



# **FREEDOM OF INFORMATION AND THE PROTECTION OF INDIVIDUAL PRIVACY**

**THE STATUTORY LIMITS OF FOIA, A BREAKDOWN OF *CHILD PROTECTION GROUP V. CLINE* AND THE  
CASES THAT FOLLOWED, AN ANALYSIS OF THE *CLINE* FACTORS, AND A PRACTICAL APPLICATION OF  
THE *CLINE* BALANCING TEST**

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## I. EXECUTIVE SUMMARY

This memorandum was prepared in response to an inquiry posed to the West Virginia State Privacy Office by the Chapter 30 Professional Licensing Boards—what personal information should be disclosed upon receipt of a Freedom of Information Act (FOIA) request? Under FOIA, all writings owned or received by a public body are open to the public for inspection and copying. There are two exemptions to FOIA disclosure that are relevant to the answer of this question: information exempted by statute, and information of a personal nature if the disclosure would result in an unreasonable invasion of privacy. In interpreting the personal information FOIA exemption, the West Virginia Supreme Court developed a balancing test to determine when disclosure would result in a substantial invasion of privacy. The Supreme Court’s balancing test consists of 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 of 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.

After the West Virginia Supreme Court decided a string of cases with apparently minimal analysis of the balancing test, it became clear that custodians of public records need guidance in applying the balancing test. Based on an analysis of the six cases that apply the Supreme Court’s balancing test, this memorandum breaks down the Supreme Court’s analyses, assigns weight values to each of the balancing test factors, and provides a scale (the *Cline* Scale) to which the weight values should be applied, ultimately answering whether or not information should be disclosed under FOIA.

## II. INTRODUCTION

### A. Background

The West Virginia Freedom of Information Act (FOIA) gives any person the right to inspect or copy any writing that is prepared or received by a public body, so long as the content or context of said writing relates to the official duties, responsibilities or obligations of a public body.<sup>1</sup> FOIA makes several exceptions to this broad right, including information which is exempted by statute and information of a personal nature if the disclosure of said information would result in “an unreasonable

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<sup>1</sup> W.Va. Code § 29B-1-1, et seq.; See also *AP v. Canterbury*, 688 S.E.2d 317.

invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in [the] particular interest.”<sup>2</sup> Despite these exceptions, FOIA should be liberally construed in favor of disclosure.<sup>3</sup>

The West Virginia Boards and Commissions, which are responsible for the licensing and regulation of professional occupations in the State, receive various amounts of personal information from applicants as part of their official duties.<sup>4</sup> Absent a statutory restriction against disclosing a particular element of personal information, the State Boards and Commissions must decide whether or not to disclose personal information upon receiving a FOIA request, and are left with little help from the statutory language and West Virginia case law.<sup>5</sup> In 1986, the West Virginia Supreme Court attempted to provide guidance regarding the analysis of the personal information exemption to FOIA with the five-factor balancing test established in *Child Protection Group v. Cline*.<sup>6</sup> Despite the Supreme Court’s efforts, there is still uncertainty concerning the application of the balancing test from *Cline*. The purpose of this memorandum is to provide a tool that can be used to answer the question that the Supreme Court attempted to resolve in *Cline*—when does disclosure constitute an unreasonable invasion of privacy?

## **B. Roadmap**

This memorandum will begin with a section that analyzes those elements of personal information in which there are statutes concerning the requirement of or restriction against their disclosure. Following the section on statutorily restricted and required disclosures, this memorandum will provide case summaries of *Cline* and of the cases that followed. Each factor of the *Cline* balancing test will then be reviewed and its applications will be analyzed to produce a simple test for each factor. After the factors are simplified, the appropriate weight value that should be assigned to each factor will be discussed. Finally, this memorandum will deliver a scale to which the weight calculated from application of the simplified factors can be applied, which will provide an answer as to whether or not to disclose.

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<sup>2</sup> W.Va. Code § 29B-1-4; NOTE: It is important to note that there are eighteen categories of FOIA exemptions, not counting the two named herein. For example, W.Va. Code § 29B-1-4(a)(8) exempts “internal memoranda or letters received or prepared by a public body”, which would exempt certain information received by a State Board or Commission pertaining to an application, such as letters of recommendation. See also, *Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 2015 W. Va. LEXIS 679 (W. Va. 2015).

<sup>3</sup> W.Va. Code § 29B-1-1.

<sup>4</sup> W.Va. Code § 30-1-6.

<sup>5</sup> *Child Protection Group v. Cline*, 350 S.E.2d 541 (W.Va. 1986).

<sup>6</sup> *Id.*

### III. DISCLOSURE REQUIREMENTS

#### A. Exempt from Disclosure

Information that is specifically exempted from FOIA disclosure by statute should not be disclosed upon FOIA request.<sup>7</sup> For example, Social Security numbers as well as credit and debit card numbers may not be disclosed under FOIA by any State Executive Branch agency.<sup>8</sup> Also exempt from disclosure is personal information regarding state officers, employees, retirees and their legal dependents, including the home address, Social Security number, credit and debit card numbers, driver's license identification number, maiden name, spouse's name or marital status of the state officer, employee, retiree or their dependent.<sup>9</sup> Birth records, death records, marriage and divorce records and records and reports of fetal deaths are also exempt from disclosure under FOIA.<sup>10</sup> Military discharge records are statutorily exempt from disclosure.<sup>11</sup> Adoption records may not be disclosed under FOIA.<sup>12</sup> The proceedings and records of all medical, psychological, nursing, dental, optometric, pharmaceutical, chiropractic and podiatric peer review organizations may not be disclosed.<sup>13</sup> Information exempt from disclosure by legislative rule, as discussed later in this memorandum, should also not be disclosed under the statutory exemption of FOIA.<sup>14</sup>

In addition to the statutory exceptions above, the West Virginia Consumer Credit and Protection Act ("the Act") also imposes a duty on government agencies to protect certain personal information.<sup>15</sup> The Act requires that when computerized Social Security numbers, driver's license numbers, state identification card numbers, or financial account numbers in combination with the appropriate access information are accessed without proper authorization and the Act's harm threshold is met, notice must be given to the affected individuals.<sup>16</sup> Although the Act seeks to protect computerized information, the purpose of this required notice is to protect against "identity theft or other theft to any resident of this State."<sup>17</sup> The purpose of the privacy exemption of FOIA is also to protect West Virginians from the injuries that could result from unnecessary disclosure.<sup>18</sup> Because the policies behind the required notice of the Act and the privacy exemption of FOIA both seek to

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<sup>7</sup> W.Va. Code § 29B-1-4(a)(5).

<sup>8</sup> W.Va. Code § 5A-8-22.

<sup>9</sup> W.Va. Code § 5A-8-21.

<sup>10</sup> W. Va. Code § 16-5-27; W. Va. CSR § 64-32-14.

<sup>11</sup> W.Va. Code § 7-1-31l.

<sup>12</sup> W.Va. Code § 48-22-702.

<sup>13</sup> W. Va. Code § 30-3C-1.

<sup>14</sup> W.Va. Code § 29B-1-4(a)(5); For example, any information pertaining to a person participating in pharmacist recovery network is explicitly restricted from disclosure by legislative rule. W.Va. CSR § 15-10-12.

<sup>15</sup> W.Va. Code § 46A-2A-101, et seq.

<sup>16</sup> W.Va. Code § 46A-2A-101.

<sup>17</sup> W.Va. Code § 46A-2A-101(1).

<sup>18</sup> *Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 2015 W. Va. LEXIS 679, 45 (W. Va. 2015).

protect individuals from the injuries of unnecessary disclosure, the duty on government agencies to protect consumer information should be interpreted as a statutory exemption to FOIA disclosure.<sup>19</sup> When information that is statutorily exempt from disclosure is sought pursuant to a FOIA request, the information should not be disclosed.<sup>20</sup>

#### **B. Required Disclosure**

The State Boards and Commissions are required to furnish some personal information to the public. The dates and status of applications, names of applicants, age of applicants, and an applicant's educational and other qualifications are required to be recorded in a register that is maintained by the secretary of every State Board or Commission and made available to the public.<sup>21</sup> The status of prior applications and the county of residence of each applicant should also be made available.<sup>22</sup> The registers maintained by the State Boards and Commissions also must contain the license or registration number of all licensees of that Board or Commission, as well as each licensee's place of residence.<sup>23</sup> In addition to the register of applicants, the secretary of every State Board or Commission must maintain and publish a roster of all persons licensed and practicing in West Virginia, which contains the name and office address of those practicing licensees.<sup>24</sup> When a FOIA request is made for information that a State Board or Commission is required to furnish by law, the information should be disclosed.

### **IV. THE CLINE FAMILY**

#### **A. *Child Protection Group v. Cline***

##### *Facts*

In *Child Protection Group v. Cline*, the WV Supreme Court faced the decision of whether or not to require the disclosure of the mental evaluation records of a school bus driver, Mr. Roberts, to concerned parents.<sup>25</sup> In January of 1986, Mr. Roberts stopped his school bus, which contained children with ages ranging from six to eighteen, and dramatically lectured the children about the impending rapture.<sup>26</sup> Before the children boarded Mr. Roberts' school bus, Mr. Roberts was seen "fooling around" with the school bus brakes.<sup>27</sup> Mr. Roberts was subsequently suspended by the

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<sup>19</sup> W.Va. Code § 29B-1-4(a)(5).

<sup>20</sup> W.Va. Code § 29B-1-4(a)(5).

<sup>21</sup> W.Va. Code § 30-1-12.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> W.Va. Code § 30-1-13.

<sup>25</sup> *Cline*, 350 S.E.2d 541.

<sup>26</sup> *Id.*, at 542.

<sup>27</sup> *Id.*

Gilmer County Board of Education, pending psychological and medical evaluations.<sup>28</sup>

After having been seen by several physicians, Mr. Roberts was allowed to return to work by the Board of Education. The Superintendent of Gilmer County Schools then sent a letter to the parents of the school children that rode Mr. Roberts' school bus, "assuring that Mr. Roberts was capable of providing a safe means of transportation for the students," accompanied by quotes from various physicians that were "somewhat ambiguous and less than totally reassuring to the parents" concerning Mr. Roberts' ability to return to driving the school bus.<sup>29</sup> After refusing to allow their children to ride Mr. Roberts' school bus, several of the affected parents sought information from the Gilmer County Board of Education under FOIA concerning Mr. Roberts' mental problems.<sup>30</sup> After the circuit court denied the parents' requests, the issue was brought before the West Virginia Supreme Court.

The Supreme Court was asked to decide whether Mr. Roberts' psychological and medical evaluations were "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."<sup>31</sup> To aid in its interpretation, the Supreme Court created a five-factor balancing test to use when analyzing this "personal privacy exception" to disclosure under FOIA.<sup>32</sup>

#### *The Balancing Test*

The first factor in the Supreme Court's balancing test asks "whether disclosure would result in a substantial invasion of privacy and, if so, how serious?"<sup>33</sup> The first part of this two-part test asks if the invasion of privacy would be substantial—"information of a non-intimate or public nature may be disclosed."<sup>34</sup> The second part "measure[s] the seriousness of the invasion . . . relative to the customs of the time and place, and is determined by the norm of the ordinary man."<sup>35</sup> This factor examines the "extent to which the release of the information would cause an ordinary man in the time and place of the private individual involved, [sic] embarrassment or harm."<sup>36</sup> After noting that this factor must be looked at in a subjective, case-by-case scenario, the Supreme Court stated that the disclosure of Mr. Roberts' psychological and medical information would obviously be a substantial invasion of privacy—"an individual's medical records are classically a private interest"—that was very serious—

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, at 543.

<sup>31</sup> W.Va. Code § 29B-1-4(a)(2).

<sup>32</sup> *Cline*, 350 S.E.2d at 543.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

“it is difficult to imagine an item more potentially embarrassing than individual psychiatric reports.”<sup>37</sup>

The second factor in the balancing test asks what is “the extent or value of the public interest, and the purpose of the object of the individuals seeking disclosure?”<sup>38</sup> This factor has two parts. The first part ensures that there is a legitimate interest—the interest may be pecuniary or the rights and liabilities of the public may be affected—in the disclosure of the information.<sup>39</sup> The interest must be something more than curiosity. The second part of this factor looks to the purpose to which disclosure 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. . . . Where a misuse of information may result, the courts are wary of ordering disclosure.”<sup>40</sup> The court found that the affected parents had a compelling interest in disclosure, and that “the safety of school children is always of great importance.”<sup>41</sup>

The third factor asks “whether the information is available from other sources?”<sup>42</sup> If the information is available in a format “less intrusive to individual privacy,” the information should not be disclosed.<sup>43</sup> If the information is otherwise publicly available, “the court should simply allow the plaintiff access to information which he would eventually get anyway.”<sup>44</sup> If the information is not available from any other method or source, this factor favors disclosure.<sup>45</sup> The Supreme Court noted that Mr. Roberts’ medical and psychological evaluations were available only from the parents’ FOIA request.<sup>46</sup>

The fourth factor in the balancing test asks “whether the information was given with an expectation of confidentiality?”<sup>47</sup> The court notes that governments often receive very personal information “given with a legitimate expectation that this information would be kept private.”<sup>48</sup> The Supreme Court found that Mr. Roberts’ records were given to the Gilmer County Board of Education with a “justifiable expectation of confidentiality.”<sup>49</sup>

The fifth and final factor of the Supreme Court’s balancing test asks “whether it is possible to mould relief so as to limit the invasion of individual privacy?”<sup>50</sup> The court stated that releasing

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<sup>37</sup> *Id.* at 545.

<sup>38</sup> *Id.* at 543.

<sup>39</sup> *Id.* at 544.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 546.

<sup>42</sup> *Id.* at 543.

<sup>43</sup> *Id.* at 544.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 546.

<sup>47</sup> *Id.* at 543.

<sup>48</sup> *Id.* at 544.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 543.

personal information under FOIA is not an “all or nothing” decision,” and that innovative measures should be taken to “limit the invasion of individual privacy whenever disclosure is required.”<sup>51</sup> After making the decision to disclose Mr. Roberts’ medical and psychological evaluations, the Supreme Court tried “to limit the damage . . . to Mr. Roberts” by applying the fifth factor.<sup>52</sup> The Supreme Court limited relief by allowing only the affected parents access to Mr. Roberts’ records, but refused to allow the parents to copy the records or disclose the contents of the records to the public.<sup>53</sup>

### *Holding*

The Supreme Court’s analysis of whether disclosure of Mr. Roberts’ medical information would result in an unreasonable invasion of privacy by application of the balancing test led the court to several conclusions: First, disclosure of Mr. Roberts’ records would result in a substantial and serious invasion of individual privacy. Second, the parents of the children that rode Mr. Roberts’ bus had a legitimate and compelling interest in the safety of their children, and that the medical records would be useful in assessing that safety. Third, Mr. Roberts’ medical records were only available from the affected parents’ FOIA request to the Gilmer County Board of Education. Fourth, Mr. Roberts gave the Gilmer County Board of Education his medical records with a justifiable expectation of confidentiality. And fifth, it was possible to mould relief to limit the harm done to Mr. Roberts in disclosure by only allowing the parents of the children that rode Mr. Roberts’ bus limited access to the medical and psychological evaluations. Ultimately, the Supreme Court held that the balancing test weighed in favor of disclosure, and granted the parents’ FOIA request.

In *Cline*, the West Virginia Supreme Court not only provided relief to a select number of parents in Gilmer County, it also provided guidance on the issue of disclosure for several cases brought before the Supreme Court—those cases are detailed in the following two sections.

## **B. Cases Resulting in Disclosure**

### *In re Gazette FOIA Request*

In 2008, The Charleston Gazette (Gazette) sought “weekly payroll time sheets and activity logs for certain named police officers of the Charleston Police Department.”<sup>54</sup> Gazette was investigating allegations which stated that while those named police officers were on duty for the city of Charleston, the police officers were also employed by private entities as security guards, essentially misusing their tax-paid salary.<sup>55</sup> The Charleston Police Department refused the request for disclosure

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<sup>51</sup> *Id.* at 545.

<sup>52</sup> *Id.* at 546.

<sup>53</sup> *Id.*

<sup>54</sup> *In re Gazette FOIA Request*, 671 S.E.2d 776, 779.

<sup>55</sup> *Id.*



and the West Virginia Supreme Court applied the same analysis that had been applied twenty-two years before in *Cline*.<sup>56</sup>

In its analysis, the Supreme Court found that release of the weekly payroll time sheets and activity logs would not result in a substantial invasion of individual privacy.<sup>57</sup> Further, the court found that no evidence had been admitted which suggested that the police officers had an expectation of confidentiality in their time sheets.<sup>58</sup> The Supreme Court found that “Gazette [sought] this information for a valuable public interest and that the information would not otherwise be available from other sources.”<sup>59</sup> The Supreme Court did not apply the fifth factor of the *Cline* balancing test. The Supreme Court held that the balancing test favored disclosure, and that the Charleston Police Department must disclose the requested records pursuant to FOIA.<sup>60</sup> *Charleston Gazette v. Smithers*

In 2013, the West Virginia Supreme Court decided *Charleston Gazette v. Smithers*—another case to which the analysis from *Cline* was applied.<sup>61</sup> In this case, Gazette sought data provided to the West Virginia State Police Internal Review Board (IRB) which helped determine which employees are frequently reviewed under the internal review system; a log of the complaints maintained by the “West Virginia State Police Professional Standards Section;” and the quarterly, bi-annual and yearly reports of the IRB for the previous five years, with the names of certain employees redacted.<sup>62</sup> The trial court denied Gazette’s request for information, stating that the type of information satisfied the invasion of privacy exemption to FOIA—the same exemption analyzed under *Cline*.<sup>63</sup> Here, the Supreme Court was faced with the same analysis.

Noting its own lack of substantive analysis in previous cases, the Supreme Court performed a detailed examination of the facts according to the *Cline* factors.<sup>64</sup> Despite misquoting the first *Cline* factor, the Supreme Court determined that “conduct by a state police officer while the officer is on the job in his or her official capacity as a law enforcement officer and performing such duties . . . does not fall within the [FOIA] invasion of privacy exemption,” and therefore disclosure would not result in a substantial invasion of privacy.<sup>65</sup> Under the second factor of the balancing test, the Supreme Court found that the public has “a legitimate interest in how a police department responds to and

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 783.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 784.

<sup>61</sup> *Charleston Gazette v. Smithers*, 752 S.E.2d 603 (W.Va. 2013).

<sup>62</sup> *Id.*, at 612.

<sup>63</sup> *Id.*, at 613.

<sup>64</sup> *Id.* at 619.

<sup>65</sup> *Id.*

investigates” internal complaints.<sup>66</sup> Further, the intended use of the information was to write articles for the public about police misconduct—which the Supreme Court stated was useful to the public as “an important cornerstone of vivacious democracy.”<sup>67</sup>

The third *Cline* factor was easily dealt with by the court—both parties agreed that the information requested was not available from any other source.<sup>68</sup> The fourth factor, however, received the Supreme Court’s most detailed analysis. The West Virginia Code of State Rules contains several provisions which state that the records requested by Gazette are confidential, and only allow release of those records under very limited circumstances, within the discretion of the records custodian, including a signed release by the subject of the investigation.<sup>69</sup> The Supreme Court reconciled the apparent conflict between the Code of State Rules and FOIA by stating that when there is a legislative rule that declares certain pieces of information confidential, subject to the discretion of the custodian of that information, that legislative rule should not control, but should be considered as part of the FOIA analysis.<sup>70</sup> In other words, when a legislative rule gives the custodian of a public record discretion in his or her decision to disclose, there only exists an expectation of confidentiality and not a bar to disclosure under FOIA.<sup>71</sup> The legislative rule governing disclosure of the IRB data created an expectation of confidentiality for the members of the State Police.<sup>72</sup> This is differentiated from the situation where a legislative rule mandates confidentiality, even with specified exceptions, and the Court has applied FOIA exemption number five and exempted the information from disclosure as specifically exempted by statute.<sup>73</sup>

After deciding to disclose the IRB information, the Supreme Court applied the fifth *Cline* factor to limit the resulting harm.<sup>74</sup> Following its own advice, the Supreme Court used innovation to limit the harm resulting from disclosure of the IRB information by only disclosing the complaints in which the IRB has found probable cause, and required disclosure to comply with the confidentiality requirements set forth in the West Virginia Code of State Rules.<sup>75</sup> The Supreme Court held that the

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 620.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 621.

<sup>70</sup> *Id.*, at 622.

<sup>71</sup> *Id.*; NOTE: In the alternative, when a legislative rule declares certain information confidential but does not give the custodian discretion in his or her decision to disclose, the legislative rule should be treated as a statutory exemption to FOIA disclosure.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, at 624.

<sup>74</sup> *Id.*, at 622.

<sup>75</sup> *Id.* at 624.

balancing test favored disclosure, but required a limitation on the information disclosed in order to protect the individual privacy of the members of the West Virginia State Police.<sup>76</sup>

### C. Cases Not Resulting in Disclosure

#### *Robinson v. Merritt*

In 1988, the West Virginia Supreme Court was tasked with deciding whether microfiche maintained by the Worker's Compensation Fund that contained personal information regarding numerous injured workers, including pictures of injuries sustained, was exempt from disclosure under FOIA.<sup>77</sup> The party seeking disclosure, James Robinson, was a Huntington, West Virginia attorney who represented injured workers.<sup>78</sup> Each sheet of microfiche sought by Robinson contained personal injury information for as many individuals that would fit on one sheet.<sup>79</sup> Therefore, by accessing one person's records, Robinson would also be accessing the records of several others.<sup>80</sup> The Worker's Compensation Fund denied Robinson access to the information under the personal information exemption of FOIA, the same exemption analyzed in *Cline*.<sup>81</sup>

Under the first *Cline* factor, the Supreme Court looked to the information within the microfiche, such as "sensitive information related to prior injuries to various body parts," and information related to psychiatric diagnoses and treatment, which led to the finding that disclosure would result in "a substantial and potentially serious invasion of privacy."<sup>82</sup> The Supreme Court found that disclosure could cause harm to "professional and personal dignity."<sup>83</sup> In its analysis of factor two, the Supreme Court did not find any substantive interest to satisfy Robinson's need for the microfiche, and stated that a legitimate interest is required by factor two of the balancing test.<sup>84</sup>

The third *Cline* factor was "critical" to the Supreme Court's decision.<sup>85</sup> The Worker's Compensation Fund allowed individual claimants *and their representatives* to review the microfiche which contained information concerning the claimants.<sup>86</sup> This method of reviewing the microfiche was implemented by the Worker's Compensation Fund to limit the invasion into the privacy of other claimants.<sup>87</sup> Because the information was available in a less intrusive format, the third *Cline* factor

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<sup>76</sup> *Id.* at 626.

<sup>77</sup> *Robinson v. Merritt*, 375 S.E.2d 204, 206 (W.Va. 1988).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*, at 207.

<sup>80</sup> *Id.*

<sup>81</sup> *Cline*, 350 S.E.2d at 541.

<sup>82</sup> *Robinson*, 375 S.E.2d at 208-209.

<sup>83</sup> *Id.*, at 209.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*, at 207.

did not favor disclosure.<sup>88</sup> Under the fourth balancing test factor, the Supreme Court “acknowledge[d] that there [was] a legitimate question regarding a claimant’s expectation of confidentiality.”<sup>89</sup> However, because the information has never been open to the general public, and because information about a specific individual normally cannot be released without a written authorization from that individual, claimants likely had a reasonable expectation of confidentiality.<sup>90</sup>

Because the Supreme Court found the microfiche to be exempt from disclosure, the fifth *Cline* factor was not applied to disclosure of the microfiche.<sup>91</sup> In its holding, the Supreme Court found that disclosure of the microfiche would result in a substantial and potentially serious invasion of privacy, that Robinson failed to present a legitimate reason for disclosure, that the microfiche was available to Robinson and his clients in a less intrusive format and that the claimants had an expectation of confidentiality in their claim information.<sup>92</sup>

*Manns v. City of Charleston Police Dep’t*

In 2000, *Manns v. City of Charleston Police Dep’t* was decided by the West Virginia Supreme Court.<sup>93</sup> Laura Manns was arrested after refusing to pay a bus fare, and was charged with numerous offenses, including battery on a police officer and resisting arrest.<sup>94</sup> Manns claimed that an arresting officer used excessive force in her arrest, and appropriate investigations were launched by the City of Charleston Police Department (CPD) and, upon the CPD’s request, the FBI.<sup>95</sup> The arresting officer was cleared in both investigations.<sup>96</sup>

In the pre-suit investigation of a related civil suit threatened by Manns, Manns requested through FOIA the names of all current police officers with a complaint filed against them or who the CPD has otherwise investigated, the names of all officers with a civil or criminal complaint files against them, and the outcome of the provided complaints and investigations.<sup>97</sup> The CPD responded by providing Manns with a list of all current police officers.<sup>98</sup> The CPD claimed the personal information exemption to FOIA with regard to the remaining information, and the Supreme Court applied the balancing test from *Cline*.<sup>99</sup>

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<sup>88</sup> *Id.*, at 209.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Manns v. City of Charleston Police Dep’t*, 550 S.E.2d 598 (W.Va. 2000).

<sup>94</sup> *Id.*, at 600.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*, at 602.

<sup>99</sup> *Id.*

In applying the first balancing test factor, the Supreme Court found that “clearly the disclosure . . . would result in a substantial invasion of privacy” due to the unfiltered nature of the complaints.<sup>100</sup> Disclosure of unsubstantiated complaints could result in serious and unwarranted embarrassment to a police officer.<sup>101</sup> In its analysis of the second *Cline* factor, the Supreme Court noted that “the lawfulness of police operations is a matter of great concern to the state’s citizenry,” but the frivolous litigation and “fishing expeditions” that were likely to result inclined the Supreme Court to find that the public interest did not require disclosure.<sup>102</sup>

The Supreme Court did not analyze the third factor of the balancing test; however, it can be deduced from the facts that this factor favored disclosure. Manns was given the names of all current CPD police officers, and copies of all criminal and civil complaints were available from the Kanawha County Clerk’s Office.<sup>103</sup> The other information—information concerning internal police investigations—is likely unavailable from other sources.<sup>104</sup> Both sets of circumstances favor disclosure.<sup>105</sup>

In its analysis of the fourth *Cline* factor, the Supreme Court found that “the information was obviously given with an expectation of confidentiality” because the CPD policies and procedures mandated that all investigative reports should be “treated with the strictest of confidence.”<sup>106</sup> Further, the court noted that “the expectation of confidentiality is crucial to continued reports of possible misconduct.”<sup>107</sup> The Supreme Court did not apply the fifth factor of the balancing test in its opinion. Ultimately, the Supreme Court held that disclosure of the requested information would result in a substantial and possibly serious invasion of privacy; that, despite the public need for information concerning their law enforcement agencies, the public interest did not favor disclosure; and the information was obviously given with an expectation of confidentiality.<sup>108</sup>

*Smith v. Bradley*

The most recent case that involved a “*Cline* analysis” by the West Virginia Supreme Court

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<sup>100</sup> *Id.*, at 604.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, at 602.

<sup>104</sup> See *Charleston Gazette*, 752 S.E.2d at 620.

<sup>105</sup> *Cline*, 350 S.E.2d at 544.

<sup>106</sup> *Manns*, 550 S.E.2d at 604.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*; Note: Although not in the Supreme Court’s holding, the information was likely not available in a less intrusive format or otherwise available, which favors disclosure.; Note: Justice Starcher filed a concurring opinion in which he noted that, while FOIA would typically mandate disclosure in this type of situation, the request for information in this case was so broad that in no way did the balancing test weigh in favor of disclosure. “Had the appellee sought to inspect and copy documents alleging police use of excessive force, with names (at least initially) redacted, we would have had a different kettle of fish.” *Id.*, at 605.

that did not end in disclosure is *Smith v. Bradley*, which was decided in 2005.<sup>109</sup> The facts of *Smith* are as follows: John Smith’s employment contract with Fairmont State was not renewed after his first year as a professor.<sup>110</sup> Smith was unsuccessful in both the grievance he filed with Fairmont State University and its appeal to the Circuit Court of Kanawha County.<sup>111</sup>

Smith was also unsuccessful in two civil actions filed against Fairmont State, and then filed a discrimination claim.<sup>112</sup> Subsequently, Smith filed a FOIA request seeking student, peer and chair evaluations for non-tenured faculty for several academic years.<sup>113</sup> The circuit court ordered disclosure of the evaluations in various redacted formats, and Smith appealed to the West Virginia Supreme Court.<sup>114</sup> The Supreme Court was then tasked with applying the personal information exemption analysis from *Cline* to the requested evaluations.

In applying the first factor, the Supreme Court found that “release of the evaluations in an un-redacted form would clearly constitute a substantial invasion of individual privacy.”<sup>115</sup> In its analysis of the second *Cline* factor, the Supreme Court bypassed the first of the two parts, looking directly at the lack of public usefulness and harm to the public that would result from disclosure.<sup>116</sup> Public access to evaluations would be of no public use, but would result in a misuse of the information, such as personal attacks by vindictive supervisors.<sup>117</sup> Despite the Supreme Court’s bypass, it is important to note that Smith potentially had a pecuniary interest in the disclosure of the evaluations—his job.

The third factor of *Cline* was not applied in the Supreme Court’s opinion, but performance evaluations maintained by an employer are not likely available from any other source, which supports disclosure.<sup>118</sup> Application of the fourth balancing test factor resulted in the Supreme Court’s finding that “individuals who completed the evaluations had a reasonable expectation that their responses were confidential.”<sup>119</sup> In support of this finding, the Supreme Court noted that there would be a severe lack of truthful criticism if there was not an expectation of confidentiality in the evaluations.<sup>120</sup> In its holding, the Supreme Court found that disclosure of un-redacted student, peer, and chair evaluations would result in a substantial invasion of privacy, would be harmful to the public and that the

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<sup>109</sup> *Smith v. Bradley*, 673 S.E.2d 500 (W.Va. 2005).

<sup>110</sup> *Id.*, at 502.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*, at 503.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, at 505.

<sup>117</sup> *Id.*

<sup>118</sup> *Academic Affairs*, FAIRMONT STATE UNIVERSITY: INSTITUTIONAL FORMS (last visited July 17, 2015), <http://www.fairmontstate.edu/institutional-forms>; *Cline*, 350 S.E.2d at 544.

<sup>119</sup> *Smith*, 673 S.E.2d at 505.

<sup>120</sup> *Id.*

evaluations were given with an expectation of confidentiality.<sup>121</sup>

## V. THE BALANCING TEST

Despite there being six cases in which the West Virginia Supreme Court applied the balancing test (the *Cline* Family), “no method exists to determine the ‘weight’ given to the factors to be balanced. Thus the court, without an objective measure to weigh competing interests, must substitute its subjective judgement.”<sup>122</sup> While the Supreme Court is able to make FOIA decisions based on its own subjective judgement, custodians of public records are left to interpret the Supreme Court’s balancing test with potentially looming criminal penalty if the custodian makes the wrong choice.<sup>123</sup> Custodians of public records need a guide with which they can use to navigate the Supreme Court’s balancing test and come to the right answer.

### A. The Factors

#### *Factor One*

The first factor of the balancing test, “Whether disclosure would result in a substantial invasion of privacy and, if so, how serious,” is analyzed in all six cases in the *Cline* Family. In *Cline*, the invasion of privacy was substantial because the disclosure was of Mr. Roberts’ medical records, which are “classically a private interest.”<sup>124</sup> The substantial invasion in *Cline* was also a very serious invasion, because disclosure had the potential to be highly embarrassing.<sup>125</sup> In *Robinson*, the invasion of privacy was substantial because the microfiche sought by Robinson contained sensitive information about different body parts of different individuals.<sup>126</sup> The substantial invasion in *Robinson* was also a serious invasion, because disclosure had the potential to cause harm to the professional and personal dignity of the persons whose information was contained on the microfiche.<sup>127</sup>

In *Smith*, the Supreme Court focused on the importance of job performance evaluations to the employment records of Fairmont State University when applying the first *Cline* factor, and did not go into detail as to why disclosure would result in a substantial and serious invasion of privacy.<sup>128</sup> However, the evaluations sought in *Smith* pertained to specific individuals, and the Supreme Court

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<sup>121</sup> *Id.*; Note: Although not in the Supreme Court’s holding, the information was likely not available in a less intrusive format or otherwise available, which favors disclosure.

<sup>122</sup> *Cline*, 350 S.E.2d at 544.

<sup>123</sup> W.Va. Code § 29B-1-6.

<sup>124</sup> *Cline*, 350 S.E.2d at 545.

<sup>125</sup> *Id.*

<sup>126</sup> *Robinson*, 375 S.E.2d at 208.

<sup>127</sup> *Id.*, at 209.

<sup>128</sup> *Smith*, 673 S.E.2d at 505.

noted that disclosure could result in personal attacks and retribution against those individuals being evaluated as well as the individuals doing the evaluating.<sup>129</sup> Finally, in *Manns*, the Supreme Court found that disclosure of all reported instances of misconduct by individual police officers was a substantial invasion of privacy, because there was no filter to prevent the claims that were egregious, unfounded or potentially embarrassing to the individual police officers.<sup>130</sup> However, the Supreme Court did not identify the substantial invasion of privacy in *Manns* as a serious invasion.

In *In re Gazette*, the Supreme Court found that the release of time records of specific police officers was not a substantial invasion of individual privacy.<sup>131</sup> The Supreme Court cleared up this seemingly inconsistent finding in *Smithers*, where the Supreme Court found that there is no substantial invasion of privacy in disclosure of records relating to the official duties and functions of police officers.<sup>132</sup> In every case involving a substantial invasion of privacy, the information sought referred to specific individuals.<sup>133</sup> Therefore, there is a substantial invasion of privacy when information is disclosed that refers to specific individuals, and not the general public.<sup>134</sup> In the cases involving a substantial and serious or potentially serious invasion of privacy, the Supreme Court found that there was a possibility that disclosure would cause some harm or embarrassment to the private individuals whom the disclosure would affect.<sup>135</sup> A substantial invasion of privacy rises to the level of seriousness required in *Cline* when disclosure could cause harm or embarrassment to the individuals referred to within the requested information.<sup>136</sup>

Before deciding whether disclosure could cause harm to the named individual, it is important to understand the current risks associated with the information requested. While disclosure of certain information may seem innocuous, disclosure may actually have sinister results. For example, in 1985 the West Virginia Supreme Court held that names, addresses, Social Security numbers, driver's license information and other personal information was not the type of confidential information that FOIA was meant to protect.<sup>137</sup> However, today there are statutory restrictions that restrict the disclosure of most, if not all, of the above-named personal information in some form, because of the

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<sup>129</sup> *Id.*

<sup>130</sup> *Manns*, 550 S.E.2d at 604.

<sup>131</sup> *In re Gazette*, 671 S.E.2d at 788.

<sup>132</sup> *Smithers*, 752 S.E.2d at 619.

<sup>133</sup> *Cline*, 350 S.E.2d at 543.; Note: While *In re Gazette* and *Smithers* involved timesheets and internal complaint information which referred to specific police officers and not the general public, the Supreme Court's finding in *Smithers* that police officers do not have an expectation of privacy in official police conduct resolves any discrepancy.

<sup>134</sup> *Cline*, 350 S.E.2d at 543.

<sup>135</sup> *Id.*; Note: In *Manns*, the Supreme Court noted that complaints could be "potentially embarrassing;" however, there was no specific support for the "potential embarrassment" that would result from disclosure.

<sup>136</sup> *Id.*

<sup>137</sup> *Hechler v. Casey*, 333 S.E.2d 799 (W.Va. 1985).



ever-changing risks to individual privacy.<sup>138</sup>

One piece of confidential personal information that is stolen could result in not only identity theft, but could also provide hackers with unlimited access to computers, smartphones and all types of accounts.<sup>139</sup> Further, “hacking” is no longer something that is done in the shadows and limited to a select group of computer-savvy individuals—it can be done virtually anywhere and by anyone.<sup>140</sup> Automated virtual tools are available for downloading to the public, and provide step-by-step guidance on injecting malware and retrieving personal information.<sup>141</sup> And it is not necessarily those who access the personal information who use it to cause harm—millions of pieces of personal information are sold on the black market.<sup>142</sup>

E-mail addresses, for example, typically are sold by the thousands for just a few dollars.<sup>143</sup> However, the information gained from illicit access to an e-mail account can sell for thousands.<sup>144</sup> The current rate for a single set of online store payment credentials, like *Amazon.com*, can sell for up to \$1,500.00; banking credentials sell for upwards of \$700.00; and bank account transfers and check cashing sell for anywhere from 10% to 40% of the total amount transferred.<sup>145</sup>

Exempting all e-mail addresses, cell phone numbers and other information tied to a person’s digital profile may seem like an adequate mitigation to the above-described risks, but the answer is not so simple. With an individual’s e-mail address, birth date, and a general knowledge about that individual, a person could access and then modify that individual’s *Apple ID*.<sup>146</sup> While *Google* offers stricter requirements for password resets, an individual’s personal information can still be used to access and modify that person’s *Google* account. With a person’s *Apple ID* or *Google* account credentials, a hacker could access a person’s *iCloud* or *Google Drive* information in a matter of

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<sup>138</sup> W.Va. Code § 5A-8-21, 22.

<sup>139</sup> Joshua VanBerkum, *What do Hackers Want with Your Email?*, MOTOR CITY TECHNOLOGY (Jan. 29, 2014), <https://www.motorcitytechnology.com/blog/item/what-do-hackers-want-with-your-email.html>.

<sup>140</sup> Parmy Olson, *Now Anyone Can Hack a Website Thanks to Clever, Free Programs*, FORBES (April 25, 2010, 10:00 A.M.), <http://www.forbes.com/sites/parmyolson/2012/04/25/now-anyone-can-hack-a-website-thanks-to-clever-free-programs/>

<sup>141</sup> *Id.*

<sup>142</sup> Michael Barnett, *The Internet Information Black Market: Your confidential personal and business information for sale...*, BUSINESSIDTHEFT.ORG (March 2012), <http://www.businessidtheft.org/Education/BusinessIDTheftScams/InternetBlackMarket/tabid/117/Default.aspx>

<sup>143</sup> Carlton Purvis, *\$00.000025: The Going Rate on the Black Market for your Email Address*, SECURITY MANAGEMENT, ASIS INTERNATIONAL (Aug. 26, 2011), <https://sm.asisonline.org/Pages/00000025-going-rate-black-market-your-email-address-008950.aspx>

<sup>144</sup> Michael Barnett, *The Internet Information Black Market: Your confidential personal and business information for sale...*, BUSINESSIDTHEFT.ORG (March 2012), <http://www.businessidtheft.org/Education/BusinessIDTheftScams/InternetBlackMarket/tabid/117/Default.aspx>

<sup>145</sup> *Id.*

<sup>146</sup> MY APPLE ID (last visited July 17, 2015), [https://iforgot.apple.com/password/verify/appleid?returnURL=https://appleid.apple.com&app\\_id=93&language=US-EN](https://iforgot.apple.com/password/verify/appleid?returnURL=https://appleid.apple.com&app_id=93&language=US-EN)

seconds.<sup>147</sup> Once a person's *iPhone* is accessed, applications such as *LogMeIn* also allow access of that person's home computer, which could contain even more information than what is found on a typical *iPhone*.<sup>148</sup>

The risk of harm from disclosure of personal information is constantly growing. Therefore whenever personal information is requested under FOIA, it is important to understand the current state of that risk when applying this factor. Facially, disclosure of an individual's e-mail address to a concerned citizen or a local newspaper would not appear to cause harm or embarrassment to that individual. However, as noted above, the damage that can stem from access to personal information can be devastating, and it is imperative that the potential harm be given appropriate weight in the application of the first factor of the *Cline* Scale.

#### *Factor Two*

Factor two of the balancing test, "the extent or value of the public interest, and the purpose or object of the individuals seeking disclosure" is also applied throughout the *Cline* Family.<sup>149</sup> In *Cline*, the public interest that favored disclosure was the safety of school children.<sup>150</sup> The object of the parents who sought Mr. Roberts' medical and psychological records was to assess their children's safety.<sup>151</sup> In *In re Gazette*, the public had an interest in how police officers used their tax-funded time.<sup>152</sup> The *Gazette's* object was to write articles about potential police misconduct, which the Supreme Court stated was not a misuse of information but instead was a "cornerstone of vivacious democracy" in *Smithers*.<sup>153</sup>

In *Smithers*, the Supreme Court reiterated a decision of the Washington Supreme Court and found that the public had a legitimate interest in allegations of police misconduct, due to the public accountability of police.<sup>154</sup> The Supreme Court in *Smithers* stated that writing articles for the public about police misconduct was not a misuse of information, but was useful to the public.<sup>155</sup> In *Robinson*, the Supreme Court reiterated the requirement that the extent or value of the public interest must be more than curiosity—a legitimate interest is required by factor two.<sup>156</sup> Robinson's desire to personally flip through the records of worker's compensation claimants, when he was already given access to

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<sup>147</sup> GOOGLE DRIVE (last visited July 17, 2015), <https://www.google.com/drive/>; iCloud (last visited July 17, 2015), <https://www.icloud.com/>.

<sup>148</sup> *LogMeIn*, iTunes PREVIEW (last visited July 17, 2015), <https://itunes.apple.com/us/app/logmein/id479229407?mt=8>

<sup>149</sup> *Cline*, 350 S.E.2d at 543.

<sup>150</sup> *Id.*, at 546.

<sup>151</sup> *Id.*

<sup>152</sup> *In re Gazette*, 671 S.E.2d at 788.

<sup>153</sup> *Smithers*, 752 S.E.2d at 620.

<sup>154</sup> *Id.*, at 619.

<sup>155</sup> *Id.*, at 620.

<sup>156</sup> *Id.*, at 209.

the specific information concerning his clients, was not a legitimate interest.<sup>157</sup>

The Supreme Court in *Manns* noted that, although the public had a legitimate interest in the lawfulness of police operations, the resulting harm of fishing expeditions that would encourage frivolous litigation would be a misuse of that information.<sup>158</sup> The West Virginia Supreme Court did not include an analysis of factor two in their *Smith* opinion.<sup>159</sup> However, Smith did have a pecuniary interest in his employment at Fairmont State University. Despite Smith's pecuniary interest, the Supreme Court found that only harm, not public utility, could result from disclosing un-redacted student, peer and chair evaluations.<sup>160</sup>

The purpose of determining the extent or value of the public interest is to ensure that the interest in the personal information is something more than simple curiosity.<sup>161</sup> "The interest may be pecuniary, or the public may have an interest because their legal rights or liabilities are affected."<sup>162</sup> Whatever the interest in disclosure may be, the interest must be legitimate.<sup>163</sup> Therefore, the public interest favors disclosure if it is a legitimate pecuniary interest or if public rights or liabilities are affected. The second part of factor two asks the purpose or object of the individuals seeking disclosure.<sup>164</sup> If the purpose of disclosure is useful to the public, this factor favors disclosure, but if "a misuse of information may result," disclosure is less favorable.<sup>165</sup>

When is information useful to the public and not a misuse of information? Freedom of the press regarding official police conduct is useful for the public and is not a misuse of information, even if the exercising of that freedom may be harmful to the police officers involved.<sup>166</sup> In *Manns*, the Supreme Court found that the increase in frivolous litigation was not useful to the public and that the fishing expeditions into police operations that were likely to occur as a result of disclosure was a misuse of the information.<sup>167</sup> In *Robinson*, allowing Robinson to access the private files of numerous individuals to find errors in his own clients' files was not useful to the public.<sup>168</sup> In *Cline*, the Supreme Court found that allowing parents to access to Mr. Roberts' medical records to judge their children's

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<sup>157</sup> *Id.*; The Supreme Court noted that "An individual claimant's right to privacy should not suffer because of occasional errors."

<sup>158</sup> *Manns*, 550 S.E.2d at 604.

<sup>159</sup> *Smith*, 673 S.E.2d at 505.

<sup>160</sup> *Id.*

<sup>161</sup> *Cline*, 350 S.E.2d at 544.

<sup>162</sup> *Id.*

<sup>163</sup> *Robinson*, 375 S.E.2d at 209.

<sup>164</sup> *Cline*, 350 S.E.2d at 544.

<sup>165</sup> *Id.*

<sup>166</sup> *Smithers*, 752 S.E.2d at 620.

<sup>167</sup> *Manns*, 550 S.E.2d at 604.

<sup>168</sup> *Robinson*, 375 S.E.2d at 209.

safety was useful to the public and was not a misuse of information.<sup>169</sup> Finally, in *Smith*, the Supreme Court found that the chilling effect on open and honest criticism that would result from a release of un-redacted evaluations was not useful to the public.<sup>170</sup> In summary, the purpose or object of the individuals seeking disclosure favors disclosure if the purpose or object is for the use of the public and is for the public's greater good.

### *Factor Three*

The third *Cline* factor, "whether the information is available from other sources," is interpreted very broadly by the Supreme Court in the *Cline* Family.<sup>171</sup> What does it mean for information to be available from other sources? In *Robinson*, the information sought by Robinson was already in the possession of his clients.<sup>172</sup> The information possessed by Robinson's clients was individualized to each client, however, unlike the broad and un-redacted format of the information held by the Worker's Compensation Fund.<sup>173</sup> Because this information was available to Robinson in a format less intrusive to personal privacy, the Supreme Court did not consider this factor as favoring disclosure.<sup>174</sup> In *Manns*, the civil and criminal complaints against the police officers were already generally available as public records, which favored their disclosure.<sup>175</sup> In *Smithers*, both parties agreed that the sought after information was otherwise unavailable; therefore, the Supreme Court considered that factor to be in favor of disclosure.<sup>176</sup>

In *Cline*, the Supreme Court noted that the information was otherwise unavailable.<sup>177</sup> The same conclusion regarding the availability of the information was reached in *In re Gazette*.<sup>178</sup> In *Smith*, the Supreme Court did not discuss the availability of the information, but peer evaluations are likely unavailable from any source other than the institution responsible for the evaluations. In *Cline*, the Supreme Court explained this factor by providing three options: the requested information is available in formats which are less intrusive to individual privacy, which disfavors disclosure; the requested information is generally available, which favors disclosure; and the otherwise total unavailability of the information, which strongly favors disclosure.<sup>179</sup>

Information is available from other sources if it can be obtained from *any* publicly accessible

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<sup>169</sup> *Cline*, 350 S.E.2d at 544.

<sup>170</sup> *Smith*, 673 S.E.2d at 505.

<sup>171</sup> *Cline*, 350 S.E.2d at 544.

<sup>172</sup> *Robinson*, 375 S.E.2d at 209.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Manns*, 550 S.E.2d at 602.

<sup>176</sup> *Smithers*, 752 S.E.2d at 620.

<sup>177</sup> *Cline*, 350 S.E.2d at 546.

<sup>178</sup> *In re Gazette*, 671 S.E.2d at 788.

<sup>179</sup> *Cline*, 350 S.E.2d at 544.

source.<sup>180</sup> For example, the names and residence addresses of all people registered to vote are required to be made part of the public record.<sup>181</sup> All court records, including unsealed criminal records, are available to the public at the offices of the Circuit Clerks.<sup>182</sup> Legal name changes are available in legal advertisements, under most circumstances.<sup>183</sup> Even DEA registration numbers, used to monitor the prescription of controlled substances, can be found through a paid online service.<sup>184</sup> The availability of information from other sources should be interpreted very broadly. The Supreme Court's findings concerning the availability of information and disclosure are consistent with the three options provided for in *Cline*, and the same should be the test when applying the third factor of the balancing test.

#### *Factor Four*

The fourth *Cline* factor, "whether the information was given with an expectation of confidentiality," does not affect disclosure as strongly as the other factors.<sup>185</sup> But the court is unclear as to when there is an expectation of confidentiality. In *Cline*, Mr. Roberts' surrendered his medical records to the Gilmer County School Board "under a justifiable expectation of confidentiality."<sup>186</sup> In *Robinson*, the court noted that because an authorization was required before an individual's information contained on the microfiche could be disclosed, the information was likely given with an expectation of confidentiality.<sup>187</sup> The Supreme Court in *In re Gazette* did not find any evidence that the time records of the police officers were maintained with any expectation of confidentiality.<sup>188</sup>

In *Smithers*, the Supreme Court recognized that the legislative rule that required an authorization before internal investigation documents could be released created an expectation of confidentiality.<sup>189</sup> The Supreme Court found there to be an expectation of confidentiality in the peer evaluations involved in *Smith* based on the absolute necessity for confidentiality.<sup>190</sup> Finally, in *Manns*, the language contained in the police department's policy and procedural manuals that mandated investigative reports be treated as confidential, as well as the necessity for confidentiality created an

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<sup>180</sup> *Id.*

<sup>181</sup> W.Va. Code § 3-2-30

<sup>182</sup> W.Va. Trial Court Rule 10.04.

<sup>183</sup> W.Va. Code § 48-25-101(b).

<sup>184</sup> *Drug Enforcement Administration*, U.S. DEPT. OF COMMERCE: NATIONAL TECHNICAL INFORMATION SERVICE (last visited July 17, 2015), <http://www.ntis.gov/products/dea.aspx> (Follow "Federal Data Products: Drug Enforcement Administration" hyperlink).

<sup>185</sup> *Cline*, 350 S.E.2d at 543.

<sup>186</sup> *Id.*, at 546.

<sup>187</sup> *Robinson*, 375, S.E.2d at 209.

<sup>188</sup> *In re Gazette*, 671 S.E.2d at 788.

<sup>189</sup> *Smithers*, 752 S.E.2d at 621.

<sup>190</sup> *Smith*, 672 S.E.2d at 505.

expectation of confidentiality.<sup>191</sup>

“When we say information is . . . confidential, we have an expectation that it will be shared only after authorization is provided, and then only with authorized individuals.”<sup>192</sup> Information similar to that requested in *Smithers* was requested in *Manns*, and, although the Supreme Court did not state whether the information required an authorization prior to release, the Supreme Court did find that the information was given with an expectation of confidentiality.<sup>193</sup> Finally, the Supreme Court did not state whether evaluations in *Smith* required authorizations prior to release, but found that the evaluations were given with an expectation of confidentiality.<sup>194</sup> Although the Supreme Court did not specify in every instance whether an authorization was required for release of information that was given with an expectation of confidentiality, the Supreme Court’s reasoning in *Robinson* applies to the majority of the *Cline* Family.<sup>195</sup> Therefore, information is given with an expectation of confidentiality if, when normally accessing the information, an authorization is required prior to the information’s release.

The Supreme Court’s reasoning in *Smithers* makes an important addition to this rule: when there is a legislative rule or statute in place that normally makes certain information confidential, there is also a legitimate expectation of confidentiality.<sup>196</sup> For example, the mental and psychological evaluations disclosed in *Cline* were made confidential by statute.<sup>197</sup> However, because the statute only applied to the professionals involved in Mr. Roberts’ treatment and did not restrict disclosure by the Gilmer County Board of Education, the information was not statutorily exempt from disclosure—the statute merely created an expectation of confidentiality.<sup>198</sup>

Another example is the restriction on the DMV against disclosing driver’s license records.<sup>199</sup> The statutory restriction on disclosure of driver’s license records applies only to the DMV, and therefore the information is not statutorily exempt from disclosure except from the DMV, but is given with an expectation of confidentiality. Biometric information (fingerprints, retinal scans, DNA, etc.), child support obligation information, reports concerning medical professional liability, passport information and immigration information all have statutory expectations of confidentiality.<sup>200</sup> When

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<sup>191</sup> *Manns*, 550 S.E.2d at 604.

<sup>192</sup> *Is there a Difference Between Confidentiality and Privacy?*, FINDLAW (last visited July 17, 2015), <http://criminal.findlaw.com/criminal-rights/is-there-a-difference-between-confidentiality-and-privacy.html>.

<sup>193</sup> *Manns*, 550 S.E. at 604.

<sup>194</sup> *Smith*, 673 S.E.2d at 505.

<sup>195</sup> *Robinson*, 375 S.E.22d at 209.

<sup>196</sup> *Smithers*, 752 S.E.2d at 621.

<sup>197</sup> W.Va. Code § 27-3-1.

<sup>198</sup> *Cline*, 350 S.E.2d at 546.

<sup>199</sup> W.Va. Code § 17A-2A-1.

<sup>200</sup> W.Va. Code § 33-12-37; W.Va. Code § 15-2-24; W.Va. Code § 15-2b-12; W.Va. Code § 27-3-1; W.Va. Code § 48-

applying the fourth factor of the *Cline* Scale, there may be a statutory expectation of confidentiality, even if there is no statutory restriction on disclosure. Therefore, there is an expectation of confidentiality when an authorization is normally required for the release of the information, or there is a legislative rule or statute that identifies the information as confidential.

*Factor Five*

Unlike the other factors in the balancing test, the fifth factor, “whether it is possible to mould relief so as to limit the invasion of individual privacy,” is only applied once the decision to disclose has been made, and even then, only when limiting the invasion of privacy is necessary.<sup>201</sup> How can relief be moulded to limit the invasion of individual privacy? “Innovative measures” should be taken to limit the invasion of individual privacy when disclosing personal information.<sup>202</sup>

In *Cline*, after deciding that Mr. Roberts’ medical and psychological evaluations should be disclosed, the Supreme Court turned its “attention to trying to limit the damage [the Supreme Court has] done to Mr. Roberts” by limiting access to the records and prohibiting their distribution.<sup>203</sup> In *Robinson*, the Supreme Court stated that because it had decided not to disclose the requested microfiche, there was no need to discuss alternate relief.<sup>204</sup> In *In re Gazette*, the Supreme Court did not discuss limiting the invasion of privacy at all, despite deciding that disclosure of the requested information was necessary.<sup>205</sup>

In *Smithers*, once the Supreme Court decided that disclosure of the requested internal review information was necessary, it applied the fifth factor and redacted the information in accordance with the legislative confidentiality requirements, as well as required a probable cause finding prior to the release of the records otherwise.<sup>206</sup> The Supreme Court in *Smith* again did not apply the fifth factor of the balancing test after deciding not to disclose the evaluations in an un-redacted form.<sup>207</sup> Finally, the Supreme Court again chose not to apply the fifth *Cline* factor to the FOIA request in *Manns*, along with its decision not to disclose.<sup>208</sup>

Because the Supreme Court only attempted to “mould relief to limit the invasion of individual privacy” after deciding to disclose in *Cline* and *Smithers*, the fifth *Cline* factor should only be applied

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18-131; W.Va. Code §55-7b-6(i); 5 USCS § 552a; 8 USCS § 1202(f); 8 CFR § 245a.

<sup>201</sup> *Cline*, 350 S.E.2d at 543.

<sup>202</sup> *Id.*, at 545.

<sup>203</sup> *Id.*, at 546.

<sup>204</sup> *Robinson*, 375 S.E.2d at 209.

<sup>205</sup> *In re Gazette*, 671 S.E.2d at 788.

<sup>206</sup> *Smithers*, 752 S.E.2d at 623-624.

<sup>207</sup> *Smith*, 673 S.E.2d at 505.

<sup>208</sup> *Manns*, 550 S.E.2d at 604.

once the decision to disclose has been made.<sup>209</sup> Further, because the Supreme Court encouraged “innovative measures” in limiting invasions of individual privacy, custodians of public records should have broad discretion in modifying relief.<sup>210</sup> Therefore, once the decision to disclose has been made, custodians of public records should use any means available to them when attempting to limit the invasion of individual privacy.

### **B. Weighing the Factors**

In *Cline*, there were two factors in favor of disclosure—the value of the public interest in children’s safety with the purpose of allowing parents to assess that safety, and the otherwise unavailable nature of Mr. Roberts’ medical information—and two factors that disfavored disclosure—disclosure would result in a serious and substantial invasion of privacy and the information was given with an expectation of confidentiality.<sup>211</sup> With an equal number of factors weighing in favor of and against disclosure, how much weight should be assigned to each *Cline* factor?

In order to make consistent findings concerning disclosure under the balancing test, the *Cline* factors should be assigned specific point values based on the amount of influence, or weight, that each factor has on disclosure. After applying the first four *Cline* factors, the total weight of the factors should then be applied to a scale which offers the various disclosure options: no disclosure, disclosure with the fifth *Cline* factor applied, and full disclosure. Each factor’s presence within the *Cline* Family should be examined when determining these weights. The first factor weighed in favor of disclosure in *In re Gazette*, *Smithers*, and *Manns*, and the second factor weighed in favor of disclosure in every case in the *Cline* Family except for *Robinson*. Factor three of the balancing test weighed in favor of disclosure in *Cline*, *In re Gazette*, and *Smithers*, as well as arguably in *Manns* and *Smith*. *In re Gazette* was the only case in the *Cline* Family in which the information was not given with an expectation of confidentiality, the fourth *Cline* factor.

Because the second factor is so prevalent among the cases in the *Cline* Family, and because, in *Cline*, the second factor was found “to be a factor of overriding importance, tipping the scales clearly and convincingly toward disclosure,” the second *Cline* factor should be the heaviest factor and the starting point for assigning weight to the other factors.<sup>212</sup> A breakdown of the second factor of the balancing test reveals three parts: a two-part threshold inquiry to ensure disclosure is sought for a legitimate interest (Is there a legitimate pecuniary interest? Are the general rights or liabilities of the

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<sup>209</sup> *Cline*, 350 S.E.2d at 546; *Smithers* 752 S.E.2d at 622.

<sup>210</sup> *Cline*, 350 S.E.2d at 545.

<sup>211</sup> *Id.*, at 545-546.

<sup>212</sup> *Id.*, at 546.



public affected?) and then an inquiry regarding the weight of the purpose of disclosure (if the purpose or object is for use by the public and for the public's greater good).<sup>213</sup>

The three “sub-factors” of factor two could potentially all weigh in favor of disclosure.<sup>214</sup> Using the second factor—which weighs most heavily on the disclosure scale—as a starting point for determining the values to be assigned to each factor, each sub-factor of factor two should be assigned one point that could possibly weigh towards disclosure or “disclosure points.” In other words, if there is a legitimate pecuniary interest in disclosure and the purpose or object of disclosure is for the use and greater good of the public, factor two would weigh two disclosure points. If there was a legitimate interest in disclosure, but the purpose was not for the use of the public, factor two would weigh one disclosure point. If there is a legitimate pecuniary interest, the rights or liabilities of the public are affected by disclosure, and the purpose of disclosure was not for the use of the public, factor two would weigh three disclosure points. Because of the three sub-factors, factor two could weigh zero, one, two or three disclosure points.

The same analysis should be applied to the remaining *Cline* factors. The first factor contains two sub-factors—does the information to be disclosed refer to specific individuals, and not the general public, and is there some likelihood that disclosure could cause harm to the individuals referred to within the requested information? Because this factor contains two sub-factors, it should weigh two disclosure points. If the information sought refers to specific individuals and not the general public, but there is no likelihood that disclosure would cause harm to those individuals, this factor would weigh one disclosure point. If the information sought did not refer to specific individuals, this factor would weigh two disclosure points. Because of the two sub-factors, this factor could weigh zero, one or two disclosure points.

Factor three also contains two sub-factors—is the information otherwise available, and, if so, is it available in a less intrusive format? Therefore, the third factor should also weigh two disclosure points. If the information sought is otherwise available in a less intrusive format, this factor would weigh zero disclosure points. If the information is generally available from other sources, this factor would weigh one point. And if the information is unavailable from any other source that the FOIA request, this factor would weigh two points.

Finally, factor four does not contain any sub-factors, but instead rests entirely upon the question “does the information require an authorization prior to release?” Because factor four has no

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<sup>213</sup> Note: Remember, the first part of this factor is a threshold inquiry, meaning that if there is neither a legitimate pecuniary interest nor the general rights or liabilities of the public are affected, the second part of this factor is not weighed.

<sup>214</sup> *Id.*

sub-factors, and in only one instance did the Supreme Court not find an expectation of confidentiality that weighed against disclosure, factor four should weigh the least of the *Cline* factors, with one disclosure point.<sup>215</sup> If the information requested does not normally require an authorization prior to its release, this factor would weigh one point. If the information does require an authorization prior to its release, this factor would weigh zero points. Because the fifth factor is not applied until after the decision to disclose is made, it should not be assigned any disclosure points.

### **C. The Scale**

Once the four weighted balancing test factors have been applied to the specific information requested, the remaining question is what to do with the total number of disclosure points? The *Cline* Family provided insight in determining a disclosure threshold. In *Cline*, the parents sought information which affected their legal liabilities (their children) and had a purpose that was useful to the public (assessing the safety of children on Mr. Roberts' bus), which was not a misuse of information.<sup>216</sup> The information requested in *Cline* was also unavailable from any source other than the parents' FOIA request.<sup>217</sup> The other two factors did not favor disclosure. The total weight of the disclosure points in *Cline* would be four disclosure points, two points for factor two, and two points for factor three. After the Supreme Court decided to disclose the requested information in *Cline*, the Supreme Court applied the fifth factor and limited disclosure.<sup>218</sup>

The results from applying the weighted balancing test factor to *Cline* indicate that when application of the weighted balancing test results in four disclosure points the requested information should be disclosed, but the fifth *Cline* factor should be applied to limit the invasion of individual privacy. The same result can be concluded from the application of the weighted balancing test to *Smithers*. In *Smithers*, the Supreme Court found that there was no substantial invasion of privacy, that the public has a legal interest in police misconduct, that writing articles for the public about police misconduct was useful to the public, and that the information was not available from any other source.<sup>219</sup> *Smithers* earned six disclosure points from the application of the weighted balancing test, and resulted in the Supreme Court's decision to disclose and then to apply the fifth *Cline* factor to limit the invasion of individual privacy. Just like *Cline*, the results from *Smithers* indicate that when the result of the balancing test's application is six points, the information should be disclosed and the fifth *Cline* factor should be applied. Therefore, when the total disclosure points is between four and

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<sup>215</sup> *In re Gazette*, 671 S.E.2d at 788.

<sup>216</sup> *Cline*, 350 S.E.2d 546.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Smithers*, 752 S.E.2d at 619-620.

six points, the fifth *Cline* factor must be applied before disclosing the requested information.

In *In re Gazette*, the Supreme Court found that there was no substantial invasion of privacy, that the public had a legal interest in the timesheets of police officers and that writing about the misuse of tax-funded time by police is useful to the public, and that there was no expectation of confidentiality.<sup>220</sup> Police time sheets would not be available from any other source. *In re Gazette* earned seven disclosure points after application of the weighted balancing test, and resulted in disclosure without the application of the fifth *Cline* factor. Therefore, when the total of the balancing test's application is seven points or greater, the requested information should be disclosed without applying factor five.

The remaining cases of the *Cline* Family illustrate the range in which disclosure is inappropriate. For instance, in *Manns*, the requested information pertained to specific individuals and could embarrass the ordinary man in that situation. While the public did have a legal interest in police misconduct, the Supreme Court concluded that the influx of frivolous litigation and fishing expeditions against the police department that were likely to result from disclosure would be a misuse of information.<sup>221</sup> Although some of the information was generally available, the internal documents requested in *Manns* were not available from any other source, and the information was given with an expectation of confidentiality.<sup>222</sup> *Manns* earned three disclosure points by application of the weighted balancing test, and resulted in the Supreme Court's decision not to disclose.

In *Smith*, the Supreme Court noted that the requested information related to specific individuals and could cause embarrassment to the ordinary man in that situation.<sup>223</sup> *Smith* sought the information because of a pecuniary interest, his job, but the purpose of disclosure was a misuse of information.<sup>224</sup> The information was not available from any other source, and was given with an expectation of confidentiality.<sup>225</sup> *Smith* also earned three disclosure points, and did not result in disclosure. The final case in the *Cline* Family, *Robinson*, scored even fewer disclosure points. In *Robinson*, the information related to specific individuals and disclosure could have embarrassed the ordinary man in that situation.<sup>226</sup>

*Robinson* did have a pecuniary interest in disclosure, and the legal rights of the public, or at least, all claimants of the Workers' Compensation Fund, were affected.<sup>227</sup> The information in

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<sup>220</sup> *In re Gazette*, 671 S.E.2d at 788.

<sup>221</sup> *Manns*, 550 S.E.2d at 604.

<sup>222</sup> *Id.*

<sup>223</sup> *Smith*, 673 S.E.2d at 505.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Robinson*, 375 S.E.2d at 209.

<sup>227</sup> *Id.*

*Robinson* was available in a format less intrusive to individual privacy and required an authorization prior to release.<sup>228</sup> *Robinson* earned two disclosure points, and did not result in disclosure. Because the cases resulting in non-disclosure earned three disclosure points or fewer, and *Cline* earned four disclosure points and resulted in a limited disclosure, when the total points resulting from an application of the weighted balancing test are less than or equal to three points, the requested information should not be disclosed.

In summary, when the application of the balancing test results in the total number of disclosure points being three or less, the requested information should not be disclosed. When the total number of disclosure points is between 4 and 6, the requested information should be disclosed, but the custodian of the information should apply the fifth *Cline* factor to modify relief and limit the invasion of individual privacy. When the total number of disclosure points is seven or higher, the information should be disclosed without modification.

| <b>Disclosure Points</b> | <b>0</b>               | <b>1</b> | <b>2</b> | <b>3</b> | <b>4</b>                                   | <b>5</b> | <b>6</b> | <b>7</b>        | <b>8</b> |
|--------------------------|------------------------|----------|----------|----------|--|----------|----------|-----------------|----------|
| <b>Result</b>            | <b>Do Not Disclose</b> |          |          |          | <b>Disclose and Apply<br/>Fifth Factor</b> |          |          | <b>Disclose</b> |          |

## VI. CONCLUSION

The need for a guide that custodians of public records can use when deciding whether or not to disclose personal information is more than ideal—it is necessary. The *Cline* Scale is a tool that public servants can use to ensure that they comply with FOIA and protect citizens’ privacy. Citizens whose personal information is part of the public record also deserve the assurance that the risk of harm from disclosure of their information will be seriously considered before their information is disclosed. The *Cline* Scale gives its users the ability to navigate through the Supreme Court’s personal privacy FOIA exemption and come up with a reliable and justifiable answer.

Due to the subjective nature of the balancing test, there will occasionally be errors and personal information that should not be disclosed may end up being disclosed. However, it is necessary to remember that West Virginia law strongly favors disclosure.<sup>229</sup> Further, when an item falls below a score of seven on the *Cline* Scale, disclosure can be modified so as to limit the invasion

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<sup>228</sup> *Id.*

<sup>229</sup> W.Va. Code 29B-1-1.

of personal privacy.<sup>230</sup> The fifth factor of the balancing test gives the custodian of public records broad discretion in redacting or otherwise limiting the use of or access to personal information.<sup>231</sup> Because of the need for a simple application of the balancing test, the public policy that strongly favors disclosure and the protection of individual privacy by the fifth factor of the balancing test, the *Cline* Scale should be used to decide whether any piece of personal information should be disclosed under FOIA. Application of the simplified balancing test to the *Cline* Scale provides a reliable and concrete answer to the question posed—when does disclosure result in an unreasonable invasion of privacy?

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<sup>230</sup> *Cline*, 350 S.E.2d at 546.

<sup>231</sup> *Id.*