

19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO. 717529

SECTION 24

ROBERT BURNS

VERSUS

COL. LAMAR DAVIS, IN HIS OFFICIAL CAPACITY AND
CUSTODIAN OF RECORDS FOR THE LOUISIANA STATE POLICE

FILED: _____

DEPUTY CLERK

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PETITION FOR MANDAMUS

MAY IT PLEASE THE COURT:

Defendant, Col. Lamar Davis, in his official capacity and as custodian of records for the Louisiana State Police ("LSP"), submits this opposition memorandum in advance of the May 23, 2022, hearing in this matter in which Col. Davis has been ordered by the Court to show cause why certain records should not be produced for *in camera* inspection by the Court and why Col. Davis should not be taxed with the costs incurred by the plaintiff, Robert Burns, in pursuing this lawsuit.

As set forth in plaintiff's petition, LSP receives very frequent requests for public records from Burns, including at least 78 requests in the past two years alone. LSP has consistently worked with Burns in providing him with requested documents. Based on Burns' status as a regular and serial requester of records, LSP has maintained an open dialogue with Burns through regular correspondence regarding his many requests. Whenever LSP has redacted documents in response to past requests, it has either stated a clear basis for those redactions when producing the records or Burns has, through follow-up correspondence, requested that LSP provide reasons for the redactions. LSP then responds to those requests from Burns by explaining the reasons for redactions made to records.

On January 7, 2022, Burns made a public records request to LSP seeking the personnel file on Trooper Scott Lopez.¹ LSP provided a copy of Trooper Lopez's personnel file to Burns on March 8, 2022.² Burns notes that 137 pages of the personnel file were redacted by LSP; however, in contravention to the usual practice between the parties, he did not request that LSP provide any explanation before then proceeding with this lawsuit.

¹ Petition for Writ of Mandamus, par. 36.

² Id., par. 37.

On April 18, 2022, this Court signed an order submitted by Burns, who is proceeding *pro se* in this lawsuit, which orders Col. Davis to produce the entire unredacted personnel file to the Court so the Court may conduct an *in camera* review of the file to determine if the records should be released to Burns without redactions. The order also contradictorily requests that Col. Davis show cause why the records should not be produced to the Court for an *in camera* review. The order is confusing but Col. Davis will make every effort to comply. Counsel for Col. Davis will appear at the May 23, 2022, hearing with redacted and unredacted versions of the personnel records as ordered to be provided to the Court if the Court deems that an *in camera* inspection is necessary. However, Col. Davis also submits to the Court that the redactions were necessary and proper under the law to protect the privacy interests of Trooper Lopez and that the unredacted documents should not ultimately be produced to plaintiff.

The documents redacted from the personnel file produced by LSP in response to plaintiff's request primarily consist of (1) forms reflecting Trooper Lopez's personal information including his home address, telephone number, social security number, and other confidential information protected by law and (2) performance evaluation records reflecting evaluations of Trooper Lopez's performance conducted by his supervisors.

La. R.S. 44:11 specifically provides that the following information contained in the personnel records of a public employee shall be confidential:

- (1) The home telephone number of the public employee if the employee has chosen to have an unlisted number or has requested that his phone number be kept confidential;
- (2) The home address of the public employee where the employee has requested that the address be confidential;
- (3) The name and account number of any financial institution to which the employee's wages or salary are directly deposited;
- (4) The employee's social security number;
- (5) All medical records, claims forms, insurance applications, requests for payments of benefits, and all other health records of public employees.

To the extent this information related to Trooper Lopez was redacted, the redactions are specifically required by the public records law.

Further, in *Trahan v. Larivee*, 365 So.2d 294 (La. App. 3 Cir. 1979), the court held that while a public employee's performance evaluations may arguably fall within the broad definition

of “public records” set forth in the Louisiana Public Records Law, La. R.S. 44:1 *et seq.*, the release of a public employee’s performance evaluations would violate that employee’s right to be free from “invasion of privacy” under Article I, Section 5 of the Louisiana State Constitution of 1974. *Id.* at 298-299. In reaching this conclusion, the court reasoned as follows:

We point out this process in some detail to show that the evaluation report is very personal and directly effects the employee. To publish or disclose such personal opinions may embarrass or humiliate the employee among his fellow employees, friends, or family. It may affect his future employment. Humiliation or embarrassment could flow even though the rating would be “outstanding as this rating may create envy or jealousy in other employees.

We conclude and do hold that to publish or disclose such reports would be an “invasion of privacy” and is prohibited by the provisions of Art. 1, s 5 of the La. Const. of 1974.

Id. at 300. [Emphasis added]. The court further reasoned that requiring personnel evaluations to be subject to public disclosure would likely result in public supervisors failing to be “accurate, objective, or candid” in their evaluations of subordinates. *Id.* Because the court concluded that “[t]he public interest in efficient government is better served by keeping these evaluations confidential,” it held that “the individual rights of the employees herein shall prevail over the public’s ‘right to know.’” *Id.*

To the extent that LSP redacted Trooper Lopez’s performance evaluation records, it did so based on Trooper Lopez’s rights to privacy as set forth under the law.

Plaintiff’s Petition itself refers to a second request made by plaintiff for Trooper Lopez’s “disciplinary file”—which is maintained wholly separately from any trooper’s personnel file, the subject of plaintiff’s original public records request—but this Court’s April 18, 2022, does not order Col. Davis to produce any previously unproduced disciplinary records to the Court for an *in camera review* or order Col. Davis to show cause as to why they should not be produced. Col. Davis accordingly does not address plaintiff’s arguments that those records were improperly withheld.

Col. Davis does not oppose an *in camera* review of the redacted and unredacted records produced to plaintiff in response to his request for Trooper Lopez’s personnel file. The Court’s review would confirm that (1) LSP redacted all personal confidential information for Trooper Lopez as required by La. R.S. 44:11 and (2) LSP redacted Trooper Lopez’s performance evaluations based on the authority set forth in *Trahan v. Larivee* holding that production of those records by LSP in response to a public records request would be an unconstitutional invasion of

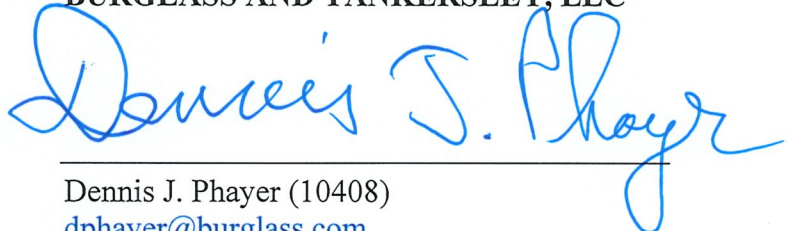
Trooper Lopez's rights to privacy and the public policy interests in ensuring that personnel evaluations are accurate, objective, and candid.

Finally, to the extent Burns seeks costs of this proceeding, Col. Davis submits that the request for costs should be denied. LSP responded in full to plaintiff's request for Trooper Lopez's personnel records, and all redactions made to the records were authorized and supported by the Louisiana Public Records Law and established jurisprudence. Plaintiff should not "prevail" on his request under La. R.S. 44:35(D)(1) because he should not be provided with any additional unredacted records which have not already been provided. Alternatively, should the Court find that any redactions made by LSP were improper, Col. Davis submits that the redactions were not made "unreasonably or arbitrarily" such that plaintiff would be entitled to civil damages or penalties pursuant to La. R.S. 44:35(E)(1).

If Col. Davis prevails either at the upcoming hearing or following an *in camera* review performed by the Court, Col. Davis reserves the right to seek reasonable attorney's fees from plaintiff incurred in the defense of this action pursuant to La. R.S. 44:35(E)(2).

Respectfully submitted,

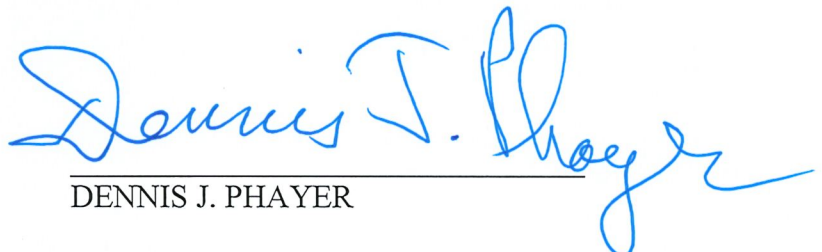
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleadings on all counsel of record in these proceedings by email, facsimile transmission and/or United States Mail, postage prepaid, this 13th day of May, 2022.



DENNIS J. PHAYER