

No. 49186-9-II

**Court of Appeals, Div. II,
of the State of Washington**

Jane Doe,

Appellant,

v.

**Washington State Department of Fish and
Wildlife, et al.,**

Respondents

Brief of Appellant

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1. Introduction

An investigation into sexual harassment at Washington Department of Fish and Wildlife (WDFW) produced hundreds of pages of public records containing graphic descriptions of alleged sexual conduct. The records contain unsubstantiated allegations that Jane Doe participated in this private conduct.

Jane Doe asked WDFW to protect her privacy as required by the Public Records Act, by redacting from the records any references to her by name or by relationship to one of the investigated parties, because such references would connect her to the unsubstantiated sexual conduct. Disclosure of such a connection would be highly offensive and embarrassing.

WDFW refused, forcing Jane Doe to litigate for an injunction, at great personal expense. Jane Doe ultimately prevailed, but the trial court limited to the redactions to only those instances where Jane Doe's identity appeared in close proximity to the salacious allegations. The trial court also refused to extend the protection of the injunction to all future requests for the same records, requiring Jane Doe to return to court every time another request for the records is made. Jane Doe asks this Court to reverse and order that the injunction be modified to apply to all future requests and to require redaction of Jane Doe's identity everywhere it appears in the records.

2. Assignments of Error

Assignments of Error

1. The trial court erred in denying protection for some instances of Jane Doe's identity in the records.
2. The trial court erred in entering Finding of Fact # 8: "Jane Doe has submitted, and the Court has reviewed, in camera, 141 pages of records from which Jane Doe seeks to have her private information redacted, with her proposed redactions indicated by red-ink outlines. WDFW has received a copy of the 141 pages with proposed redactions. Many of the references to Jane Doe in these records, whether by name or by association or relationship, connect her identity to the alleged sexual conduct. Some of the references do not." (underline added to highlight the challenged portion)
3. The trial court erred in refusing to make the injunction expressly apply to future requests for the same records.
4. The trial court erred in denying Jane Doe's request for an award of attorney's fees for WDFW's frivolous defense.

Issues Pertaining to Assignments of Error

1. A person's right to privacy under the Public Records Act is violated if disclosure of information about the person would be highly offensive and is not of legitimate concern to the public. The trial court recognized that under its limited injunction, a person examining the records could "connect the dots" to discover that Jane Doe had allegedly participated in the alleged sexual acts. Was the trial court required to order redaction of Jane Doe's identity everywhere it appeared in the records? (assignments of error 1 and 2)

2. RCW 42.56.540 authorizes courts to enjoin “the examination of any specific public record.” Such an injunction is based on the record, not on any particular request for the record. Does an injunction under this statute bar all future requests for the records to which it applies? (assignment of error 3)
3. A defense is frivolous under RCW 4.84.185 if it cannot be supported by any rational argument on the law or the facts. WDFW’s redaction of the identities of employees other than Jane Doe demonstrates that WDFW knew that the right to privacy exemption was implicated. Did the trial court abuse its discretion in refusing to award attorney’s fees under the statute? (assignment of error 4)

3. Statement of the Case

3.1 WDFW investigated two of its employees on allegations of sexual harassment.

Washington Department of Fish and Wildlife conducted an investigation into cross-complaints of sexual harassment by WDFW employees Ann Larson and Greg Schirato. CP 357.¹ Schirato was accused of staring at female coworkers, making inappropriate comments about them, and having inappropriate

¹ CP 349-579 are confidential clerk’s papers, having been sealed by order of the trial court (CP 345-48). Pages 354-85 are a complete, unredacted copy of the final report of the investigation, provided to give the Court a more complete picture of the context in which the public records at issue were generated. Pages 387-433 are copies of the investigation report and disciplinary letters, as those records were redacted by WDFW prior to litigation. Pages 439-579 are excerpts from the records as redacted by WDFW prior to litigation, with the additional redactions proposed to WDFW by Jane Doe outlined in pen.

discussions with coworkers about his private sex life. *E.g.*, CP 370-76. WDFW hired an outside firm to conduct the investigation. CP 357. The firm generated numerous records, including interview notes (*e.g.*, CP 476-545) and a final report (CP 357-85). WDFW issued disciplinary letters to Schirato, which recounted many of the details from the investigation report. CP 419-33.

3.2 Jane Doe was not a target of the investigation, but the records generated in the investigation contain numerous accounts of alleged private, sexual conduct by Jane Doe outside the workplace.

Jane Doe had close relationships with both Larson and Schirato. *See* CP 364. Partly because of these relationships, the outside firm chose not to interview Jane Doe, believing her testimony would not be unbiased. CP 364 n. 7. Despite Jane Doe's personal connections to Larson and Schirato, the firm was clear that the scope of the investigation was limited to the workplace conduct of only Larson and Schirato. CP 358. Jane Doe was not a target of the investigation, was not interviewed, and was not disciplined. *See* CP 136.

Although Jane Doe was not a target of the investigation, the records generated in connection with the investigation contain numerous accounts of private, sexual conduct outside the workplace in which Jane Doe is alleged to have participated.

E.g., 535, 567. Jane Doe denies the allegations, but was never given the opportunity to rebut them. *See* CP 29, 136. The investigation did not substantiate any of these accounts. *See* CP 358-59.

3.3 Jane Doe requested WDFW redact the records to protect her privacy, but WDFW refused.

Having learned what the investigation records said about her, Jane Doe requested WDFW redact the records before they were requested by some outside party. *See* CP 37 (“I want to bring to your attention her first efforts with Joe Stohr to have sufficient redactions made to protect her privacy”). WDFW not only refused to redact the records, but would not release the records to Jane Doe unless she made a public records request of her own. *Id.*

WDFW received a public records request from Dakota Loomis, which sought all records relating to the investigations of Larson and Schirato. CP 65. WDFW identified the responsive records and redacted the records as it believed was authorized under the Public Records Act. CP 63. This time, WDFW gave Jane Doe notice of the request and provided her copies of the redacted records. *Id.* Through counsel, Jane Doe requested that WDFW redact from the records all references to her by name or relationship, to protect her privacy as permitted by the Public Records Act. CP 32, 34. WDFW again refused. CP 35.

WDFW demanded that Jane Doe submit specific proposed redactions, with statutory authority for each. *Id.* Jane Doe submitted her proposed redactions. *See* CP 37-41. WDFW summarily refused to make any changes. CP 43. On Sunday, November 29, WDFW told Jane Doe's counsel that Jane Doe would have to bring a motion for an injunction if she wanted to prevent WDFW from producing the records to the requester two days later, on December 1. *Id.* Jane Doe obtained a temporary restraining order on December 2, before WDFW released the records. CP 44.

3.4 Evidence suggests that WDFW was acting out of retaliation against Jane Doe.

WDFW singled out Jane Doe, leaving her identity intact in the records while redacting the identities of other individuals, including WDFW employees. For example, WDFW's redactions of the Schirato prediscipline letter redacted the names of numerous WDFW employees from descriptions of inappropriate workplace conversations with Schirato, while leaving references to Jane Doe untouched. *Compare* CP 439 *with* CP 440. At the same time, WDFW's version of Schirato's response letter was replete with unredacted instances of Jane Doe's name, directly connecting her with sexual conduct described in salacious detail. CP 568.

Later comments by WDFW’s counsel suggest the reason for treating Jane Doe differently—WDFW blamed her personally for the scandal that had rocked the entire department:

Please keep in mind that **but for your client’s behavior** and that of [redacted] and the ensuing investigation surrounding **their** behavior, **we would not be having this discussion.**

CP 313 (emphasis added).

3.5 Jane Doe was forced to litigate for an injunction requiring WDFW to redact the records.

Shortly after the temporary restraining order was entered, Loomis stipulated to entry of a permanent injunction prohibiting WDFW from releasing the subject records to anyone without first making the redactions requested by Jane Doe.

CP 66-71. The stipulated injunction provided that release of the records without the redactions would violate Jane Doe’s privacy and that the redactions were appropriate under the Public Records Act’s exemptions. CP 70. WDFW refused to stipulate to this injunction. *See* CP 66.

The trial court granted a preliminary injunction. CP 79. The parties returned to court numerous times, extending the preliminary injunction until a final decision was made. *See, e.g.*, CP 134, 262-63, 316.

Jane Doe argued that her identity and relationship to the targets of the investigation were “personal information” under

the Public Records Act. CP 73. She argued that she has a right of privacy in that information in these records because disclosure of the information would connect her with the alleged, unsubstantiated, private sexual conduct described in the records. *Id.* She argued that the presence of her identity or relationships in any record that describes the sexual allegations would violate her right of privacy. RP, Mar. 4, 2016, at 24.

Jane Doe argued that, because sexual relations are entirely private matters, disclosure of the records without redacting her identity would be highly offensive. *Id.* She argued that her private, sexual relations are of no concern to the public because she was not investigated or disciplined, none of the allegations were substantiated, and the alleged conduct was unrelated to her public employment. *Id.* Jane Doe argued that her identity must be redacted everywhere it appears in the records (CP 284; RP, Mar. 4, 2016, at 24; RP, Apr. 29, 2016, at 21-22) and that the injunction should apply permanently to all future requests for the same records (CP 75, 111; RP, Mar. 4, 2016, at 6-9).

WDFW stubbornly insisted that Jane Doe had no right of privacy in this personal information. WDFW argued that disclosure of Jane Doe's name and relationship status is not highly offensive. CP 57. WDFW also argued that the events were

public, not private, because they were the opinions of witnesses to the alleged sexual harassment in the workplace. CP 57-58.

Jane Doe argued that WDFW's defense was frivolous and requested an award of attorney's fees. CP 283, 289-90, 291. She argued that the inconsistencies in WDFW's own redactions demonstrated that WDFW believed that redaction of employee identities was appropriate under the Public Records Act, except, apparently, when the employee was Jane Doe. *Id.* Jane Doe argued that WDFW's defense was frivolous because it could not be supported by any rational argument on the law or the facts. *Id.*

3.6 Jane Doe eventually prevailed, but the trial court limited the redactions and refused to apply the injunction to future public record requests.

The trial court found that Jane Doe was not a subject of the investigation and was not interviewed. CP 322. The investigation did not substantiate whether any of the alleged sexual conduct occurred, and Jane Doe contended that the allegations were false. *Id.* The alleged conduct occurred outside of work hours, away from the workplace, and not connected with Jane Doe's public employment. *Id.*

The trial court agreed with Jane Doe that disclosure of her identity in connection with unsubstantiated allegations of sexual conduct would be highly offensive to a reasonable person.

CP 323. Connecting Jane Doe's identity with these allegations is of no legitimate concern to the public. *Id.* Disclosure would irreparably damage Jane Doe and would not be in the public interest. *Id.*

The trial court agreed with Jane Doe that protection of her right to privacy required WDFW to make additional redactions. CP 324. However, the trial court determined that not all of Jane Doe's proposed redactions implicated her privacy interests, and, therefore, not all references to her identity would be redacted from the records. CP 325-29.

The trial court explain the distinction it was drawing:

There's many references throughout to various alleged activities that were sexual in nature, including pole dancing, buying hot tubs full of women and people involved in relationships, swinging, which I understand to be having multiple partners. And so ultimately my conclusions are where Miss Doe's name and/or relationship is found on records where it is connected to those sorts of activities, given the context of the records and all of the background I've already provided, I'm finding that her right of privacy is properly invoked to protect those records, that it would be highly offensive to a reasonable person for her name associated with those activities or alleged activities to be released, and that her name and relationship is not of legitimate concern to the public.

On the other hand, where she's described in general terms as having a relationship with both of the subjects of the investigations and engaged in

other activities that are not highly offensive subject matters, the court does not find a privacy interest. I certainly recognize that somebody reading all of the materials may very well then be able to connect the dots, and I have given some thought to that. Nonetheless, I am not persuaded that the right of privacy and the standards I'm required to apply extend to cover every instance of Miss Doe's name and relationship, and so for that reason as you'll see when I tell you what my ultimate answers are, I'm approving some and not approving others.

RP, Apr. 29, 2016, at 30-31.

The trial court refused to grant Jane Doe's request that the injunction be permanent and effective against all future requests for the records:

Scope of the permanent injunction. Ultimately, I'm prepared to sign a permanent injunction that protects some of the redacted portions of the records. My injunction will be silent on the scope of the injunction in that it is not going to expressly say that it applies to future requests, but it's not going to expressly say that it doesn't apply to future requests. I think it's an injunction to Fish and Wildlife to not release these records. It was brought in the context of this case, and I'll leave it for the parties to determine what that means in a future case.

RP, Apr. 29, 2016, at 33. The trial court also denied Jane Does' request for sanctions for WDFW's frivolous defense. *Id.*

4. Argument

4.1 This Court reviews decisions under the Public Records Act de novo.

This court reviews decisions under the Public Records Act de novo. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 208, 189 P.3d 139 (2008). Application of PRA exemptions is a matter of statutory interpretation that is also reviewed de novo. *Id.*; RCW 42.56.550(3).

4.2 The trial court erred in failing to order redaction of Jane Doe's identity everywhere it appeared in the records.

The Public Records Act exempts disclosure of personal information contained in employment records to the extent that disclosure would violate a public employee's right to privacy. RCW 42.56.230(3). For purposes of the PRA, a person's right to privacy is violated if disclosure of information about the person would be highly offensive and is not of legitimate concern to the public. RCW 42.56.050. A court may enjoin the examination of any specific public record if examination would not be in the public interest and would substantially and irreparably harm any person. RCW 42.56.540. Where the person's privacy can be protected by redaction of the information, redaction is the preferred remedy. *See* RCW 42.56.210.

A person has a right of privacy in personal information appearing in a public record when disclosure of the information would be highly offensive to a reasonable person and the information is not of legitimate concern to the public. *Bellevue John Does*, 164 Wn.2d at 212. This includes matters of the kind described in Comment b to § 652D of the Restatement (Second) of Torts: “Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. **Sexual relations, for example, are normally entirely private matters.**” *Bellevue John Does*, 164 Wn.2d at 212-13 (emphasis added).

In the PRA context, a person’s right to privacy in sexual matters is lost **only** when it relates to misconduct in the course of performing public duties **and** the allegations are substantiated or result in discipline. *Id.* at 215.

Jane Doe was not charged with any misconduct in the course of performing her public duties. She was not disciplined. The allegations of sexual conduct were not substantiated, or even investigated. Jane Doe was not even questioned during the course of the investigation. The trial court correctly found that Jane Doe has a right of privacy in information connecting her with allegations of sexual conduct outside the workplace.

Where the trial court went wrong was in concluding that not all references to Jane Doe in the records connect her to the alleged sexual conduct. *See* CP 322 (Finding of Fact # 8). The trial court analyzed each proposed redaction only within its immediate context. That is, the trial court attempted to discover whether each instance of Jane Doe’s identity was directly connected to some description of private conduct. *See* RP, Apr. 29, 2016, at 30-31. This analysis views the right of privacy too narrowly.

The correct analysis is stated in *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 906, 346 P.3d 737 (2015): “Agencies and courts must review each responsive record and discern from its four corners whether the record discloses factual allegations that are truly of a private nature.” The correct unit of analysis is each **record**, not each instance of private information.

Here, the final investigation report is one record, the prediscipline letter is another record, Schirato’s response is another record, etc. Each of these records contains allegations that Jane Doe participated in particular acts of a private, sexual nature. As a result, any mention of Jane Doe’s identity within any given record would connect Jane Doe with the alleged conduct. Disclosure of any given record without redacting every reference to Jane Doe’s identity within that record would be highly offensive and would violate Jane Doe’s right to privacy.

The trial court understood this: “I certainly recognize that somebody reading all of the materials may very well then be able to connect the dots.” RP, Apr. 29, 2016, at 31. As an example, one of the allegations, repeated throughout the records, related to the nature of Jane Doe’s relationship with Schirato. *E.g.*, CP 447 (second to last line of the paragraph directly below heading “D”). The trial court ordered that this reference to Jane Doe be redacted. CP 327. However, the first line of the same paragraph—which the trial court **did not redact** (CP 327)—identifies Jane Doe by name and by relationship in a manner that unmistakably connects her to the offensive allegation.

A similar instance of Jane Doe’s identity appears on the previous page of the same record. CP 446 (the paragraph above heading “3”). The trial court did not redact this instance. CP 325. Although, viewed by itself, this instance does not appear to be connected with any offensive allegations, when viewed in the context of the four corners of the entire record, this instance enables the reader to easily draw the connection between Jane Doe’s name and the offensive alleged conduct. Because of this connection, disclosure of this instance of Jane Doe’s identity violates her right to privacy.

Under the unit of analysis mandated by *Predisik*, Jane Doe’s identity must be redacted everywhere it appears in the

records. Each of the records contains offensive allegations. Disclosure of Jane Doe's identity in any of the records would connect her to the offensive allegations. This Court should remand with instructions to the trial court to order redaction of every reference to Jane Doe's identity, whether by name or by relationship or association.

4.3 The trial court erred in refusing to make the injunction expressly apply to future requests for the records.

Jane Doe specifically requested the trial court make the injunction apply to all future requests for the records. The trial court refused. In doing so, the trial court erred in interpreting the statute.

The PRA authorizes a court to enjoin the examination of any specific public record:

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

RCW 42.56.540 (emphasis added). This statute applies to specifically identified **records**, not to specific requests.

The issue under this statute is **not** whether a particular **request** would cause irreparable harm; rather, by the statute's plain terms, it is whether "examination of **any specific public record** ... would clearly not be in the public interest and would substantially or irreparably damage any person." The inquiry focuses on the **record itself**, not the request.

The injunction described by the statutory language is not an injunction against production of the record in response to a particular request. The injunction is against "examination of any specific public record." The injunction attaches **to the record**, not to the request or to the person making the request. An injunction against examination of a specific record must naturally apply permanently to the record itself and remain in effect against any future requests for that record.

Such an interpretation is consistent with common sense and with judicial economy. It enables the person whose privacy would be violated to come to the courthouse only once and obtain permanent protection against any future disclosure of the offensive records. Without a permanent injunction attaching to the records, Jane Doe would be forced to return to court, at great personal expense, every time there is a new request, to re-litigate the issue of her right to privacy. Surely that is not the result the legislature or the people intended when they enacted the PRA.

WDFW argued against a permanent injunction because future requesters are not parties to the lawsuit. However, the actual requester here, Mr. Loomis, **was a party** and had full opportunity to defend the public's interest in disclosure of the records. Additionally, WDFW vigorously opposed Jane Doe's attempt to obtain an injunction, citing, at times, the broad rights of the public to inspect public records under the Act. In *Predisik*, 182 Wn.2d 896, the Washington Supreme Court noted that the school district's opposition to the injunction "adequately represent[ed] the public's interest in full disclosure," even without the active participation of any requester in the litigation. *Id.* at 902 n. 1. Here, WDFW's opposition to the injunction and the Court's analysis of the public interest sufficiently protect the interests of the public, including any future requesters.

Finally, there is no prejudice to future requesters. At the time of any future request, the interests to be balanced by the court will be the same. The records will be the same. Jane Doe's privacy interests will be the same. The lack of any public interest in connecting Jane Doe with the unsubstantiated allegations will be the same. There is no reason for the injunction **not** to apply permanently to all future requests for the same records.

The plain language of the statute requires an injunction that applies permanently to all future requests for the same records. The trial court erred in allowing the injunction to be open to a different interpretation. This Court should remand with instructions to the trial court to make the injunction expressly apply to all future requests for the same records.

4.4 The trial court abused its discretion in denying Jane Doe’s request for an award of attorney’s fees under RCW 4.84.185 for WDFW’s frivolous defense.

A trial court may award reasonable expenses, including attorney’s fees, to a prevailing party upon finding that the defense of the nonprevailing party was “frivolous and advanced without reasonable cause.” RCW 4.84.185. A frivolous defense is one that cannot be supported by any rational argument on the law or the facts. *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 343-44, 314 P.3d 729 (2013).

WDFW’s entire defense was that Jane Doe’s identity was not subject to the statutory exemption. Yet WDFW’s own redactions in some of the records reveal that WDFW did not even agree with its own argument.

For example, WDFW’s redactions of the Schirato prediscipline letter redacted the names of numerous WDFW employees from descriptions of inappropriate workplace conversations with Schirato, while leaving references to Jane

Doe untouched. *Compare* CP 439 *with* CP 440. At the same time, WDFW’s version of Schirato’s response letter was replete with unredacted instances of Jane Doe’s name, directly connecting her with sexual conduct described in salacious detail. CP 568.

WDFW’s defense could not be supported by any rational argument on the law or the facts. WDFW’s own redactions demonstrated that it did not believe its own argument. WDFW had already concluded, prior to any litigation, that under the law and the facts, employee identities—including references to an employee’s relationship—are exempt from disclosure.² WDFW could not rationally argue that Jane Doe was not entitled to similar redactions to protect her privacy. Indeed, WDFW did not even attempt a rational explanation for this discrepancy.

WDFW’s defense asked the trial court to find that the redactions were correct when proposed by WDFW, but incorrect when requested by Jane Doe. The defense was motivated by malice and retaliation for Jane Doe’s involvement with the investigated parties. WDFW blamed Jane Doe for the scandal

² *E.g., compare* CP 439 (unredacted version) *with* CP 440 (WDFW redacted employee names to protect their privacy); *compare* CP 443 (unredacted version) *with* CP 444 (WDFW redacted a reference to Jane Doe by relationship to protect her privacy). The redaction codes “4a” and “3a” on these pages refer to protection of the right of privacy under RCW 42.56.050 and RCW 42.56.230. CP 268.

that rocked the department. During the litigation, WDFW's counsel expressed the department's opinion of Jane Doe:

Please keep in mind that **but for your client's behavior** and that of [redacted] and the ensuing investigation surrounding **their** behavior, **we would not be having this discussion.**

CP 313 (emphasis added). WDFW's defense was absurd, frivolous, and violated CR 11.

This Court should reverse the trial court's denial of Jane Doe's request for attorney's fees as a sanction for WDFW's frivolous defense, which forced her to unnecessarily incur large amounts of legal fees to obtain the protection of her privacy that it was WDFW's duty to provide under the PRA. This Court should remand with instructions to the trial court to award Jane Doe her reasonable attorney fees and costs in obtaining the permanent injunction, including fees and costs incurred on appeal.

4.5 This Court should award Jane Doe attorney's fees on appeal.

Because this appeal was necessitated by WDFW's frivolous defense in the trial court, Jane Doe cannot be made whole unless she is also able to recover her fees and costs incurred on appeal to achieve the full relief to which she should have been entitled. This Court should remand with instructions to the trial court to award Jane Doe her reasonable attorney fees

and costs on appeal together with the fees and costs she incurred at the trial court level.

5. Conclusion

The trial court erred in failing to order redaction of every reference in the records to Jane Doe's identity, whether by name or by relationship or association. The trial court erred in refusing to make the injunction expressly apply to all future requests for the records. The trial court abused its discretion in denying Jane Doe's request for attorney's fees and costs under RCW 4.84.185.

This Court should reverse and remand to the trial court with instructions to order redaction of every reference in the records to Jane Doe's identity, whether by name or by relationship or association; to amend the injunction so that it expressly applies to all future requests for the records; and to award Jane Doe her reasonable costs and attorney's fees incurred at the trial court and on appeal.

Respectfully submitted this 8th day of June, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 8, 2017, I caused the original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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