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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF FIFE, a Washington Municipal Corporation,
Appellant,

v.

RUSSELL P. HICKS,
Respondent.

DIRECT APPEAL
FROM THE SUPERIOR COURT OF PIERCE COUNTY

APPELLANT'S OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

 A. Assignments of Error..... 1

 B. Issues Pertaining to Assignments of Error 1

II. STATEMENT OF THE CASE..... 3

III. ARGUMENT 10

 A. Standard of Review..... 10

 B. **The names and identifying information of complainants and witnesses/interviewees in police department disciplinary investigations are exempt from PRA disclosure under RCW 42.56.240(1).**..... 12

 1. *Investigative Records Exemption Generally*..... 12

 2. *The records in this case are investigave in nature and compiled by an investigative, law enforcement, or penology agency* 13

 3. *Nondisclosure is essential to effective law enforcement*..... 15

 C. **The names and identifying information of the accused in unsubstantiated complaints in police department disciplinary investigations are exempt from disclosure under RCW 42.56.240(1) and RCW 42.56.230(3), even if the complaints do not allege sexual misconduct.**..... 20

 1. *Right to Privacy Generally*. 20

 2. *Disclosure of identities would be highly offensive to a reasonable person*..... 23

 3. *Disclosure of identities is not a legitimate public concern*..... 24

D. If the names and identifying information of complainants, witnesses/interviewees, and/or the accused in unsubstantiated complaints are exempt from disclosure under the PRA, they do not lose their exemption if the requester and third parties already know the identities of the individuals in question..... 26

E. Participation in media coverage by the City and one of the accused did not waive the accused's right to privacy in his identity in regard to PRA requests for documents used in that investigation..... 29

F. Voice identity is a part of a person's identifying information, and properly redacted under the PRA when the person's identity is exempt from disclosure. 32

G. The City produced all disclosable records to Officer Hicks in a timely manner and has thus not violated the PRA..... 33

IV. CONCLUSION 40

V. APPENDIX A-1

CP 319-24: Whistleblower Compliant dated March 18, 2011 with Redactions..... A-1

CP 371-85: Prothman Group Investigation Report with with Redactions..... A-1

TABLE OF AUTHORITIES

CASES

<i>Ames v. City of Fircrest</i> , 71 Wn. App. 284, 857 P.2d (1993).....	15
<i>Aspin v. Dep't of Defense</i> , 491 F.2d 24 (D.C.Cir.1973).....	15, 16
<i>Bainbridge Island Police Guild v City of Puyallup</i> , 172 Wn.2d 398, 259 P.3d 190 (2011)....	9, 11, 13, 14, 21, 27- 30, 32, 33
<i>Bellevue John Does 1-11 v. Bellevue School District</i> , 164 Wn.2d 199, 189 P.3d 139 (2008).....	20- 25, 27, 32, 33
<i>Bowman v. Webster</i> , 44 Wn.2d 667, 269 P.2d 960 (1954).....	30
<i>Columbian Publ'g Co. v. City of Vancouver</i> , 36 Wn. App. 25, 671 P.2d 280 (1983).....	13
<i>Cowles Publishing v. State Patrol</i> , 109 Wn.2d 712, 748 P.2d 597 (1988).....	9, 12, 13, 15-17, 19
<i>Cowles Publ'g Co. v. Spokane Police Dep't</i> , 139 Wn.2d 472, 987 P.2d 620 (1999).....	12
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 845 P.2d 995 (1993).....	23
<i>Forbes v. City of Gold Bar</i> , 171 Wn. App. 857, 288 P.3d 384 (2012).....	38
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978).....	21
<i>Koenig v. Thurston County</i> , 175 Wn.2d 837, 287 P.3d 523 (2012).....	13
<i>McNabb v. Dep't of Corr.</i> , 163 Wn.2d 393, 180 P.3d 1257 (2008).....	11
<i>Newman v. King County</i> , 133 Wn.2d 565, 572-73, 947 P.2d 712 (1997)	13, 15
<i>Oltman v. Holland Am. Line USA, Inc.</i> , 163 Wn.2d 236, 178 P.3d 981 (2008)	11
<i>Prison Legal News, Inc. v. Department of Corrections</i> , 154 Wn.2d 628, 115 P.3d 316 (2005).....	13
<i>Soter v. Cowles Publishing Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007)	23, 36
<i>Tacoma News, Inc. v. Tacoma-Pierce County Health Department</i> , 55 Wn. App. 515, 778 P.2d 1066 (1989).....	16, 17, 19

<i>United States v. Wright</i> , 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967).....	32
----------------------------------------------------------------------------------	----

Statutes

RCW 42.41	9
RCW 42.41.030	3
RCW 42.56	1
RCW 42.56.010(3).....	36
RCW 42.56.020	38
RCW 42.56.050	21
RCW 42.56.070(9).....	26
RCW 42.56.080	7, 26, 34
RCW 42.56.120	7, 34, 35
RCW 42.56.210	9
RCW 42.56.230(3).....	20, 21, 25
RCW 42.56.240(1).....	9, 12, 20, 21, 25
RCW 42.56.240(2).....	9
RCW 42.56.520	34, 35
RCW 42.56.540	36, 39
RCW 42.56.550	8
RCW 42.56.550(1).....	11
RCW 42.56.550(3).....	10
RCW 42.56.565	26

Court Rules

CR 56(c).....	11
---------------	----

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in ordering the City of Fife to disclose unredacted responses to Officer Hicks' public records request, only allowing redaction of the identifying information of the accused in regard to unsubstantiated allegations of sexual malfeasance. CP 301.

2. The trial court erred in holding that the City of Fife violated the Public Disclosure Act in its response to Officer Hicks' May 17, 2012 public records request. CP 301.

B. Issues Pertaining to Assignments of Error

1. Should the names and identifying information of complainants, witnesses, and interviewees in police department disciplinary investigations be exempt from disclosure in Public Record Act¹ ("PRA") requests? (Assignments of Error 1 and 2).

2. Should the names and identifying information of the accused in unsubstantiated complaints in police department disciplinary investigations be exempt from disclosure in PRA requests, where the complaints do not involve allegations of sexual malfeasance?
(Assignments of Error 1 and 2).

¹ Chapter 42.56 RCW.

3. If the names and identifying information of complainants, witnesses/interviewees, and/or the accused in unsubstantiated complaints are exempt from disclosure in PRA requests, do they become nonexempt if the requestor already knows the identities of the individuals in question? (Assignments of Error 1 and 2).

4. If the subject of an investigation and the agency participate in media coverage of the investigation, is the subject's right to privacy in his identity permanently waived in regard to PRA requests for documents used in that investigation? (Assignments of Error 1 and 2).

5. If the names and identifying information of complainants, witnesses/interviewees, and/or the accused in unsubstantiated complaints are exempt from disclosure in PRA requests, may the voices of complainants, witnesses/interviewees, and/or the accused in audio recordings be "anonymized?" (Assignments of Error 1 and 2).

6. Did the City violate the PRA when it produced records in response to Officer Hicks' May 17, 2012 records request in installments, beginning May 30, 2012, with the final installment released on September 21, 2012? (Assignments of Error 1 and 2).

II. STATEMENT OF THE CASE

On March 18, 2011, the Appellant, City of Fife (the "City"), received a "whistleblower complaint"², sent on behalf of Fife Police Officer Russell P. Hicks (the Respondent herein), and another officer, detailing multiple accusations of misconduct against several members of the Fife Police Department. CP 319-24³. The complaint included allegations of race discrimination, retaliation, gender discrimination and harassment, misappropriation of City funds, improper work place relationship and cover-up, and suspicious relationships with known offenders. CP 319-24. Specific allegations included the following:

- Discrimination against two officers by denying them bilingual pay when other officers were compensated for their bilingual skills.
- Retaliation against one of the officers by not allowing him to teach at the Fife Police Reserve Academy.
- Discrimination against a female employee by denying her educational pay.
- Discrimination against a female applicant for Police Service Specialist when a male applicant was selected for the position even

² "Whistleblower complaint" refers to the right of every government employee pursuant to RCW 42.41.030 to report to the appropriate person or persons information concerning an alleged improper governmental action.

³ A copy of CP 319-24, the whistleblower complaint dated March 18, 2011 with the City's redactions is attached as Appendix A-1.

though the female applicant had placed higher on the initial testing list.

- One of the accused employees often makes disparaging comments about women in staff meetings and has made numerous rude and harassing comments to female dispatchers at the Fife Police Department.
- One of the accused employees misappropriated City funds when extending bilingual pay to a department employee without the requisite qualifications.
- One of the accused employees reported for duty while under the influence of a behavior impairing substance and was not duly disciplined for her actions.
- One of the accused employees failed to take appropriate action when another employee reported to work in an alleged intoxicated condition from prescription drugs.
- As department heads, two accused employees failed to take meaningful action on complaints received pertaining to alleged incompetence.
- A supervisor and subordinate are or were involved in a romantic relationship that exceeds normal platonic boundaries, violating professional standards of conduct.

- One of the accused employees lied to another employee regarding teaching at the Police Academy.
- On various occasions friendly association with known offenders has brought one of the accused employee's integrity into question as well as violated department policy. He was allegedly observed via a surveillance camera in the police department placing his hand on the thigh of an 18 year old male offender while standing next to a truck. In a separate incident he was allegedly observed running his fingers through the hair of a suspect who was crying and handcuffed in the back of a patrol vehicle. It was also alleged that on at least two occasions, the accused employee had offenders brought to his office by custody personnel. It was also implied that he made a phone call to an offender's cell phone during the time that the offender was being booked. Finally it was alleged that he maintained an ongoing friendship with an offender whom he would meet for meals and another offender had fixed the deck on his house and had a key to his personal residence.

CP 319-24.

City Manager David Zabell contacted the City's insurance pool, Washington Cities Insurance Authority (WCIA), to inform them about the allegations and the potential pending litigation. CP 31. WCIA then hired,

and paid for, the Prothman Group to conduct a full investigation into the allegations. CP 32. The investigation was completed after hundreds of hours of investigation and over two dozen people interviewed. CP 181. In the fall of 2011, the Prothman Group investigation concluded that all of the allegations were either not sustained or unfounded, with “unfounded” meaning the allegation was false or not factual, and “not sustained” meaning there is insufficient evidence to prove or disprove the allegation. CP 371-85⁴. In response to several PRA requests from the media, the City released a copy of the final report, with the names of the complainant, interviewees, and the accused redacted. CP 184-85; CP 371-85.

On May 17, 2012, Officer Hicks filed a request with the City of Fife under the PRA requesting that the City produce “all documents related to the 2011 Whistleblower Complaint.” CP 178. The request indicated that the response should include all of the following:

1. All final reports made as a result of any investigations into the 2011 Whistleblower Complaint.
2. All audio recordings and accompanying transcripts from the interviews of the following persons made during the investigation of the 2011 Whistleblower Complaint:

[seven police department employees named]

⁴ A copy of CP-371-85, the Prothman Group investigation report with the City’s redactions is attached hereto as Appendix A-2.

3. All documents, emails, audio recordings, video, and electronic messages that were relied on in conducting the investigation.

4. All documents provided to any media regarding the 2011 Whistleblower Complaint, its investigation, and findings arrived at in response to that Complaint.

CP 178.

The Fife City Clerk responded to Officer Hicks on May 18, 2012, acknowledging receipt of the public records request and indicating that due to the size of the request, the City would need to provide the disclosable records in installments. CP 36-37. Many of the requested records were unquestionably disclosable, and the City Clerk disclosed them to Officer Hicks in installments pursuant to RCW 42.56.080 and RCW 42.56.120, starting May 30, 2012.⁵ CP 37. However, the City was uncertain regarding the disclosability of some of the requested records. First, the City was unsure if the records qualified as public records, and second, if they did qualify as public records, the City was uncertain whether they would be exempt under attorney/client privilege and/or attorney work product doctrine. CP 1-7. In order to resolve this uncertainty, the City promptly filed a Complaint for Declaratory Judgment

⁵ The Fife City Clerk released installments of the undisputed documents to Officer Hicks on May 30, 2012, June 20, 2012, July 13, 2012, August 3, 2012, August 28, 2012, and September 21, 2012, approximately one installment every three weeks. CP 37.

and Injunctive Relief on May 24, 2012, in the Pierce County Superior Court to obtain a determination from the court, as authorized by RCW 42.56.550. CP 1-7. The records in question consisted of documents produced by the Prothman Group for WCIA, specifically, the audio recordings and transcripts of all witness interviews, as well as interview questions, investigator notes and other investigator-created documents used for production of Prothman Group's final report. CP 4. Those documents remained in the sole custody of the Prothman Group until such time as the Complaint was filed. CP 32.

On August 3, 2012, the trial court ruled that the records in question were public records under the PRA, were not attorney work product, and were not protected by the attorney client privilege, and ordered that the records be provided to Officer Hicks within twenty (20) days. CP 34-35. While Officer Hicks requested that the court's order cover all remaining unreleased documents, including documents the City Clerk's office was processing, the trial court limited its ruling to only the documents at issue in the declaratory judgment complaint. CP 52, 62-64. The trial court also specifically declined to rule on whether names and identifying information of complainants, witnesses, or the accused could be redacted. CP 64.

Officer Hicks was provided those records, along with an exemption log, on August 22, 2012. CP 38. Consistent with the City's

prior records releases, the names and identifying information of the complainants in the whistleblower complaint, the names and identifying information of witnesses/interviewees, and the names and identifying information of the accused, were redacted from the records (“identifying information” was limited to rank/job title where there was only one person in that position, and making unrecognizable the protected parties’ voices on the audio logs). CP 220-37. The exemption logs provided with the records cited RCW 42.56.240(1) and (2), RCW 42.56.210 and RCW 42.41 (whistleblower statute) as authority for the redaction of the complainant’s name/identifying information. The exemption logs cited RCW 42.56.240(1) and (2), RCW 42.56.210, *Cowles Publishing v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988), and *Bainbridge Island Police Guild v City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011), as authority for the redaction of the witnesses/interviewees’ names/identifying information. The exemption logs cited RCW 42.56.240(1), RCW 42.56.210, and *Bainbridge Island Police Guild* as authority for the redaction of the names/identifying information of the accused in the unsubstantiated complaints. CP 220-37.

On January 25, 2013, Officer Hicks filed a Motion for Partial Summary Judgment, alleging that all of the redactions of the complainant, witnesses/interviewees, and accused names/identifying information were

in violation of the PRA due *inter alia* to Hicks' knowledge of the identities of all involved and the media coverage, and requested that the court have the documents released to him without those redactions. CP 68-88. On that date the City also filed a motion for summary judgment asking for dismissal of the original complaint and summary judgment on Hicks' counterclaim. CP 20-29.

On February 22, 2013, Judge Serko of the Pierce County Superior Court ordered:

. . . Defendant's Motion for Partial Summary Judgment Regarding Public Records Act Violations is GRANTED, and it is HELD that Plaintiff, City of Fife, violated the Public Records Act in its response to Officer Hicks' May 17, 2012 public records request. The City of Fife will disclose complete responses to Officer Hicks within sixty (60) days of this motion. The City's claim is dismissed. The City may redact identifying information of the accused in regard to unsubstantiated allegations of sexual malfeasance. The names of the complainant, accused and witnesses are otherwise to be disclosed.

CP 300-02.

The City timely filed notice of appeal and requested direct review to the Supreme Court on March 20, 2013. CP 303.

III. ARGUMENT

A. Standard of Review

Judicial review under the PRA is de novo. RCW 42.56.550(3).

Where, as in this case, the record consists only of affidavits, memoranda

of law, and other documentary evidence, and the trial court has not seen or heard testimony requiring it to assess the credibility or competency of witnesses, the appellate court stands in the same position as the trial court. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407, 259 P.3d 190 (2011). The appellate court also reviews summary judgment orders de novo. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). Summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). The appellate court considers all facts and reasonable inferences in the light most favorable to the nonmoving party. *McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008).

An agency withholding public records bears the burden of proving “that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550(1).

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B. The names and identifying information of complainants and witnesses/interviewees in police department disciplinary investigations are exempt from PRA disclosure under RCW 42.56.240(1).

1. *Investigative Records Exemption Generally.*

RCW 42.56.240(1), known as the investigative records exemption, provides as follows:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

The purpose of the investigative records exemption is to protect the integrity of law enforcement investigations. *See Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 478, 987 P.2d 620 (1999). In order to be exempt under the investigative records exemption (1) the record must be investigative in nature; (2) the record must be compiled by an investigative, law enforcement, or penology agency; and (3) it must be essential to law enforcement or essential to the protection of privacy. *See Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 728, 748 P.2d 597 (1988). In particular, records are "specific investigative records" if they were compiled as a result of a specific investigation focusing with special

intensity upon a particular party. *Koenig v. Thurston County*, 175 Wn.2d 837, 843, 287 P.3d 523 (2012)(citations omitted). The investigation must be “one designed to ferret out criminal activity or to shed light on some other allegation of malfeasance.” *Columbian Publ'g Co. v. City of Vancouver*, 36 Wn. App. 25, 31, 671 P.2d 280 (1983).

2. *The records in this case are investigative in nature and compiled by an investigative, law enforcement, or penology agency.*

Internal investigations of alleged misconduct of particular police department employees constitute investigative records compiled by an investigative, law enforcement, or penology agency. *See Cowles v. State Patrol*, 109 Wn.2d at 728 (investigative records exemption applied to police internal investigation); *Prison Legal News, Inc. v. Department of Corrections*, 154 Wn.2d 628, 642 n. 14, 115 P.3d 316 (2005)(investigation of police performing the functions of their jobs is investigation of law enforcement); *Bainbridge Island Police Guild*, 172 Wn.2d at 419 (2011) (internal investigation by outside agency of alleged police misconduct clearly investigative records compiled by law enforcement). It is not necessary that a record be created by the agency to be “compiled” by the agency. *Newman v. King County*, 133 Wn.2d 565, 572-73, 947 P.2d 712 (1997)(any document placed in investigative file is “compiled” by law enforcement).

In *Bainbridge Island Police Guild*, the Bainbridge Island police department asked the Mercer Island police department to conduct an internal investigation into an allegation of misconduct by a Bainbridge Island police officer in order to determine whether the police officer should be disciplined. 172 Wn.2d at 405. The court held that the internal investigation report prepared by Mercer Island was clearly an investigative record. *Id.* at 419. In the present case, like in *Bainbridge Island*, the investigation was conducted by an outside agency on behalf of the City to investigate alleged misconduct of particular police department employees, in order to determine whether the particular police department employees should be disciplined. CP 371-85. Thus, the City of Fife has satisfied the first two prongs of the investigative records exemption. The first prong is satisfied because the records were compiled as a result of a specific investigation focusing with special intensity upon particular parties. The second prong is satisfied because the records were compiled on behalf of the City to investigate alleged misconduct of particular police department employees, for use by the City Manager to determine whether the particular police department employees should be disciplined. CP 371-85.

3. *Nondisclosure is essential to effective law enforcement.*

The names and identifying information of the complainants, witnesses and interviewees were properly redacted because the City produced uncontroverted evidence that the third prong of the investigative records exemption was also satisfied—that nondisclosure was essential to effective law enforcement. In an open and active law enforcement investigation, nondisclosure is essential to effective law enforcement as a matter of law. *Newman*, 133 Wn.2d at 574. Once the investigation is complete, whether nondisclosure is essential to effective law enforcement is an issue of fact. *Ames v. City of Fircrest*, 71 Wn. App. 284, 295, 857 P.2d (1993). In *Cowles v. State Patrol*, the court held that the identities of law enforcement officers and witnesses involved in internal investigations were exempt under the investigative records exemption because confidentiality of the names in the records was “necessary to effective law enforcement.” *Cowles v. State Patrol*, 109 Wn.2d at 728. The *Cowles* court found the following observations of the D.C. Circuit instructive in reaching its decision:

If an agency's investigatory files were obtainable without limitation after the investigation was concluded ... [t]he names of people who volunteered the information that had prompted the investigation initially or who contributed information during the course of the investigation would be disclosed. The possibility of such disclosure would tend severely to limit the agencies' possibilities for investigation

and enforcement of the law since these agencies rely, to a large extent, on voluntary cooperation and on information from informants.

Id. at 732–33, 748 P.2d 597 (quoting *Aspin v. Dep't of Defense*, 491 F.2d 24 (D.C.Cir.1973)). In so holding, the *Cowles* court upheld the trial court's finding that:

If the individual law enforcement agencies were unable to assure confidentiality to the complaining witnesses, the ability of the specific law enforcement agencies to carry out their functions in investigating complaints against individual law enforcement officers would be seriously hampered. If the complaining witness is a law enforcement officer, and if the name of the charged officer would be made public, the ability of the Internal Affairs Section of each law enforcement agency to obtain open and candid comments from complaining witnesses who happen to be law enforcement officers would be seriously hampered.

Id. at 717. The *Cowles* trial court's finding was based *inter alia* on testimony by officers that if the names of complainants, witnesses, or the accused were released to the public, fellow officers would be reluctant to assist in internal investigations "and the system so needed to combat inefficiency and misconduct would be severely handicapped or ineffective." *Id.* at 716.

In *Tacoma News, Inc. v. Tacoma-Pierce County Health Department*, 55 Wn. App. 515, 778 P.2d 1066 (1989), the News Tribune sought records of a health department investigation concerning the quality of an ambulance service's care. In support of its assertion that the

identities of complainants and witnesses were exempt from disclosure under the investigative records exemption, the health department provided affidavits indicating that although witnesses and complainants provided information voluntarily, they would not have done so without assurances of confidentiality. *Id.* at 522. Based on the affidavits and the *Cowles* decision, the court in *Tacoma News* held that the nondisclosure of names and identifying information of complainants and witnesses was necessary for effective law enforcement, because disclosure of their identities would discourage potential complainants and witnesses from providing information in the future, and therefore frustrate the investigative process. *Id.* at 522.

In the present case, in support of its assertion that nondisclosure was essential to effective law enforcement, the City submitted a sworn declaration from Assistant Police Chief Mark Mears, a veteran command officer with 19 years of police experience, in which he states, in part:

During my career as an officer and a member of the command staff, I have worked on hundreds criminal cases and several internal investigations. I have had the opportunity to conduct countless interviews, of witnesses, possible witnesses, and complainants. When conducting an investigation, getting a person you are interviewing to feel comfortable enough to share the totality of what they know on the subject is vitally important. Part of being able to do that comes from being able to assure the person that their identity will be kept confidential.

In conducting such investigations, the police department relies heavily on the voluntary participation of witnesses. We also heavily depend upon interviewees being completely candid and feeling able to speak openly about their knowledge, impressions, observations, and concerns. It is essential to law enforcement's ability to conduct thorough and complete investigations that complainants, witnesses, and interviewees can rely on being able to speak freely in response to the investigator's questions, with the knowledge that their identities will be protected.

If complainants knew that their identities would be revealed to anyone who files a public records request, I believe, based on my 19 years of experience, that fewer complaints would be filed. If witnesses knew that their identities would be revealed to anyone who files a public records request, I believe, based on my 19 years of experience, that fewer people would voluntarily come forward to provide information.

If interviewees knew that their identities would be revealed to anyone who files a public records request, I believe, based on my 19 years of experience, that they would be greatly more restrained in their responses to an investigation, thus making it vastly harder, if not impossible at times, to fully investigate a complaint.

CP 285-87 (sentence numbering omitted). Assistant Chief Mears' declaration demonstrates the chilling effect that disclosure of complainants, witnesses, and interviewees identities would have on criminal and internal investigations. Officer Hicks did not provide the trial court with any affidavits or evidence to rebut or controvert Assistant Chief Mears' declaration. Officer Hicks merely argued that nondisclosure was not essential to law enforcement because "the names are already well

known, both to the requesting party and to the public more generally.” CP 80. This argument is without merit for two reasons. First, although Officer Hicks, as a complainant and a member of the Fife Police Department, may have knowledge of the names of the complainants, witnesses, interviewees and the accused, they are not well known by the public generally. Neither the press release issued by the City, nor any of the media articles provided by Officer Hicks to the trial court identified the names of any complainants, witnesses, interviewees, or the accused, except that the media articles identified the Fife Police Chief as one of the accused. CP 180-88. Second, it is not the present investigation that is impacted by the release of complainant and witness names from that investigation, but *subsequent* investigations. The fact that this particular requester has knowledge of the names of the complainants, witnesses, and accused or that the media identified one of the accused, does not have the chilling effect that a mandatory disclosure of all names would have on subsequent investigations.

As recognized by the courts in *Cowles* and *Tacoma News*, and by Assistant Chief Mears, the ability of agencies to conduct thorough and complete investigations would be severely curtailed should the names of complainants and witnesses/interviewees be obtained by anyone as soon as the investigation was closed. It is quite likely the number of people

willing to file complaints or cooperate candidly would drop significantly as a result of the chilling effect of such disclosure. CP 287.

C. The names and identifying information of the accused in unsubstantiated complaints in police department disciplinary investigations are exempt from disclosure under RCW 42.56.240(1) and RCW 42.56.230(3), even if the complaints do not allege sexual misconduct.

The trial court ordered that the name and identifying information of the accused regarding allegations of sexual malfeasance could be redacted, but the names and identifying information of the accused in all other allegations must be disclosed. CP 301. This determination violates the accuseds' right to privacy under RCW 42.56.240(1) and RCW 42.56.230(3), and is contrary to the reasoning and intent of the Supreme Court in *Bellevue John Does 1-11 v. Bellevue School District*, 164 Wn.2d 199, 189 P.3d 139 (2008), as discussed below.

1. Right to Privacy Generally.

The third prong of the investigative records exemption has two alternatives. Nondisclosure must either be essential to effective law enforcement or for the protection of any person's right to privacy. RCW 42.56.240(1). Similarly, RCW 42.56.230(3) provides that:

The following personal information is exempt from public inspection and copying under this chapter:

...

(3) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.

An employee's identity in connection with unsubstantiated allegations of misconduct is "personal information" under RCW 42.56.230(3). *Bellevue John Does*, 164 Wn.2d at 211-12. The right to privacy analysis under RCW 42.56.240(1) is identical to the right to privacy analysis in RCW 42.56.230(3). *Bainbridge Island*, 172 Wn.2d at 419. The test for determining whether a person's right to privacy is violated under the PRA is set forth in RCW 42.56.050 which provides as follows:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

A person has a right to privacy in matters concerning the person's "private life." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978).

In *Bellevue John Does*, the issue was whether the identities of public school teachers who are subjects of unsubstantiated allegations of sexual misconduct during the course of employment are exempt from disclosure.

Bellevue John Does, 164 Wn.2d at 208. In determining this issue, the court first held that “the teachers have a right to privacy in their identities because the unsubstantiated or false allegations are matters concerning the teachers' private lives and are not specific incidents of misconduct during the course of employment”. *Id.* at 215-16. In so holding, the court reasoned that an unsubstantiated or false accusation is not an action taken by an employee in the course of performing public duties. *Id.* at 215. The same reasoning applies in the present case, where, after intensive investigation, all of the allegations were determined to be “unfounded,” meaning the allegation was false or not factual, or “not sustained,” meaning there is insufficient evidence to prove or disprove the allegation. CP 371-85. “Not sustained” is equivalent to “unsubstantiated” as used in *Bellevue John Does*. See *Bellevue John Does*, 164 Wn.2d at 205-06; CP 371-85.⁶ Such allegations are not actions taken by the employee in the course of performing public duties. Thus, the police department employees have a right to privacy in their identities regarding these allegations.

⁶ The *Bellevue John Doe* court held that in determining whether an individual's right to privacy is violated, there was no distinction between an allegation that was unsubstantiated and one that was “patently false.” *Id.* at 218. The court defined “unsubstantiated” as “not supported or borne out by fact.” *Id.* at 205 n.1 (quoting Webster's Third New International Dictionary 2512 (2002)).

2. *Disclosure of identities would be highly offensive to a reasonable person.*

After determining that the accused teachers had a right to privacy in their identities, the *Bellevue John Does* court then held that disclosure of the identities of the accused teachers would be highly offensive to a reasonable person, citing *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993), *abrogated in part by Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007). *Id.* at 216. The *Dawson* case is highly instructive because in that case the court held that employees have a privacy interest in their performance evaluations, and that performance evaluations that do not discuss specific instances of misconduct are presumed to be highly offensive to a reasonable person. *Dawson v. Daly*, 120 Wn.2d at 797. Under *Dawson*, a performance evaluation is presumed to be highly offensive unless it contains a specific instance of misconduct (i.e. a substantiated allegation of misconduct). An internal investigation of the conduct of a police department employee is really just an intensive evaluation of performance in a specific circumstance. As the *Bellevue John Doe* court correctly reasoned, if a performance evaluation without a specific instance of misconduct is presumed to be highly offensive, an accusation of employee misconduct—that is determined to be unsubstantiated would also be highly offensive. *Bellevue John Does*, 164

Wn.2d at 216. This reasoning does not depend on the severity of the accusation or whether the alleged conduct occurred inside or outside of employment, but only on the fact that the accusation was not substantiated.

3. *Disclosure of identities is not a legitimate public concern.*

Finally, the *Bellevue John Doe* court determined that although the facts of an unsubstantiated allegation of misconduct are of legitimate public concern, the identity of the accused is not.

When an allegation is unsubstantiated, the teacher's identity is not a matter of legitimate public concern. In essence, disclosure of the identities of teachers who are the subject of unsubstantiated allegations "serve[s] no interest other than gossip and sensation." *Bellevue John Does*, 129 Wash.App. at 854, 120 P.3d 616. The public can continue to access documents concerning the nature of the allegations and reports related to the investigation and its outcome, all of which will allow concerned citizens to oversee the effectiveness of the school districts' responses. The identities of the accused teachers will simply be redacted to protect their privacy interests. *See* former RCW 42.17.260(1) (providing that agencies may delete names and other identifying information from records if such deletions are "required to prevent an unreasonable invasion of personal privacy").

Bellevue John Does, 164 Wn.2d at 221. The above reasoning is applicable whether the allegation is sexual misconduct, discrimination, misappropriation of funds, or any other allegation of wrong doing. If the allegation is unsubstantiated, the public does not have a legitimate public

interest in the identity of the accused. Disclosure of identities would serve no interest other than “gossip or sensation.” The public has a legitimate interest in overseeing the effectiveness of an agency’s response to an allegation of misconduct, which is effectively served by the disclosure of documents concerning the nature of the allegations and reports related to the investigation and its outcome, with the identities of the accused redacted.

The mere allegations of impropriety made in this case—race discrimination, retaliation, gender discrimination and harassment, misappropriation of City funds, improper work place relationship and cover-up, and suspicious relationships with known offenders---could harm the accuseds’ reputations and give the public unfavorable opinion of the accused without any evidence that the alleged conduct occurred. As such, redaction of the names and identifying information of the accused was proper under RCW 42.56.240(1) and RCW 42.56.230(3), and the reasoning and intent of the Supreme Court in *Bellevue John Does*, 164 Wn.2d 199, 189 P.3d 139 (2008).

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D. If the names and indentifying information of complainants, witnesses/interviewees, and/or the accused in unsubstantiated complaints are exempt from disclosure under the PRA, they do not lose their exemption if the requester and third parties already know the identities of the individuals in question.

Because Officer Hicks was the person who made the complaints that led to the investigation and identified the witnesses and the accused by name in his public records request, and because some of the individuals has already been named in the media, Officer Hicks alleged at the trial court that it was improper for the City to redact his name and the names of the already identified persons. CP 68-88. This is incorrect.

When responding to a public records request, an agency must look at the contents of the requested documents, and not the requester, when deciding what is to be redacted or exempted. RCW 42.56.080 states in part:

. . . Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons.

There have only been two exceptions allowed by the legislature in regard to considering who the requester is when responding to a public records request: the commercial purposes exception under RCW 46.56.070(9), and the recently passed "inmate in bad faith" exception in RCW 42.56.565.

Officer Hicks clearly was not requesting this information for commercial purposes, and clearly was not an inmate. As such, neither of the two circumstances where an agency is allowed to distinguish among persons requesting records applied.

If an exemption applies when one person requests the records, it also applies when another person requests the records. An agency cannot apply exemptions differently based on who the requester is, or what the requester knows, or claims to know. To do so would result in wildly inconsistent disclosure results, and put the public records officers in the role of mind reader. In *Bainbridge Island Police Guild v City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011), a police officer was accused of sexual misconduct. An investigation of the complaint returned a result of unsubstantiated. *Id.* at 405. There was a great deal of media attention involving the complaint, investigation and result. *Id.* at 413-14. Public records requests were made, specifically requesting the investigation file of Officer Cain. *Id.* at 405. The records were released, but with the officer's name redacted, citing the court's holding in *Bellevue John Does*, 164 Wn.2d 199, 217 (2008), that the accused in false or unsubstantiated complaints have a right to privacy, and that "the public as a rule has no legitimate interest in finding out the names of people who have been falsely accused." The requester protested the redactions, arguing that he

had requested the records by the officer's name, and the officer's name had already been released to the media, so no redaction should be allowed. *Bainbridge Island*, 172 Wn.2d at 412. The court held that the level of media coverage and the knowledge of the requester or other third parties was not relevant. *Id.* at 413-14. The court stated:

An agency should look to the contents of the document, and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity. Even through a person's identity might be redacted from a public record, the outside knowledge of third parties will always allow some individuals to fill in the blanks. But just because some members of the public may already know the identity of the person in the report, it does not mean that an agency does not violate the person's right to privacy by confirming that knowledge through its production.

Id. at 414. The court went on to address what the result would be if agencies had to take into account how much a requester may or may not know:

We also must note the practical effect on the agency if we were to hold that Officer Cain has no right to privacy in his identify. Under such a holding, agencies will be required to engage in an analysis of not just the contents of the report but the degree and scope of media coverage regarding the incident. Exactly how much media coverage is required before we will rule that an individual's right to privacy is lost? Agencies will be placed in the position of making a fact-specific inquiry with uncertain guidelines. If the agency incorrectly finds that there has been little media coverage and exempts from disclosure the identity of the subject of the report, the agency could face significant statutory penalties. . . . Denying the existence of a right to privacy on the basis of the extent of media coverage is

likely to result in incorrect assessments and potentially significant costs to the agency. We hold that Officer Cain has a right to the privacy of his identity, regardless of the media coverage stemming from the production of the PCIR.

Id. at 414. Officer Hicks' arguments that the identities of various people should not have been redacted because there was media coverage and because Officer Hicks had direct knowledge of the information, is in direct contrast to the court's holding in *Bainbridge Island*, that the agency must look to the contents of the document, not the knowledge of third parties, when deciding if an exemption applies, and that the extent of media coverage is irrelevant.

Based on *Bainbridge Island*, the City was correct in redacting the names and identifying information of the complainants, witnesses, and the accused without regard to the knowledge of the requester or other third persons, or the extent of the media coverage.

E. Participation in media coverage by the City and one of the accused did not waive the accused's right to privacy in his identity in regard to PRA requests for documents used in that investigation.

Officer Hicks argued before the trial court that the City waived its right to assert a privacy exemption by issuing a media release about the investigation, and because one of the accused officers answered questions about the investigation asked by the media. CP 68-88. This argument is without merit.

The issue of waiver of the right of privacy under the PRA was addressed in *Bainbridge Island*, where the appellant argued that the accused officer waived his right to privacy by failing to object to an initial public records request for the investigative records, having received notice of that request. 172 Wn.2d at 409. The court, finding no statutory provision for waiver of a claimed exemption, applied the common law doctrine of waiver, quoting *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954) as follows:

A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego [sic] some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

Bainbridge Island, 172 Wn.2d at 409-410. The *Bainbridge Island* court then determined that the officer's actions were inconsistent with an intent to waive his right to privacy. *Id.* at 410-11. In the present case, the City's press release in question gives no specific details regarding the identity of the complainant, interviewees, or the accused. CP 181-82. It mentions only that there were allegations leveled at "high ranking members" of the

police department. CP 181. No names were revealed, or even the number of employees accused. CP 181. The press release was clearly insufficient to infer an intent to waive, particularly considering that the City has pursued this action in order to protect its employees' right to privacy.

Nor does a response by one of the accused to a media question about the investigation prevent the City from asserting a privacy exemption. First, this would require the agency to know, at all times, if and when an employee has made a statement to any member of the media. If the agency failed to keep track of all such statements, then it might unwittingly apply an exemption when an employee has already discussed the issue with the media, and be immediately found in violation of the PRA. It would be impossible for the City to insure that it had prompt notice of all employee communications to the media. Second, the mere act of responding to a media question does not evidence the requisite intent to waive the exemption. When asked by a reporter about the allegations leveled, the sum total of the accused's response was that the accusation was "unfounded." CP 184-85.

The conduct of the City and one of the accused in addressing the media in this case does not warrant an inference of an intent to relinquish the accused's right to privacy in his identity.

F. Voice identity is a part of a person's identifying information, and properly redacted under the PRA when the person's identity is exempt from disclosure.

When courts have held that a person's identity is exempt from disclosure, it generally means the person's name and identifying information. See *Bainbridge Island*, 172 Wn.2d at 418 (name and identifying information of accused exempt from disclosure); *Bellevue John Does*, 164 Wn.2d at 222 (name and identifying information of accused exempt from disclosure). In the present case, in addition to redacting the names and identifying information from written documents, the City "anonymized"⁷ interviewees voices in each audio file of interviews. CP 218.

A person's voice is just as much a revelation of a person's identity as a name or photograph, and certainly more identifying than other typical identifying information such as a date of birth or a home phone number. Using a person's voice to positively identify them in the legal system first started being used in the 1960s, with the court allowing admissibility of voice identification analysis in *United States v. Wright*, 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967). Voice identification has been admitted in court cases on the local, state, and federal circuit levels countless times since.

⁷ Anonymizing is a process of altering the sound of a voice in an audio recording to make the voice unrecognizable.

Although neither *Bainbridge Island* nor *Bellevue John Does* dealt with audio recordings, the principles for protecting a person's identity are the same. If the person's name is exempt, but the person's recognizable voice is disclosed in audio files, then the purpose of the exemption is defeated. Moreover, anonymizing a voice does not thwart the legitimate public interest because although the voice is altered, the communication itself is unchanged.

If the court holds that the City was correct in protecting the identity of interviewees by removing their names and other identifying information in the written documents, removing the voice identity of those individuals from audio files was appropriate as well.

G. The City produced all disclosable records to Officer Hicks in a timely manner and has thus not violated the PRA.

Officer Hicks submitted his public records request on May 17, 2012, requesting the following records:

1. All final reports made as a result of any investigations into the 2011 Whistleblower Complaint.

2. All audio recordings and accompanying transcripts from the interviews of the following persons made during the investigation of the 2011 Whistleblower Complaint:

...
[seven police department employees named]

3. All documents, emails, audio recordings, video, and electronic messages that were relied on in conducting the investigation.

4. All documents provided to any media regarding the 2011 Whistleblower Complaint, its investigation, and findings arrived at in response to that Complaint.

CP 178.

RCW 42.56.520 requires a public agency to respond to a public records request within five business days by: (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested; (3) acknowledging that the agency, has received the request and providing a reasonable estimate of the time the agency will require to respond to the request; or (4) denying the public record request. "Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request." RCW 42.56.520. Pursuant to RCW 42.56.080 and RCW 42.56.120, an agency is permitted to make records available in installments as additional records are assembled to complete the request.⁸

⁸ RCW 42.56.080 provides, in part: "... agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a

In accordance with RCW 42.56.520, the Fife City Clerk responded to Officer Hicks on May 18, 2012, acknowledging the receipt of the public records request and indicating that due to the scope of the request, the City would need to provide the disclosable records in installments, with the first installment estimated to be available on May 30, 2012. CP 2, 36-37. Many of the requested records were unquestionably disclosable, subject to applicable redactions, so the City Clerk proceeded to make regular installment releases of those records to Officer Hicks as they were assembled, with an accompanying exemption log if applicable. CP 190-216. Installments were released on May 30, 2012, June 20, 2012, July 13, 2012, August 3, 2012, August 28, 2012, and September 21, 2012, approximately one installment every three weeks. CP 37. A total of 274 documents were released by the City Clerk's office in response to Officer Hicks' request. These documents totaled 2,278 pages. CP 273. Exemption logs totaling 27 pages were provided with the documents. CP 190-217.

partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure."

RCW 42.56.120 provides, in part: "If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request."

However, the City was uncertain regarding the disclosability of some of the requested records, consisting of documents produced by the Prothman Group for WCIA, specifically, the audio recordings and transcripts of all witness interviews, as well as interview questions, investigator notes and other investigator-created documents used in producing Prothman Group's final report. CP 4. First, the City was unsure if the records qualified as public records. CP 1-7. A public record is one that is "prepared, owned, used, or retained" by an applicable agency or municipality. RCW 42.56.010(3). Because the City did not prepare the investigative documents, never used the underlying documents in the final decision making process, and never possessed the documents, the City was uncertain if the underlying documents qualified as public records. CP 1-6, 31-32. Second, if they did qualify as public records, the City was uncertain whether they would be exempt under attorney/client privilege and/or attorney work product doctrine, since the City anticipated litigation, CP 31-32, in light of *Soter v. Cowles Publishing Co.* 162 Wn.2d 716, 733, 174 P.3d 60 (2007), where investigative documents prepared when litigation was reasonably anticipated were found to be exempt under the work product doctrine.

The City was in a difficult position since it did not wish to improperly deny access to records, nor did it wish to improperly release

records. In order to resolve this uncertainty, the City promptly filed a complaint for Declaratory Judgment on May 24, 2012 in the Pierce County Superior Court, to obtain a determination from the court, as authorized by RCW 42.56.540. CP 1-7. In utilizing the option provided in RCW 42.56.540 to seek judicial clarification regarding the legal status of some of the records requested by Officer Hicks, the City did not violate the PRA. *Soter*, 162 Wn.2d at 757 (agencies from which records are requested may seek a determination from trial court as to whether an exemption applies).

On August 3, 2012, the trial court ruled that the records in question were public records under the PRA, were not attorney work product, and were not protected by the attorney client privilege, and ordered that the records be provided to Mr. Hicks within twenty (20) days. CP 34-35. While Officer Hicks requested that the court's order cover all remaining unreleased documents, including documents the City Clerk's office was processing, the trial court limited its ruling to only the documents at issue in the Declaratory Judgment complaint. CP 52, 62-64. The trial court also specifically declined to rule on whether names and identifying information of complainants, witnesses, or the accused could be redacted. CP 64.

Officer Hicks was provided with the records included in the court's order, along with an exemption log, on August 22, 2012. CP 38, 283. As

stated previously, the City Clerk completed producing her installments September 21, 2012. Thus, the period between the initial public records request and production of the last installment was approximately four months. An agency must provide non-exempt public records within a reasonable time after the request is made. *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384, 387 (2012). As provided in RCW 42.56.020, additional to time is allowable based on (1) the need to clarify the intent of the request, (2) to locate and assemble the information requested, (3) to notify third persons or agencies affected by the request, or (4) to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. Thus, a determination of reasonableness should include an analysis of whether the timing of the disclosure was based on any of the reasons set forth in RCW 42.56.020.

In the present case the time needed by the City to complete the disclosure was based on all four of the reasons set forth in RCW 42.56.020. First, the City needed time to request clarification regarding Officer Hicks' desire that all documents be provided in their native format, since he had also requested that the records be provided on CD. CP 2-3, 178. Second, the City needed time to locate and assemble 335 documents totaling 2,786 pages, and audio files consisting of over 16.8 hours of audio

interviews, most of which were not in the City's possession.⁹ CP 31-32, 273, 283. Third, it is the City's policy, as authorized by RCW 42.56.540, to provide ten days notice to each employee named in the record or to whom a record specifically pertains, so additional time was needed in order to provide the ten day notice to affected employees, prior to release of the installment CP 53, 273. The purpose of this notice is to allow affected employees time to request an injunction from the trial court. However, before the notice can be given, the City had to examine and process each record, apply appropriate redactions and exemptions, and prepare an exemption log. CP 283. Fourth, the City needed time to determine whether any of the information requested was exempt from disclosure, including court determination under RCW 42.56.540 for some of the records, and also time to prepare exemption logs, which totaled 47 pages. CP 1-6, 190-37. The City filed its complaint under RCW 42.56.540 a mere seven days after the public records request was made, and the records at issue in the complaint were released twenty days after the court made its determination, with accompanying exemption logs, which was within the time limit the court had given. CP 38.

Based on the above, disclosure of all of the requested documents within approximately four months was a reasonable time period. The

⁹ These totals are the sum of the documents and pages produced by the City Clerk and those produced by the assistant city attorney. CP 273, 283.

documents at issue in the trial court were provided within a timely manner in relation to the trial court's order, and provided in a timely manner in relation to the original public records request, which was not completed by the City Clerk until the last installment was released on September 21, 2012. By promptly taking steps to receive clarification by the trial court, the City was able to avoid ever denying Officer Hicks any disclosable documents, and provided the documents at issue in the Complaint almost a month before they would have been provided by the City Clerk, had the Complaint never been filed. In requesting court clarification and providing the documents before the City Clerk completed producing documents under the installment schedule, the City did not violate the PRA. As set forth in section III. A-F above, the City's redactions were proper. As such, the City's response to Officer Hicks' public disclosure request was timely and complete in accordance with the PRA.

IV. CONCLUSION

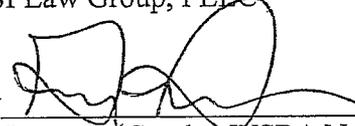
As set forth above, forcing the City to disclose the names and identifying information of complainants, witnesses and interviewees in police department internal investigations of alleged misconduct would have a chilling effect on investigations, and prevent effective law enforcement. Disclosure of the names and identifying information of the accused regarding unsubstantiated allegations of misconduct would violate

the accused's right to privacy, even if the allegations did not involve sexual malfeasance. Requiring the City to gauge media coverage or the knowledge of requestor or third parties in determining disclosability would put the City in an untenable position. Finally since the City's redactions were authorized under the PRA and all disclosable records were provided in a timely manner, no violation of the PRA occurred.

For the reasons set forth herein, the City respectfully requests that the trial court's rulings be reversed and that the appellate court determine that the City's redaction of the names and identifying information of the complainants, witnesses, interviewees, and the accused was proper and authorized under the PRA and that the City did not violate the PRA.

RESPECTFULLY SUBMITTED this 36th day of May, 2013

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CERTIFICATE OF SERVICE

I certify that on the 30th day of May, 2013, I caused a true and correct copy of this *Appellant's Opening Brief* to be served on the following in the manner indicated below:

Counsel for Russell P. Hicks:
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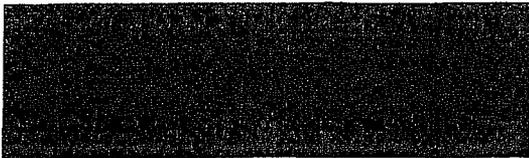
() U.S. Mail
(x) Email
(x) Legal Messenger (special)

By: Alison Rigby
Alison Rigby, Paralegal

V. APPENDIX

A-1

CP 319-24: Whistleblower Compliant dated March 18, 2011
with Redactions



CITY OF FIFE
CITY MANAGER
MAR 21 2011

ATTORNEYS AT LAW

A Professional Service Corporation

March 18, 2011

Dave Zabell
City Manager, City of Fife
5411 23rd Street East
Fife, WA 98424

Re: RCW 42.41.030 notice

Dear Mr. Zabell:

We represent [REDACTED] and [REDACTED] two officers of Hispanic descent employed by your city's police force. We are writing to you pursuant to RCW 42.41 *et seq.* to report a series of improper activities by [REDACTED] and [REDACTED] in the City's police department. Additionally, we are putting the City on notice that legal action may be forthcoming if the issues addressed in this letter are not adequately investigated and responded to.

Race Discrimination

The first area of concern involves several somewhat-separate incidents that, taken together, demonstrate a pattern of race and gender discrimination in the Fife Police Department.

I believe you are aware that Officers [REDACTED] and [REDACTED] made a complaint through the Washington State Human Rights Commission regarding the denial of bilingual pay to them, while such pay was given to a non-Hispanic officer, [REDACTED] who speaks very little Spanish. My understanding from our clients is that the City has asserted that [REDACTED] exercised his discretion in denying bilingual pay to Officers [REDACTED] and [REDACTED] and has provided back pay in an attempt to rectify this error. Officer [REDACTED] started a Hispanic community outreach program in 2005 and along with Officer [REDACTED] has made numerous presentations in Spanish. Additionally, Officer [REDACTED] was routinely called out to the field by other officers when a Spanish-speaking officer was required. Officer [REDACTED] and Officer [REDACTED] frequently use Spanish in the course of their duty. Officer [REDACTED] on the other hand, has admitted that he "does not speak Spanish very well at all," but has taken some training classes on survival Spanish. In field calls, Officer [REDACTED] is unable to assist as an interpreter.



During the week of November 15, 2010, Lt. [REDACTED] and Lt. [REDACTED] the Fife Police Guild President and Vice-President, met with [REDACTED] on this issue. According to Lt. [REDACTED] immediately began to blame [REDACTED], saying [REDACTED] provided this bilingual pay to [REDACTED] because [REDACTED] came over from Sumner PD and recruited [REDACTED]. [REDACTED] then called [REDACTED] who was upset and said that [REDACTED] knew and was lying. [REDACTED] told [REDACTED] that he had asked [REDACTED] repeatedly over the previous two years to set up some type of testing program for bilingual pay and open it up for more officers.

Retaliation for this complaint has occurred against both Officers [REDACTED] and [REDACTED]. Officer [REDACTED] who designed the Hispanic Outreach Program in 2005, was excluded from the Program's Latino Christmas Event in December 2010. Further, in October 2010, after Officer [REDACTED] complaint regarding bilingual pay, [REDACTED] attempted to exclude [REDACTED] from teaching at the Fife Police Reserve Academy, even though he was the *most* qualified in the department for this assignment. [REDACTED] had made known his experience and desire to teach. [REDACTED] told [REDACTED] he had asked [REDACTED] to select him and [REDACTED] said "no" repeatedly without giving any explanation. [REDACTED] apologized to [REDACTED] and told him he was the most qualified, and that the decision was [REDACTED] solely. When [REDACTED] suggested that he meet with [REDACTED] to find out the reasons, [REDACTED] warned him that [REDACTED] would lie, blame [REDACTED] and claim no knowledge. On October 19, 2010, [REDACTED] met with [REDACTED], apologized for any misunderstandings, and asked why he had not been picked to teach. [REDACTED] as predicted, stated that he leaves those decisions to [REDACTED] and had no idea what [REDACTED] was talking about. The guild got involved because the assignment involved a pay issue, and [REDACTED] retreated, giving contradictory and unpersuasive rationales for the decision.

Officer [REDACTED], frustrated at being routinely utilized by other officers on Spanish calls but not receiving bilingual pay, complained to the union about the unequal treatment after learning about [REDACTED] pay and was the victim of retaliation. He was put through a collision review board for a minor accident in his patrol vehicle. The review board was not warranted because the damage did not meet the state collision report damage value threshold. The union raised this issue with the Command Staff but they proceeded with the review board anyway. Additionally, in July 2008, four months after [REDACTED] hire, [REDACTED] was unable to assist with a Spanish translation for another officer because he was assisting at a DUI crash scene. [REDACTED] sought formal discipline for [REDACTED] but was talked into a counseling session instead.

In a separate incident, in September 2010, [REDACTED] a Hispanic female, was number 2 or 3 on a recent hiring list for the position of Community Services Officer. She had held the same position at Lakewood PD. [REDACTED] passed her over and hired a young, white male, [REDACTED] who was reportedly between #8-12 on the hiring list. Our understanding is that [REDACTED] hiring discretion is limited to the top three applicants without sufficient cause. [REDACTED] has filed a formal complaint with the Human Rights Commission and we believe she has an excellent case for race/gender discrimination in hiring. She is ready and willing to retain our firm to pursue her claims in court.

Gender Discrimination and Harassment

Communications Officer [REDACTED] has a four-year degree in accounting. She asked [REDACTED] and [REDACTED] for specialty education pay and was denied. Officer [REDACTED], however, has the same degree from the same university and was granted education pay. [REDACTED] initially tried to argue that a degree in accounting was more applicable to a patrol officer. Only when [REDACTED] complained to the guild and Lt. [REDACTED] threatened [REDACTED] with further action did he change his mind.

Lt. [REDACTED] and Lt. [REDACTED] have reported that [REDACTED] often makes disparaging comments about women in staff meetings. [REDACTED] has also made numerous rude and harassing comments to female dispatchers of the Fife PD.

Misappropriation of City Funds

Setting aside the issue of race discrimination in the denial of bilingual pay to Officers [REDACTED] and [REDACTED], [REDACTED] misappropriated funds by extending bilingual pay to Officer [REDACTED] without requisite qualifications. Our understanding is that this pay was offered as a recruiting tool by [REDACTED] to lure [REDACTED] away from the Sumner Police Department, a flagrant misappropriation of funds under City policies. Officer [REDACTED] disclosed to our clients that he did not misrepresent himself — he told [REDACTED] before he was hired that he could not speak Spanish very well. This secret deal was kept from the guild. Since our clients' Human Rights Commission complaint, the guidelines for bilingual pay have been expanded to include anyone with 50 hours of language training, in as transparent attempt to legitimize [REDACTED] bilingual pay.

Improper Workplace Relationship and Cover-Up

On information and belief, numerous complaints have been made by co-workers about Fife PD [REDACTED] performance on the job. Numerous dispatchers have reported that [REDACTED] often appears disoriented and under the influence of some type of controlled substance. Dispatchers have also reported that [REDACTED] e-mails are often incoherent. On one occasion, [REDACTED] showed up for work wearing two different shoes and was bumping into things. She is also seen frequently crying at work.

On November 15, 2010, [REDACTED] called [REDACTED] and stated she had switched her medication inadvertently and was at Tacoma General Hospital. [REDACTED] indicated she was being released but couldn't drive due to her level of intoxication from the prescription narcotics. [REDACTED] asked [REDACTED] for a ride to Fife PD for her duty shift. [REDACTED] was not available, but did not direct [REDACTED] not to come to work. [REDACTED] called her subordinate, [REDACTED] for a ride. [REDACTED] did and so and observed that [REDACTED] was so intoxicated she could not walk on her own. [REDACTED] had to assist her in walking in to the building.

Other dispatchers and officers that day noticed [REDACTED] intoxicated state and observed that she could not walk on her own. [REDACTED] was later crying and wondering what was the big deal, she had just switched her prescriptions around. By all accounts, [REDACTED] showed poor judgment and poor leadership in attempting to come to work, especially given her supervisory status. But the bad judgment and leadership does not stop there.

After the numerous complaints about [REDACTED] police employee [REDACTED] witnessed [REDACTED] very upset and throwing things around his office, shouting something to the effect of "All that work for nothing!" after a meeting with [REDACTED] and/or [REDACTED] about [REDACTED] [REDACTED] has told [REDACTED] and former employee [REDACTED] that he "would back [REDACTED] to the very end." They interpreted this as a clear message to "leave [REDACTED] alone."

It is believed that [REDACTED] and [REDACTED] have an ongoing romantic and/or sexual relationship. They both worked together at the Sumner PD, and Sumner officers have reported an extremely close relationship between the two. [REDACTED] has bragged to dispatchers that [REDACTED] bought her a \$1500 Mountain Pyranee dog named "Raven." On a previous Christmas Day, [REDACTED] came to work and broke out in tears because [REDACTED] was not at work to exchange gifts with her. [REDACTED] called [REDACTED] crying and he came to work immediately. In 2008, former employee Lt. [REDACTED] erroneously intercepted an e-mail from [REDACTED] to [REDACTED] stating "I miss you and wish you were here." [REDACTED] was concerned enough to show Lt. [REDACTED] who printed the e-mail and showed [REDACTED] who apparently laughed and said [REDACTED] told him they were just good friends. Finally, it has been reported at Fife PD that [REDACTED] wife submitted a public records request during the last 18 months for all e-mails between [REDACTED] and her husband.

If true, this relationship explains the tolerance and lack of accountability for [REDACTED] behavior. As a [REDACTED] such impropriety compromises the safety and security of the entire community. At least two officers have stated that when [REDACTED] is dispatching, they order their patrol officers to return to the station and only answer dispatched calls. Both have stated they believe their officers are in danger when [REDACTED] is dispatching.

Suspicious Relationships With Known Offenders Involving [REDACTED]

Our clients have also compiled evidence of numerous incidents reported by current and former officers concerning suspicious behavior involving young male offenders and [REDACTED] [REDACTED] formerly ran a "special probation" club for young adult offenders. In 1997 or 1998, former dispatcher [REDACTED] former officer [REDACTED] and Officer [REDACTED] observed [REDACTED] on dispatch cameras with an 18-year-old probationer placing his hand on the probationer's thigh. All three officers were concerned and met with the guild president. [REDACTED] caught wind of the report and threatened a defamation suit.

In 2002-03, former officer [REDACTED] (now a Tacoma officer), arrested [REDACTED]. While in the booking area, [REDACTED] cell phone was ringing non-stop. [REDACTED] asked who was calling him and [REDACTED] replied, "your sergeant ... [REDACTED] always calls me." Former officer [REDACTED]

[REDACTED] (now a Tacoma police sergeant) witnessed [REDACTED] running his fingers through the hair of a prisoner who was in handcuffs and seated in the back of the patrol car. [REDACTED] was reportedly disturbed by the incident. In 2006, Officer [REDACTED] stopped an 18-20-year-old white male suspect. The suspect immediately began talking about his association with [REDACTED], mentioning the special probation and that he would have dinner at [REDACTED] house on occasion, including Thanksgiving that year. [REDACTED] approached his supervisor, Lt. [REDACTED] who told him [REDACTED] had very questionable relationships with former probationers, but that [REDACTED] was very vindictive and would make "life hard" if he knew anyone was talking about it.

On December 22, 2009, Officer [REDACTED] was making a criminal traffic arrest of [REDACTED]. Evidence of illegal drug use was seen in the vehicle and [REDACTED] admitted he uses illegal drugs. [REDACTED] began to beg and plead for [REDACTED] to call [REDACTED] who would vouch for him. [REDACTED] stated he had been on [REDACTED] "special probation" and had meetings with [REDACTED] and did things with him, stating, "I just had dinner with him a few months ago."

On December 14, 2010, Officer [REDACTED] was in uniform and was contacted by a young white male at a restaurant, asking "Do you ever see [REDACTED]?" The male told [REDACTED] he had been on [REDACTED] "special probation" and "did a bunch of things with and for [REDACTED]... I even do things for him now — I fix his house and built his deck." He then proudly showed Officer [REDACTED] his key ring stating, "I even got the key for his house right here!" Finally, several officers reported bizarre incidents where young white male inmates were brought into [REDACTED] office on his orders and left alone with him.

Conclusion

The allegations made herein are not made lightly. It seems evident that a culture of fear and corruption has been set in the foundation of the Department that has discouraged these matters from being brought forth earlier. Our clients take pride in being police officers and feel strongly about their oaths of honor and integrity.

This notice is being given pursuant to RCW 42.41.030, the City of Fife Whistleblower Protection Guidelines, and Fife Police Manual § 18.01.32, Duty To Report. The actions detailed herein, clearly, violate a range of City personnel guidelines and police department policies, in addition to tort laws and criminal statutes. The enclosed packet of supporting materials was prepared by our clients and they asked that it be included with this letter.

Most of all, our clients want to see their department's leadership reformed. In that vein, we trust that your office will take swift and appropriate investigative and remedial actions. If not, we will consider more high-profile legal action in court.

Very truly yours,



Enclosure (1)

cc: 

A-2

CP 371-85: Prothman Group Investigation Report with
Redactions

A - 2

Review of Allegations - Determination of Merit City of Fife Police Department

Introduction:

The City of Fife received a letter dated March 18, 2011, from [REDACTED], representing [REDACTED]. The letter made nine separate allegations regarding improper activities by the [REDACTED] and [REDACTED] of the Fife Police Department.

Scope of Work:

Prothman was retained to determine if there is merit to the nine allegations summarized in the above referenced letter. The scope of the review included reviewing reports, documents, policies, conducting employee interviews, visiting the police department, and interviewing persons not employed by the City of Fife but who were considered to have firsthand knowledge surrounding some of the allegations. Materials reviewed were provided by the City of Fife and from interviewed witnesses and/or their attorney's. Prothman agreed to complete a written report upon completion of review of the documentation provided and completion of the review.

Methodology:

The findings listed in this report are the culmination of approximately two-hundred sixty-five investigatory hours expended by employee's of the Prothman Company and included examination of policies and procedures, related documents, interviews with employees, as well as interviews with various persons not employed by the City of Fife. This review included:

- Review of City of Fife Policy Manual and Procedure Manual.
- Review of Fife Police Department Policy and Procedure Manual.
- Review of City of Fife / Fife Police Guild Bargaining Agreement.
- Employee interviews.
- Interview with the [REDACTED].
- Interviews with offenders associated with post-sentencing programs.
- Preparation and review of interview summaries.
- Preparation and review of interview transcripts.
- Review of Washington State Human Right Commission Reports.
- Review of RCW 42.41.030 letter dated 3/18/11 from [REDACTED] Attorneys at Law.
- Various meetings with City of Fife executive personnel and representative attorney's.
- Discussion with previous [REDACTED].
- Discussions with the Human Resources Supervisor.

- Review of supporting documentation, including various memo's, emails, personnel files, supervisory files, and specialty pay documents.
- Various site visits to the City of Fife and the Police Department.
- Preparation of Final Findings Report.

Determination of Merit:

Determination of merit regarding the nine allegations were made utilizing the standards found in Fife Police Department Manual, Section 28.07.00, Disposition of Complaints:

- Sustained – The allegation was substantiated.
- Unfounded – The allegation was false or not factual.
- Not Sustained – There is insufficient evidence to prove or disprove the allegation.
- Exonerated – The incident occurred, but the employee acted lawfully and properly.

Allegations

1. Violation of City of Fife Personnel Guidelines – Section 1.4 (Equal Employment Opportunity) and Section 27.4 (Reporting Improper Governmental Actions - Retaliatory Action)

Section 1.4: *"The City of Fife prohibits discrimination against any individual in regard to hiring, promotion, discipline or other employment practices. Everyone is treated equally regardless of age, gender, race, creed, color, national origin, sexual orientation or the presence of any physical, mental or sensory disability, marital or veteran status, or any other basis that is protected by local, state, or federal law."*

Section 27.4: *"The city encourages employers to report improper governmental actions and will protect employees against retaliatory action when the reports are made in compliance with this policy and related guidelines. City employees and officials are prohibited from taking retaliatory action against an employee in the event the employee has, in good faith, reported alleged improper governmental action in accordance with this policy and related guidelines"*.

- Allegation: [REDACTED] discriminated against [REDACTED] and [REDACTED] by denying them bilingual pay when other officers were compensated for their bilingual skills.

Our review revealed that [REDACTED] decision to approve bilingual pay for [REDACTED] was based on his understanding from information provided by [REDACTED] that [REDACTED] spoke Spanish and met the requirements for such pay. The [REDACTED] decision to deny bilingual pay to [REDACTED] and [REDACTED] was based on his belief that neither met the requirements. This issue was subsequently brought forward by the

Police Guild and was rectified through the bargaining process. As a result, both [REDACTED] and [REDACTED] receive bilingual pay.

Determination of Merit: Not Sustained. Information provided during the review demonstrated that [REDACTED] decision to grant [REDACTED] bilingual pay was based on his understanding through information provided that [REDACTED] met the requirements for the extra pay, while he believed that [REDACTED] or [REDACTED] did not meet the requisite requirements. No information was identified to sustain a finding that [REDACTED] intentionally discriminated against either [REDACTED] or [REDACTED] on this issue.

Note: On January 14, 2011, a "Notice of Charge of Discrimination" was filed by with the Washington State Human Right Commission by both [REDACTED] On February 7, 2011, the Commission returned a "No Reasonable Cause Finding" on both filings.

- Allegation: [REDACTED] denial to attend a Latino Christmas event in 2010 was an act of retaliation.

This allegation is the result of a decision made by [REDACTED] and [REDACTED] to deny [REDACTED] request to attend an event for the Hispanic Outreach Program in December of 2010. The decision to deny the request appears to have been based on the fact that sufficient number's of personnel were scheduled to attend and [REDACTED] who was scheduled for vacation at that time, was not needed and the overtime was not necessary. [REDACTED] was invited to attend the event on his own time but did not attend.

Determination of Merit: Unfounded. Budget oversight and approval of expenditures is a basic function of the office of the [REDACTED]. The review revealed that [REDACTED] decision was based on his belief that the Department was well represented at the function and paying [REDACTED] overtime to attend a function while on his vacation was not fiscally responsible.

- Allegation: [REDACTED] denial to teach at the Fife Police Reserve Academy was an act of retaliation.

This allegation was brought forth due to [REDACTED] decision to deny [REDACTED] the opportunity to teach a Criminal Procedures block at the Reserve Academy. Our review revealed

that [REDACTED] believed that an attorney was required to teach Criminal Procedures and that [REDACTED] would have had to team-teach, which would have resulted in extra overtime that [REDACTED] did not feel was necessary. When it was brought to his attention that an attorney was not required, [REDACTED] was later afforded the opportunity to teach.

Determination of Merit: Not Sustained. Budget oversight and approval of expenditures is a basic function of the office of the [REDACTED]. The review revealed that [REDACTED] decision was made in an effort to be fiscally responsible and conserve overtime.

- Allegation: [REDACTED] was subjected to an Internal Accident Review Board as an act of retaliation.

This allegation resulted from [REDACTED] being subjected to an Accident Review Board when, in his opinion and by his research, damage from the accident did not meet the monetary threshold required to trigger a Review Board. Both [REDACTED] and [REDACTED] felt the Review Board was necessary based on damage estimates received from the City Shop that exceeded the threshold coupled with Department policy. The accident was found to be "preventable". [REDACTED] indicated that since that Review Board, [REDACTED] has been involved in an accident that did not meet damage thresholds and no accident review was held.

Determination of Merit: Unfounded. The [REDACTED] is responsible for evaluating the performance of assigned personnel. The review revealed that the decision to convene an accident review board was within department policy based on estimates provided by the City that exceeded minimum damage thresholds.

2. Violation of City of Fife Personnel Guidelines – Section 1.4 (Equal Employment Opportunity) and Section 3.4 (Harassment Prevention)

Section 1.4: "The City of Fife prohibits discrimination against any individual in regard to hiring, promotion, discipline or other employment practices. Everyone is treated equally regardless of age, gender, race, creed, color, national origin, sexual orientation or the presence of any physical, mental or sensory disability, marital or veteran status, or any other basis that is protected by local, state, or federal law."

Section 3.4: *The city of Fife intends to provide a workplace free from all verbal, physical, visual, and other forms of harassment. All employees are expected to be sensitive to and respectful of their co-workers and others with whom they come in contact while representing the City of Fife. We prohibit all forms of harassment, whether due to gender, sexual orientation, marital status, race, color, national origin, citizenship status, creed, religion, age, actual or perceived disability, political ideology, or any other protected status.*

- Allegation: [REDACTED] and [REDACTED] discriminated against [REDACTED] when he denied her educational pay.

[REDACTED] was denied educational pay for a four-year degree in accounting based on the decision that the degree did not meet the parameters for her position as a dispatcher, while [REDACTED], who attended the same college and attained the same degree, did receive the pay.

[REDACTED] indicated he made his decision initially as he believed that an accounting degree was applicable to the daily duties associated with a patrol officer, more so than that of a dispatcher. He reversed his position after a nexus was demonstrated between the accounting degree and a dispatcher's duties (statistical reports) and [REDACTED] has since received this pay.

Determination of Merit: Not Sustained. It is the responsibility of the [REDACTED] to monitor fiscal operations, which would include justifications of specialty pay. This review revealed that [REDACTED] decision was made on his assessment of the duties associated with the both patrol officers and dispatch officers and the nexus of those duties to a degree in accounting.

- Allegation: [REDACTED] discriminated against [REDACTED] an applicant for the position of "Police Service Specialist" when he selected a male applicant for the position, even though [REDACTED] had placed higher on the initial testing list. A complaint was filed by [REDACTED] with the Human Rights Commission alleging bias against women and that the [REDACTED] did not hire her because she is female.

In a response to the Human Rights Commission, the City responded that, pursuant to Section 2.52.050 of the Fife Municipal Code, the City Manager is the appointing authority for the position of Police Services Specialist. [REDACTED] made his

recommendation to not hire based on information obtained in [REDACTED] background investigation, when it was revealed that she allegedly had difficulties working well with co-workers. The document identifies [REDACTED] of the Lakewood Police Department as confirming this issue, indicating that the Lakewood Police Department would not consider rehiring her. Based on the information gathered during the background investigation process, [REDACTED] made the decision to move on to other candidates that he felt more qualified for the position.

Determination of Merit: Unfounded. It is the responsibility of the [REDACTED] to oversee the recruitment, selection and training of Department personnel. The review revealed that the [REDACTED] decision to recommend not hiring [REDACTED] was based on his belief that better qualified applicants were available for the open position.

- Allegation: [REDACTED] often makes disparaging comments about women in staff meetings and has made numerous rude and harassing comments to female dispatchers at Fife Police Department.

During our interview with [REDACTED], he advised that he had on occasion referred to the Dispatch Center as a "piranha pit" due to employees at times being difficult to manage. He also indicated that he had referred to one female officer as the "station cat" as a reference to the amount of time that she spent in the station. [REDACTED] who apparently was the officer referred to as the "station cat", implied in her interview that she has never felt she has been the target of discrimination or retaliation based on gender.

In an interview with [REDACTED], he recalled [REDACTED] making reference that the dispatchers looked like "sausages" in their new uniforms, and while he indicated that some of the [REDACTED] comments were unprofessional, he did not consider them sexist.

Determination of Merit: Not Sustained. The comments that [REDACTED] made about the dispatch center being a "piranha pit", while inappropriate, were not made exclusively about one particular race or gender group. There was no information identified to indicate that his comments were intended to harass employees.

3. Violation of City of Fife Personnel Guidelines – Section 27.4 (Reporting Improper Governmental Actions and 27.5.1b (Misappropriation of City Funds)

Section 27.4: "The city encourages employers to report improper governmental actions and will protect employees against retaliatory action when the reports are made in compliance with this policy and related guidelines. City employees and officials are prohibited from taking retaliatory action against an employee in the event the employee has, in good faith, reported alleged improper governmental action in accordance with this policy and related guidelines".

Section 27.5.1b: Improper governmental action includes action "That it is in violation of any federal, state or local law or rule: is an abuse of authority; is of substantial and specific danger to the public health or safety; or is a gross waste of public funds".

- Allegation: [REDACTED] misappropriated City funds when he extended bilingual pay to [REDACTED] without "requisite" qualifications.

[REDACTED] explained that he authorized bilingual pay for [REDACTED] based on his understanding, by way of information relayed to him from [REDACTED] that [REDACTED] did in fact speak Spanish, and from his perspective, met the requirements for bilingual pay.

[REDACTED] recalls that he believed that [REDACTED] spoke Spanish and that the offer of bilingual pay was not intended to entice [REDACTED] to accept employment with Fife Police Department. He recalls telling [REDACTED] that [REDACTED] did speak Spanish.

[REDACTED] denied that bilingual pay was offered as a specific incentive to entice him away from Sumner Police Department and to the Fife Police Department.

Determination of Merit: Not Sustained. The review revealed that [REDACTED] approved bilingual pay for [REDACTED] based on the best information he had at the time the decision was made and that there was no intentional misuse or misappropriation of City Funds.

4. Violation of City of Fife Personnel Guidelines – 21.4d (Disciplinary Action Pertaining to Detrimental Use of Drugs)

Section 21.4d: "Any other use, possession or trafficking of alcohol, drugs or controlled substances in a manner which is detrimental to the interest of the City, or that creates a safety concern or unduly interferes with job performance. Any employee found in violation of the above stated prohibitions will be subject to

disciplinary action including immediate discharge pursuant to the City of Fife, Administrative Guideline Disciplinary Action".

- Allegation: [REDACTED] reported for duty while under the influence of a behavior impairing substance and was not duly disciplined for her actions.

On November 15th, 2010 as part of an emergency management preparedness exercise, [REDACTED] responded to work in what was perceived as an impaired condition. According to [REDACTED] she had mistakenly taken a nighttime medication in addition to her daytime medication (which she described as a sleeping medication) before reporting to work.

As a result of that incident, [REDACTED] met with [REDACTED] admonished her for her actions, explaining that her behavior was unacceptable, and placed a memo in her personnel file.

Determination of Merit: Unfounded. It is the responsibility of the [REDACTED] to discipline members of the Department for non-compliance with rules, regulations and procedures. [REDACTED] received a verbal counseling for her actions and the counseling was documented in her personnel file.

5. Violation of City of Fife Personnel Guidelines – Section 21.5.6d (Supervisor Responsibility)

Section 21.5.6d: *"Supervisor Responsibility. If a supervisor has reasonable suspicion that an employee is under the influence of alcohol or drugs when reporting for work or during the work shift, the supervisor shall remove an employee from duty where reasonable suspicion of controlled substance influence or impairment is verified. A supervisor will not allow an employee believed to be under the influence of alcohol or drugs to operate equipment or drive a vehicle until the employee has been determined to be able to do so safely."*

- Allegation: [REDACTED] failed to take appropriate action when [REDACTED] reported to work in an alleged intoxicated condition from prescription drugs.

As previously identified in the preceding allegation, [REDACTED] appeared to report to work in an impaired condition. [REDACTED] advised during his interview that he recognized that [REDACTED] was having difficulty, and that he had her sit down in a room away from the exercise until appropriate transportation could be

arranged to take her home. He indicated that her mother eventually picked her up.

[REDACTED] advises that she did not do any dispatching during the exercise.

[REDACTED] said that he did have a conversation about condition with [REDACTED] while at the exercise and [REDACTED] advised him that he would address the matter.

Determination of Merit: Unfounded. The review revealed that [REDACTED] took action to ensure that [REDACTED] did not have dispatching responsibility during the exercise so as to place any employee in jeopardy. [REDACTED] brought the matter to a superior officer's attention and the matter was subsequently addressed through disciplinary action.

6. Violation of City of Fife Personnel Guidelines – Section 22.5.2 (Safety and Security)

Section 22.5.2 paragraph 3: *Department Directors and supervisors are responsible for assuring safe working conditions and compliance with established written safety standards of each worksite. Failure to comply with the responsibilities set forth above shall be grounds for disciplinary action up to and including termination.*

- Allegation: As Department Heads, [REDACTED] and [REDACTED] failed to take meaningful action on complaints received pertaining to [REDACTED] alleged incompetence.

In reviewing [REDACTED] personnel file, we found that recent evaluations demonstrated acceptable job performance in a majority of rating areas.

A review of her personnel/training records also demonstrated that remedial training and evaluation had taken place to address areas of concern or perceived sub-standard performance.

While [REDACTED] voiced frustration with upper management effectively addressing job performance issues, he implied in his interview that [REDACTED] knows how to dispatch and her performance has improved.

██████████ recalled during his interview that performance issues have been brought to his attention and as a result a "job assessment" was designed to test ██████████ job performance skills. He said ██████████ administered the assessment and implied while there was room for improvement, her performance was "satisfactory".

Determination of Merit: Not sustained. The ██████████ is responsible to ensure that employees under his/her command are properly trained. This review concluded that both the ██████████ and the ██████████ were aware of concerns regarding perceived deficiencies in ██████████ job performance. Subsequently, various remedial actions were taken to improve her performance and a "job knowledge assessment" administered to determine her level of competency. Job competency is supported by employee evaluations that demonstrate either improvement in rated areas or designate acceptable job performance.

7. Violation of City of Fife Personnel Guidelines – Section 3.5.5b (Prohibited Conduct – Management and Supervisory Responsibilities) and Section 24.5.1s (Prohibited Behavior)

Section 3.5.5b: *"Because of the potential for miscommunication, effects on morale, abuses of authority, misunderstandings, and conflicts of interest, the City of Fife does not permit supervisors to have romantic or sexual relations with any person within their chain of supervision. This prohibition applies to all employees who have the authority or practical power to supervise, hire, terminate or discipline another employee, who have decision making authority over another employee, or who are responsible for auditing, evaluating, or reviewing the work of another employee".*

Section 24.5.1s: *Any inappropriate conduct that may bring discredit to the City as investigated and determined by the City Manager or his/her designee".*

- Allegation: ██████████ and ██████████, while employed by the City of Fife, are or have been involved in a romantic relationship that exceeds normal platonic boundaries, violating professional standards of conduct.

Both ██████████ and ██████████ strongly deny having any type of relationship that exceeds normal professional platonic relationship boundaries while working for the Fife Police Department.

[REDACTED] was asked about receiving a gift of a Pyrenees' dog from [REDACTED]. She advised that while he had given her a dog when they both worked in Sumner, she has not received any type of dog from [REDACTED] since working for the City of Fife.

[REDACTED] said that she does exchange gifts with [REDACTED] as well as other employees within the Department during the holiday season. Both she and [REDACTED] deny any knowledge of her becoming emotionally upset while working on Christmas day as a result of [REDACTED] failing to come in to dispatch to exchange gifts.

During the review, a sample of emails between [REDACTED] and [REDACTED] were reviewed. While it was the investigators perception that some of the emails lacked the degree of professionalism that one might expect between a supervisor and a subordinate, nothing was found that demonstrated an ongoing romantic relationship between the two.

A conversation with previous [REDACTED] confirmed that a public records request had in fact been made requesting email correspondence between [REDACTED] and [REDACTED] however he advised no impropriety was found to have occurred.

Determination of Merit: Not Sustained. No information was identified during this review to corroborate the allegation that [REDACTED] or [REDACTED] are or have been involved in a romantic relationship while employees of the City of Fife.

8. Violation of City of Fife Personnel Guidelines – Section 24 (Standards of Conduct) and Fife Police Department Manual – Section 18.01.11 (Truthfulness)

Section 24.5.1s: *"Any inappropriate conduct that may bring discredit to the City as investigated and determined by the City Manager or his/her designee".*

Section 18.01.11: *"All employees shall truthfully answer all questions specifically directed and narrowly related to the scope of employment and operations of the department which may be asked of them by the Chief of Police, their designee, a supervisor or a superior officer. Members shall not make false or fraudulent statements, whether orally or in writing, or induce others to do so".*

- Allegation: [REDACTED] allegedly lied to [REDACTED] regarding teaching at the Fife Police Academy.

[REDACTED] explained that his decision to deny [REDACTED] request to teach at the Fife Police Academy was based on his misunderstanding of the requirements necessary for an instructor to teach Criminal Procedures.

It was inferred in documents provided that [REDACTED] told [REDACTED] that the [REDACTED] would "lie to him" regarding the Reserve Academy issue. In his interview, [REDACTED] was asked specifically if he told [REDACTED] that [REDACTED] was going to lie to him, and he said "I never told him that [REDACTED] was going to lie to him".

In our interview with [REDACTED], he did indicate that there had been a good deal of finger pointing over the Reserve Academy issue between the [REDACTED] and [REDACTED] with regard to the final decision, however he explained the matter as basically a breakdown in communication.

[REDACTED] was asked if he could recall a conversation with [REDACTED] or any other person where he said that [REDACTED] frequently lies. He replied that he did not.

Determination of Merit: Not Sustained. While there appeared to be a breakdown in communication on this issue, no information was identified during this review that corroborated the allegation that [REDACTED] was intentionally untruthful or deceptive.

9. Violation of Fife Police Department Regulation 18.01.22 (Association with Known Offenders)

Section 18.01.22: "An employee, except in the discharge of official duty, or with permission of the Chief of Police, shall not knowingly associate with or have any dealings with criminals. Employees shall not engage in any business or financial arrangements with anyone under review, in custody, or arrested for a felony crime by this department".

- Allegation: [REDACTED] is suspected of associating with known offenders not directly related to the discharge of his official duties.

It has been alleged that on various occasions, [REDACTED] friendly association with known offenders has brought his integrity into question as well as violated department policy.

In two separate incidents, officers expressed concern when [REDACTED] was allegedly observed via a surveillance camera in the police department placing his hand on the thigh of an 18-year-old male offender while standing next to a truck. In a separate incident, he was allegedly observed by officers to apparently run his fingers through the hair of a suspect who was crying and handcuffed in the back of a patrol vehicle...saying something to the effect of "everything will be ok". These names of these suspects were not provided.

According to documents provided, this matter was later discussed with the Fife Guild Attorney who allegedly made the comment that the incident was not subject to mandated reporting unless a crime had been committed. During this review no formal complaint or report was produced or brought forward regarding these alleged incidents.

[REDACTED], when asked if he had any knowledge of any concern being expressed about the manner in which he touched a suspect while in custody seemed surprised at the question and said he had no idea why this might have been a concern of his officers. He also said that he had no recollection of his making a threat to bring forth a defamation suit as a result of the allegations. In two interviews with previous offenders that he had supervised, neither referred to any mistreatment or inappropriate behavior on the part of [REDACTED]

It was also alleged that [REDACTED] on at least two different occasions, had offenders brought to his office by custody personnel. When asked about this matter, [REDACTED] said that on one occasion, he had received a note from a prisoner asking to speak with him and had the prisoner brought to his office. On another occasion, he knew one of the offender's who was on probation and he wanted to speak to him about the violations. He said that the reason he had the offenders brought to his office was because there is really not a good place to have a conversation with prisoners in the jail.

It was also implied that [REDACTED] had made a phone call to an offender's cell phone during the time that the offender was being booked. When asked during his interview, the [REDACTED] indicated that he really didn't have a clear recollection of the phone call being made, but acknowledged that it could be possible that he was returning a phone call.

Finally, it was alleged that [REDACTED] maintained an ongoing friendship with [REDACTED], whom he would meet for meals and was on the [REDACTED] "special probation", and that another offender (later identified as [REDACTED]) had fixed the deck on his house and had a key to his personal residence.

During our interview, [REDACTED] said that he did have a meal with [REDACTED] at the Tacoma Mall. He said he had known [REDACTED] family for about 10 years and was instrumental in getting him placed with CPS when he was abandoned.

During the same interview, he identified [REDACTED] as the person who fixed his deck and that during that time he may have had a key to his house. He said he paid [REDACTED] to do the job and it was not part of any community service program.

Interviews were held with both [REDACTED] and [REDACTED].

[REDACTED] described [REDACTED] as a "good guy, who does things for people that most would not. He just loves his job". [REDACTED] said [REDACTED] set up a probation program for him when [REDACTED] determined that [REDACTED] was old enough to work within the constraints of such a program. He said that he helped [REDACTED] with work around his house after he could show a consistent pattern of sobriety. When not working on projects, he would occasionally check in with [REDACTED] by phone or for lunch to "just see how things were going". He said he hadn't interacted with [REDACTED] for several years.

[REDACTED] confirmed that he first met [REDACTED] when he was between the ages of 10 and 15. He said he was a runaway and that [REDACTED] took him to his ([REDACTED]) home, where his father and the [REDACTED] seemed to "hit it off" right away. He said his trouble with the law was due to the consumption of drugs and alcohol and that he had various community service projects he was directed to fulfill. He advised that [REDACTED] and his Dad developed a personal, mutually agreed upon plan, whereby his father would obtain a urine sample and [REDACTED] would test the sample for the presence of drugs or alcohol using test strips. He went on to say that he had also been assigned manual labor tasks with the Parks Department and occasionally within the police department, painting curbs, weeding and emptying trash. He implied that [REDACTED] was a good man who had a positive impact on his and his brother's lives.

[REDACTED] explained that he has no "special probation" but at one time, when he was a sergeant with Fife, he was in charge of coordinating the community service program for offenders through the court. He said that he has a passion to turn offenders around and get them on the right track. He indicated that past assignments while at Fife PD (crime prevention, school programs, supervisor of the SRO program) demonstrates his focus on rehabilitative efforts.

An interview was conducted with [REDACTED] to discuss how the court manages their Community Service Program. [REDACTED] recalled that approximately nine years ago, [REDACTED] then a sergeant, was the liaison between the court and the police department on work crew assignments. [REDACTED] was asked if any offender involved in a work crew, supervised by [REDACTED], ever complained about their treatment while participating in either program, he replied, "no." He did add, however, that through the court, several offenders thanked [REDACTED] and the police department for how they were treated and several stated that it was their belief that [REDACTED] "had their best interests at heart."

Determination of Merit: Not sustained. Department Policy 18.01.22 prohibits employees from knowingly associating with or having dealings with criminals, except in the discharge of their official duty, or with the permission of the Chief of Police.

The policy provides the [REDACTED] latitude to determine what associations are appropriate. In interviews with two of the offenders he supervised, they both credited the [REDACTED] with changing the direction in their lives and offered nothing to support an inference of criminal conduct. Additionally, the review revealed that the majority of the contacts occurred when [REDACTED] was a Sergeant and was working with the courts community service program. Comments made by the presiding [REDACTED] during the time that [REDACTED] was involved with the program were highly complementary. The [REDACTED] strongly believes that his association with past offenders was appropriate as a means of rehabilitation and changing lives of criminal offenders.

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To: Alison Rigby
Cc: Greg Amann; Loren Combs; Jennifer Combs
Subject: RE: City of Fife v. Hicks - No. 88601-6 - Appellant's Opening Brief

Rec'd 5-30-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Alison Rigby [<mailto:arr@vsilawgroup.com>]
Sent: Thursday, May 30, 2013 11:24 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Greg Amann; Loren Combs; Jennifer Combs
Subject: City of Fife v. Hicks - No. 88601-6 - Appellant's Opening Brief

Mr. Carpenter:

Please find attached the *Appellant's Opening Brief* for case No. 88601-6.

Alison Rigby

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