

FILED

MAR 27 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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OF THE STATE OF WASHINGTON

NO. 311783

ALLEN MARTIN

Appellant

v.

RIVERSIDE SCHOOL DISTRICT NO. 416 and COWLES
PUBLISHING COMPANY

Respondents

BRIEF OF APPELLANT

Tyler M. Hinckley, WSBA 37143
Attorney for Appellant Allen Martin
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I. INTRODUCTION

Allen Martin formerly taught in the Riverside School District (“District”). Upon learning that Mr. Martin engaged in intimate conduct with a consenting adult at Riverside High School during a school holiday, that did not involve any students, and that was unrelated to his public employment duties, the District conducted an investigation into Mr. Martin’s conduct. The District ultimately issued Mr. Martin a notice of probable cause for termination and nonrenewal under RCW 28A.405.300 and .310. Mr. Martin filed a grievance under the Riverside Education Association’s collective bargaining agreement with the District, which proceeded to arbitration before a neutral arbitrator.

In the meantime, a reporter from The Spokesman-Review, a Spokane area newspaper, issued a public records request that generally sought all records related to Mr. Martin. Mr. Martin filed a lawsuit against the District seeking to prevent disclosure of the requested records on the basis that the records were exempt from disclosure under RCW 42.56.230(3)’s “personal information” exemption and RCW 42.56.240(1)’s “investigative records” exemption. Cowles Publishing Company, which owns The Spokesman-Review, joined as a defendant.

The trial court granted Cowles Publishing Company’s motion for summary judgment and ordered the records disclosed. Mr. Martin appeals

the trial court's summary judgment dismissal of its case because the trial court failed to properly apply Mr. Martin's claimed exemptions and because disclosure of the records would violate his right to privacy because the conduct for which he was disciplined related to his private life, and did not concern alleged misconduct in the course of carrying out his public employment responsibilities.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred by determining that the records that The Spokesman requested were not exempt from disclosure under RCW 42.56.230(3).

2. The trial court erred by determining that the records that The Spokesman requested were not exempt from disclosure under RCW 42.56.240(1).

3. The trial court erred by determining that Allen Martin should not have the opportunity to exhaust his statutory and/or contractual appeal rights before the requested records were disclosed.

Issues Pertaining to Assignments of Error

1. Should the court review the moot issues in this case when those issues are of continuing and substantial public interest and highly likely to occur again?

2. Does Mr. Martin have a right to privacy in his identity and in the requested records where the alleged misconduct he committed concerned his private life and not specific incidents of misconduct during the course of employment?

3. Does disclosing the records violate Mr. Martin's right to privacy when a reasonable person would be highly offended by the disclosure of records related to his private life and when the public has no legitimate concern in the nature of an investigation into conduct in a teacher's private life that is unrelated to his work responsibilities?

4. Does the public have a legitimate concern in the release of records concerning a teacher's private life before a neutral third-party has decided whether the District had a sufficient basis to issue a notice of probable cause for nonrenewal and termination under chapter 28A.405 RCW.

5. Are the requested records "personal information" that is "maintained in a file for an employee", under RCW 42.56.230(3), when the records in the District's possession contain and reference personal and

confidential information concerning intimate details of Mr. Martin's private life?

6. Are the requested records "specific investigative records", under RCW 42.56.240(1), when they were created during the District's investigation into allegations of misconduct against Mr. Martin?

7. Is the District an "investigative agency", under RCW 42.56.240(1), when the District performed a formal investigation into the allegations of misconduct against Mr. Martin that was designed to shed light on Mr. Martin's alleged malfeasance?

8. Would redacting Mr. Martin's name and identifying information from the records adequately protect his identity when the fact of disclosure alone would identify Mr. Martin?

9. If disclosure is ordered, should certain information exempted from disclosure under RCW 42.56.250(3) be redacted?

III. STATEMENT OF THE CASE

Allen Martin is a certificated teacher who formerly taught history and biology and was the head football coach at Riverside High School, in the District. (CP 56). He worked in the District for approximately 25 years. (CP 56).

The District placed Mr. Martin on administrative leave in the fall of 2011 pending an investigation into allegations of misconduct. (CP 56). During the investigation Mr. Martin told the District that he had engaged in certain conduct on school property with a consenting adult. (CP 57). As a result of that conduct, District superintendent Roberta Kramer served Mr. Martin with a Notice of Probable Cause for Discharge Pursuant to RCW 28A.405.300 and Notice of Probable Cause for Non-renewal Pursuant to RCW 28A.405.210. (CP 57-58).

The conduct for which the District issued its notice of probable cause did not involve any student and did not occur during a time when he had teaching or coaching responsibilities. (CP 57). In fact, the school was closed for a school holiday when the conduct for which the District issued the probable cause notice occurred. (CP 57). Mr. Martin's conduct was not criminal, and the District did not consider Mr. Martin's conduct criminal. (CR 57).

Following receipt of the Notice of Probable Cause for Discharge Pursuant to RCW 28A.405.300 and Notice of Probable Cause for Non-renewal Pursuant to RCW 28A.405.210, Mr. Martin filed a grievance—under the Riverside Education Association's collective bargaining agreement (CBA) with the District—challenging the District's decision to

discharge and nonrenew him. (CP 58, 61-62). Pursuant to the CBA, Mr. Martin demanded a hearing before an arbitrator. (CP 58).

On April 27, 2012, Jody Lawrence-Turner, a reporter for The Spokesman-Review (“The Spokesman”), submitted to the District a request for public records containing:

[A]ny information regarding teacher/coach Allen Martin, including emails containing his first or last name, or both, within the last six months, administrative leave notification or letter, documentation regarding cause for termination, available investigative information about his actions, any memos containing his first or last name, or both and any termination documents.

(CP 50). The District informed Mr. Martin about Ms. Lawrence-Turner’s request and stated that it would disclose the responsive records unless Mr. Martin sought to enjoin the disclosure. (CP 48-49). Accordingly, Mr. Martin filed a lawsuit to prevent the District from disclosing records in response to the above request. (CP 5-9). Cowles Publishing Company, which owns The Spokesman-Review, joined as a defendant. (CP 14-16).

On September 6, 2012, the trial court granted Cowles Publishing Company’s summary judgment motion and ordered the District to disclose the requested records. (CP 97). The court ruled that “[t]he Public Records Act presumes release of records, and is to be liberally construed;” that “[t]he Plaintiff has cited a number of reasons why various exceptions should apply and the records should not be released;” and that “pursuant to

the cases cited by the Defendants, . . . those exceptions do not apply.” (CP 96). Mr. Martin timely appealed. (CP 92)

During the summary judgment hearing, the District presented the trial court with a binder containing documents (Exhibit 1, Tabs 1-80)¹ that the District intended to disclose to The Spokesman in response to The Spokesman’s records request. (RP 14; Exhibit 1). To the best of Mr. Martin’s knowledge, the District intends to disclose the records in their entirety, without redaction. (Exhibit 1, Tabs 1-81).

The records that the District intends to disclose include the following (collectively referred to as “the requested records” or “the records”): (1) notes of the District’s and its Private Investigator’s interviews with Mr. Martin;² (2) notes of the District’s and its Private Investigator’s interviews with people the District believed had knowledge of the alleged misconduct;³ (3) a background check of the person with whom the District believed the alleged misconduct occurred;⁴ (4) notes of District Superintendent, Roberta Kramer’s, interviews with community members and District staff regarding their opinions as to the alleged

¹ The District added the documents at Tab 81 to Exhibit 1 after Mr. Martin filed his notice of appeal and first designation of clerk’s papers. The first designation of clerk’s papers did not include Exhibit 1. The parties stipulated that Exhibit 1, Tab 81 should be part of the record on appeal.

² Exhibit 1, Tabs 3, 4, 6, 20, and 21.

³ Exhibit 1, Tabs 10, 11, 14, 15, 24, and 25.

⁴ Exhibit 1, Tab 13.

misconduct;⁵ (5) correspondence between the District and Allen Martin related to the alleged misconduct and the District's investigation thereof;⁶ (6) correspondence, and notes of correspondence, between the Riverside Education Association and the District related to the alleged misconduct and the investigation thereof;⁷ (7) grievances and arbitration demands under the Riverside Education Association's CBA with the District, and correspondence related to the grievance and arbitration process;⁸ (8) notes from Mr. Martin's level III grievance meeting;⁹ (9) an administrative leave letter;¹⁰ (10) a notice of probable cause for discharge and nonrenewal pursuant to chapter 28A.405 RCW;¹¹ (11) correspondence related to the termination of Mr. Martin's paycheck and benefits;¹² (12) correspondence between the District and the Office of Superintendent of Public Instruction;¹³ (13) the District's investigator's file and notes;¹⁴ (14) correspondence between the District and Educational Service District 101;¹⁵ (15) Mr. Martin's cell phone text message records;¹⁶ (16) a flier

⁵ Exhibit 1, Tabs 27 - 53.

⁶ Exhibit 1, Tabs 2, 7, and 8.

⁷ Exhibit 1, Tabs 16, 17, 19, 26, and 54 - 57.

⁸ Exhibit 1, Tabs 18, 65 - 67, 69, 71, 72, 74, 75, and 77.

⁹ Exhibit 1, Tab 70.

¹⁰ Exhibit 1, Tab 5.

¹¹ Exhibit 1, Tab 58.

¹² Exhibit 1, Tabs 68, 73, and 76.

¹³ Exhibit 1, Tab 60.

¹⁴ Exhibit 1, Tabs 9 and 81.

¹⁵ Exhibit 1, Tab 1.

¹⁶ Exhibit 1, Tabs 22 and 23.

containing derogatory comments about Mr. Martin;¹⁷ and (17) decisions from the Office of Superintendent of Public Instruction (OSPI) in other cases unrelated to Mr. Martin.¹⁸

On October 15, 2012, the arbitrator presiding over Mr. Martin's grievance arbitration hearing ruled that the District had sufficient cause to discharge and nonrenew Mr. Martin. Accordingly, Mr. Martin no longer works in the District.

IV. ARGUMENT

A. Standard of Review.

This court reviews decisions under the Public Records Act (PRA) de novo. RCW 42.56.550(3); *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 208, 189 P.3d 139 (2008). This court also reviews statutory construction issues de novo. *Bellevue John Does*, 164 Wn.2d at 209.

RCW 42.56.540 authorizes this court to enjoin "the examination of any specific public record" if it finds "that such examination would clearly not be in the public interest and would substantially and irreparably damage any person. . . ." As the party seeking to enjoin production, Mr. Martin bears the burden to show that an exemption or statute prohibits

¹⁷ Exhibit 1, Tab 79.

¹⁸ Exhibit 1, Tabs 61-64.

production in whole or in part. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407-08, 259 P.3d 190 (2011).

Although the PRA is intended to enable the citizens of the State of Washington to retain sovereignty over our government and to demand full access to information relating to our government's activities, the PRA was not intended to make it easier for the public to obtain personal information about individuals who have become subject to government action due to personal factors. . . . Such personal information generally has no bearing on how our government operates.

DeLong v. Parmelee, 157 Wn. App. 119, 155, 236 P.3d 936 (2010). (quoting *Lindeman v. Kelso Sch. Dist. No. 458*, 127 Wn. App. 526, 535-36, 111 P.3d 1235 (2005), *rev'd on other grounds*, 162 Wn.2d 196, 172 P.3d 329 (2007)) (emphasis added).

B. The court should decide this case because it presents issues of continuing and substantial public interest and the issues raised in this case are likely to occur again.

Allen Martin was an employee of the District when he filed his lawsuit. After this appeal was filed, an arbitrator determined that the District had sufficient cause to terminate Mr. Martin. Although his appeal rights have been exhausted, they were not at the time these issues were presented to the trial court and at the time he filed the notice of appeal in this case.

This court may review a moot case if it presents issues of continuing and substantial public interest. *Wash. Off Hwy. Vehicle Alliance v. State*, 176 Wn.2d 225, 232, 290 P.3d 954 (2012). To determine whether a case presents issues of continuing and substantial public interest, a court considers ““(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.”” *Wash Off Hwy. Vehicle Alliance*, 176 Wn.2d at 233. (quoting *In re Marriage of Horner*, 151 Wn.2d 884, 892, 93 P.3d 124 (2004)).

The issues presented in this case are public issues in that it involves a newspaper’s public records act request, issued to a public school, for information related to a public employee. An authoritative determination will provide future guidance to public schools who receive public records requests regarding teachers who have been placed on administrative leave and/or disciplined as a result of allegations of misconduct. This issue is likely to recur and, in fact, there is another appeal pending before this court that involves similar and overlapping issues (*Predisik et al. v. Spokane School District No. 81*, Appeal No. 311767). The undersigned counsel has represented seven public school

teachers—in five school districts—who have been the subjects of similar public records requests in the past year.

Additionally, teachers who are the subjects of public records requests will often have exhausted their appeal rights before an appellate court has an opportunity to rule on any PRA disclosure issue raised by the teacher before exhausting his appeal rights. A teacher who receives a notice of probable cause for nonrenewal or discharge has a right to an appeal under RCW 28A.405.300 and .310 and, ordinarily in the alternative, under his local bargaining unit's collective bargaining agreement with the school district. RCW 28A.405.310(6)(d) requires the hearing officer to set a hearing within ten days of the prehearing conference. And if the teacher pursues grievance and arbitration under the collective bargaining agreement, he will likely have exhausted his appeal rights before an appellate court can rule on a PRA issue related to the release of documents concerning allegations for which he was disciplined or the District's investigation into those allegations.

Because this case presents issues of continuing and substantial public interest, the court should decide the issues raised in this appeal.

C. Disclosing the requested records would have violated Mr. Martin’s right to privacy.¹⁹

The District would have violated Mr. Martin’s right to privacy had it disclosed the requested records at the time of The Spokesman’s request because disclosure would have been highly offensive to a reasonable person and because the public did not have a legitimate interest in the requested records. Mr. Martin seeks to enjoin disclosure of the records under the exemptions contained in RCW 42.56.230(3) and RCW 42.56.240(1). RCW 42.56.230(3) exempts from disclosure “[p]ersonal information in files maintained for employees . . . of any public agency to the extent that disclosure would violate their right to privacy[.]” And RCW 42.56.240(1) exempts from public inspection and copying “specific investigative records compiled by investigative . . . agencies . . . the nondisclosure of which is essential to . . . protection of any person’s right to privacy[.]”

Mr. Martin’s claimed exemptions both turn on whether disclosure would violate his right to privacy. In determining whether disclosure would violate a person’s right to privacy, this court must first determine

¹⁹ Mr. Martin claims that the records were exempt from disclosure under RCW 42.56.230(3) and RCW 42.56.240(1). Because both exemptions require the court to analyze whether disclosure would violate Mr. Martin’s right to privacy, Mr. Martin addresses right to privacy issue first. The other elements of Mr. Martin’s claimed exemptions are addressed below.

whether a right to privacy exists. *See Bellevue John Does*, 164 Wn.2d at 210.

1. Mr. Martin had a right to privacy in his identity and in the requested records because the alleged misconduct concerned his private life and not specific incidents of misconduct during the course of employment.

Mr. Martin had a right to privacy in his identity and in the documents the District created and compiled in response Mr. Martin's alleged misconduct because Mr. Martin's alleged misconduct was a matter concerning his private life.

The PRA does not explicitly identify when a person who is the subject of a public records request has a right to privacy in his identity or in records concerning him. *See Bellevue John Does*, 164 Wn.2d at 212. The PRA merely sets forth the test for determining when the right to privacy is violated. RCW 42.56.050. In enacting RCW 42.56.050's precursor, former RCW 42.17.255 (1987), "the legislature stated that the term "privacy" "is intended to have the same meaning as the definition given that word by the Supreme Court in '*Hearst v. Hoppe*.'"²⁰ *Bellevue John Does*, 164 Wn.2d at 212 (quoting Laws of 1987, ch. 403, § 1). In

²⁰ *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978).

Bellevue John Does, the Supreme Court held that “[a] person has a right to privacy in ‘matter[s] concerning the private life.’” *Bellevue John Does*, 164 Wn.2d at 212 (quoting *Hearst*, 90 Wn.2d at 135). In describing the nature of facts that could be considered matters concerning the private life, the *Bellevue John Does* quoted section 652D from 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, as are 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. . . .

Bellevue John Does, 164 Wn.2d at 212-13 (quoting RESTATEMENT (SECOND) OF TORTS §652D (1977)).

Washington courts have assumed that employees have a right to performance evaluations that do not discuss any specific instances of misconduct. In *Dawson v. Daly*, the court noted that, “[s]peaking generally about the right of privacy, [the Supreme Court has] stated that the right of privacy applies ‘only to the intimate details of one’s personal and private life. . . .’” *Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993), *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, 112 Wn.2d at 38). And while the court did not specifically hold that a prosecutor had a right to privacy in performance evaluations, the court implied that the right to privacy existed in holding that disclosing a prosecutor's job performance evaluation would violate the prosecutor's right to privacy. *Dawson*, 120 Wn.2d at 797. The court in *Bellevue John Does*, acknowledged that, in *Dawson*, the court "assumed a prosecutor had a right to privacy in his or her performance evaluations." *Bellevue John Does*, 164 Wn.2d at 151-52.

Washington courts also hold that employees have a right to privacy in their identities and in documents in their personnel files when the allegations of misconduct do not involve specific instances of misconduct in the course of their public duties. In *Bellevue John Does*, the court held that a teacher has a right to privacy in his identity and in unsubstantiated or false allegations of sexual misconduct against him because "[a]n unsubstantiated or false accusation of sexual misconduct is not an action taken by an employee in the course of performing public duties. . . ." *Bellevue John Does*, 164 Wn.2d at 215. The court further held that teachers have a right to privacy in letters of direction in their personnel files, citing *Dawson*. *Bellevue John Does*, 164 Wn.2d at 151-52. In *Bellevue John Does*, the Seattle Times requested all records relating to allegations of teacher sexual misconduct in the last 10 years for the

Seattle, Bellevue, and Federal Way school districts. *Bellevue John Does*, 164 Wn.2d at 206. In applying the *Hearst* definition of the right to privacy—that a person has a right to privacy in “matters concerning the private life”—to the teachers’ rights to privacy in their identities in connection with allegations of sexual misconduct, the *Bellevue John Doe* court explained that:

The fact of the allegation, not the underlying conduct, does not bear on the teacher’s performance or activities as a public servant. The mere fact of the allegation of sexual misconduct toward a minor may hold the teacher up to hatred and ridicule in the community, without any evidence that such misconduct ever occurred. The fact that a teacher is accused of sexual misconduct is a “matter concerning the private life” within the *Hearst* definition of the scope of the right to privacy.

Bellevue John Does, 164 Wn.2d at 215 (citing *Hearst*, 90 Wn.2d at 135).

Accordingly, the court held that “teachers have a right to privacy in their identities because the unsubstantiated or false allegations are matters concerning the teachers’ private lives and are not specific incidents of misconduct during the course of employment.” *Bellevue John Does*, 164 Wn.2d at 215-16. In cases where courts have held that an employee does not have a right to privacy in certain information, the information at issue is related to conduct that occurred during the course of the employee performing his public duties. In *Cowles Publishing Company v. State Patrol*, 109 Wn.2d 712, 726, 748 P.2d 597 (1988), the court held that

information contained in police investigatory reports did not implicate officers' rights to privacy because the misconduct alleged in that case involved events occurring in the course of the officers' public service. The requesting party in *Cowles* sought "records or files generated by complaints [against police officers] filed during 1983 which were determined to be true, i.e., "sustained", following an internal affairs investigation." *Cowles*, 109 Wn.2d at 714. The court held that "[i]nstances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life when examined from the viewpoint of the *Hearst* case." *Cowles*, 109 Wn.2d at 726.

Courts have also held that no right to privacy exists where the information sought is information about that conduct that occurred publicly. In *Spokane Police Guild v. Washington State Liquor Control Board*, 112 Wn.2d 30, 38, 769 P.2d 283 (1989), 40 or more people, some of whom were police officers, attended a bachelor party on the Spokane Police Guild Club premises. *Spokane Police Guild*, 112 Wn.2d at 31. The Washington State Liquor Control Board ("LCB") commissioned an investigation into the party that resulted in LCB suspending the club's liquor license. *Spokane Police Guild*, 112 Wn.2d at 31. A reporter submitted a public records request for the investigation report, which the police guild sought to enjoin. *Spokane Police Guild*, 112 Wn.2d at 32.

Noting that, in the public records context, “[t]he right of privacy is commonly understood to pertain only to the intimate details of one’s personal and private life[,]” the court held that none of the attendees had a right to privacy in the investigation report because the incident giving rise to the investigation occurred before a group of 40 or more people. *Spokane Police Guild*, 112 Wn.2d at 38. The 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 has a right to privacy in his identity and the requested records because the conduct giving rise to the allegations against Mr. Martin, and the District’s subsequent investigation into that conduct, are matters concerning his personal life. Similar to the unsubstantiated allegations of sexual misconduct in *Bellevue John Does*, Mr. Martin’s consensual personal relationship with another adult is not an action taken in the course of performing public duties or a specific incident of misconduct during the course of employment; it is a matter concerning his private life. (CP 57). *Bellevue John Does*, 164 Wn.2d at 215; *Bainbridge*, 172 Wn.2d at 413.

Unlike *Cowles*, where the records concerned misconduct in the course and performance of the officers’ public duties, the allegations

against Mr. Martin arise from private personal conduct that was unrelated to his public employment responsibilities, and that occurred when he was off duty, on a school holiday. (CP 57); *Cowles*, 109 Wn.2d at 726. And unlike the conduct in *Spokane Police Guild*, which occurred in the presence of 40 or more people at a bachelor party, no other person witnessed the conduct for which the District issued Mr. Martin a notice of probable cause for termination and nonrenewal. (CP 57).

Mr. Martin has a right to privacy in his identity and the records the District created and compiled in response to the alleged misconduct because the allegations concern Mr. Martin's private life and not specific instances of misconduct during the course of his public duties.

2. Disclosure of the requested records constitutes a violation of Mr. Martin's right to privacy under RCW 42.56.050.

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. Because a reasonable teacher would be highly offended by disclosure of information concerning conduct in his private life that is unrelated to performing any public duties, and because information concerning private conduct unrelated to his public employment

responsibilities is not of legitimate concern to the public, the court should prevent the District from disclosing the records.

a. Disclosing Mr. Martin's identity and the records concerning his private conduct would be highly offensive to a reasonable person.

Any reasonable person would be highly offended to have detailed information of his intimate relationships disclosed to the public. The records contain information that does not relate to any work-related misconduct or job performance issues, but to matters concerning Mr. Martin's private life. (CP 57).

Washington courts recognize that disclosing information concerning private and confidential personal matters would be highly offensive to a reasonable person. In *Washington State Human Rights Commission v. City of Seattle*, 25 Wn. App. 364, 369-70, 607 P.2d 332 (1980), the court held that a reasonable person would find highly offensive the disclosure of private and confidential matters contained in applications for a City of Seattle plumber position. In that case, the records requestor filed a complaint with the Washington State Human Rights Commission ("HR Commission") after the City refused to hire him for the plumber position. *Human Rights Comm'n*, 25 Wn. App. at 365. The HR

Commission subpoenaed copies of other applications for the plumber position and the City refused to produce the applications, citing the need to protect the applicants' privacy. *Human Rights Comm'n*, 25 Wn. App. at 365. Noting that the applications contained private, confidential matters such as reasons for leaving prior jobs, salary at prior jobs, education, military service, criminal history, and disabilities, the court held that "[i]t cannot be disputed by any reasonable person that the public disclosure of material contained in answers to the [application] questions would or could be highly offensive. . . ." *Human Rights Comm'n*, 25 Wn. App. at 369-70.

In *Ollie v. Highland School District 203*, 50 Wn. App. 639, 645, 749 P.2d 757 (1988), the court held that "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." In that case, a former employee that filed a wrongful termination lawsuit requested production of performance evaluations or work records of other employees, and subpoenaed all of Highland School District's personnel records involving an individual that was disciplined or admonished for job performance or misconduct over a five-year period. *Ollie*, 50 Wn. App. at 640-41. The court held that by deleting the names and identifying information of employees who were

subject to a broad public records request would adequately protect their rights to privacy. *Ollie*, 50 Wn. App. at 645.

In *Tiberino v. Spokane County*, 103 Wn. App. 680, 689-90, 13 P.3d 1104 (2000), the court held that disclosure of a county employee's private emails that she sent from work would be highly offensive because they contained intimate details about her personal and private life. In that case, the county terminated the employee due to the fact that she had sent hundreds of personal emails to her sister, mother, and friends during work hours. *Tiberino*, 103 Wn. App. at 684-85. The court held that "any reasonable person" would find highly offensive the disclosure of emails that a county employee sent to her sister, mother, and friends. *Tiberino*, 103 Wn. App. at 689-90.

The cases in which courts have held that disclosure of personal information in an employee's file is not "highly offensive" involve alleged misconduct connected with job performance or workplace or on-the-job behavior.

In *Cowles*, 109 Wn.2d at 726, the court held that disclosing information contained in police investigatory reports that included details of officers' misconduct while in the performance of their public duties is not highly offensive. Likewise, in *Columbian Publishing Co. v. Vancouver*, 36 Wn. App. 25, 29, 671 P.2d 280 (1983), a case that involved

a newspaper's request for copies of complaints made by police officers concerning the local chief of police, the Court of Appeals upheld the trial court's finding that the employee privacy exemption "does not apply because the records relate to the job performance of a public official".

In *Morgan v. City of Federal Way*, 166 Wn.2d 747, 756, 213 P.3d 596 (2009), the court held that disclosure of allegations concerning a municipal court judge's inappropriate behavior at work was not sufficiently highly offensive as to violate his right to privacy. In that case, the City of Federal Way hired an attorney to perform an investigation into a City employee's hostile work environment complaint concerning the municipal court judge. *Morgan*, 166 Wn.2d at 752. The judge attempted to prevent disclosure of the attorney's investigative report. *Morgan*, 166 Wn.2d at 752. The court held that the judge's inappropriate workplace behavior, "including angry outbursts, inappropriate gender-based and sexual comments, and demeaning colleagues and employees—do not rise to the level of 'highly offensive.'" *Morgan*, 166 Wn.2d at 756.

Washington courts have also recognized other situations in which disclosure of a person's identity or information about them is considered "highly offensive." In *Dawson*, the court held that disclosure of performance evaluations that do not discuss specific instances of misconduct, "is presumed to be highly offensive." *Dawson*, 120 Wn.2d at

797. In *Bellevue John Does*, the court held that disclosure of the identity of a teacher accused of sexual misconduct, and disclosure of an unredacted letter of direction that does not identify substantiated misconduct, would be highly offensive to a reasonable person. *Bellevue John Does*, 164 Wn.2d at 216, 223. And in *Bainbridge*, the court held that revealing a police officer's identity in connection with an unsubstantiated allegation of sexual misconduct is highly offensive to a reasonable person. *Bainbridge*, 172 Wn.2d at 415.

The District's disclosure of the requested records would be highly offensive to a reasonable person. Like the records in *Human Rights Commission*, *Ollie*, and *Tiberino*, the requested records were created as a result of an investigation into private and confidential matters pertaining to Mr. Martin's personal life. Any reasonable person would find highly offensive the disclosure of information concerning his or her intimate relationships. Unlike the records in *Cowles*, *Columbian*, *Morgan*, *Bellevue John Does*, and *Bainbridge*, the records the District compiled are related to conduct that occurred in Mr. Martin's private life and that was unrelated to his job performance or job duties.

The fact that Mr. Martin admitted his conduct does not make disclosure any less offensive. The offensive nature of disclosure is implicit in the conduct or allegations that are disclosed, not whether the

conduct or allegations are admitted, denied, substantiated, or unsubstantiated. *See Bellevue John Does*, 164 Wn.2d at 216, n. 18 (“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.”). Regardless of how the District learned about Mr. Martin’s conduct, the disclosure of information concerning his private conduct would be highly offensive to a reasonable person.

b. The public did not have a legitimate interest in the disclosure of Mr. Martin’s identity or in the requested records at the time The Spokesman requested the records.

The public had no legitimate concern in Mr. Martin’s identity or the requested records when The Spokesman submitted its request because the District’s notice of determination of probable cause for nonrenewal and discharge under chapter 28A.405 RCW is not a final, binding decision, and Mr. Martin had not exhausted review options available to him. “[L]egitimate” means “reasonable.” *Bellevue John Does*, 164 Wn.2d at 217 (quoting *Dawson*, 120 Wn.2d at 798).

When The Spokesman submitted its public records request, Mr. Martin was in the process of appealing the District’s determination that it

had probable cause to terminate him and nonrenew his contract. (CP 58). The District served Mr. Martin with a Notice of Probable Cause for Discharge Pursuant to RCW 28A.405.300 and Notice of Probable Cause for Non-renewal Pursuant to RCW 28A.405.210. (CP 57; Exhibit 1, Tab 58). Upon receiving the notice of probable cause, Mr. Martin had the option to file a grievance under the CBA or request an appeal under RCW 28A.405.300 and .310.²¹ Both of his review options could have resulted in a neutral, third party determining that the District had insufficient cause to issue the notice of probable cause. Article III, section 2 of the Riverside Education Association's CBA with the Riverside School District states that "in cases of non-renewal, discharge, or actions which adversely affect the employee's contract status, the employee shall select the statutory procedures or the grievance procedure." (CP 62). Mr. Martin selected the grievance procedure, which ultimately proceeded to arbitration before a neutral third party. (CP 58).

When the trial court ordered the District to disclose the records, Mr. Martin had not had his contractually guaranteed opportunity to present

²¹ The "statutory procedure" set forth in RCW 28A.405.300 and .310 provides an aggrieved employee with a hearing, before a neutral third party, in which the District bears the burden of establishing sufficient cause or causes for the action the District took. *See generally* RCW 28A.405.300; RCW 28A.405.310. "If the final decision is in favor of the employee, the employee shall be restored to his or her employment position. . . ." RCW 28A.405.310(7)(c).

his case to a neutral third party, who could have determined that no discipline was warranted. (CP 57, 97). If no discipline was warranted, there would have been a greater justification for nondisclosure or 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.”).

During the pendency of the District’s investigation and during the grievance procedure, the District ordered Mr. Martin to refrain from discussing this case with people in the community. (CP 57). Accordingly, if records were disclosed during the pendency of the grievance procedure, he could not explain the true nature of his conduct, dispel rumors, or correct misstatements, without the District taking adverse action against him for violating its gag order. Disclosure before the appeal process is completed or waived is also particularly problematic where, as here, the District argues lack of community support for a teacher as a basis for sufficient cause to terminate him. Even if the neutral third party determines that the District’s discipline is unwarranted, and ordered Mr.

Martin reinstated, once the District releases records, there is no unringing the bell in the court of public opinion. If the records are disclosed prematurely, Mr. Martin's right to privacy is not adequately protected.

The public does not have any legitimate interest in Mr. Martin's identity, conduct, or the District's investigation until and unless a neutral third party makes a final determination that the District had sufficient cause to discipline him. Permitting the public to hear only one side of the story, before Mr. Martin had the opportunity to have a neutral third party decide the propriety of the District's decision fails to adequately protect his right to privacy.

c. The public did not have a legitimate interest in the disclosure of Mr. Martin's identity or in the requested records because Mr. Martin's alleged misconduct did not involve sexual misconduct.

Mr. Martin's identity, in connection with matters concerning his private life, and the records the District created and compiled as a result of his conduct, were not of legitimate public concern. The public has no reasonable interest in the details of Mr. Martin's intimate personal relationships with consenting adults.

Mr. Martin's conduct, although admitted, does not constitute "known sexual misconduct". In *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 797-98, 791 P.2d 526 (1990), the court held records specifying the reasons for revoking a teacher's certification were of legitimate public interest because they contained "information about the extent of known sexual misconduct in the schools." The *Bellevue John Does* court noted that *Brouillet* "stands only for the proposition that known sexual misconduct on behalf of teachers is of legitimate public concern. . . ." *Bellevue John Does*, 164 Wn.2d at 226, n. 25. *Brouillet* is inapplicable because Mr. Martin did not engage in sexual misconduct with any students.

"Sexual misconduct" is a term of art in the context of public education. For example, when a current or former school employee applies for a job in a new school district, the former school district employer must provide the new school district with all of the information related to "sexual misconduct" in the applicant's personnel record. RCW 28A.400.301(4). In enacting RCW 28A.400.301(11), the legislature directed the State board of education to adopt rules defining "sexual misconduct". 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:

(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, as in *Bellevue John Does*, and it did not involve an allegation of violent sexual assault at work, as in *Bainbridge*. See *Bellevue John Does*, 164 Wn.2d at 205; *Bainbridge*, 172 Wn.2d at 404. The public has no legitimate interest in Mr. Martin's identity or the records containing details of his intimate relationship with a consenting adult because it is not "sexual misconduct".

Moreover, the claimed legitimate public interest of monitoring a school district's investigations into allegations of sexual misconduct is not present where no sexual misconduct is alleged and the alleged misconduct concern's aspects of Allen Martin's personal life unrelated to his public duties. *Cf. Bellevue John Does*, 164 Wn.2d at 219-221 (public interest in investigation into allegations of sexual misconduct); *Bainbridge*, 172 Wn.2d at 416-17 (same). Unlike the alleged misconduct in *Bellevue John Does* and *Bainbridge*, the District did not investigate an allegation of sexual misconduct when it investigated details of Mr. Martin's intimate relationship with a consenting adult. The public has no legitimate interest in monitoring the District's investigation into Mr. Martin's private life and actions that do not involve students, coworkers, or job-related duties.

To the extent that the court determines the public has a legitimate concern in monitoring the District's investigation into Mr. Martin's personal life, the public's interest in monitoring the investigation does not require the District to disclose Mr. Martin's identity, the specific details of the alleged misconduct, or the identities of any persons involved or interviewed by the District. Any legitimate public concern is in the nature of the investigation, not the specific details of the investigation. *See Bainbridge*, 172 Wn.2d at 417. And "the identity of the accused . . . is unnecessary, and plays little role in the public's oversight of the

investigation.” *Bellevue John Does*, 164 Wn.2d at 220. The public can adequately inform itself of the District’s investigation without the District disclosing specific details of Mr. Martin’s personal life.

D. RCW 42.56.230(3) exempts the requested records from disclosure because they are personal information the District maintains in a file for Mr. Martin, and disclosing them would violate his right to privacy.

The requested records are “personal information” that contain and reference personal and confidential information concerning intimate details of Mr. Martin’s private life. RCW 42.56.230(3) exempts from disclosure “[p]ersonal information in files maintained for employees . . . of any public agency to the extent that disclosure would violate their right to privacy[.]”²²

The requested records constitute “personal information” under RCW 42.56.230(3), and there is no dispute that the District maintains the requested records in a file for Mr. Martin. *See* RCW 42.56.230(3). Although the PRA does not define “personal information”, Washington courts define “personal information”, for purposes of RCW 42.56.230, as “information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or

²² The analysis as to why disclosure would have violated Mr. Martin’s right to privacy was set forth in section C, above.

general. . . .” *Bellevue John Does*, 164 Wn.2d at 211 (citing statutes from other jurisdictions that define “personal information” similarly); *see DeLong*, 157 Wn. App. at 156 (“The term ‘[p]ersonal information’ means information ‘of or relating to a particular person.’”) (quoting *Lindeman*, 127 Wn. App. at 539-40). The requested records are “personal information” under RCW 42.56.230(3) because they contain information relating to or affecting Mr. Martin, information associated with his private concerns, or information that is not public or general. *See Bellevue John Does*, 164 Wn.2d at 211.

Mr. Martin’s identity constitutes “personal information” under RCW 42.56.230(3). A teacher’s identity is “personal information” because the teacher’s identity relates to a particular person. *Bellevue John Does*, 164 Wn.2d at 211 (“The teachers’ identities are clearly “personal information” because they relate to particular people.”). Because The Spokesman requested records solely pertaining to Mr. Martin, Mr. Martin’s identity is “personal information” at issue in this case.

The records the District intends to disclose are “personal information” under RCW 42.56.230(3) because all of the requested records relate to or affect Mr. Martin. The term “personal information”, as used in RCW 42.56.230(3), encompasses a broad range of information and records. In *Dawson*, the court held that employee evaluations qualify as

personal information because they relate to the subject employee's competence. In *Bellevue John Does*, 164 Wn.2d at 211, the court held that "letters of direction" in a teacher's personnel file constituted "personal information", noting that, like the performance evaluations in *Dawson*, they "contain information regarding the school districts' criticisms and observations . . . that relate to [the teachers'] competence as education professionals."

In *Bainbridge*, 172 Wn.2d at 412, the court noted that "personal information", for RCW 42.56.230(3)'s purposes, is "information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general." (quoting *Bellevue John Does*, 164 Wn.2d at 211). The *Bainbridge* court held that investigative reports that two police departments created following investigations into allegations of sexual misconduct against a police officer contained "personal information", because "a police officer's identity in connection with an unsubstantiated allegation of sexual misconduct is 'personal information' . . ." *Bainbridge*, 172 Wn.2d at 411-12.

Finally, in *Harley H. Hoppe & Associates, Inc. v. King County*, 162 Wn. App. 40, 55-56, 255 P.3d 819 (2011), the court held that Department of Revenue personal property ratio audits related to a

corporation constitute “personal information” under RCW 42.56.230(3) because it is “information pertaining to” an identifiable corporate taxpayer.

The requested records constitute “personal information”, under RCW 42.56.230(3), that relates to or affects Mr. Martin, that is associated with his private concerns, and that was not public or general. *See Bellevue John Does*, 164 Wn.2d at 211. With the exception of the OSPI decisions and the background check of the person with whom the District believed the alleged misconduct occurred,²³ all of the requested records directly relate to or affect Mr. Martin, frequently mention Mr. Martin by name, are associated with his private concerns, or contain information that was not public or general.²⁴

Moreover, like the letters of direction in *Bellevue John Does*, and the employee evaluations in *Dawson*, the following requested records relate to Mr. Martin’s competence, and “contain information regarding the school districts’ criticisms and observations” related to Mr. Martin’s actions and competence as a teacher. *See Bellevue John Does*, 164 Wn.2d at 211 (letters of reprimand are “personal information”); *Dawson*, 120 Wn.2d at 797 (employee evaluations are “personal information”). And like the police departments’ investigative reports in *Bainbridge*, the

²³ Exhibit 1, Tab 13 and Tabs 61-64..

²⁴ *See* Exhibit 1, Tabs 1-12, 14-60, and 65-81.

District compiled all of the requested records in response to the allegations against Mr. Martin. *Bainbridge*, 172 Wn.2d at 404. All of the requested documents, therefore, relate to the District’s investigation into the alleged misconduct, which ultimately resulted in the District issuing Mr. Martin a notice of probable cause for discharge and nonrenewal under chapter 28A.405 RCW. (CP 48-50, 58, 67, RP 14). Accordingly, all of the requested records relate to and affect Mr. Martin. *See Bainbridge*, 164 Wn.2d at 211 (defining “personal information”).

Because the requested records contain information relating to or affecting Mr. Martin, information associated with his private concerns, or information that is not public or general, all of the requested records are “personal information” under RCW 42.56.230(3). *See Bellevue John Does*, 164 Wn.2d at 211. And the court should not have ordered the District to disclose the personal information because disclosure would have violated Mr. Martin’s right to privacy.

E. RCW 42.56.240(1) exempts the requested records from disclosure because they are specific investigative records and nondisclosure is essential to protect Mr. Martin’s right to privacy.

RCW 42.56.240(1) exempts from public inspection and copying “specific investigative records compiled by investigative . . . agencies . . .

the nondisclosure of which is essential to . . . protection of any person's right to privacy[.]”²⁵ The records the District intends to disclose are specific investigative records and the District is an “investigative agency”, under RCW 42.56.240(1).

1. The requested records are specific investigative records under RCW 42.56.240(1).

The records that the District intends to disclose are “specific investigative records” under RCW 42.56.240(1). “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*, 36 Wn. App. at 31).

The District placed Mr. Martin on administrative leave and conducted an investigation into allegations of misconduct against him. (CP 56-58). The District compiled and created the records as a result of a specific investigation focusing with special intensity upon Mr. Martin.

²⁵ The analysis as to why disclosure would have violated Mr. Martin's right to privacy was set forth in section C, above.

Accordingly, the records are “specific investigative records” under the PDA. *Dawson*, 120 Wn.2d at 792-93

2. The District is an “investigative agency”, for purposes of RCW 42.56.240(1), when it conducts a formal investigation into its employee’s alleged misconduct.

The District was an “investigative agency”, for purposes of the exemption in RCW 42.56.240(1), when it conducted an investigation into Mr. Martin’s alleged misconduct. For purposes of the PRA, the term “[a]gency” includes all state agencies and all local agencies.” RCW 42.56.010(1). “Local agency” includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.” RCW 42.56.010(1). The District is a “local agency” and, therefore, an “agency” under the PRA. RCW 42.56.010(1).

The PRA does not define the term “investigative agency”. When conducting an investigation into a particular employee, a school district is an “investigative agency” within that term’s plain meaning. “Investigate” means “to observe or study closely: inquire into systematically. . . .” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1189 (2002). The District systematically inquired into Mr. Martin’s alleged misconduct,

conducting its own investigation and working with a third party to investigate the allegations against Mr. Martin. (CP 56-57; Exhibit 1, Tabs 1-81). The District is an investigative agency when it conducts formal investigations into allegations against its teachers.

The investigative records exemption is not limited to law enforcement or criminal investigations. The legislature specifically used the terms “investigative, law enforcement and penology agencies”. RCW 42.56.240(1) (emphasis added). Courts must give meaning to every word in a statute and presume the legislature did not use any superfluous words. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000).

In *Ashley v. Washington State Public Disclosure Commission*, 16 Wn. App. 830, 834, 560 P.2d 1156 (1977), the court held that the Public Disclosure Commission (“Commission”) was an “investigative agency” for purposes of the former Public Disclosure Act, by virtue of its statutory duties. Former RCW 42.17.360 (1973), which set forth the Commission’s duties, included the duty to “investigate whether properly completed statements and reports have been filed within the times required by this chapter by examining its duties[,]” and to “investigate and report apparent violations of this chapter to the appropriate law enforcement authorities.” Former RCW 42.17.360(2) and .360(3) (1973). The court also noted that that the Commission had compiled an “investigative file” pertaining to the

petitioner's allegations in that case. *Ashley*, 16 Wn. App. at 835. Although the *Ashley* court focused on the statutory duties of the agency in that case, a record may fall within the PRA's "investigative record" exemption if the record was compiled as a result of a specific investigation focusing with special intensity upon a particular party, regardless of whether the investigation is statutorily mandated. *See, e.g., Prison Legal News, Inc. v. Dep't of Corrections*, 154 Wn.2d 628, 637, n.7, 115 P.3d 316 (2005); *Dawson*, 120 Wn.2d at 792-93.

Like the Commission in *Ashley*, the District has compiled an investigative file pertaining to the allegations of misconduct against Mr. Martin. *Ashley*, 16 Wn. App. at 835. And similar to the statutory duties governing the agency in *Ashley*, the District has an obligation to investigate allegations of misconduct against its teachers. For example, RCW 28A.400.317(1) requires school employees to report suspected physical or sexual abuse of a student by another employee to a school administrator, who must conduct an investigation to determine whether reasonable cause supports the allegation. "The school administrator shall cause a report to be made to the proper law enforcement agency if he or she has reasonable cause to believe that the misconduct or abuse has occurred. . . ." RCW 28A.400.317(1). "During the process of making a

reasonable cause determination, the school administrator shall contact all parties involved in the complaint.” RCW 28A.400.317(1).

In addition to statutory investigation requirements, the District is an “investigative agency” by virtue of its obligations under the CBA to conduct investigations into allegations of misconduct before imposing discipline. *See Ashley*, 16 Wn. App. at 834. The CBA implies that the District has an obligation to investigate alleged employee misconduct and to discipline teachers when just cause for discipline exists. (CP 61-64). Article III, section 2 of the CBA provides that “No employee shall be reprimanded, disciplined, or reduced in rank or compensation without just cause.” (CP 62). The test for just cause is set forth in the CBA, which provides, in relevant part:

“It is commonly accepted that there are seven (7) tests as to whether an employer has used “just cause” in determining whether the District had proper reason to discipline an employee

...

3. Did management investigate before administering the discipline?

4. Was the investigation fair and objective?

5. Did the investigation produce substantial evidence or proof of guilt?

....

7. Was the penalty reasonably related to the seriousness of the offense and the past record of the employee?”

(CP 61). Further implying the requirement of investigation before discipline, the CBA, at Article III, section 2, clause E, states that “[a]ny

disciplinary or other adverse action taken against an employee shall be appropriate to the behavior or situation that precipitates the action.” (CP 62). District policy also requires the District to investigate. (Exhibit 2).

In *Columbian*, the court held that “the kind of investigation that the exemption requires” is “one designed to ferret out criminal activity or to shed light on some other allegation of malfeasance.” *Columbian*, 36 Wn. App. at 31 (emphasis added). The court held that the exemption did not apply because the city manager was reviewing 13 statements from police officers in the police chief’s job performance following a union vote of “no confidence”. *Columbian*, 36 Wn. App. at 30-31.

The District’s investigation into Mr. Martin’s alleged misconduct was an investigation designed to shed light upon a particular allegation of malfeasance against him. Unlike the city manager in *Columbian*, the District did not merely review an issue regarding Mr. Martin’s job performance. Rather, the District conducted an internal investigation and hired an outside investigator to investigate a specific allegation of malfeasance against Mr. Martin. (CP 57; Exhibit 1, Tabs 1-81).

The District was an “investigative agency” for purposes of RCW 42.56.240(1), when it investigated the allegations against Mr. Martin. The requested records are specific investigative records, and, as discussed in section C above, nondisclosure of the requested records is essential to Mr.

Martin's right to privacy. Accordingly, the requested records are exempt from public disclosure under RCW 42.56.240(1).

F. Redacting Mr. Martin's name from the records does not protect Mr. Martin's right to privacy and does not render the disclosure any less offensive.

This court cannot adequately protect Mr. Martin's right to privacy by ordering disclosure of the requested records with his name and identifying information redacted. Disclosing the records with his name and identifying information redacted is no less highly offensive than full disclosure. "The [PRA] seeks to provide people with full access to public records while remaining mindful of the right of individuals to privacy and of the desirability of the efficient administration of government." *Bellevue John Does*, 164 Wn.2d at 224-25 (quotations omitted). The court cannot protect Mr. Martin's right to privacy if it orders disclosure with Mr. Martin's name and identifying information redacted.

In *Bellevue John Does*, the court held that there is no legitimate public concern in information identifying teachers within letters of direction, but that disclosing the letters with the teachers' names and identifying information redacted did not violate the teachers' rights to privacy because disclosing the redacted records was not highly offensive.

Bellevue John Does, 164 Wn.2d at 226-27. In that case, the Seattle Times requested, from the Seattle, Bellevue, and Federal Way school districts, “all records relating to allegations of teacher sexual misconduct in the last 10 years”. *Bellevue John Does*, 164 Wn.2d at 206. The request implicated 55 current and former teachers, 37 of whom filed suit. *Bellevue John Does*, 164 Wn.2d at 206. When a large number of people are the subject of records disclosed in response to a broad public records request, redaction may provide adequate protection for those people’s right to privacy because the requestor has no way of identifying the person merely from the fact of disclosure. But where the records request is for “any information regarding teacher/coach Allen Martin[,]” redaction is useless to protect his right to privacy. (CP 50).

In *Bainbridge*, the court held that the public lacked a legitimate interest in the name of the police officer who was the subject of unsubstantiated allegations of sexual misconduct, but that the public had a legitimate interest in how the police department responded to and investigated the allegations. *Bainbridge*, 172 Wn.2d at 416. Accordingly, the court ordered disclosure of the investigative reports with the officer’s name redacted. *Bainbridge*, 172 Wn.2d at 416. The court acknowledged that ordering the police officer’s name redacted did not protect his identity, but held that since there was a legitimate public interest in the

nature of the investigations, disclosure of the investigative reports with the officer's name redacted did not violate his right to privacy. *Bainbridge*, 172 Wn.2d at 416.

The *Bainbridge* court reached its decision relying, in part, on *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006), *Bainbridge*, 172 Wn.2d at 416. In *Koenig*, the requestor sought from the City of Des Moines all records concerning his daughter, the victim of sexual molestation, whom he identified by name and case number in his records request. *Koenig*, 158 Wn.2d at 178. The City refused to disclose the records, claiming an exemption under Former RCW 42.17.31901 (1992), which provided that:

Information revealing the identity of child victims of sexual assault who are under age eighteen is confidential and not subject to public disclosure. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.

Koenig, 158 Wn.2d at 181 (quoting former RCW 42.17.31901 (1992)). The court held that, “[b]y its plain language, [the statute] excludes from disclosure only the information falling within one of the enumerated categories, and not entire records.” *Koenig*, 158 Wn.2d at 182.

But RCW 42.56.230(3) and RCW 42.56.240(1), and the exemptions claimed in *Bellevue John Doe* and *Bainbridge*, do not

expressly limit or define the specific information that is exempt from disclosure, unlike like the statute in *Koenig*. The court can determine that nondisclosure of an entire record is necessary to protect Mr. Predisik's right to privacy because the court can exempt any information that falls under the claimed exemptions "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; *See* RCW 42.56.230(3); RCW 42.56.240(1). The exemptions Mr. Martin claims apply to *all* information that would violate his right to privacy if disclosed. As described above, disclosing the requested records would be highly offensive to a reasonable person and the public had no legitimate concern in the records. Because the exemptions Mr. Martin claims do not restrict the scope of information exempted like the statute in *Koenig*, the rationale in *Koenig* and *Bainbridge* do not apply.

Bellevue John Does and *Bainbridge* are distinguishable on their facts. First, the *Bellevue John Does* court did not address whether redaction adequately protects the subject of a records request when the request seeks records related to a specific individual. *Bellevue John Does*, 164 Wn.2d at 206. Second, the *Bellevue John Does* and *Bainbridge* courts held that the public has a legitimate concern in how an agency investigates allegations of sexual misconduct related to the performance of public

duties. The District's investigation into Mr. Martin's conduct was not an investigation into allegations of sexual misconduct, but into private details of Mr. Martin's personal life. The public does not have the same legitimate concern in investigations into allegations concerning a person's private life as it has in investigations into allegations of sexual misconduct on the job.

The purpose of redaction is to protect a person's right to privacy. See RCW 42.56.070(1); see, e.g., *Bellevue John Does*, 164 Wn.2d at 226-27. Redacting Mr. Martin's name and identifying information completely fails to protect his right to privacy because anyone who reviewed the records would know that Mr. Martin's name and identifying information are what were redacted. Reading RCW 42.56.050 to permit redaction of a person's name to ensure that disclosure would not be "highly offensive to a reasonable person" leads to an absurd result when a records request identifies records regarding a specific person. Courts construe statutes so as to avoid strained or absurd results. *City of Auburn v. Gauntt*, 174 Wn.2d 321, 330, 274 P.3d 1033 (2012).

Redacting Mr. Martin's name from the requested records does not adequately protect Mr. Martin's right to privacy.

G. If the court orders disclosure of the requested records, at a minimum, the court should order the District to redact information that RCW 42.56.250 requires the District to redact.

If the court orders disclosure of the requested records, it should nonetheless order the District to redact certain information from the records. The District presented Exhibit 1 to the trial court during the summary judgment hearing and represented to the court that the documents in that binder are the documents the District intends to disclose. (RP 14). To the best of Mr. Martin's knowledge, none of those documents contained any redactions. RCW 42.56.250 exempts from public inspection and copying:

The residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of employees . . . of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of dependents of employees . . . of a public agency that are held by any public agency in personnel records, public employment related records, or volunteer rosters, or are included in any mailing list of employees or volunteers of any public agency.

Many of the documents in Exhibit 1 contain information exempted from disclosure under RCW 42.56.250(3). If the court orders disclosure of the

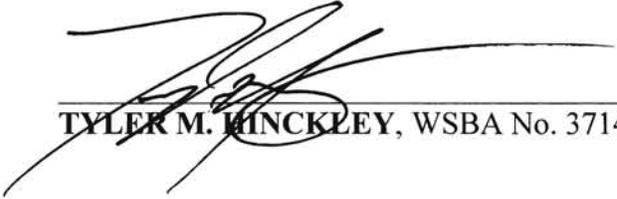
records, the court should require the District, at a minimum, to redact the information exempted from disclosure in RCW 42.56.250(3).

V. CONCLUSION

Based on the foregoing, 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).

Respectfully submitted this 26th day of March, 2013.

MONTOYA HINCKLEY PLLC
Attorneys for Appellant Allen Martin



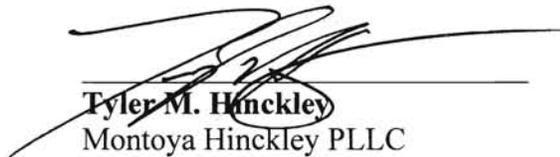
TYLER M. HINCKLEY, WSBA No. 37143

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 type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input checked="" 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 type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> FedEx Next Day
Clerk of Court Court of Appeals, Division III 500 N. Cedar Street Spokane, WA 99201-2159	<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> FedEx Next Day

DATED at Yakima, Washington, this 26th day of March, 2013.


Tyler M. Hinckley
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