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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By .....

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

NO. 311783

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ALLEN MARTIN

Appellant

v.

RIVERSIDE SCHOOL DISTRICT NO. 416 and COWLES  
PUBLISHING COMPANY

Respondents

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ARGUMENT ..... 1

    A. The Public Records Act’s policy of broad disclosure does not require the court to ignore exemptions designed to protect an individual’s right to privacy..... 1

    B. Allen Martin has a right to privacy in the requested records because they concern his private life and not a specific incident of misconduct in the course of performing his public duties... 1

    C. Allen Martin has not waived his right to privacy in his identity or information contained in the requested records..... 5

    D. Disclosing the requested records before the arbitrator reached his decision would have violated Mr. Martin’s right to privacy ..... 7

        1. Disclosing the requested records would be highly offensive to a reasonable person because the records concern intimate aspects of Mr. Martin’s personal life ..... 8

        2. The public did not have a legitimate concern in the requested records when The Spokesman requested the records..... 14

    E. The requested records are specific investigative records and the District is an investigative agency under RCW 42.56.240(1) .. ..... 19

    F. The public has no interest in the details of Mr. Martin’s personal life, and disclosure would substantially and irreparably damage Mr. Martin..... 22

G. This court should exercise its discretion and hold that the District must redact information that RCW 42.56.250 exempts from disclosure ..... 23

II. CONCLUSION ..... 25

## TABLE OF AUTHORITIES

### Table of Cases

<i>Bainbridge Island Police Guild v. City of Puyallup</i> , 172 Wn.2d 398, 259 P.3d 190 (2011) .....	3, 4, 5, 6, 12, 18
<i>Bellevue John Does 1-11 v. Bellevue School District No. 405</i> , 164 Wn.2d 199, 189 P.3d 139 (2008) .....	1, 2, 3, 5, 10, 11, 12, 18, 19
<i>Bowman v. Webster</i> , 44 Wn.2d 667, 269 P.2d 960 (1954) .....	6
<i>Brouillet v. Cowles Publishing Company</i> , 114 Wn.2d 788, 791 P.2d 526 (1990) .....	21, 22
<i>Columbian Publishing Company v. Vancouver</i> , 36 Wn. App. 25, 671 P.2d 280 (1983) .....	19, 21
<i>Cowles Publishing Company v. State Patrol</i> , 109 Wn.2d 712, 748 P.2d 597 (1988) .....	13, 14, 16, 17
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 845 P.2d 995 (1993) .	2, 12, 13, 19, 21
<i>Detroit Edison Company v. NLRB</i> , 440 U.S. 301, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979) .....	12
<i>Hearst Corporation v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978)	2, 4, 5, 12
<i>Laborers International Union, Local 374 v. Aberdeen</i> , 31 Wn. App. 445, 642 P.2d 418 (1982) .....	19, 21
<i>Limstrom v. Ladenberg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998) .....	1

<i>Morgan v. City of Federal Way</i> , 166 Wn.2d 747, 213 P.3d 596 (2009) .....	13, 17
<i>Progressive Animal Welfare Society (PAWS) v. University of Washington</i> , 125 Wn.2d 243, 884 P.2d 592 (1994) .....	2
<i>Resident Action Council v. Seattle Housing Authority</i> , No. 87656-8, Slip Opinion (May 9, 2013) .....	1
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	24
<i>Smith v. Miller</i> , 32 Wn.2d 149, 201 P.2d 136 (1948).....	20
<i>Spokane Police Guild v. Washington State Liquor Control Board</i> , 112 Wn.2d 30, 769 P.2d 283 (1989) .....	2, 7, 9, 10
<i>Tiberino v. Spokane County</i> , 103 Wn. App. 680, 13 P.3d 1104 (2000) .....	8
<i>Washington State Human Rights Commission v. City of Seattle</i> , 25 Wn. App. 364, 607 P.2d 332 (1980) .....	8

**State Statutes**

RCW 9A.44.010.....	18
RCW 9A.88.010.....	18
RCW 28A.405.210.....	16
RCW 28A.405.300.....	15, 16
RCW 28A.405.310.....	16
RCW 28A.405.310(2).....	16
RCW 28A.405.310(8).....	15
RCW 42.17.255(former).....	13
RCW 42.56.050 .....	8, 13, 22
RCW 42.56.230(3).....	25
RCW 42.56.240 .....	22
RCW 42.56.240(1).....	19, 20, 21, 22, 25

RCW 42.56.250 .....	23
RCW 42.56.250(3).....	24, 25
RCW 42.56.540. ....	23

**Regulations and Rules**

WAC 181-88-060.....	18
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**Constitutional Provisions**

Washington Constitution, Article V, Section 3 .....	20
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**Secondary Sources**

RESTATEMENT (SECOND) OF TORTS § 652D (1977) .....	2
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**Other Sources**

MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 704 (10 <sup>th</sup> ed. 1995) .....	20
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## **I. ARGUMENT**

**A. The Public Records Act's policy of broad disclosure does not require the court to ignore exemptions designed to protect an individual's right to privacy.**

“The [Public Records Act's (PRA)] mandate for broad disclosure is not absolute.” *Resident Action Council v. Seattle Housing Authority*, No. 87656-8, slip opinion at p. 9 (May 9, 2013). The PRA's exemptions “protect certain information or records from disclosure” and “are provided solely to protect relevant privacy rights . . . that sometimes outweigh the PRA's broad policy in favor of disclosing public records.” *Resident Action Council*, at p. 9 (citing *Limstrom v. Ladenberg*, 136 Wn.2d 595, 607 963 P.2d 869 (1998)).

**B. Allen Martin has a right to privacy in the requested records because they concern his private life and not a specific incident of misconduct in the course of performing his public duties.**

Mr. Martin has a right to privacy in his identity and in the records and information contained in the records that The Spokesman-Review (hereinafter, “The Spokesman”) requested because his purported misconduct concerned his private life. “A person has a right to privacy in ‘matter[s] concerning the private life.’” *Bellevue John Does 1-11 v.*

*Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 212, 189 P.3d 139 (2008) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978)); see *Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993) (the right of privacy applies “to the intimate details of one’s personal and private life. . . .”), *abrogated in part by Progressive Animal Welfare Society (PAWS) v. Univ. of Wash.*, 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994) (quoting *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 38, 769 P.2d 283 (1989)). “Sexual relations, for example, are normally entirely private matters” concerning a person’s private life, in which a person has a right to privacy. *Bellevue John Does*, 164 Wn.2d at 212-13 (quoting RESTATEMENT (SECOND) OF TORTS §652D (1977)). Mr. Martin’s intimate relationship with a consenting adult is a matter concerning his private life; he has a right to privacy in the records and information related to that relationship.

Mr. Martin also has a right to privacy in the requested records because his conduct is not a specific incident of misconduct during the course of his public employment. A right to privacy may exist where a public employee’s conduct is not an action taken in the course of performing his public duties. See *Bellevue John Does*, 164 Wn.2d at 215. Mr. Martin’s personal relationships are matters concerning his private life, not actions taken while performing public duties, and not specific

incidents of misconduct during the course of public employment. (CP 57); *see Bellevue John Does*, 164 Wn.2d at 215. Whether the conduct is substantiated or results in discipline is irrelevant; Mr. Martin has a right to privacy in the requested records because they pertain to conduct that is not misconduct during the course of public employment. *See Bellevue John Does*, 164 Wn.2d at 215.

The *Bellevue John Does* court determined that an unsubstantiated or false accusation of sexual misconduct with a minor student is not an action a teacher takes in the course of performing his public duties, but is a matter concerning the teacher's private life. Recognizing that an accusation of sexual abuse of a minor, by itself, has the potential to greatly damage a person, the court settled on a distinction between substantiated and unsubstantiated accusations of sexual misconduct with a minor student in analyzing whether a teacher has a right to privacy in her identity and in records related to the accusations. *See Bellevue John Does*, 164 Wn.2d at 215 (“[t]he mere fact of the allegation of sexual misconduct toward a minor may hold the teacher up to hatred and ridicule in the community. . . .”). The *Bainbridge* court accepted the *Bellevue John Does* court's rationale that public employees have a right to privacy in unsubstantiated allegations of sexual misconduct on the job, “because the unsubstantiated allegations are matters concerning the [employees']

private lives.” *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 413, 259 P.3d 190 (2011).

The distinction between substantiated and unsubstantiated is unnecessary to determine whether Mr. Martin’s conduct at issue concerns his private life. The policy considerations that favor disclosing information about a person who is the subject of substantiated accusations of sexual misconduct toward a minor student, or substantiated accusations of sexual assault, are not present in the context of an adult having a consensual intimate relationship with another adult. The “substantiated unsubstantiated” distinction, in the context of Mr. Martin’s conduct, is irrelevant because his intimate relationship with a consenting adult is precisely the type of matter concerning the private life that the *Hearst* court contemplated in defining the scope of the right to privacy. *See Hearst*, 90 Wn.2d at 135-36. The substantiated unsubstantiated distinction is a tool that courts have used to determine whether records contain “matters concerning the private life” in circumstances where it is less certain than in this case as to whether the matters at issue concern the private life.

The information the District intends to disclose concerns Mr. Martin’s intimate relationship with a consenting adult, not accusations of sexual misconduct against a minor student. But like unsubstantiated

allegations against a teacher of sexual misconduct with minor students,<sup>1</sup> and unsubstantiated allegations against a police officer of sexual assault against a motorist,<sup>2</sup> Mr. Martin's intimate involvement with another adult is a matter concerning the private life. *See Hearst*, 90 Wn.2d at 135-36. Accordingly, Mr. Martin has a right to privacy in the requested records, which contain information concerning his private life.

**C. Allen Martin has not waived his right to privacy in his identity or the information contained in the requested records.**

Mr. Martin has not waived his right to privacy in his identity or his right to privacy in the requested records. His intimate relationship with another adult is a matter concerning his personal life regardless of whether he admitted his conduct to the Riverside School District (hereinafter, "District"). *See Bellevue John Does*, 164 Wn.2d at 215 (right to privacy applies to matters concerning the private life). Mr. Martin disclosed details of his intimate relationship to the District during its investigation into unrelated, baseless allegations against him; he did not publically announce his conduct. (CP 56-57). In any event, in admitting the nature of his conduct during the District's investigation, he did not knowingly

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<sup>1</sup> *See Bellevue John Does*, 164 Wn.2d at 215.

<sup>2</sup> *See Bainbridge*, 172 Wn.2d at 412-13.

waive his right to privacy in the details of his conduct and the District's investigation into his conduct. *See Bainbridge*, 172 Wn.2d at 409 (“[W]aiver is the intentional and voluntary relinquishment of a known right.”) (quoting *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)).

Mr. Martin's admission to the underlying conduct, and his attorney's general reference to the underlying conduct, do not constitute an intentional and voluntary relinquishment of Mr. Martin's right to privacy in his identity or the requested records. In *Bainbridge*, the court held that even the prior disclosure of the requested records did not prevent the police officer in that case from asserting his right to privacy in response to a subsequent request for the same records. *Bainbridge*, 172 Wn.2d at 409-10. The police officer in *Bainbridge* failed to object to a request for the report that he later sought to prohibit his employer from disclosing. *Bainbridge*, 172 Wn.2d at 409. The court held that the officer's failure to object was “not an intentional and voluntary relinquishment of a person's right to privacy regarding all future requests for that document[,]” and that he was not “forever prohibited from protecting his right to privacy.” *Bainbridge*, 172 Wn.2d at 410-11. Mr. Martin has not relinquished his right to privacy.

The conduct leading to the requested documents' creation did not occur publicly; rather, Mr. Martin's conduct occurred privately. (CP 57). *Spokane Police Guild*—which The Spokesman cites as support for its position that Mr. Martin waived his right to privacy—is distinguishable because the conduct leading to the requested documents' creation did not occur publicly, like the event in that case. *See Spokane Police Guild*, 112 Wn.2d at 38 (“The case before us, however, concerns antics before a group of some 40 or more people . . . We perceive no personal intimacy involved in one's presence or conduct at such a well attended and staged event which would be either lost or diminished by being made public.”).

Mr. Martin has a right to privacy in the requested records, and he has not waived his right to privacy.

**D. Disclosing the requested records before the arbitrator reached his decision would have violated Mr. Martin's right to privacy.**

Disclosing information related to Mr. Martin's personal relationship before he exhausted his contractual appeal rights would have violated his right to privacy. Under the PRA, a person's right to privacy is violated “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.” RCW 42.56.050. Disclosing details about a person’s consensual intimate relationship is highly offensive to a reasonable person. At the time of the request, the public did not have a legitimate concern in information about Mr. Martin’s intimate relationship, or the District’s response to learning about his relationship.

**1. Disclosing the requested records would be highly offensive to a reasonable person because the records concern intimate aspects of Mr. Martin’s personal life.**

Any reasonable person would be highly offended if his employer disclosed detailed information of his intimate encounters to the public. The records contain information unrelated to any work-related misconduct or job performance issues. (CP 57). Washington courts have held that disclosing personal communications between family members, and personal information in job applications, is highly offensive to reasonable people. *See Tiberino v. Spokane County*, 103 Wn. App. 680, 689-90, 13 P.3d 1104 (2000) (communications); *Wash. State Human Rights Comm’n v. City of Seattle*, 25 Wn. App. 364, 369-70, 607 P.2d 332 (1980) (job applications). Disclosing details of a person’s intimate involvement with another is far more offensive than personal information in a job application or emails between family members.

Mr. Martin's admission to the District that the underlying conduct occurred does not render disclosure any less offensive to a reasonable person. Mr. Martin did not publically broadcast details of his personal relationship that ultimately led to his discharge. Rather, during the course of the District's investigation into unrelated and unfounded allegations, he "reported [the intimate relationship] to make sure that [he] was being open with the District in the course of its investigation." (CP 57). And although Mr. Martin admitted to intimate involvement with a consenting adult on school property, he did not publically communicate the details of his relationship or the details of the District's investigation. (CP 57). The requested records contain those details. (*See generally*, Exhibit 1). Admitting to the general nature of certain conduct does not make disclosure of the details of the conduct, or the investigation into the conduct, any less highly offensive. A reasonable person would be highly offended by the public disclosure of details of her intimate encounters, even if she communicated that information to her employer during an internal investigation.

The fact that Mr. Martin's intimate encounter occurred at a school, during a school holiday, does not make the conduct public information or render disclosure any less highly offensive to a reasonable person. Unlike the conduct in *Spokane Police Guild*, 112 Wn.2d at 38, which occurred

before a group of 40 or more people, no student, staff, or any other person has reported witnessing Mr. Martin's conduct. (CP 57). The *Spokane Police Guild* court "perceive[d] no personal intimacy involved in one's presence or conduct at such a well attended and staged event which would be either lost or diminished by being made public." *Spokane Police Guild*, 112 Wn.2d at 38. Mr. Martin's conduct occurred in private, in the presence of no one but the other person involved. (CP 57).

Characterizing Mr. Martin's as substantiated or unsubstantiated is irrelevant to the offensiveness of disclosure. In *Bellevue John Does*, the court held that "[i]t is undisputed that disclosure of the identity of a teacher accused of sexual misconduct is highly offensive to a reasonable person." *Bellevue John Does*, 164 Wn.2d at 216. The court did not condition offensiveness on whether the allegations were substantiated. Rather, the *Bellevue John Does* court recognized that "the offensive nature of disclosure does not vary depending on whether the allegation is substantiated or unsubstantiated. The offensiveness of disclosure is implicit in the nature of an allegation of sexual misconduct." *Bellevue John Does*, 164 Wn.2d at 216, n. 18. Thus, the *Bellevue John Does* court recognized that the subject matter of requested records dictates the offensiveness of disclosure, not whether the subject matter is admitted, denied, substantiated, or unsubstantiated. The subject matter of Mr.

Martin's conduct makes disclosure highly offensive to a reasonable person.

The Respondents cite to a portion of *Bellevue John Does* that the court must read in the context of the very serious, potentially criminal nature of the allegations in *Bellevue John Does*: allegations of sexual misconduct with minor students. The *Bellevue John Does* court held that “[f]ollowing our analysis above regarding disclosure of the actual allegations, disclosure of a teacher's identity would be highly offensive if the letter of direction does not identify substantiated misconduct and the teacher is not disciplined or subjected to any restriction.” *Bellevue John Does*, 164 Wn.2d at 224. The court must read that quote in the context of the very serious, potentially criminal nature of the allegations in *Bellevue John Does*: allegations of sexual misconduct with minor students. The *Bellevue John Does* court's statement that disclosure would be highly offensive if the records did not identify substantiated misconduct and the teacher is not disciplined or subjected to any restriction, refers to *substantiated allegations of sexual misconduct involving minor students*, or discipline *as a result of sexual misconduct with students*. See *Bellevue John Does*, 164 Wn.2d at 224. The court's holding is not sufficiently broad to imply that disclosure of *any* record concerning a teacher is not

highly offensive if it involves conduct for which a school district finds probable cause for discipline.

The court must view the holding in *Bellevue John Does*—and the holding in *Bainbridge* involving allegations of sexual misconduct—in light of the very serious, potentially criminal nature of the allegations in those cases. Although categorically and qualitatively very different, the serious, potentially criminal, nature of the subject matter of the requested records in *Bellevue John Does* and *Bainbridge* and the private, personal nature of Mr. Martin’s conduct renders blanket disclosure the records highly offensive to a reasonable person. Disclosing the requested information in either instance is highly offensive because they involve “matter[s] concerning the private life”, within the *Hearst* definition of the right to privacy. *Hearst*, 90 Wn.2d at 135.

Disclosing details regarding Mr. Martin’s intimate relationship is more highly offensive to a reasonable person than is disclosing an employee evaluation. In *Dawson*, the court quoted with approval the following: “The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice.” *Dawson*, 120 Wn.2d at 797 (quoting *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979)). The court held that “[t]his sensitivity goes

beyond mere embarrassment” . . . and that “disclosure of performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive within the meaning of [former] RCW 42.17.255.”<sup>3</sup> The reference to “specific instances of misconduct” refers to specific instances of misconduct while in the performance of public duties. *See Dawson*, 120 Wn.2d at 796 (quoting *Cowles Pub’g Co. v. State Patrol*, 44 Wn. App. 882, 892-93, 724 P.2d 379 (1986)). In any event, any reasonable person would be more “sensitive” to and, therefore, “highly offended” by disclosure of information regarding details of his intimate encounters than by disclosure of information concerning his basic competence in the performance of his job.

Finally, disclosing information concerning the details of Mr. Martin’s intimate involvement with another adult is much more highly offensive to a reasonable person than disclosing information concerning a judge’s conduct while performing his public duties. *Cf. Morgan v. City of Federal Way*, 166 Wn.2d 747, 756, 213 P.3d 596 (2009) (allegations of a judge’s inappropriate behavior in the workplace, including angry outbursts, inappropriate gender-based and sexual comments, and demeaning colleagues and employees, was not “highly offensive”).

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<sup>3</sup> Former RCW 42.17.255 was recodified as RCW 42.56.50.

Any reasonable person would be highly offended by disclosure if the information contained in the requested records concerned them.

**2. The public did not have a legitimate concern in the requested records when The Spokesman requested the records.**

The public had no legitimate concern in the requested records because the District's notice of determination of probable cause for nonrenewal and discharge is not binding, and Mr. Martin had not exhausted his contractually and/or statutorily guaranteed appeal rights. (CP 58, 63). Mr. Martin filed a grievance and proceeded to binding arbitration under the Riverside Education Association's Collective Bargaining Agreement (CBA) with the District. (CP 58, 63; Exhibit 1, Tab 65). The trial court ordered disclosure before Mr. Martin's arbitration. (CP 97). The arbitrator could have determined that the District did not have sufficient cause to issue the notice of discharge and nonrenewal, and that no discipline was warranted. (CP 57, 97). If no discipline was warranted, there would have been greater justification for nondisclosure. At a minimum, there would have been greater justification for a greater amount of redaction of the records than if the neutral third party ruled that the District had sufficient cause to terminate Mr. Martin. *See Cowles*, 109 Wn.2d at 725 ("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 sanction against the officers involved.”). Even if the arbitrator had determined that the District’s discipline is unwarranted, and ordered Mr. Martin reinstated, once the District releases records, there is no undoing the substantial and irreparable damage caused to Mr. Martin. Accordingly, the public had no legitimate interest in the release of the requested records until Mr. Martin exhausted his appeal rights.

Although Mr. Martin elected to pursue the grievance procedure and arbitration, Mr. Martin could have opted to pursue his appeal rights set forth in RCW 28A.405.300, which guarantees teachers a hearing before a hearing officer to determine whether the District has “sufficient cause or causes for his or her discharge[.]” RCW 28A.405.300. “Any final decision by the hearing officer to nonrenew the employment contract of the employee, or to discharge the employee . . . shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action.” RCW 28A.405.310(8).

Moreover, the legislature has implicitly acknowledged that publically disclosing the information used in discharge appeal hearings implicates a teacher’s right to privacy. “In any request for a hearing

pursuant to RCW 28A.405.300 or 28A.405.210, the employee may request either an open or closed hearing. The hearing shall be open or closed as requested by the employee. . . .” RCW 28A.405.310(2). In providing the teacher with the right to request and obtain a closed hearing, the legislature expressly acknowledged the lack of any legitimate public concern in the disclosure of information during the proceedings.

The CBA also acknowledges a teacher’s right to privacy during the pendency of disciplinary proceedings and the grievance process, including arbitration. Article III, Section 2.D. of the CBA states “Confidentiality: Employee discipline . . . shall be conducted privately, only in the presence of another administrator and an Association representative. . . .” (CP 62).

The cases that The Spokesman and the District cite are inapposite because they did not involve disclosure of records concerning people who had contractual and/or statutory appeal rights that were not exhausted or waived. Teachers are afforded special protection that members of other professions are not. *See* RCW 28A.405.300; RCW 28A.405.310; CP 61-63. Although *Cowles* provides some support for Mr. Martin’s argument that disclosure should not occur before appeal rights are exhausted,<sup>4</sup> that

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<sup>4</sup> *See* *Cowles*, 109 Wn.2d at 725 (“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 sanction against the officers involved.”).

case is distinguishable because nothing in that case suggests that the police officers had a right to appeal the internal review into the complaints of misconduct against them. *Cowles*, 109 Wn.2d at 726-27.

The *Morgan* court did not expressly address the issue, but it is apparent from the opinion in that case that the judge who was identified in the subject requested records had no right to appeal the investigator's decision. *See Morgan*, 166 Wn.2d at 752-58. The District misstates the holding in *Morgan*, which is also distinguishable on other grounds. Contrary to the District's assertion, the court did not hold that "there is a 'substantial' public interest in disclosing an investigative report about substantiated allegations." *Brief of District* at 9. Rather, the *Morgan* court held that "the public has a substantial interest in disclosure of information related to an elected official's job performance." *Morgan*, 166 Wn.2d at 757. The details contained in the requested records do not pertain to Mr. Martin's job performance, and he is not an elected official. (Exhibit 1).

The public also lacks a legitimate concern in the requested records during the pendency of Mr. Martin's appeal rights because nobody accused Mr. Martin of, and he has not committed, any sexual misconduct.<sup>5</sup>

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<sup>5</sup> "Sexual misconduct" is a term of art. The State board of education, in relevant part, defines "sexual misconduct", in the context of public education employment, as:

(1) Any sexually exploitive act with or to a student. Sexually exploitive acts include, but are not limited to, the following:

In *Bellevue John Does*, the court held that “the identities of teachers accused of sexual misconduct should be released . . . if a school district has found the allegations to be substantiated”. *Bellevue John Does*, 164 Wn.2d at 222. The quoted language is dicta that the court included in explaining why it rejected the notion that the quality of a school district’s investigation should determine whether an individual’s right to privacy is violated. *Bellevue John Does*, 164 Wn.2d at 222. Regardless, the language refers to substantiated allegations of sexual misconduct involving students, which was the issue in *Bellevue John Does*. Mr. Martin did not engage in sexual misconduct. *Bellevue John Does* is further distinguishable because Mr. Martin’s conduct was not misconduct

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(a) Any sexual advance, verbal, written or physical.

(b) Sexual intercourse, as defined in RCW 9A.44.010.

(c) Sexual contact, i.e., the intentional touching of the sexual or other intimate parts of a student except to the extent necessary and appropriate to attend to the hygienic or health needs of the student.

(d) Any activities determined to be grooming behavior for purposes of establishing a sexual relationship.

(e) The provisions of (a) through (d) of this subsection shall not apply if at the time of the sexual conduct the participants are married to each other.

(2) Indecent exposure, as defined in RCW 9A.88.010.

(3) Sexual harassment of another as defined under local employer policy.

(4) Commission of a criminal sex offense as defined under chapter 9A.44 RCW.

(5) Sexual abuse or sexual exploitation of any minor as found in any dependency action under chapter 13.34 RCW or in any domestic relations proceeding under Title 26 RCW.

WAC 181-88-060. Mr. Martin’s conduct is not “sexual misconduct” under WAC 181-88-060, it did not involve sexual misconduct with students, like that alleged in *Bellevue John Does*, and it did not involve violent sexual assault, like that alleged in *Bainbridge*.

during the course of his public employment, and the teachers in *Bellevue John Does* either exhausted their appeal rights, waived them, or had no reason to appeal. *See Bellevue John Does*, 164 Wn.2d at 206-07, 215.

The public did not have a “legitimate” interest in the requested records until the arbitration was complete. Until a neutral third party determines whether the District had sufficient cause to discipline Mr. Martin, disclosure serves no interest other than gossip and sensation. *See Bellevue John Does*, 164 Wn.2d at 221. A person’s right to privacy may only be protected if he is allowed to exhaust the remedies contractually and/or statutorily guaranteed to him.

**E. The requested records are specific investigative records and the District is an investigative agency under RCW 42.56.240(1).**

The District created and compiled the requested records during its investigation into Mr. Martin. “Records are ‘specific investigative records’ if they were ‘compiled as a result of a specific investigation focusing with special intensity upon a particular party.’” *Dawson*, 120 Wn.2d at 792-93 (quoting *Laborers Int’l Union, Local 374 v. Aberdeen*, 31 Wn. App. 445, 448, 642 P.2d 418 (1982)). The investigation involved must be designed to shed light on some allegation of malfeasance. *Dawson*, 120 Wn.2d at 793 (quoting *Columbian Pub’g Co. v. Vancouver*,

36 Wn. App. 25, 31, 671 P.2d 280 (1983)). The Spokesman admits that the District's investigation focused with special intensity upon Mr. Martin.

The Spokesman's malfeasance/misfeasance argument ignores RCW 42.56.240(1)'s plain meaning and Washington law construing that statute, and does not apply to PRA cases. The malfeasance/misfeasance argument arises from *Smith v. Miller*, 32 Wn.2d 149, 151-52, 201 P.2d 136 (1948), a case involving the application of a statute that required the state auditor to "direct prosecutions" against people who fail to pay official delinquencies to the State, and a separate statute that authorized the attorney general to prosecute any public officer or employee who the auditor finds, in examining the accounts of public officers, has engaged in "malfeasance, misfeasance or nonfeasance in office". *Miller* is inapposite, and does not provide a definition of the term "malfeasance" as that term is used in the context of the investigative records exemption to the PRA. Likewise, Article V, Section 3 of the Washington Constitution applies to impeachment of judicial officers, not whether an investigation creates specific investigative records in the context of the PRA.

The term "malfeasance" is commonly understood to include "misconduct". Merriam Webster defines "malfeasance" as "wrongdoing or misconduct especially by a public official." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 704 (10<sup>th</sup> ed. 1995). The dictionary definition is

consistent with the type of investigations envisioned in *Dawson*, *Columbian*, and *Laborers International*. Because the District's investigation focused with special intensity on Mr. Martin, and because the investigation was designed to shed light on Mr. Martin's alleged malfeasance—an intimate encounter with another adult at school—the District's records are “specific investigative records”.

The District is an “investigative agency”, for purposes of RCW 42.56.240(1), when it conducts a formal investigation into its teacher's alleged misconduct. The District systematically inquired into Mr. Martin's alleged misconduct, conducting its own investigation and working with a third party to investigate the allegations. (Exhibit 1).

The District misstates the law by claiming that the court in *Brouillet* rejected the contention that a school district is an investigative agency. Neither party in *Brouillet* contended that a school district was an investigative agency. The parties in *Brouillet* agreed that the Office of the Superintendent of Public Instruction (OSPI) was a state agency vested with responsibility to discipline teachers. *Brouillet v. Cowles Publishing Company*, 114 Wn.2d 788, 795-97, 791 P.2d 526 (1990). The *Brouillet* court never addressed whether school districts are investigative agencies under RCW 42.56.240(1).

Moreover, *Brouillet* does not address the same exemption that Mr. Martin claims applies. See RCW 42.56.240. In *Brouillet*, the court held that OSPI is not a law enforcement agency and that, therefore, nondisclosure of the records was not “essential to effective law enforcement”. *Brouillet*, 114 Wn.2d at 795-97. Because the party seeking to prevent disclosure did not contest that the public had a legitimate concern in the requested information, the court held that nondisclosure was not “essential . . . for the protection of any person’s right to privacy.” *Brouillet*, 114 Wn.2d at 798; see RCW 42.56.050 (party seeking to show violation of right to privacy must show the disclosure of information about them is (1) highly offensive to a reasonable person and (2) of no legitimate concern to the public). *Brouillet* is inapposite, not dispositive.

The District is an investigative agency and the records are specific investigative records exempt from disclosure. RCW 42.56.240(1).

**F. The public has no interest in the details of Mr. Martin’s personal life, and disclosure would substantially and irreparably damage Mr. Martin.**

The requested records contain information related to Mr. Martin’s private relationship with another adult. As discussed at length above and in the Appellant’s Brief, the public has no interest in the disclosure of

information about a person's intimate involvement with another person, particularly when the conduct is unrelated to the performance of Mr. Martin's job performance, or the performance of his public duties, and he had not yet exercised his right to appeal the District's determination that the conduct warranted discharge.

The record evidence establishes that disclosure would substantially and irreparably damage Mr. Martin. Exhibit 1 is replete with information that, if disclosed, would cause substantial and irreparable damage to Mr. Martin. Mr. Martin stated, in his declaration, that disclosure of the requested records would be "very emotionally upsetting" to him and his family. (CP 57-58). The Spokesman's trolling into his personal life to engage in tabloid journalism is substantially and irreparably damaging to Mr. Martin. The public disclosure of details of any person's intimate involvement with another person causes substantial and irreparable damage to that person.

Mr. Martin has made a sufficient showing under RCW 42.56.540.

**G. This court should exercise its discretion and hold that the District must redact information that RCW 42.56.250 exempts from disclosure.**

The District has an obligation to redact the information set forth in RCW 42.56.250(3). The District did not deliver to Mr. Martin Exhibit 1, in the form that it provided to the trial court, until the summary judgment hearing, and did not deliver Exhibit 1, tab 81 to Mr. Martin until after the hearing. Mr. Martin did not have an adequate opportunity to review the documents during the hearing to determine whether the District had redacted the information set forth in RCW 42.56.250(3). Accordingly, counsel for Mr. Martin did not raise the exemption in RCW 42.56.250(3) at the summary judgment hearing.

This court has discretion to consider issues not raised in the trial court. *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). The type of information exempted under RCW 42.56.250(3), such as social security numbers, addresses, and phone numbers, is highly personal, private information that any ordinary person would not disclose. And Exhibit 1 contains personal information for people other than Mr. Martin. Even if this court accepts The Spokesman's argument that disclosure is necessary to permit the public to oversee the District's conduct, disclosing the information in RCW 42.56.250(3) does not assist in public oversight.

The court should, at a minimum, require the District to redact the information set forth in under RCW 42.56.250(3).

## II. CONCLUSION

Based on the foregoing, and the arguments in the Appellant's Brief, Allen Martin respectfully requests this court to reverse the trial court and hold that the records, in their entirety, are exempt from disclosure under RCW 42.56.230(3) and RCW 42.56.240(1). At a minimum, Mr. Martin requests the court to hold that the District must redact the records under RCW 42.56.250(3).

Respectfully submitted this 24<sup>th</sup> of May, 2013.

MONTOYA HINCKLEY PLLC  
Attorneys for Appellant Allen Martin



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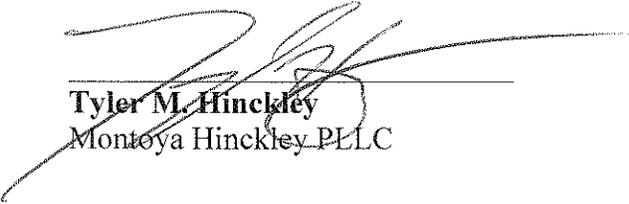
TYLER M. HINCKLEY, WSBA No. 37143

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that on the date stated below I served a copy of this document in the manner indicated:

Paul Clay Stevens Clay Manix, P.S. Attorneys for Riverside School District and Spokane School District 421 W. Riverside Ave #1575 Spokane, WA 99201	<input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input type="checkbox"/> FedEx Next Day
Duane Swinton Witherspoon Kelley Attorneys for Cowles Publishing Company 422 W. Riverside Ave., Suite 1100 Spokane, WA 99201-0300	<input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input type="checkbox"/> FedEx Next Day
Clerk of Court Court of Appeals, Division III 500 N. Cedar Street Spokane, WA 99201-2159	<input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input type="checkbox"/> FedEx Next Day

DATED at Yakima, Washington, this 24<sup>th</sup> day of May, 2013.

  
Tyler M. Hinckley  
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