

No. 44964-1

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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ARTHUR WEST

Appellant

vs.

PORT OF OLYMPIA

Respondent

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APPELLANT ARTHUR WEST'S REPLY BRIEF

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## I. INTRODUCTION

Appellant Arthur West and the Respondent the Port of Olympia agree on the facts and procedural history of this Public Records Act (“PRA”) case. They agree on the exemptions that are at issue. They agree on the controlling authority. What they do not agree on is the application of these exemptions and authority to the facts at hand: Mr. West contends that the Port made excessive redactions under a claim of personal privacy exemption, thereby violating the PRA, while the Port argues that its redactions were proper. But the Port’s interpretation is not in accordance with law. Statute and caselaw, applied to the facts of this case, require that the Port “unredact” all its redactions and release the report and supporting exhibits and emails to Mr. West in full. The Trial Court affirmed the Port’s redactions. This Court should reverse and remand.

## II. ARGUMENT

The Port argues: “Here, all of the Port’s limited redactions fall squarely within the four walls of that allowed by RCW 42.56.050 and RCW 42.56.230(2), and interpreting case law: **Redactions are limited to that necessary to avoid identification of an employee, subject of an investigation where no wrong doing was conclusively established... and the redactions maintain the confidentiality of the reporting ‘whistleblower’ employee.**” Response at 33 (emphasis added). But the

Port has got the law wrong: the Port redacted enough material from the report, supporting materials, and emails so as to **avoid identification** of the employee accused of wrongdoing and **maintain the confidentiality** of the whistleblowing employee, while the law only protects the **identities** of the accused employee and the whistleblower both.

This is no pedantic or hairsplitting distinction. Under the PRA, exemptions are narrowly construed. The controlling caselaw here, Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 417-418, 259 P.3d 190 (2011), allows redaction only of the “identity” of the accused police officer, even if production of the otherwise unredacted report would allow the **identification** of the accused officer. Similarly, the whistleblowing exemption, RCW 42.41.030(7), is limited to maintaining the confidentiality of the employee’s identity, not the confidentiality of the employee him or herself: “The **identity** of a reporting employee shall be kept confidential to the extent possible under law, unless the employee authorizes the disclosure of his or her identity in writing.” And under the other controlling caselaw, Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 219 n. 21 *and* 220-221, 189 P.3d 139 (2008), “identity” is equated with “name.”

Accordingly, under Bainbridge Island, RCW 42.41.030(7), and Bellevue John Does, the Port may, at most, redact the employees’ names

and personal pronouns, thereby protecting their identities, but must produce the remainder of the records unredacted. “We realize that appellants’ request under these circumstances may result in others figuring out Officer Cain’s identity. However, it is unlikely that these are the only circumstances in which the previously existing knowledge of a third party, paired with the information in a public records request, reveals more than either source would reveal alone.” Bainbridge Island, 172 Wn.2d at 417-418. Even though production of the remainder of the unredacted report paired with the previously existing knowledge of a third party would allow someone to identify, that is, to figure out the identity, of both the accused employee and the whistleblowing employee, the mandate of the PRA towards liberal construction of the Act and narrow construction of its exemptions dictates this result.

**A. The Port Properly Claimed the Personal Privacy Exemption as to its Accused Employee and its Whistleblowing Employee, But Did Not Claim Any Other Exemptions at Issue Here, and Made Redactions in Excess of Those Allowed by the Exemptions**

The Port properly claimed the personal privacy exemption as to its accused employee and its whistleblowing employee (Mr. West did not and does not challenge either *exemption*, but only the excessive redactions not allowed under the Act). But the Port’s redactions were in excess of those allowed by the exemptions it claimed. Nor did the Port claim any other

exemptions at issue here. As Mr. West argued in his opening brief, the Port waived any potential attorney-client or work-product exemption by releasing the records.

The Port argues that this Court should affirm its redactions if the Court finds that any exemption applies, whether or not the Port properly cited it in the exemption log it gave Mr. West. Response at 36. But the Port cites to State v. Ellis, 21 Wn. App. 123, 124, 584 P.2d 428 (1978) for this argument, a criminal law case on search and seizure, not a Public Records Act case. This case is not on point, and this Court should disregard it. Indeed, the PRA requires that a responding agency fully describe the justification for any redactions: “To the extent required to prevent an unreasonable invasion of personal privacy interest protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.” RCW 42.56.070(1). Here, for example, the Port did not cite to Mr. West or to the Trial Court that the investigative report or the exhibits or emails somehow constituted an “evaluation” of a public employee under the PRA.

**B. The Port Made Redactions In Excess of Those Allowed by RCW 42.56.050 and RCW 42.56.230(3)**

In his opening brief, Mr. West argued that assuming, *arguendo*, that the three broad categories of material redacted by the Port ((1) the Port employees' names and pronouns – that is, the Port employee's *identities*; (2) factual details concerning the allegations of “improper government action”; and (3) factual details concerning the Port employees' duties and responsibilities) all constituted “personal information” under the statute, and that the port employees in question had a right to privacy in their identity (in the case of the accused employee, this would be a right to privacy in his or her identity in connection with an unsubstantiated accusation of improper government conduct; in the case of the whistleblowing employee, this would be a right to privacy in his or her identity in connection with the report he or she made), that even still, the Port violated the PRA in making excessive redactions.

The Port argued “The Port’s redactions to the Investigative Report and Associated emails and exhibits were limited to those needed to protect the identity of the exonerated employee.” Response at 42. But the Port’s duty under the PRA is not to *protect* the identity of the exonerated employee – that is, to ensure that no third person could ever figure out the identity of the exonerated employee – but to *redact* the identity of the

exonerated employee. The Port redacted more than just the names and personal pronouns of its employees; it also redacted details of the alleged wrongdoing and also details about job descriptions and duties. Even though some third person might be able to figure out the actual names of the employees in question – either from the job duties or from the details of the alleged wrongdoing – the Port cannot redact more than allowed by law. And under the PRA, the Port may only redact the employees’ *identities*, that is, their names and personal pronouns.

Under Bellevue John Does, “identity” is associated with “name.” For example, the Court addressed the concern that the name of a teacher accused of sexual misconduct must be released because a pattern of unsubstantiated accusations of sexual misconduct is more troubling than each individual complaint. The Court noted that “if teachers’ identities are replaced by pseudonyms, members of the public will still be able to track and determine whether a certain teacher is the subject of numerous unsubstantiated allegations. 164 Wn.2d at 219, n. 21. Here, by suggesting the replacement of “identity” with “pseudonym,” the Supreme Court illustrated that “identity” is, in this case, limited to an employee’s *name*. Similarly, in the same case, the Supreme Court quoted with approval the observation of amicus American Civil Liberties Union of Washington (ACLU-WA) that used “identity” and “name” interchangeably. Bellevue

John Does, 164 Wn.2d at 220-221. Since “identity” is limited to “name,” then the Ports’ redactions of the job descriptions and duties, as well as the redactions of the details of the allegations of wrongdoing, were excessive, just as Mr. West argued to the Trial Court. Bainbridge Island is on point. Even if the limited redactions allowed by law allow some third person to figure out the identity of the Port’s employees, that is in accordance with the PRA’s mandate of disclosure and narrow construction of its exemptions.

**C. Alternatively, Even the Port’s Redactions of the Accused Employee’s Name Were In Excess**

Alternatively, even the Port’s redactions of the accused employee’s name (though not the redactions of the whistleblowing employee’s name) were in excess of that allowed by law. This is because the accusations here were of government wrongdoing, not of sexual misconduct. In so arguing, Mr. West is simply asking this Court to distinguish Bellevue John Does and Bainbridge Island on a factual basis, not asking that this Court “create new law.” Response at 55. The Port argues that there is no factual basis on which to distinguish Bellevue John Does and Bainbridge Island. “It is the fact that the allegations are unsubstantiated – not the particular category of the wrongdoing – that renders the records outside the scope of ‘employment’ and legitimate public scrutiny.” Response at 56. But the

Port's argument is incorrect; *this* is the law: "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. That is, because the Port employee was accused of wrongdoing within the scope of his or her employment, not within the scope of his or her private life, there is no offense in disclosing the employee's name in connection with an investigative report that ultimately – the Port argues – exonerates him or her of wrongdoing. And if there is no offense in the disclosure of the employee's name, then the personal privacy exemption does not apply and the Port also violated the PRA in redacting the employee's name.

**D. This Court Should Deny the Port's Request for Fees and Should Grant Mr. West His Fees**

This Court should reverse the Trial Court, should conclude that the Port violated the PRA with its excessive redactions, should conclude that Mr. West is the prevailing party, award him his fees under RCW 42.56.550 and RAP 18.1, and should remand the matter back to the Trial Court for a determination of the per diem penalty. But even if this Court affirms the Trial Court, this Court should deny the Port's request for fees. The Port argues that this appeal is without merit, saying that the issues on

review are clearly controlled by settled law, are factual and supported by the evidence, or are matters of judicial discretion and the decision was clearly within the discretion of the trial court. Response at 60, *citing State v. Rolax*, 104 Wn.2d 129, 132, 702 P.2d 1185 (1985). Here, Mr. West agrees that the issues on review are clearly controlled by settled law: Bainbridge Island and Bellevue John Does. He challenges the Port's and the Trial Court's interpretation of this settled law. That reasonable minds may differ in their interpretation does not make an appeal frivolous. This Court should deny the request for fees.

### III. CONCLUSION

For the foregoing reasons, this Court should reverse the Trial Court, conclude that the Port violated the Public Records Act with its excessive redactions, conclude that Mr. West is the prevailing party, award him his attorney fees and costs, and remand to the Trial Court for the determination of an appropriate per diem penalty.

Respectfully submitted this 5th day of December, 2013.

CUSHMAN LAW OFFICES, P.S.

/s/ Stephanie M. R. Bird

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# CUSHMAN LAW OFFICES PS

**December 05, 2013 - 4:54 PM**

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CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On December 5, 2013, I caused the foregoing document to be filed with this Court and served on the undersigned in the manner indicated:

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SIGNED at Olympia, Washington this 5<sup>th</sup> day of December, 2013.

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