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NO. 96544-7

SUPREME COURT
OF THE STATE OF WASHINGTON

THE CHURCH OF THE DIVINE EARTH,

Appellant,

v.

CITY OF TACOMA,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY
HONORABLE GRANT BLINN

APPELLANT CHURCH'S REPLY TO CITY'S RESPONSE BRIEF

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Comes now The Church of the Divine Earth and for its REPLY to the City of Tacoma's Response Brief states the following:

I. RESPONSE TO CITY'S STATEMENT OF FACTS

The City reproduces its "privilege log" but misstates same by claiming it "explained the bases for redactions to the performance evaluations." Response Br. p. 1 Rather, as is apparent on the log's face, it is simply a quotation from two statutes and reference to a single case. There is no factual explanation of how or if RCW 42.56.050's reference to "personal information" is a proper characterization of each and every redaction over 135 pages. There is *nothing* stating how each and every of these many redactions relates "to the intimate details of one's personal and private life." *Dawson v. Daly*, 120 Wn.2d 782, 796, 845 P.2d 995 (1993) overruled in part *Soter v. Cowles Pub.*, 162 Wn.2d 716, 174 P.3d 60 (2007) (quoting approvingly from *Spokane Police Guild v. Liquor Control Board*, 112 Wn.2d 30, 38, 769 P.2d 283 (1989) Do some redactions pertain to medical records? Do some pertain to family problems or health problems? Do some relate to military records or scores from IQ tests? There is simply no factual basis stated to justify the redactions.

Nor is there any factual explanation of how disclosure of the material represented by any (much less all) of these massive redactions would be "highly offensive to a reasonable person" much less why

disclosure of any of the same would not be of “legitimate concern to the public.” RCW 42.56.050(1) The whole privilege log is simply a legal claim devoid of any brief explanation of why *any* of the redactions fit within the claimed privilege. *Compare* RCW 42.56.210(3) Apparently the requestor is to simply take the City’s word for it, contrary to this statute.

The City’s Response Br. 8 claims “the only records at issue in our case are the confidential, one-on-one, performance evaluations done by an employee and his or her supervisor.” If that is important, why isn’t it set forth in the privilege log “brief explanation”? The log does not deny that the redacted information relates to what these individuals did on the job, how they were trained or not trained, how they managed their employees or how they treated the public. Presumably, even simple facts about their job attendance, or lack thereof, would be withheld under the City’s broad claim of categorical, blanket privilege without further explanation, general or specific.

II. REPLY TO ARGUMENT

A. There is no per se statutory exemption for performance evaluations

“The burden of proof shall be on the agency to establish 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) (emphasis added)

Performance evaluations are not directly or even indirectly mentioned by any of our exemption statutes. There is no statutory per se exemption for performance evaluations and our court is not in the position to create one not specified by the legislature. However, the bottom line of the City’s position is that *all* performance evaluations, regardless of content, are categorically exempt. And Judge Blinn erred by holding exactly that.

At page 5 of the Response Brief the City claims “Washington courts have held that employee performance evaluations fall within the ambit of RCW 42.56.050’s invasion of privacy exemption,” citing *Spokane Research v. City of Spokane*, 99 Wn. App. 452, 456, 994 P.2d 267 (2000). However the statement is misleading if taken to mean *all* performance evaluations, and every part thereof, are categorically exempt. Rather the pin cite to *Spokane Research*, at 456, quotes *Dawson* which characterizes the issue as “whether disclosure of a performance evaluation, which does not discuss any specific instances of misconduct *or of the performance of public duties*, would be highly offensive to a reasonable person.” (italics added) Unlike the case at bar, the performance evaluation in *Dawson* concerned “personal information” defined as applied “only to the intimate details of one’s personal and private life.” *Dawson*, 120

Wn.2d at 796 *Dawson* created a presumption that release of a performance evaluation containing “personal information” so defined would be considered “highly offensive;” however it did not dispense with the statutory “personal information” requirement nor did it dispense with the further criterion that it *also* not be of “legitimate concern to the public.” Ibid. at 797 As a matter of fact, *Spokane Research* held although other criteria had been met for the exemption, the exemption would be denied because the City had failed to prove there was not a legitimate public concern for the material.

Response Br. p. 5 also cites some federal cases which have nothing to do with our Public Records Act. *Detroit Edison v. NLRB*, 440 U.S. 301, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979) concerned a union’s claim that the employer had violated its duty to bargain collectively by refusing to provide employee performance evaluations. *Celmins v. United States Dep’t of Treasury*, 457 F. Supp. 13 (D.D.C. 1977) and *Smith v. Department of Labor*, 798 F. Supp. 274 (D.D.C. 2011) both arose under 5 U.S.C. 552 (b)(6) within the federal Freedom of Information Act. That provision exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” but does not trace the “personal information” privacy exemption at issue here. Rather it identifies types of files rather than

generic “personal information” without regard to how the file, or if there is a file at all, is denominated.

Response Br. p. 6 argues the definition of “personal information” is not the “intimate details of one’s personal and private life” notwithstanding *Dawson* at 796 quotes *Spokane Police Guild*, 112 Wn.2d at 38 to state exactly that. Thereafter the brief goes on to mislead:

The Dawson Court went on to state that it “has not previously been considered in this jurisdiction” whether performance evaluations are personal information entitled to a right of privacy Id. . . . and . . . concluded, “We agree that employee evaluations contain personal information within the meaning of RCW 42.17.310(1)(b).”

Actually, the opinion states:

The issue of whether disclosure of a performance evaluation, *which does not discuss* any specific instances of misconduct or of *the performance of public duties*, would be highly offensive to a reasonable person has not previously been considered in this jurisdiction.

(italics added) Ultimately the court held this type of evaluation “is presumed to be highly offensive. . . . The presumption we establish *only* satisfies the offensiveness prong of RCW 42.17.255.” *Dawson* at 797 (italics in original) *Dawson* does not immunize “performance evaluations” regardless of content.

While not otherwise defined in the statute, our Supreme Court has held the nature of facts constituting “personal information” subject to the right of privacy defined by Restatement (Second) of Torts Sec. 652D, at

383 (1977) uniquely concern the *private* life of another. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135-6, 580 P.2d 246 (1978). The types of information encompassed within the right of privacy are “[s]exual relations, . . . family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man’s life in his home, and some of his past history that he would rather forget.” *Hearst*, 90 Wn.2d at 136 (quoting Sec. 652D cmt. b). But the City does not claim any such information was withheld here.

Not only did our Supreme Court expressly adopt this definition of “personal information” subject to the right of privacy, but the legislature confirmed in 1987 it was its intended meaning under the act as well. Laws of 1987, ch. 403, Sec. 2, at 1547 (“‘privacy’ . . . is intended to have the same meaning as the definition given that word by the Supreme Court in *Hearst*”). Many published opinions of the Supreme Court as well as the Court of Appeals have expressly relied upon this definition—including *Dawson*. See e.g. *Cowles Publ’g Co. v. State Patrol*, 109 Wn.2d 712, 726, 748 P.2d 597 (1988) (police conduct while on the job “[is] not private, intimate, personal details of an officer’s life” exempt from disclosure) But here *everything* redacted by the City relates to the on the job performance of these department heads.

In sum, *Dawson* did not hold every word in every personnel evaluation was “personal information” within the meaning of the statute; rather it adhered to the definition of “personal information” contained in *Police Guild*, i.e. it pertains “only to the intimate details of one’s personal and private life.” The evaluation at issue in *Dawson* contained “personal information” *by that definition* and the court concluded by holding that public release of that particular information would be presumably “highly offensive”—although of course it could be released anyway if the City did not carry its burden to meet other criteria to fulfill the privacy exemption such as demonstrating the public did not have a legitimate concern for its disclosure.

What the City attempts, and the trial court did, is to simply read the “personal information” threshold out of RCW 42.56.230(3) and then stand the statute on its head by claiming “personal” information means *anything* the public employee did or did not do on his public job including how he performed his public duties. This proposition is exactly the opposite of the legislative instruction that the act be liberally construed to promote openness in government and its exemptions be “narrowly construed.”

RCW 42.56.030

And it is exactly the opposite of the personal information definition set forth in *Hearst* approved by the legislature. Rather, “The people *insist*

on remaining informed so that they may maintain control over the instruments that they have created.” Id. (italics added)

Response Br. 7 attempts to make a few disparate points.

For example, the City claims the Church made no effort to overcome the presumption that disclosure of an employee evaluation is “highly offensive.” This again requires the presence of “personal information” relating to the intimate details of one’s private life. But if there is no “personal information” in the evaluation the “highly offensive” inquiry is irrelevant under the statute. If a public employee is offended by public disclosure of his job performance, perhaps he should seek private employment because under the PRA the public has a right to evaluate his job performance.

The City claims “The Church also argues that the trial court failed to explain how the phrase ‘performance of public duties’ modifies the personal information analysis.” But to restate the obvious: how one performs public duties is not “personal information.” Then the city claims such a view “swallows the entire exemption.” No. That depends what is in the employee evaluation. If there is personal information in the evaluation such as medical records, IQ scores, family details, etc. that *is* “personal information” which might be withheld properly under the act—

all specifically referenced in *Dawson*, 120 Wn.2d at 797. But there is none of that here.

The City's discussion of *Ollie v. Highland Sch. Dist.* 203, 50 Wn. App. 639, 645, 749 P.2d 757, review denied, 110 Wn.2d 1040 (1988) (Response Br. 7-8) is telling. *Ollie* states the rule exactly as the Church understands it:

We hold that under RCW 42.17.310, not all the information contained in personnel evaluations and personnel records of school district employees is privileged; *information about public, on-duty job performances should be disclosed*...Highland has the burden to show information contained in the evaluations is intimate personal information.

Ollie, 50 Wn. App. at 465 (italics added) It is submitted virtually everything redacted by the City here is “information about public, on-duty performance” and none of it is “intimate personal information.”

Incredibly, the City claims “there are no records of ‘public, on-duty job performances’ that were withheld or redacted,” rather “[t]he only records at issue in our case are the confidential, one-on-one, performance evaluations done by an employee and his or her supervisor.” Response Br. 8 This too is *literally* “information about public, on-duty performance,” not “intimate personal information.” If the City wants to call this “confidential,” that doesn't make it immune from public disclosure under the PRA. *Hearst*, 90 Wn.2d at 137 The public is the ultimate employer and has a right to know what their employees are doing and how their

performance is evaluated. Moreover, if this “fact” is important, why wasn’t it set forth as part of the “brief explanation” how the exemption is applicable to the matter redacted?

B. The public has a legitimate concern about the job performance of City Directors of large departments

Citing *Spokane Research*, 99 Wn. App. at 456, the City claims evaluations of public employees are “ordinarily” of small public concern; however *Spokane Research* is the exception which proves the rule. That case distinguished *Dawson* which dealt with portions of the deputy attorney’s personnel file from the case at issue which sought materials on the Spokane City Manager. While the former might have been of little legitimate public concern, the performance evaluation of the City manager is of *great* public concern: “The performance of the City Manager’s job is a legitimate subject of public interest and debate.” *Ibid* at 457 That being the case, is it not also of legitimate public interest and debate how the Directors of Planning and Development Services as well as the Public Works departments perform *their* public duties? They each have hundreds of employees and a great deal of discretionary authority over citizens in their everyday lives. The PRA makes them accountable—even if the information is “personal” and its release would otherwise be “highly

offensive” to these individuals. Open, transparent government is our statutory public policy which the courts have a responsibility to enforce.

The City asserts release of these evaluations would demoralize some public employees. That is the City assertion but is not a fact of record in this proceeding. Rather release of evaluations would provide a powerful incentive to serve the taxpayers well or be fired. If supervisors would then be unwilling to provide “candid evaluations,” the supervisor is not performing his duties appropriately. Perhaps he should look elsewhere where there would not be the public accountability required by the PRA.

The City cites *Brown v. Seattle Public Schools*, 71 Wn. App. 613, 860 P.2d 1059 (1993). Response Br. 10-11 Relying on a misreading of *Dawson* exclusively, that court reversed the trial court finding release of the personnel records of a principal was not presumed highly offensive and thus not exempt from disclosure. *Brown* is not particularly helpful here because it did not discuss the nature of “personal information” and appears to misread *Dawson* that everything and anything in a performance evaluation is in fact “personal information” without closely reading *Dawson*’s caveat about exempt performance evaluations not containing discussion about the performance of public duties; or defining “personal information” to relate “only to the intimate details of one’s personal and private life.” The trial court decision in *Brown* preceded *Dawson* so it

appears *Dawson* wasn't the subject of trial court argument or analysis. Moreover, unlike here where direct Supreme court review is sought, there could be no argument to the Court of Appeals that *Dawson* should be overruled if it means what the City claims.

C. The City's Brief explanation did not comply with RCW 42.56.210(3)

The facial inadequacy of the City's "brief explanation" why the redactions met the claimed privacy privilege was thoroughly discussed in the Church's Opening Brief and earlier in this brief as well. Basically, the City claims performance evaluations are categorically exempt regardless what they might contain. But exemptions, including categorical ones, must only be established by statute and then be strictly construed against the government. But there is no statutory exemption, categorical or otherwise, exempting performance evaluations. The criterion outlined in RCW 42.56.230 is *only* "personal information," the release of which would violate one's right to privacy. RCW 42.56.050 defines invasion of the right to privacy as (1) a disclosure of personal information which would be "highly offensive to a reasonable person" and (2) "not of legitimate concern to the public." Each criterion is fact specific although the City's log presented no facts, just quoted the statutes. This violates

Lakewood v. Koenig, 182 Wn. 2d 87, 343 P.3d 335 (2014) and *Sanders v. State*, 169 Wn.2d 827, 240 P.3d (2010)

Contrary to the City's argument, *Klinkert v. Washington State Criminal Justice Training Comm'n*, 185 Wn. App. 832, 342 P.3d 1198 (2015), rev' dn'd, 183 Wn.2d 1019 (2015) adds nothing to the discussion since it merely affirmed dismissal of that PRA action as time barred under the PRA.

D. Collateral estoppel bars the City's claim it complied with the brief explanation requirement

The City privilege log in this proceeding is exactly the same format as the one the Pierce County Superior Court ruled violated RCW 42.56.210(3) in the 2015 proceeding. Both simply identified redactions by a code reference to the claimed exemption. Neither gave a further factual explanation to justify the claim that the document or redaction fit within the claimed exemption. This was adequately covered in the opening brief and need not be repeated here. Moreover the City's claim that the law is somehow different now than it was in 2015 based on *Klinkert* is preposterous.

III. CONCLUSION

The Supreme Court should retain jurisdiction to construe or overrule *Dawson*.

Dawson should be construed to enforce the “personal information” requirement of RCW 42.56.230 as written in the opinion, i.e. to relate “only to the intimate details of one’s personal and private life.” And the Court should properly conclude that no personal information was redacted and no exemption to disclosure of anything in this proceeding is proper. If the court construes *Dawson* to abandon the “personal information” requirement as stated above, *Dawson* must be overruled because it creates an exemption by case law which is not in the statute and contrary to the statutory requirement that exemptions to disclosure only be created by statute and even then narrowly construed. RCW 42.56.550(1); RCW 42.56.030 *Ollie*, 50 Wn. App. at 465, correctly states the rule that information contained in personnel evaluations “about public, on-duty job performances should be disclosed.”

In addition to the above, the court should hold disclosure of this performance evaluation is not highly offensive and is of legitimate concern to the public.

The court should hold the City’s exemption log does not state an adequate “brief explanation” mandated by RCW 42.56.210(3), and is collaterally estopped to deny it.

The court should hold the Church is entitled to an award of “all costs, including reasonable attorney fees, incurred in connection with [this]

legal action” RCW 42.56.550(4) and that the City should be denied such an award under the same statute regardless of outcome.

The court should order this case remanded for imposition of \$100 per document for each day said document has been wrongfully withheld and award of all costs and attorney fees incurred by the Church.

DATED this 8th day of August 2019.

GOODSTEIN LAW GROUP PLLC

s/Richard B. Sanders

Richard B. Sanders, WSBA #2813
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 8th day of August 2019, at Tacoma, Washington.

s/Deena Pinckney
Deena Pinckney

GOODSTEIN LAW GROUP PLLC

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