NO. 100181-9

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals, Div. I, 81814-7-I

JOHN DOE 1, et al.,

Petitioners,

v.

KING COUNTY AND THE SEATTLE TIMES,

Respondents.

THE SEATTLE TIMES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Seattle Times is still waiting to receive records of an adult criminal investigation that were released to other news media three years ago. The trial court and Court of Appeals correctly denied an injunction against disclosure to the Times, agreeing with the King County Prosecutor's Office that the juvenile records exemption does not apply to an adult's file and that any privacy interests are protected by redactions. But disclosure remains on hold while the "John Does" appeal for as long as possible. Review should be denied. The Court of Appeals decision is unpublished, so it cannot pose a conflict with published law or eradicate important policies. Moreover, this Court denied direct review of this case, establishing that public importance was insufficient for prompt and ultimate determination. Under these circumstances, and because the Public Records Act (PRA) was applied consistently with case law, review at this late date should be denied.

II. RESTATEMENT OF THE CASE

A. The Adult and Juvenile Investigation Files Were Separate.

In 2018, the Clyde Hill Police Department investigated allegations that four or five high school football players sexually assaulted a drunken 16-year-old girl while one or two others filmed the event. CP 202, 288, 311, 315. According to the victim, videos and pictures of the incident "were widely distributed and seen by many people." CP 288.[1] Police submitted a 518-page investigative file to the King County Prosecutor's Criminal Division for possible charges against an adult. CP 202. Police also submitted a "*separate*, and nearly identical" file to the Juvenile Division for possible charges against three then-minor suspects. *Id*. (italics added). Thus, there was not a "single investigative file," contrary to the Does'

[1] The case involved Snapchat postings. CP 315, 373. "Snapchat is a cell phone app similar to text messaging except that photos and texts sent through Snapchat disappear once they are seen by the recipient and are not preserved." *Nelson v. Duvall*, 197 Wn.App. 441, 446, 387 P.3d 1158 (2017).

assertions. CP 202; Petition p. 7. Only the adult file was proposed for release. CP 373; RP 17-18.

B. The Does Did Not Oppose Disclosure To KING 5.

KING 5 TV requested records of the criminal case in November 2018. CP 203. In December 2018, the Prosecutor's Office determined that the adult's file was not wholly exempt from disclosure and could be released with names redacted. CP 203, 223-224. The Prosecutor's Office notified the suspects, victim and several witnesses that they could pursue an injunction against disclosure to KING 5. CP 203. Attorneys for John Doe 1 asked the Prosecutor to withhold his name, not entire records. CP 44-45. None of the Does sought an injunction against disclosure, and on December 31, 2018, the Prosecutor released the adult suspect's file to KING 5 with names of the suspects, victim and witnesses redacted. CP 203.

C. The Seattle Times Requested the Records To Scrutinize Government.

On January 8, 2020, Seattle Times reporter Geoff Baker

asked the Prosecutor's Office for:

> all written, electronic and digital records pertaining to the decision not to bring forth criminal charges in relation to a spring 2018 sexual assault case involving current and former members of the Eastside Catholic High School Football team.
>
> This request includes any correspondence between King County Attorney's Office representatives and police and school officials pertaining to the matter. Also, any correspondence between the KC Attorney's Office and parents/guardians or legal representatives/lawyers for the players involved, including but not limited to players [John Does 1 to 6]. Also, the request includes any video taken of the alleged sexual assault ...

CP 32, 243, 248.

Mr. Baker requested the records in order to investigate "the handling of the case by police and prosecutors, and the factors that influenced the prosecutors' no-charge decision." CP 245, RP 16.

D. The Assault Allegations Were Widely Known In The Community Before the Does Sought To Enjoin Disclosure.

On February 26, 2020, witness John Doe 1, suspects John Doe 3 and John Doe 4, and parents of suspect John Doe 2 ("Paula

and Paul Parent") sued King County and Clyde Hill to prevent disclosure pursuant to RCW 42.56.540. CP 5-8. The Times and the Palo Alto Daily Post, which also requested the police file, were added as defendants after a temporary restraining order was granted. CP 1-9, 95; RP 11.[2]

Before the suit, the allegations were well known in the community and had been reported to the universities where the Does were recruited to play football. CP 14, 50-52, 85. Adults, peers and strangers ostracized the Does, including chanting at them during high school football games. CP 49, 51, 84, 87. John Doe 1 testified: "During the state semi-finals championship game in December 2019, the chanting continued and coaches from the opposing team would say 'no means no'. ..." CP 51. The Does blamed "rumors and gossip" for community attention to the allegations. CP 97, 230.

[2] The Times could not file materials opposing the temporary order. RP 11, 17.

E. The Trial Court And Court of Appeals Denied An Injunction Against Disclosure.

The Does moved for a preliminary injunction based primarily on RCW 13.50.050, the exemption for juvenile records, although only the adult's file was proposed for release. CP 103-06, 234. The Does also asserted a right of privacy under RCW 42.56.240(1), which protects law enforcement records when disclosure would be highly offensive to a reasonable person and not of legitimate concern to the public. CP 107. The Does argued the information is "highly personal and not related to the operation of government." CP 109.

The trial court denied the injunction, stating:

> The investigative file associated with John Doe 5, the adult, and emails pertaining to the investigation are at issue in this case. …
>
> King County redacted the names of the juveniles and John Doe 5 from the John Doe 5's investigative file. Plaintiffs proposed additional redactions, including the height and weight attributed to some of the juveniles, an address, the year, make, model, and color of the suspect vehicle, much of the synopses and narratives contained in the Clyde Hill

Police Department case report, most of the transcribed interviews or notes from those interviews, information contained in applications for search warrants and the inventories taken based on those search warrants, texts, some investigative notes, statements regarding the incident, and correspondence between attorneys and prosecutors.

…Plaintiffs have not met their burden of proving that the records requested by The Seattle Times are wholly exempt from disclosure. The Court holds that the records referred to the King County Prosecuting Attorney's Office for possible charges against an adult are not categorically exempt under RCW 13.50.050. The statute applies only to records in juvenile cases whereas those records relate to the investigation of an adult. …

Finally, the Court also concludes that the public has a legitimate interest in scrutinizing how agencies handled the investigation at issue, which precludes fully withholding the records under RCW 42.56.240 and RCW 42.56.050. Because the records are not wholly exempt, and RCW 42.56.540 requires proving that an exemption applies, plaintiffs are not entitled to an injunction prohibiting disclosure entirely.

The Court has reviewed in camera an unredacted copy of the records at issue as well as the redactions proposed by King County and the additional redactions proposed by the plaintiffs as an alternative to withholding. The court holds that plaintiffs have not met their burden of proving that

> the proposed additional redactions meet the heightened test for an injunction under RCW 42.56.540.
>
> Specifically, plaintiffs failed to prove that it is clearly not in the public interest to disclose the adult suspect's investigation file without the plaintiffs' additional proposed redactions. The proposed additional redactions would impede the public's ability to evaluate King County's and Clyde Hill's handling of the investigation at issue as they would remove all of the assertions of what allegedly occurred.
>
> Further, those redactions are not necessary to protect privacy and might unfairly protect the privacy of some involved at the expense of others.
>
> Finally, those redactions are inconsistent with the narrow construction of exemptions and liberal construction of disclosure obligations required by RCW 42.56.030.

CP 373-74.

The Court of Appeals affirmed the trial court in an unpublished opinion. Petition App. 1. The analysis first quoted this Court's opinion in *Cornu-Labat v. Hosp. Dist. No. 2 Grant Co.*, 177 Wn.2d 221, 229, 298 P.3d 741 (2013), for these well-established rules: 1) records must be disclosed unless an

exemption applies, and 2) disclosure requirements must be liberally construed and exemptions narrowly construed. Petition App. 5. Then the Court of Appeals quoted this Court's opinion in *Lyft v. City of Seattle*, 190 Wn.2d 769, 789-90, 418 P.3d 102 (2018), on the two-part test for a PRA injunction: 1) an exemption must apply; and 2) if an exemption applies, the court looks to whether disclosure is against public interest and would cause substantial and irreparable damage. Petition App. 5-6.

The Court of Appeals held: "CHPD created separate, though nearly identical, files for the juvenile and adult suspects. And in Washington, 'an agency must redact [records] to overcome any and all relevant exemptions,' " quoting *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 441, 327 P.3d 600 (2013). Petition App. 7. "Consistent with Washington law, KCPAO redacted John Doe 5's records to protect the identities of juvenile suspects. Chapter 13.50 does not preclude the release of John Doe 5's records." *Id*. 7-8.

The Court of Appeals relied on this Court's opinion in *Does 1-11 v. Bellevue School Dist*., 164 Wn.2d 199, 189 P.3d 139 (2008), in holding that RCW 42.56.240(1) also does not preclude release. Petition App. 9. Citing *Does 1-11*, the Court of Appeals held that redaction of the suspects' identities protects their privacy, and release with redactions "serves the legitimate public concern of overseeing the police investigation of sexual assault allegations and the KCPAO's decision not to file charges." Petition App. 9-10. The unpublished opinion also affirmed the order allowing pseudonyms which the Times had cross-appealed. *Id*. 10-15.

III. ARGUMENT

A petition for review will be accepted only: (1) if the Court of Appeals decision conflicts with a decision of the Supreme Court; (2) the Court of Appeals decision conflicts with a published decision of the Court of Appeals; (3) a significant question of constitutional law is involved; or (4) the petition

involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). None of these conditions are met here.

A. The Opinion Is Based On The Nature Of The Records, Consistent With The Cases Cited By The Does.

The Does argue that the Court of Appeals opinion conflicts with decisions establishing that the "nature" of records, not their "location," determines whether an exemption applies. Petition pp. 14-17. But the opinion is not based on the location of John Doe 5's records. The Does point to no language supporting that premise. The Court of Appeals said John Doe 5's records are "*adult records*." Petition App. 8 (italics added). The Court of Appeals also noted that the file for John Doe 5, an adult, was separate from the file for juvenile suspects. *Id*. 7. This goes to the *nature* of the John Doe 5 records at issue – they are records of an adult criminal investigation. The adult nature, not the physical location, is what the opinion addressed. The fact that similar records existed for juveniles does not alter the adult nature of the

records which King County redacted for release. *Koenig v. City of Des Moines*, 158 Wn.2d 173, 183, 142 P.3d 162 (2006) (courts do not "look beyond the four corners of the records at issue" to determine if they are exempt).

There is no conflict with this Court's decision in *Lindeman v. Kelso School Dist. No 458*, 162 Wn.2d 196, 172 P.3d 329 (2007). That case concerned a single record (a school bus surveillance video), and whether it constituted "personal information in files maintained for students" for purposes of RCW 42.56.230(1). *Lindeman*, 162 Wn.2d at 203. This Court held the exemption must be construed narrowly to apply only when information is both "personal" and "maintained for students." *Id*. at 202. Noting that a surveillance video is recorded for security purposes and does not reveal whether a student was disciplined, the Court said: "The District cannot change the inherent character of the record by simply placing the videotape in the student's file or by using the videotape as an evidentiary

basis for disciplining the student." *Id*. at 203. In this case, the Court of Appeals opinion narrowly interpreted an exemption for juvenile records to exclude records of a different nature (adult records), just as *Lindeman* narrowly interpreted an exemption for student records to exclude security records.

Nor is there a conflict with *City of Tacoma v. Tacoma News Inc*., 65 Wn.App. 140, 827 P.2d 1094 (1992). The Does rely on a footnote stating that whether certain letters were placed in an investigative file was "not dispositive" in determining if they were investigative records. 65 Wn.App. at n.3. On that point (which the case did not turn on), the Court of Appeals looked to whether the letters were received and retained in connection with the child abuse investigation at issue. *Id*. Similarly here, in determining if the records at issue were juvenile records, the Court of Appeals looked to whether the records were received and retained in connection with the juvenile investigation. They were not – and instead were

connected with the adult investigation. Thus, there is no conflict with the cited footnote in *City of Tacoma* or with *Lindeman*.

B. The Opinion Fulfills, And Does Not Frustrate, Legislative Intent.

The Does also argue that the Court of Appeals opinion conflicts with a rule, stated in various decisions, that narrow construction must not ignore legislative intent. Petition pp. 17-22. But there is no conflict because the intent of RCW 13.50.050 is to protect juvenile records, not adult criminal records. The Does cannot point to any law allowing agencies to withhold *adult* investigation records if they mention juveniles or are similar to juvenile records. If the Legislature intended to limit public scrutiny of adult cases in that way, it would have said so.

RCW 13.50.010 defines "records" subject to RCW 13.50.050.[3] The definition does *not* include records in adult

[3] RCW 13.50.050 governs "*records* relating to the commission of juvenile offenses," and states "*records* other than the official juvenile court file are confidential." (italics added). RCW 13.50.010(1)(d) defines "records" as "the official juvenile court file, the social file, and records of any other juvenile justice or care agency *in the case*." (italics

cases. It is limited to records "in the case" of a "juvenile court file." RCW 13.50.010(1)(d). The Does want a broad interpretation encompassing police files sent to the adult criminal division for prosecution of an adult. That would conflict with *Cornu-Labat*, *Lindeman* and other decisions adhering to RCW 42.56.030, which requires narrow construction of exemptions to promote disclosure. *See, e.g., Lyft*, 190 Wn.2d at 779 (the PRA is liberally construed and its exemptions are narrowly construed to promote the policy of public disclosure, and to keep Washington residents informed and in control over the instruments they have created).

C. An Unpublished Opinion Does Not Pose Any Risk of Inconsistent Decisions.

An important purpose of Supreme Court review is to clarify the law when appellate courts have interpreted it

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added). The "social file" means "the juvenile court file containing the records and reports of the probation counselor." RCW 13.50.010(1)(e). Thus, "records" governed by RCW 13.50.050 are *the juvenile court's* legal and probation files and other records "*in the case.*" RCW 13.50.010. Under the plain wording, "records…in the case" must be records *in a juvenile court case*.

differently, so as to prevent confusion and inconsistency. RAP 13.4(b). Here, in alleging conflicts with established law and threats to juvenile privacy, the Does neglect to acknowledge that the Court of Appeals opinion is unpublished and therefore has no impact beyond this case. GR 14.1 (unpublished opinions "have no precedential value and are not binding on any court"). If the Court of Appeals panel thought it was establishing a new rule, deciding a matter of general public importance, or contradicting a prior opinion, it would have published the opinion. RAP 12.3(d).

D. The Unpublished Court Of Appeals Opinion Does Not Warrant Review Based On Public Interest.

The Does contend that the Court of Appeals opinion presents issues of substantial interest because it "imperils" juvenile rehabilitation policies and treats "deeply private, noncriminal sexual conduct" as a legitimate public concern. Petition pp. 22, 27. First, as explained above, the opinion is not binding and therefore leaves all policies and rules intact.

Second, an alleged rape is a criminal justice issue, not a "deeply private" matter, and there is nothing new or alarming about recognizing the public's strong interest in overseeing agency investigations. See, e.g., *Ameriquest Mortg. Co. v. Office of the Atty Gen. of Wash*., 177 Wn.2d 467, 493, 300 P.3d 799 (2013) (finding "no authority or evidence to prove that the public lacks a legitimate interest in monitoring agency investigations"); *Bainbridge Police Guild v. City of Puyallup*, 172 Wn.2d 398, 416, 259 P.3d 190 (2011) ("Although lacking a legitimate interest in the name of a police officer who is the subject of an unsubstantiated allegation of sexual misconduct, the public does have a legitimate interest in how a police department responds to and investigates such an allegation"); *Martin v. Riverside School Dist.*, 180 Wn.App. 28, 35, 329 P.3d 911 (2014).

The privacy right in RCW 42.56.240(1) is limited to the types of "private" facts comparable to those in the Restatement

(2nd) of Torts §652D. *Predisik v. Spokane Sch. Dist.*, 182 Wn.2d 896, 905 346 P.3d 737 (2015). Section 652D comment b says there is no invasion of privacy when "the defendant merely gives further publicity to information about the plaintiff that is already public." Here, the Does described widespread awareness of the assault allegations before KING 5 reported about the records. Moreover, §652D comment f says criminal suspects are "persons of public interest, concerning whom the public is entitled to be informed." Thus, suspected crimes are not private sexual matters and the Court of Appeals opinion did not break any new ground, contrary to the Does' arguments.

It is significant, too, that this Court previously viewed the issues presented as lacking broad or urgent public interest under RAP 4.2(a)(4). In April 2020, the Seattle Times requested direct review as a way of obtaining "prompt and ultimate determination" of the issues, emphasizing the

importance of a quick and final resolution. The Statement of Grounds for Direct Review said:

> Without direct review, the case may take years to wind through the Court of Appeals and subsequent discretionary review by this Court. The injunction pending appeal (opposed by the Times) could stay in place the entire time. Direct review would minimize delays, consistent with the PRA policy to promote the fullest and fastest disclosure possible so that the people may maintain control of government. RCW 42.56.100; RCW 42.56.030.

Statement p. 11. As the Times predicted, the injunction pending appeal has stayed in place for the entire one and half years since "prompt" review was sought based on public interest. It is too late to treat the issues as broadly important, since the Court of Appeals resolved the issues based on preexisting law and determined that its opinion does not merit publication. In sum, the Does have not shown that RAP 13.4(b) criteria for review are met.

IV. CONCLUSION

For the foregoing reasons, this Court should deny review.

Dated this 8th day of November 2021.

I certify that this Answer contains 3,257 words except for content excluded by RAP 18.17.

RESPECTFULLY SUBMITTED,

/s Katherine A. George
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on November 8, 2021, I caused service of the Answer to Petition for Review on registered parties through the electronic filing system.

KATHERINE A. GEORGE

JOHNSTON GEORGE LLP

November 08, 2021 - 3:18 PM

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