SUPREME COURT

STATE OF LOUISIANA

No. 2005-C-212

EAST BANK SPECIAL SERVICE FIRE PROTECTION DISTRICT
and INTERVENOR, JEFFERSON PARISH FIREFIGHTERS ASSOCIATION
LOCAL 1476, AFL-CIO,
PLAINTIFFS

JEFFERSON PARISH FIREFIGHTERS ASSOCIATION LOCAL 1476,
INTERVENOR-RESPONDENT

VERSUS

MIKEL CROSSEN,
DEFENDANT-RELATOR

SUPPORT BY REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND CAPITAL CITY PRESS, D/B/A THE ADVOCATE, AMICI CURIAE, FOR THE APPLICATION OF WRIT OF CERTIORARI AND REVIEW BY MIKEL CROSSEN, DEFENDANT-RELATOR, FROM THE DECISION OF THE LOUISIANA FIFTH CIRCUIT COURT OF APPEAL, NO. 04-CA-838, DATED DECEMBER 28, 2004, ON APPEAL FROM A DECISION OF THE 24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, NO. 593-770, THE HONORABLE JOAN S. BENGE

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STATEMENT OF FACTS

The controversy giving rise to this litigation began with a public records request by Mikel Crossen ("Crossen") to the East Bank Special Service Fire Department ("the Department") for "the complete personnel file of Assistant [Fire] Chief Ed Goldman, Sr. ("Goldman") including, but not limited to, records of all disciplinary actions." The department refused the request. Crossen sued, and the trial court ruled in the Department's favor. The Fifth Circuit Louisiana Court of Appeal affirmed.

Amici incorporate the Statement of Facts presented by Appellant Crossen in his petition for a writ of certiorari before this Court.

SUMMARY OF ARGUMENT

The disciplinary records of government employees, especially those in high-level positions such as Goldman, must be open to public inspection, and *amici* urges this Court to reverse the lower courts' rulings to the contrary. One who voluntarily accepts a public paycheck cannot unreasonably claim "privacy" in government records pertaining to their continuing qualifications and performance, especially upon a finding of misconduct. Such self-serving privacy claims disregard the transparency that Louisianan citizens have demanded through the ratification of the constitutional right-to-know provision in Article 12, Section 3 of the Louisiana Constitution and the enactment of the Louisiana Public Records Law.

Journalists routinely use public disciplinary records to provide Louisiana citizens with important information about public employees' job-related qualifications. The public had a legitimate interest, for instance, in the sexual harassment charges leveled against a 32-year-old

police officer who, upon being hired to work security detail at a public school, began a relationship with a 17-year-old student.[1] And certainly there is no reason why four firefighters and a paramedic should have had a "privacy right" in records detailing a group assault they committed against one of their coworkers during the workday using a hypodermic needle.[2]

Even if there were some type of privacy right in a government employee's disciplinary records, that individual's privacy interest must bend to the countervailing and compelling public interest in the records' disclosure. Simply put, Louisiana citizens have a right to know when the behavior of police officers, firefighters, and other government employees have diverged from the rule of law, community standards, and public policy. These public servants have been entrusted with duties that are the bedrock of a vital community -- law enforcement, safety, and emergency response.

Finally, an open records exemption analysis should be used to redact private information without unnecessarily suppressing information of concern to the public. That is, an open records analysis should not be conducted upon a government employee's personnel file in its entirety, as the lower courts did in this case, but on the individual component information contained in the file. This procedural flaw may have led to the incorrect substantive result below. Due to the diverse information in a personnel file, an *in globo* constitutional balancing shortchanges the individual constitutional balancing of the file's component parts. Thus, the Public Records Law requires the

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[1]Charles Lussier, EBR schools want say in deputy assignments, *The Advocate*, April 24, 2004.

[2]Melissa Moore, 5 St. George firefighters suspended in incident, *The Advocate*, August 29, 2002.

courts to use a scalped, not a meat ax, when reviewing a citizen's public records request of a government employee's personnel file.

ARGUMENT

Access to Louisiana government employees' disciplinary records is essential to the news media's ability to report on government affairs performed in the public's name, and at taxpayers' expense. Should this Court refuse to grant certiorari in this case, it will permit government employees' unjustifiable insulation from public scrutiny in cases where their alleged behavior substantially deviates from the standards of public duty.

As described in their motion to file this brief, *amici* have a longstanding interest in issues pertaining to the public's right to obtain records such as government employees' disciplinary records. News stories using disciplinary records as a source provide a clear illustration of the importance of the open government rights at stake in this litigation.

In 2002, *The* [Baton Rouge] *Advocate* reported that five firefighters and a paramedic had been disciplined for assaulting one of their peers with a hypodermic needle. Melissa Moore, 5 St. George firefighters suspended in incident, *The Advocate*, August 29, 2002. Four of the firefighters held down the victim, who had expressed a fear of needles, so that the paramedic could jab him with it, according to the original complaint. *Id.* All firefighters involved received a 90-day suspension, the most serious discipline short of termination, and some were also demoted from supervisory posts for what they called "horseplay." *Id.* The paramedic was suspended for 30 days. *Id.*

Last year, *The Advocate* reported the serious injuries sustained by a 17-year-old high school student who was injured in a car accident while riding with her school's 32-year-old security officer,

raising questions about the nature of their relationship. Charles Lussier, EBR schools want say in deputy assignments, *The Advocate*, April 24, 2004. The newspaper's subsequent review of the officer's disciplinary records revealed that the Sheriff's Office had placed him on security detail at the school despite the fact that he had previously been accused of sexual harassment. *Id.* After the story was published, the school system's chief of staff vowed to subject security staff to more rigorous background checks. *Id.*

And in 2002, *The Times-Picayune* studied police disciplinary records to report that in the preceding two years, ten New Orleans police officers had been subject to disciplinary proceedings relating to violations of departmental code on off-duty alcohol consumption. Michael Perlstein, Off-duty alcohol abuse gives NOPD headache; 10 officers penalized since January 2000, *The Times-Picayune*, September 15, 2002. That code seeks to ensure that officers' off-duty alcohol consumption does not discredit the department or "render the employees unfit to report for their next regular tour of duty." *Id.* Comparisons of New Orleans' numbers with other Southern jurisdictions revealed a surprising disparity; police forces in Little Rock, Ark., and Birmingham, Ala., only had one alcohol-related violation apiece during the same period that New Orleans had ten. *Id.*

The public's right to know outweighs Assistant Fire Chief Ed Goldman's purported privacy concerns in this case. Goldman enjoys high-level, taxpayer-funded employment in the field of public safety, and the public's interest in inspecting disciplinary records corresponding to his alleged misconduct on the job has a very clear nexus to the rights protected by the Louisiana Public Records Law and Constitution. Because Louisiana has an "expansive and constitutionally protected guarantee of public access to public documents," Capital City Press v. East Baton Rouge Parish

Metropolitan Council, 696 So.2d 562 (La. 1997), *amici* respectfully urge this Court to grant certiorari to reverse the Fifth Circuit's decision to shroud Goldman's disciplinary records in secrecy.

1. Crossen's motives are irrelevant to the Department's claimed exemption.

In its opposition to this certiorari petition, intervening party Firefighters Local 1476 opines that "Crossen's curiosity in knowing what lies in Goldman's personnel file is quintessential snooping." The department also raises the irrelevant issue of what it calls Crossen's "vendetta" and "malevolent intent" against Goldman.

Characterizing an open records request as "snooping" completely misses the point of this litigation, the Louisiana Public Records Law, and the Louisiana Constitution. Every Louisiana citizen has an identical right to inspect disciplinary records that reflect on a government employee's alleged misconduct in the place where the public has entrusted him to work and during the performance of his public duties. La. R.S. 44:31; La. Const. Art. 12, § 3. The reason for or motive behind the public records request is irrelevant. La. R.S. 44:32 ("no inquiry" of any person who applies for a public record shall be made, except age and identification). The identity of a requesting party has no bearing on the merits of an open records dispute. See United States v. Reporters Committee, 489 U.S. 749, 771 (1989); Halloran v. Veterans Admin., 874 F.2d 315 (5th Cir. 1989) (requester's identity irrelevant even when request is made for "less-than-lofty" reasons).

2. Goldman has no reasonable expectation of a privacy right in disciplinary records.

The state constitutional right of privacy *may*, in certain limited instances, affect disclosure requirements for certain otherwise public information. Local 100, Service Employees, Intern. Union v. Smith, 830 So.2d 417, 420 (La. App. 2 Cir. 2002). Because Goldman has no reasonable

expectation of privacy in his disciplinary records, however, the records do not qualify for an open records exemption, and *amici* respectfully ask this Court to grant Crossen's writ application to reverse the Fifth Circuit's holding to the contrary. Capital City Press v. East Baton Rouge Parish Metropolitan Council, 696 So.2d 562 (La. 1997) (outlining test for reasonable expectation of constitutional privacy).

This Court has said that "the test for determining whether one has a reasonable expectation of privacy which is constitutionally protected is not only whether the person had an actual or subjective expectation of privacy, but also whether that expectation is of a type which society at large is prepared to recognize as being reasonable." Capital City Press, 696 So.2d at 566 (internal quotations omitted).

In Capital City Press this Court held that an individual has "no reason" to subjectively expect privacy in his government job application. If the public's interest in a *potential* government employee's qualifications makes the applicant's subjective privacy expectation unreasonable, then the same must certainly be true for disciplinary records relating to an *actual* government employee's qualifications and performance.

The department claims that disciplinary records are different from job applications because of their potential to expose a government employee to "public disgrace." Assuming that Goldman's disciplinary records are as disgraceful as the Department argues, *amici* believe it is even more important that they should be public.[3] Louisiana citizens "have not yet chosen through their

[3]Which the trial court could not have possibly known given its non-itemized exemption of the personnel file, *see* *infra* p. 10.

legislature to recognize a general right of privacy" in a government employee's disciplinary records by enacting a public records exemption, presumably because they think that no such exemption should exist. Capital City Press, 696 So.2d at 567.

In fact, the Louisiana House of Representatives Committee on House and Governmental Affairs considered and rejected a bill proposing an exemption for public employees' disciplinary records based on privacy concerns in April 2003.[4] That idea died one day later when the committee excised the words "disciplinary records" from the bill's language. *Id.*

3. The public's right to inspect disciplinary records outweighs any privacy right.

Even if the potential for public disgrace could somehow vest government employees with an otherwise unreasonable expectation of constitutional privacy in their disciplinary records, the public interest in disclosure then must be balanced against that privacy concern to make the ultimate determination on disputed information's openness. Local 100, Service Employees, Intern. Union v. Smith, 830 So. 2d 417 (La. App. 2 Cir. 2002).

Federal courts have ordered the release of disciplinary records similar to those before this Court.[5] In a case where a citizen using the federal Freedom of Information Act asked for "memos and notices related to [police officers'] disciplinary charges," a U.S. District Court in Ohio ruled that officers had no federal constitutional privacy interest in the information because the information

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[4]HB 1649, 2003 Regular Session (Act 342) (later enacted solely with exemption protections for medical records).

[5]As to this Court's ability to consider federal case law in deciding this state issue, the Department itself urges this Court to utilize "the rationale employed by the federal jurisprudence in weighing the competing interest of the public's 'right to know'" and federal constitutional right to privacy. (Opposition Brief at 17).

would not subject them to "a substantial risk of serious bodily harm." Kallstrom v. City of Columbus, 165 F. Supp. 2d 686 (S.D. Ohio 2001). Even if there had been a federal constitutional right to privacy, the court ruled, the state still would have "a compelling interest in releasing this type of information to enlighten the public about the performance of its law enforcement agencies and ensure government accountability." *Id.*; see also Mangels v. Pena, 789 F.2d 836 (10th Cir. 1986) (firefighters had no federal constitutional privacy right in investigative records relating to their drug use -- the records do "not implicate any aspect of personal identity . . . which is entitled to constitutional [privacy] protection").

By contrast, the Fifth Circuit relied on Trahan v. Larivee, 365 So. 2d 294 (La. App. 3 Cir. 1978), to support its proposition that a public employee's state constitutional right to privacy in his periodic evaluation reports outweighs the public's right to view them. As a preliminary matter, Trahan is a poor example to rely upon because just as Louisiana has never exempted disciplinary records from openness requirements, neither has it exempted periodic evaluation reports. *See* La. R.S. 44:4.1 ("all exceptions, exemptions, and limitations to the laws pertaining to public records shall be provided for in this chapter or the Constitution of Louisiana").

Trahan's "private" evaluation reports are ill-suited for comparison for another, more basic, reason: they are materially different in their nature from disciplinary records. Disciplinary reports detailing alleged employee misconduct address major ruptures in an employee's performance, a situation in stark contrast to periodic reviews, which typically cover a range of issues. *See* L.R.S. 33:2560 (A) (listing grounds for an employee's dismissal pursuant to a disciplinary proceeding by the Civil Service Board).

A more recent case that the Department relies upon in opposing this writ application, Local 100, Service Employees, Intern. Union v. Smith, 830 So.2d 417 (La. App. 2 Cir. 2002), also addresses issues that are profoundly different from the ones before this Court. Local 100 endorsed a school board's refusal to release support personnel's union affiliations, citing to constitutional privacy concerns.

The public simply does not have the interest in union affiliations that it has in disciplinary records. Organizational affiliations concern employees' extracurricular activities, while disciplinary records pertain to government employees' alleged misconduct in the place where the public has entrusted them to work and during the performance of their public duties. Furthermore, Local 100 treated information that corresponds to what the opinion referred to as "support personnel," an apparently low level of employment. Goldman, in contrast to the support personnel in Local 100, is an Assistant Fire Chief, and that fact, combined with the substantive differences between union affiliations and disciplinary records, demands a different result: Goldman's disciplinary records should be open to inspection.

4. Courts must conduct a separate exemption analysis for each individual record.

The Fifth Circuit diverged from other circuit courts of appeal when it conducted a blanket exemption analysis on all the documents in Goldman's personnel file. This decision left the public's right to access public government information woefully unprotected. Instead, the lower courts should have itemized the documents in Goldman's personnel file for the purposes of balancing the public's constitutional right to know against his purported interest in privacy and, if necessary, made appropriate redactions.

Just last year, the Second Circuit refused to endorse a police department's blanket claim of privacy exemption in internal affairs files when a records requester asked for documents relating to a police officer's misconduct. Skamangas v. Stockton, 37,996 La. App. 2 Cir. 3/5/04 (La. App. 2 Cir. 2004), writ denied, 876 So.2d 839. "The assertion of privilege must be made individually as to particular documents, and not *in globo* against the entirety of a mass of records," the Court said, remanding the case to the district court for a document-by-document inspection to determine particularized instances where privacy concerns outweighed the right to inspect a particular document. *Id.*

The First Circuit similarly rejected a blanket exemption claim when, "rather than making individual assertions of privilege as to particular documents, the State Police asserted their [Public Records Law 'ongoing criminal litigation' exemption] *in globo* against the entirety of their mass of records." Freeman v. Guaranty Broadcasting Corp., 498 So.2d 218 (La. App. 1 Cir. 1986). The Court ruled that this procedure was unacceptable, and it remanded the case to the district court to "make a detailed *in camera* inspection of each document produced on an item by item basis and determine whether the documents . . . are subject to the [claimed disclosure exemption]." *Id.*

In deviating from other circuit court's rulings, the Fifth Circuit failed to isolate substantively different components of the personnel file, and in one fell swoop shielded many classes of documents from disclosure requirements -- disciplinary records, for example -- that should otherwise be found open. Louisiana's presumption of government openness deserves more, and *amici* respectfully urge this Court to grant the petition for a writ of certiorari to address the split among the circuit courts on the issue.

CONCLUSION

In a move contrary to the principle of open government that has been clearly mandated by the Louisiana Public Records Law and enshrined in the Louisiana Constitution, the Fifth Circuit Court of Appeal erroneously endorsed the secrecy of government employees' disciplinary records on the basis of an individual's unfounded privacy concern. The failure to itemize the contents of Goldman's personnel file undoubtedly contributed to the erroneous decision shrouding disciplinary records from public view. *Amici* respectfully request that this Court correct these fundamental errors and restore the government transparency and accountability that Louisiana law ensures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on the respondent judge, appellate court, and counsel of record on the service list below by placing same in the United States Mail, postage prepaid and properly addressed, this 3rd day of March, 2005, as follows:

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