COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NO. 311767

ANTHONY PREDISIK and CHRISTOPHER KATKE

Appellants

v.

SPOKANE SCHOOL DISTRICT NO. 81

Respondent

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

A. The Public Records Act's policy of broad disclosure does not require the court to ignore exemptions designed to protect an individual's right to privacy.

"The [Public Records Act's (PRA)] mandate for broad disclosure is not absolute." *Resident Action Council v. Seattle Housing Authority*, No. 87656-8, slip opinion at p. 9 (May 9, 2013). The PRA's exemptions "protect certain information or records from disclosure" and "are provided solely to protect relevant privacy rights . . . that sometimes outweigh the PRA's broad policy in favor of disclosing public records." *Resident Action Council*, at p. 9 (citing *Limstrom v. Ladenberg*, 136 Wn.2d 595, 607 963 P.2d 869 (1998)).

B. The District properly admits that the requested records are "personal information" under RCW 42.56.230(3).

The trial court determined that the requested records are Mr. Predisik's and Mr. Katke's "personal information". (CP 401). The District admits that the requested records are personal information. (Brief of Respondent at 5-6). This court should hold that the requested records are personal information under RCW 42.56.230(3).

C. Disclosing the requested records will violate Mr. Predisik's and Mr. Katke's respective rights to privacy.[1]

The District will violate Mr. Predisik's and Mr. Katke's right to privacy if it discloses the requested records because disclosure, even with their names redacted, would be highly offensive to a reasonable person and because the public does not have a legitimate interest in the requested records.

1. Mr. Predisik and Mr. Katke have a right to privacy in their identities and the requested records.

The District does not challenge the trial court's determination that Mr. Predisik and Mr. Katke have a right to privacy in their identities. Mr. Predisik and Mr. Katke have a right to privacy in their identities and in the requested records, which the District created as a result of unsubstantiated allegations of misconduct. *See Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 215-16, 189 P.3d 139 (2008) (teachers have a right to privacy in their identities because unsubstantiated allegations "are matters concerning the teachers' private lives and are not specific incidents of misconduct during the course of employment."). This court should affirm the trial court's determination hold that Mr. Predisik

[1] Mr. Predisik and Mr. Katke claim that the requested records are exempt from disclosure under RCW 42.56.230(3) and RCW 42.56.240(1). Both exemptions require the court to analyze whether disclosure would violate Mr. Predisik's and Mr. Katke's right to privacy.

and Mr. Katke have a right to privacy in their identities and in the requested records. (CP 401).

2. Disclosing the requested records will violate Mr. Predisik's and Mr. Katke's rights to privacy because disclosure would highly offend a reasonable person.

The nature of the allegations against Mr. Predisik and Mr. Katke are of such a serious nature that any reasonable person would be highly offended if their identities and records concerning the allegations were disclosed. (CP 10-12, 179-84). The *Bellevue John Does* court recognized that "the offensive nature of disclosure does not vary depending on whether the allegation is substantiated or unsubstantiated. The offensiveness of disclosure is implicit in the nature of an allegation of sexual misconduct." *Bellevue John Does*, 164 Wn.2d at 216, n. 18. Accordingly, the subject matter of requested records dictates offensiveness of their disclosure.

Due to the serious nature of the allegations of misconduct against Mr. Predisik and Mr. Katke, regardless of the truth of those allegations, has the potential to hold them "up to hatred and ridicule in the community, without any evidence that such misconduct ever occurred." *See Bellevue John Does*, 164 Wn.2d at 215. Disclosing the requested records is also

highly offensive because the requested records do not identify substantiated misconduct, and Mr. Predisik and Mr. Katke have not been disciplined or subjected to any restriction as a result of the alleged misconduct. *See Bellevue John Does*, 164 Wn.2d at 224.

Unlike disclosing the requested records in this case, disclosing the requested information in *Morgan v. City of Federal Way*, 166 Wn.2d 747, 756, 213 P.3d 596 (2009)–an investigative report created following a hostile work environment complaint against a municipal court judge–was not highly offensive to a reasonable person due to the nature of the allegations against the judge. Disclosing information concerning the conduct in *Morgan*, including angry outbursts, inappropriate gender-based and sexual comments, and demeaning colleagues and employees, was merely embarrassing. *See Morgan*, 166 Wn.2d at 756. The nature of the allegations against Mr. Predisik and Mr. Katke differ substantially, and are much more serious, than allegations concerning the *Morgan* judge's rude and inappropriate workplace behavior. (*See* CP 10-12; 279-84).

The highly offensive nature of the allegations leading to the District's creation of the requested records notwithstanding, a reasonable person would be highly offended by disclosure of the specific information contained in the requested records. Disclosing information showing that the District has placed a person on administrative leave is highly offensive

to a reasonable person, particularly when the District has placed him on leave for allegations of misconduct of the type alleged against Mr. Predisik and Mr. Katke. The fact that the District placed Mr. Predisik and Mr. Katke on administrative leave bears on their basic competence as teachers. In *Dawson*, the court quoted with approval: "The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice." *Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993), *abrogated in part on other grounds by Progressive Animal Welfare Society (PAWS) v. Univ. of Wash.*, 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994) (quoting *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979)). This sensitivity goes beyond mere embarrassment, information concerning a teacher being placed on administrative leave "bears on the competence of the subject employees." *Dawson*, 120 Wn.2d at 797. The *Dawson* court held that disclosure of records–performance evaluations in that case–that bear on the competence of subject employees and that do not discuss specific instances of misconduct "is presumed to be highly offensive." *Dawson*, 120 Wn.2d at 797.

The requested records contain information that imply Mr. Predisik's and Mr. Katke's competence–or alleged lack thereof–as

teachers. (Exhibits 1-3). And the requested records do not discuss specific instances of misconduct. (Exhibits 1-3). Disclosing the requested records is, therefore, "presumed to be highly offensive" to a reasonable person. *Dawson*, 120 Wn.2d at 797.

Finally, that some people know that the District placed Mr. Predisik and Mr. Katke on administrative leave does not render disclosure any less highly offensive. The requested records contain details related to the allegations against Mr. Predisik, and details concerning Mr. Predisik's and Mr. Katke's administrative leave, that are not public knowledge. Even if the specific records at issue were previously produced to every person the District claims knows that they are on administrative leave, Mr. Predisik and Mr. Katke could still assert that disclosure to The Spokesman-Review (The Spokesman) and KREM 2 Television (KREM 2) is highly offensive. *See Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-10, 259 P.3d 190 (2011) (holding that prior disclosure of the requested records did not prevent the police officer in that case from asserting his right to privacy in response to a subsequent request for the same records).

Any reasonable person would be highly offended by the disclosure of the requested information.

a. No reasonable person would find disclosure of the requested records any less highly offensive if his name was redacted from the records.

Disclosing the records with Mr. Predisik's and Mr. Katke's names redacted does not render disclosure less highly offensive. The allegations against Mr. Predisik and Mr. Katke are unsubstantiated, some of the requests specifically seek records concerning Mr. Predisik and Mr. Katke (CP 47, 282), the District is still investigating the allegations against them (CP 12, 280), and they have contractual and/or statutory appeal rights if the District determines it has sufficient cause to take adverse action against them (CP 321-23); RCW 28A.405.300; .310. Under these circumstances, redaction does not adequately protect Mr. Predisik's and Mr. Katke's respective rights to privacy.

In *Dawson*, the court held that the presumption that a reasonable person would be highly offended by disclosure of records that bear on a person's basic competence and that do not discuss specific instances of misconduct "may be overcome in *some* cases." *Dawson*, 120 Wn.2d at 797 (emphasis added). The presumption cannot be overcome in this case. *Dawson* cited *Ollie v. Highland School District No. 203*, 50 Wn. App. 639, 749 P.2d 757 (1988) for the proposition that, under the circumstances in *Ollie*, "deletion of identifying information from the evaluations of

numerous employees was effective to protect the employees' privacy." *Dawson*, 120 Wn.2d at 797.

In *Ollie*, a former employee that filed a wrongful termination lawsuit requested production of performance evaluations or work records of other employees, and subpoenaed all of Highland School District's personnel records involving any individual disciplined or admonished for job performance or misconduct over a five-year period. *Ollie*, 50 Wn. App. at 640-41. The court held that deleting the names and identifying information of employees implicated by the broad public records request would adequately protect their rights to privacy. *Ollie*, 50 Wn. App. at 645. But whereas redaction may have protected the teachers' privacy rights in *Ollie*, given the breadth of the request in that case, redaction does not afford any protection to Mr. Predisik's and Mr. Katke's privacy rights, where they are the specific subjects of narrowly tailored records requests. Redacting Mr. Predisik's and Mr. Katke's names will not prevent the disclosure of their identities; redacted disclosure affords no greater protection to their privacy rights–and is no less highly offensive–than unredacted disclosure.

Likewise, while the Supreme Court held that redaction adequately protected the employees' rights to privacy in *Bellevue John Doe* and *Bainbridge*, the circumstances in those cases differ substantially from the

circumstances in this case. Unlike *Bellevue John Does* and *Bainbridge*, where the courts ordered redacted documents released after investigations were complete, and the people involved had exhausted, waived, or did not have appeal rights, the District's investigations into Mr. Predisik and Mr. Katke are pending. *See Cowles Pub'g Co. v. State Patrol*, 109 Wn.2d 712, 725, 748 P.2d 597 (1988) ("Release of files dealing with pending investigations, or with complaints which were later dismissed would constitute a more intrusive invasion of privacy than would the release of files relating only to completed investigations which resulted in some sanction against the officers involved."). Any disclosure is highly offensive because the District or a neutral third party could determine that discipline is unjustified, which would allow Mr. Predisik and Mr. Katke to respond to the release of any records by pointing to the decision exonerating them.

Any reasonable person would find it highly offensive for records related to allegations of misconduct against Mr. Predisik and Mr. Katke to be disclosed, regardless of whether their names were redacted, before the District concludes its investigation, and before either waiving or exhausting their appeal rights if the District takes adverse action against them.

3. The public has no legitimate concern in the disclosure of the requested records because the allegations are unsubstantiated.

Mr. Predisik's and Mr. Katke's identities, and the requested records, are of no legitimate public concern because the allegations against Mr. Predisik and Mr. Katke are unsubstantiated and because the District's investigation is ongoing. "When an allegation is unsubstantiated, the teacher's identity is not a matter of legitimate public concern." *Bellevue John Does*, 164 Wn.2d at 221. The *Bellevue John Does* court further held that "[w]e find that there is no legitimate public concern in information identifying the teachers within the letters of direction but that disclosure of redacted letters of direction does not violate the teachers' right to privacy *because it is not highly offensive*." *Bellevue John Does*, 164 Wn.2d at 224. Accordingly, the court held that there is no legitimate public concern in records concerning unsubstantiated allegations of misconduct, but held that disclosure was not highly offensive to a reasonable person if the records were redacted. *Bellevue John Does*, 164 Wn.2d at 226. The requested records concern unsubstantiated allegations of misconduct against Mr. Predisik and Mr. Katke. As described above, redaction does not render disclosure any less offensive.

In *Dawson*, the court held that while "the public has some degree of interest in . . . the evaluations of prosecutors," there was no legitimate

public concern in light of the potential harm disclosure would cause. *Dawson*, 120 Wn.2d at 799. The potential harm to Mr. Predisik and Mr. Katke is great because the District's investigations into the allegations against them are pending. And disclosing the requested records also potentially provides the District with an alternative justification for discipline–community outcry or negative reaction from parents–when its investigations into the purported factual basis of the allegations cannot justify discipline.

Contrary to the District's assertion, and unlike the circumstances in *Bellevue John Does*, redacting Mr. Predisik's and Mr. Katke's names from the requested records does not both protect the public interest and the teachers' individual privacy rights. The public has no legitimate concern in the records because the allegations are unsubstantiated and the District's investigation is pending, unlike the investigations in *Bellevue John Does*. In any event, the *Bellevue John Does* language the District relies on is dicta; the test for whether disclosure violates a person's right to privacy is whether disclosure is highly offensive and whether a legitimate public concern in disclosure exists, not whether disclosure "protects . . . the public interest" and the "teacher's individual privacy rights". RCW 42.56.050; *Cf. Bellevue John Does*, 164 Wn.2d at 226-27; Br. of Resp. at 22-23.

Mr. Predisik's and Mr. Katke's identities, and the requested records, are merely fodder for tabloid journalism. "In essence, disclosure of the identities of teachers who are the subject of unsubstantiated allegations 'serves no interest other than gossip and sensation.'" *Bellevue John Does*, 164 Wn.2d at 221 (quoting *Bellevue John Does 1-11 v. Bellevue School District No. 405*, 129 Wn. App. 832, 854, 120 P.3d 616 (2005)).

The District mischaracterizes *Bainbridge*. Br. of Resp. at 23-24. The *Bainbridge* court held that disclosure of the information contained in the investigative reports was a matter of public concern, not that an entire record may never be withheld if its disclosure is of no legitimate public concern. *Bainbridge*, 172 Wn.2d at 417. Unlike the reports in *Bainbridge* the requested records do not contain the breadth of information contained in the *Bainbridge* reports. *See Bainbridge*, 172 Wn.2d at 417, n. 12. More importantly, the requested records are of no legitimate public concern–in their entirety–because the District's investigations are pending.

At this point, when the allegations are unsubstantiated, the District's investigations are pending, and the teachers have contractual and/or statutory appeal rights that they can avail themselves of, the public has no legitimate concern in the records or Mr. Predisik's and Mr. Katke's identities.

4. The public has no legitimate concern in the disclosure of the requested records when the District's investigation is still pending and Mr. Predisik and Mr. Katke are contractually and statutorily guaranteed an appeal if the District takes adverse action.

Disclosing the requested records before the District determines that the allegations are unsubstantiated or false violates Mr. Predisik's right to privacy. Moreover, if the District determines that sufficient cause exists to take adverse action against Mr. Predisik and Mr. Katke, disclosing the records before they have exhausted or waived their contractual or statutory appeal rights violates their right to privacy.

Any adverse decision resulting from the District's investigation into the allegations against Mr. Predisik and Mr. Katke is not binding. Mr. Predisik and Mr. Katke have contractually and statutorily guaranteed appeal rights. *See* CP 321-23; RCW 28A.405.300; .310. Under the Spokane Education Association's (SEA) Collective Bargaining Agreement (CBA) with the District, an SEA member may file a grievance regarding an alleged violation of a specific term of the CBA or a dispute regarding an interpretation of the CBA.[2] (CP 321). If a member is unsatisfied with the District's response to his grievance, he may ultimately proceed to arbitration before a neutral arbitrator, to determine whether the District's

[2] Mr. Predisik and Mr. Katke are members of the Spokane Education Association and are covered by the CBA. (CP 10, 283)

adverse action against the teacher was supported by "just cause". (CP 321, 323). Accordingly, Mr. Predisik and Mr. Katke could file a grievance and proceed to arbitration if the District takes adverse action, which arbitration may result in a determination that the District lacked just cause to take any adverse action against them. (CP 321-23).

If the District takes adverse action against them, Mr. Predisik and Mr. Katke could also chose to pursue their appeal rights set forth in RCW 28A.405.300,[3] which guarantees teachers a hearing before a hearing officer to determine whether the District has "sufficient cause or causes for his or her discharge[.]" RCW 28A.405.300. Moreover, the legislature has implicitly acknowledged that publically disclosing the information used in statutory appeal hearings implicates a teacher's right to privacy. "In any request for a hearing pursuant to RCW 28A.405.300 . . . the employee may request either an open or closed hearing. The hearing shall be open or closed as requested by the employee. . . ." RCW 28A.405.310(2). In providing the teacher with the right to a closed hearing, the legislature expressly acknowledged the lack of any legitimate public concern in the disclosure of information during the proceedings.

[3] Mr. Predisik is a counselor, which is a certificated employee in the District. (CP 10). RCW 28A.645.010 provides a statutory right to appeal any decision that adversely affects his contract status. RCW 28A.645.010(1). Appeals for certificated employees are governed by chapter RCW 28A.405, discussed above. RCW 28A.645.010(2).

The public has no legitimate interest in the release of the requested records until Mr. Predisik and Mr. Katke exhaust or waive their appeal rights. The cases that the District cites are inapposite because they did not involve disclosure of records concerning people who had contractual and/or statutory appeal rights that were not exhausted. School employees are afforded special protection that members of other professions are not. *See* RCW 28A.405.300; RCW 28A.405.310; RCW 28A.645.010; CP 61-63. Although *Cowles* provides some support for Mr. Predisik and Mr. Katke's argument that disclosure should not occur before their appeal rights are exhausted,[4] that case is also distinguishable because nothing in that case suggests that the police officers had a right to appeal the internal review into the complaints of misconduct against them. *Cowles*, 109 Wn.2d at 726-27. And the judge in *Morgan* had no right to appeal the investigator's decision. *See Morgan*, 166 Wn.2d at 752-58.

Mr. Predisik's and Mr. Katke's rights to privacy may only be protected if they are allowed to exhaust the remedies contractually and/or statutorily guaranteed to him before the records are disclosed.

[4] *See* Cowles, 109 Wn.2d at 725 ("Release of files dealing with pending investigations, or with complaints which were later dismissed would constitute a more intrusive invasion of privacy than would the release of files relating only to completed investigations which resulted in some sanction against the officers involved.").

D. The requested records are specific investigative records and the District is an investigative agency.

The District is an investigative agency under RCW 42.56.240(1). When the District receives a complaint against a teacher, it conducts a formal inquiry into the investigations. (CP 359-61). The District systematically inquiries into the allegations against the employee by interviewing witnesses, interviewing the employee, reviewing an employee's personnel file, the District's file on the employee, and/or reviewing other documents related to the allegations against the employee. (CP 361). In doing so it acts as an "investigative agency" for purposes of RCW 42.56.240(1).

The District misstates the law by claiming that the court in *Brouillet v. Cowles Publishing Company*, 114 Wn.2d 788, 791 P.2d 526 (1990) rejected the contention that a school district is an investigative agency. Neither party in *Brouillet* contended that a school district was an investigative agency. The parties in *Brouillet* agreed that the Office of the Superintendent of Public Instruction (OSPI) was a state agency vested with responsibility to discipline teachers. *Brouillet*, 114 Wn.2d at 795-97; *see* RCW 42.56.240(1) (exempting from disclosure specific investigative records compiled by investigative agencies, law enforcement agencies, penology agencies, and state agencies vested with the responsibility to

discipline members of any profession). The *Brouillet* court never addressed whether school districts are investigative agencies under RCW 42.56.240(1).

Moreover, *Brouillet* does not address the same exemption that Mr. Predisik and Mr. Katke claim applies. *See* RCW 42.56.240(1). In *Brouillet*, the court held that OSPI is not a law enforcement agency and that, therefore, nondisclosure of the records was not "essential to effective law enforcement" *Brouillet*, 114 Wn.2d at 795-97. The party seeking to prevent disclosure did not contest that the public had a legitimate concern in the requested information. *Brouillet*, 114 Wn.2d at 798. Accordingly, the court held that nondisclosure was not "essential . . . for the protection of any person's right to privacy." *Brouillet*, 114 Wn.2d at 798; *see* RCW 42.56.050 (party seeking to show violation of right to privacy must show the disclosure of information about them is (1) highly offensive to a reasonable person and (2) of no legitimate concern to the public). *Brouillet* is inapposite, not dispositive.

E. An injunction is proper under RCW 42.56.540 because disclosure is not in the public interest and would substantially and irreparably harm Mr. Predisik and Mr. Katke.

As set forth in the Appellants' brief, disclosing the requested records is not in the public interest given the lack of legitimate concern in the requested records at this stage. And disclosing the requested records during the pendency of the District's investigations, particularly when the District may determine that the allegations are unfounded, and where Mr. Predisik and Mr. Katke have appeal rights if the District renders a decision adverse to them, would substantially and irreparably harm Mr. Predisik and Mr. Katke. By way of example, The Spokesman already published an article regarding Mr. Katke. (CP 283). Since the article was published, substantial and irreparable damage has been done to his reputation. (CP 283). Mr. Katke's neighbors are unpleasant to him, and family and former friends refuse to speak to him. (CP 283). Because the District has ordered him to refrain from discussing the allegations, he cannot explain that the allegations are untrue without running the risk of losing his job for failing to comply with the District's order to refrain from speaking with anyone during the pendency of the District's investigation. (CP 283). Disclosing records concerning Mr. Predisik will have the same substantial and irreparable effect on him.

The court should enjoin disclosure because disclosure is not in the public interest and will substantially and irreparably harm Mr. Predisik and Mr. Katke.

II. CONCLUSION

Based on the foregoing, Anthony Predisik and Christopher Katke respectfully request this court to affirm the trial court's determination that they have a right to privacy in their identities in connection with unsubstantiated allegations of misconduct and that the requested records are personal information under RCW 42.56.230(3). Mr. Predisik and Mr. Katke respectfully request this court to reverse the trial court and hold that the records, in their entirety, are exempt from disclosure under RCW 42.56.230(3) and RCW 42.56.240(1).

Respectfully submitted this 24th day of May, 2013.

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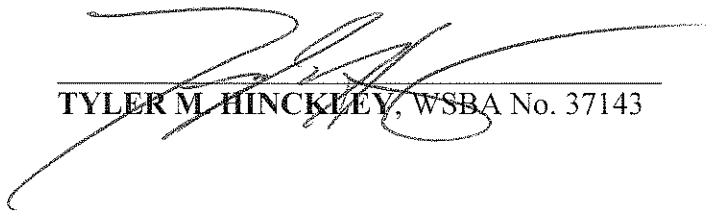

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that on the date stated below I served a copy of this document in the manner indicated:

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DATED at Yakima, Washington, this 24th day of May, 2013.

Tyler M. Hinckley
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