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45-450-5  
No. 88601-6

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF FIFE, a Washington Municipal Corporation,  
*Appellant,*

v.

RUSSELL P. HICKS,  
*Respondent.*

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DIRECT APPEAL  
FROM THE SUPERIOR COURT OF PIERCE COUNTY

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APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

The Appellant, City of Fife, respectfully submits this brief in reply to the Brief of Respondent, Officer Russell P. Hicks.

## II. ARGUMENT

### A. Respondent's Brief contains several factual inaccuracies.

The Respondent's brief contains a number of misstated facts. Contrary to Officer Hicks' assertion, the City of Fife did not "tout" the final report that resulted from the Hicks investigation as proof that "the City had done no wrong." Respondent's Brief ("RB") at 1. Rather, it presented the report to the press to demonstrate the outcome of the investigation and to prove that an outside investigation of all of Hicks' accusations against the accused were without merit. CP 181-82.

Officer Hicks also claims that "all information that might lead to the identity of any of the witnesses in the investigation, and all information that might lead to the identity of the individuals accused of discrimination" was redacted. RB at 2, 8-9. This is false. The names and identifying information of the witnesses were redacted, with "identifying information" being restricted to personal phone numbers and/or addresses if present, unique employee id numbers, and job titles, if the title was unique to one person. CP 220-37. In instances where part of a title was unique, only the unique portion was redacted. CP 220-37. All other

information, including a great deal that might lead to the identity of the witnesses, was not redacted. The names and identifying information of the accused in unsubstantiated complaints were redacted, with "identifying information" being restricted to personal phone numbers and/or addresses if present, unique employee id numbers, and job titles, if the title was unique to one person. CP 220-37. In instances where part of a title was unique, only the unique portion was redacted. CP 220-37. All other information, including a great deal that might lead to the identity of the accused, was not redacted.

Finally, Officer Hicks claims that the City altered the audio files of the interviews to distort the witnesses' voices resulting in incomprehensible audio. RB at 2. This is incorrect. While the voices of the protected parties were altered to be unrecognizable, as necessary to protect their identity as redacting their names, it did not result in the audio files being incomprehensible. CP 271-72. The quality of the audio files were unaltered - if a person spoke softly and was difficult to understand pre-voice modulation, they were equally so post voice modulation. CP 271-72. If a person spoke clearly and was easy to understand pre-voice modulation, they were equally so post voice modulation. CP 271-72. The only effect the modulation of the witnesses, complainant, and exonerated accused voices had was to prevent them from being identified.

CP 271-72. It prevented none of their testimony from being heard or understood. CP 271-72.

**B. If City of Fife's appeal is successful, it has not violated the Public Records Act**

Officer Hicks asserts that the City is in violation of the PRA by reason of the court's August 3, 2012 order to produce the documents at issue. RB at 12-13. However the court in its August 3, 2012 order 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. The City Clerk completed producing all other installments September 21, 2012. CP 36-37. 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 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, as set forth in the City's opening brief. Petitioner's Brief ("PB") at 38-39. The 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. Thus, if this appeal is successful, and the City's redactions are deemed proper, the City's response to Officer Hick's public disclosure request was timely and complete in accordance with the PRA.

**C. The investigative records exemption is applicable.**

Officer Hicks argues that the City's redactions are not supported by the investigative records exemption set forth in RCW 42.56.240(1). RB at 15. 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). Officer Hicks incorrectly alleges that the City has not met the three required elements.

*I. Records are Investigative in Nature.*

Officer Hicks asserts that the records at issue in this case are not "investigative in nature" because Officer Hicks alleges it was purely a personnel matter and not intended to ferret out criminal activity or allegations of malfeasance. RB at 16-18. Although the City agrees that the investigative records exemption is not intended to cover purely personnel matters not involving police department personnel, there is no requirement that the alleged misconduct of a police department employee be criminal in nature. 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).

Nevertheless, the allegations made by Officer Hicks and the ensuing investigation did not involve purely personnel matters and are easily distinguishable from the case Officer Hick's cites for this proposition, *Columbian Publishing Company v. City of Vancouver*, 36 Wn. App. 25, 30-31, 671 P.2d 280 (1983). In *Columbia Publishing*, the City of Vancouver investigated allegations against the police chief that were merely personnel matters, such as lack of communication skills, being "aloof," and being a "task master not a people master." *Id* at 27. In contrast the allegations made by Officer Hicks included allegations of discrimination, retaliation, sexual misconduct with a subordinate, misappropriation of City funds, being on duty while under a behavior impairing substance, and sexual misconduct with suspects. CP 319-24. A number of the allegations could potentially have resulted in criminal charges or civil penalties, had they had true. These are precisely the types of investigations the statute is designed to exempt. This was not an instance, as in *Columbian Publishing*, where a City Manager was looking

into personality conflicts or personnel issues. These were specific allegations of misconduct and malfeasance, directed at specific members of the police department.

The other case cited by Officer Hicks in support of his assertion that the record in this case are not investigative records, *Ames v. City of Fircrest*, 71 Wn. App. 284, 857 P.2d 1083 (1993), actually supports the City's position on this issue. In *Ames* the mayor ordered an internal investigation of the police chief after a criminal investigation of the police department found no evidence of criminal intent. *Id.* at 286-87. The mayor hired an interim police chief to conduct the investigation. The court held that the internal investigation records constituted specific investigative records compiled by a law enforcement agency. *Id.* at 294.

2. *Record were compiled by an investigative, law enforcement, or penology agency.*

Officer Hicks argues that documents were not compiled by a law enforcement agency because the actual investigation was conducted by a former police officer hired as a consultant and that the City itself did not have possession of the investigative file other than the final report. RB at 20-21. Contrary to Officer Hick's assertions, it is not necessary that a record be created by the agency to be "compiled" by the agency. Any document that is placed in a law enforcement investigative file is

considered “compiled” by law enforcement. *Newman v. King County*, 133 Wn.2d 565, 572-73, 947 P.2d 712 (1997). Officer Hicks argued throughout the trial court proceedings that all of the investigative records prepared and compiled by the Prothman Group were public records of the City subject to disclosure because the City caused WCIA to hire the Prothman Group to conduct the investigation, the City was supplied the final report from the investigation (which it relied on in its decision making), and the City “adopted the investigation as its own” in press releases. CP 439-46. The trial court agreed that all of the investigative records compiled by the Prothman Group were public records of the City in its August 3, 2012, ruling, which Officer Hicks did not challenge. CP 478-79.

In *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011), 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. *Id.* 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. It makes no practical difference that the actual investigative work was performed by a retired police officer in this case and an outside police department in Bainbridge Island, as both investigations were done on behalf of the City against whose police officers the allegations of misconduct were made.

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

Officer Hicks argues that nondisclosure is not essential to effective law enforcement because the City has already released the investigation to the public. RB at 22. However the City is not arguing that nondisclosure of the facts of the investigation themselves are necessary for effective law enforcement, only that nondisclosure of names of complainants, witnesses, and the accused in the investigation are necessary for effective law enforcement. 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.

Officer Hicks also argues that the third element of the investigative records exemption is not satisfied because he asserts that the trial court

must hear testimony and make a specific factual finding that nondisclosure is necessary for effective law enforcement. RB at 23. 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. at 295. In *Spokane Police Guild v. Washington State Liquor Control Board*, 112 Wn.2d 30, 37, 769 P.2d 283 (1989), the court did not hold that testimony and a specific finding was required. Rather it simply held that the Liquor Board failed to meet its burden of proving that nondisclosure was essential to effective law enforcement.

As set forth in the City's opening brief (PB at 16-17), 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.

The present case was decided on a summary judgment motion, so the City did not have the opportunity to present testimony on the issue. However, the City did provide the uncontroverted declaration of Assistant Chief Mears' declaration who described the chilling effect that disclosure of complainants, witnesses, and interviewees identities would have on criminal and internal investigations. CP 285-87.

Based on the uncontroverted declaration, it was error for the trial court to not determine that nondisclosure was necessary for effective law enforcement or to rule at the very least, that the City had presented evidence sufficient to establish a prima facie case and a genuine issue of fact for trial.

**D. The City's redactions of the names of the accused are authorized by the right to privacy exemptions.**

Officer Hicks argues that disclosure of the names and identifying information of the accused in this case will not violate their right to privacy. RB at 25-27. In support of this argument, Officer Hicks cites

three cases that are clearly distinguishable because none involved claims of specific instances of misconduct that were found to be unsubstantiated after an investigation. In *Cowles Publishing v. State Patrol*, only records of substantiated allegations of misconduct were at issue. 109 Wn.2d at 714. The court noted the difference, stating:

Release of files dealing with pending investigations, or with complaints which were later dismissed would constitute a more intrusive invasion of privacy than would the release of files relating only to completed investigations which resulted in some sanctions against the officers involved.

*Id.* at 725. In *Spokane Police Guild v. Washington State Liquor Control Board*, the Liquor Board found specific violations after an investigation. 112 Wn.2d at 31-32. See also *Columbian Publishing Company v. City of Vancouver*, 36 Wn. App. 25, 671 P.2d 280 (1983)(requested disclosure of complaints, no finding that complaints were not substantiated after investigation).

Officer Hicks also argues that the *Bellevue John Does* and *Bainbridge Island* cases should be limited to claims of sexual misconduct and not extended to the allegations in this case. RB at 28. However, it is not necessarily the type of allegation that makes disclosure highly offensive, but the fact that the allegation is not substantiated. In *Bellevue John Doe 1-11 v. Bellevue School District*, 164 Wn.2d 199, 189 P.3d 129

(2008), 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. *Id.* 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. As stated in the City’s opening brief (PB at 22-23), 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.<sup>1</sup> Such allegations are not actions taken by the employee in the course of performing public duties. Thus, the police

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<sup>1</sup> 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)).

department employees have a right to privacy in their identities regarding these allegations.

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. In *Dawson* 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. As stated in the City's opening brief (PB at 23-24), 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.

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).

Finally Officer Hicks argues that RCW 42.56.230(3) does not apply because the documents at issue are not contained in the employee's personnel file. RB at 29. However it is not necessary that the records be contained in the employee's personnel file. In *Bainbridge Island Police Guild v. City of Puyallup*, 172, Wn.2d 398, 412, 259 P.3d 190 (2011), the court determined that a police officer's identity in internal investigation

files compiled by an outside agency constituted personal information covered under RCW 42.56.230(3).

**E. City cannot distinguish between requesters.**

Officer Hicks argues that the City was not entitled to rely on RCW 42.56.080 because Officer Hick's alleges that the purpose of the statute is to protect the requester. RB at 30. However, the plain wording of RCW 42.56.080 is clear—" [a]gencies shall not distinguish among persons requesting records"—and the City is required to comply with this provision.

As stated in the City's opening brief, 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. PB at 26-29.

**III. CONCLUSION**

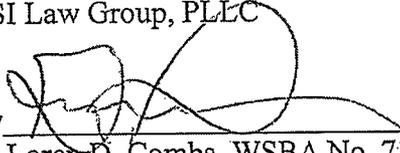
As set forth above and in the City's opening brief, forcing the City to disclose the names and identifying information of complainants, witnesses and interviewees in police department internal investigations of alleged misconduct would have a chilling effect on investigations, and

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 and in the City's opening brief, 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 28<sup>th</sup> day of August, 2013

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Good Afternoon Clerk of Supreme Court:

Please find attached the Appellant's Reply Brief, filed on behalf of the City of Fife in Case No. 88601-6

City of Fife, a Washington Municipal Corporation, Appellants,  
v.  
Russell P. Hicks, Respondent

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