most significant document in this litigation from inadvertently being released to counsel for DHHR.


35. Accordingly, it is hereby further ORDERED that DHHR's oral request for a stay is **DENIED**.

**III. CONCLUSION**

WHEREFORE, upon consideration of the pending motions, responses, and oral argument, and the applicable legal authority and record herein, the Court hereby **ORDERS** as follows:

1. The Court **DISSOLVES** the Order Granting Temporary Protective Order entered on July 14, 2023.
2. The Court **FINDS** that the First Amendment protects WSAZ's receipt and publication, if it so chooses, of the unredacted draft Samples Termination Letter.
3. The Court **DENIES** any further relief requested by DHHR in the Motion to Protect.
4. The Court **DENIES** DHHR's oral request for a stay of this Order.

ENTERED this 28<sup>th</sup> day of August, 2023.



Hon. Kenneth Ballard, Judge

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT. 28  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 28  
DAY OF August, 2023  
Cathy S. Gatson CLERK  
CIRCUIT COUNTY OF KANAWHA COUNTY, WEST VIRGINIA 4