

No. 311783

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

---

ALLEN MARTIN,

Appellant,

vs.

RIVERSIDE SCHOOL DISTRICT NO. 416, and  
COWLES PUBLISHING COMPANY

Respondents.

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**RESPONDENT SCHOOL DISTRICT'S RESPONSE BRIEF**

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## **I. INTRODUCTION**

While the Riverside School District (“School District”) is a named Respondent in this action, the School District has no real stake in the claim other than as the agency holding the records at issue (which it determined should be produced). The School District determined that the records should be disclosed because the records did not fall within any exemption allowing non-disclosure.

## **II. NO ASSIGNMENTS OF ERROR**

The School District is not seeking review of any trial court order.

## **III. STATEMENT OF THE CASE**

There are only six relevant facts at issue before the Court:

1. Riverside School District issued a Notice of Probable Cause to Appellant Mr. Martin, detailing the basis for the probable cause determination. (CP 57-58);
2. Appellant challenged issuance of the Notice of Probable Cause. (CP 58);
3. A reporter from the Spokesman-Review made a public records request of the School District seeking information regarding Mr. Martin, including records regarding his termination. (CP 50);
4. The School District identified various documents that it intended to disclose;

5. Appellant sought to enjoin the School District's disclosure, but the trial court ordered disclosure;

6. An arbitrator subsequently upheld Mr. Martin's termination, based on the Notice of Probable Cause.

#### IV. ARGUMENT

##### A. Standard of Review.

This Court reviews the Trial Court decision 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). Appellant argues that the records at issue are exempt under two separate statutes: (1) RCW 42.56.230(3); and (2) RCW 42.56.240(1). A party seeking to enjoin production of documents under the Public Records Act ("PRA") bears the burden of proving that an exemption or statute prohibits production in whole or in part. *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989).

The School District determined that the records are not exempt under RCW 42.56.230(3) because: (1) disclosure of the records would not be highly offensive to a reasonable person and (2) the records are of legitimate public interest. The School District determined that the records are not exempt under RCW 42.56.240(1) for the same reasons as above and because the School District is not an investigative agency.

**B. Disclosure of the Records Would Not Violate Appellant's Right to Privacy.**

As Appellant states in footnote 19 of his Brief to this Court, both exemptions on which he relies require this Court to analyze whether disclosure would violate Appellant's right to privacy. As with Appellant, then, the School District first addresses the privacy issues.

As a threshold matter, the School District agrees with Appellant that the records at issue here contain "personal information" under RCW 42.56.230(3) in that the records contain "information relating to or affecting" Appellants. *Bellevue*, 164 Wn.2d at 211. The Washington Supreme Court recognizes, however, that: "Personal information is exempt from production only when that production violates an employee's right to privacy." *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 412, 259 P.3d 190 (2011).

The seminal Washington Supreme Court opinion giving meaning to the "right to privacy" in the context of employee files is *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). In *Dawson*, the Supreme Court stated that an employee's right to privacy is violated only if disclosure: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. *Id.* at 795. The Supreme Court relied upon a separate

statute, RCW 42.17.255 [now codified at RCW 42.56.050], for this conclusion:

A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only 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.

*Id.* at 795; RCW 42.56.050. *Dawson* makes clear that Appellant must establish disclosure of the records at issue here would be highly offensive to a reasonable person and that those three records are not of legitimate concern to the public.

**1. Disclosure of the records would not be "highly offensive."**

In *Dawson*, the Supreme Court elaborated on the first prong of this test and explained generally what the "right to privacy" means:

Speaking generally about the right of privacy, we have stated that the right of privacy applies "only to the intimate details of one's personal and private life", which we contrasted to actions taking place in public that were observed by 40 other people. *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 38, 769 P.2d 283 (1989). The Court of Appeals has explained that the employee privacy definition protects personal information that the employee would not normally share with strangers. *Cowles Pub'g Co.*, at 890-91.

*Id.* at 796 (emphasis added). In explaining what the right to privacy means, the *Dawson* court noted that a showing of “mere embarrassment” is not sufficient to prove that disclosure is highly offensive to a reasonable person. *Id.* at 797.

In *Bellevue John Does 1-11 v. Bellevue School Dist.*, 164 Wn.2d 199, 189 P.3d 139 (2008), the Court more recently addressed the disclosure of personnel records of the type at issue here involving employee misconduct. In that case, the Court addressed certain letters of direction issued by a school district employer to teachers. The records at issue in *Bellevue John Does* contained “criticisms and observations” of the teachers that related to their “competence”. The letters did not “mention any substantiated misconduct” by the teachers but the letters of direction did “discuss specific alleged misconduct” against the teachers. *Id.* at 211, 224. The type of alleged misconduct was “sexual misconduct against students.” *Id.* at 205. Again, the allegations of sexual misconduct discussed in the letters were deemed “unsubstantiated” by the employer. *Id.* at 215.

The *Bellevue* Court held that, because the letters of direction did not identify “substantiated misconduct” and the teachers were not otherwise disciplined or subjected to any restriction, disclosure of the letters (with the employees’ names) would be highly offensive. *Id.* The *Bellevue* Court held that records which disclose unsubstantiated allegations of sexual misconduct

by a teacher toward a student is a “matter concerning the private life” of the teacher and thus within the meaning of “the right to privacy.” *Id.* at 215 (emphasis added). According to the court “[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, without any evidence that such misconduct ever occurred.” *Id.* (emphasis added).

*Bellevue* clearly stands for the proposition that disclosure of records, which contain descriptions of **unsubstantiated** allegations of sexual misconduct by teachers against students, would be highly offensive to a reasonable person. The issue in this case does not involve records that contain descriptions of **unsubstantiated** allegations. Here, the records contain descriptions of allegations that were not only **substantiated** by the District (and admitted by the employee), but also upheld by an arbitrator as a basis for discharge. *Bellevue John Does* establishes that investigative records of the very type at issue here are subject to disclosure.

More particularly, the records at issue in this matter are records that a School District employee or representative:

- (1) Received, generated, or reviewed in the course of the District's investigation of allegations of admitted misconduct by Mr. Martin; and
- (2) Made, received, or reviewed in the course of the District's nonrenewal and discharge of Mr. Martin from the District's employment.

The School District determined the records to be subject to disclosure not only because they were substantiated, but also because they were admitted by Appellant.

Likewise, in *Morgan v. Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009), the Washington Supreme Court addressed a similar effort by a public employee (a District Court Judge) to obtain injunctive relief of investigative records. There, the Court first addressed whether disclosure of the conduct at issue would be protected by the privacy exemption in the Public Records Act. To meet that exemption, the records must contain information that is highly offensive to a reasonable person and of no legitimate public interest. *Id.* at 756. According to the Court:

Judge Morgan claims that the report violates his right to privacy because it contains **unsubstantiated** allegations of ‘inappropriate behavior,’ which he contends are highly offensive. However, the allegations – including angry outbursts, inappropriate gender-based and sexual comments, and demeaning colleagues and employees – are nowhere near as offensive as allegations of sexual misconduct with a minor and do not rise to the level of ‘highly offensive.’

*Id.* at 756 (emphasis added).

As to whether allegations are unsubstantiated merely because the employee disputes them, the Court noted:

Contrary to Judge Morgan's assertion, the incidents are not unsubstantiated simply because he disputes them. The Stephson Report evaluates each person's credibility and concludes that many of the allegations are likely true, unlike in *Does*, where the allegations were found to be unsubstantiated. *Id.* at 217, 189 P.3d 139.

*Id.*

Again, here the behavior at issue has not only been substantiated, it has been admitted by Appellant and subsequently upheld as a basis for discharge by an arbitrator. More specifically, Appellant admitted to engaging in specific sexual behavior in his classroom with a former student. Thus, this is not a case where the behavior at issue is or could be in any way deemed "unsubstantiated."

Appellant nevertheless argues that the records contain information that pertains to his private life. Specifically, he asserts that the records contain information that pertains to conduct that was "unrelated to his public employment responsibilities" and that "occurred when he was off-duty, on a school holiday." Appellant's Brief at 20. As the Court will see from *in camera* review of the records, the records contain information that pertains to conduct of a public school teacher who had sexual intercourse in his classroom with a former student.<sup>1</sup> The conduct resulted in an arbitrator upholding Appellant's discharge from employment as a school

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<sup>1</sup> Appellant's actual conduct has been divulged to the public and reported in the Spokesman-Review, so it is not as if the School District is divulging any secrets by describing here the actual conduct.

teacher. The School District has difficulty understanding how Appellant can argue with a straight face that the records contain information pertaining solely to his private life.

**2. Disclosure of the records is of legitimate public concern.**

The *Morgan* Court addressed the second part of the privacy test: whether there would be public interest in disclosure of the records at issue. The Court held that there is a "substantial" public interest in disclosing an investigative report about substantiated allegations. 166 Wn.2d at 757. As such, the *Morgan* Court ordered the City to disclose the investigative report. It appears to the School District that this issue has thus been addressed by the Washington Supreme Court and that Appellant's argument is frivolous.

Appellant also argues that his conduct was not "sexual misconduct." Appellant's Brief at 29-31. Again, the School District has great difficulty understanding how Appellant can even make such an argument. First, for Appellant to suggest that his behavior was not "misconduct" is absurd. It was the basis for his termination, upheld by a neutral arbitrator. Second, for Appellant to suggest that his behavior was not "sexual" is truly unbelievable. He had sexual intercourse.

Further, Appellant asserts that the public does not have a legitimate interest in the information contained in the records because the public has

no legitimate interest in monitoring the School District's investigation. Again, Appellant seems to completely ignore existing Supreme Court precedent. In *Bellevue*, 164 Wn.2d at 217 n. 19, the Court addressed this very issue in the context of personnel records that discuss unsubstantiated allegations and other personnel matters. There, the Court held that even "when allegations of sexual misconduct are unsubstantiated, the public may have a legitimate concern in the nature of the allegation and the response of the school system to the allegation." *Id.* In *Bainbridge*, the Court echoed this same principal by again pointing out that even if allegations are unsubstantiated, both the **nature of the allegation** and the **agency response to the allegation** may be of legitimate public concern. 172 Wn.2d at 415 (emphasis added). *Bainbridge* goes on to state that "the public does have a legitimate interest in how a police department responds to and investigates such an allegation against an officer." *Id.*

Both *Bellevue* and *Bainbridge* held that the public has a legitimate interest in knowing the nature of the allegations and the agency response even when the allegations are **unsubstantiated**. Here, of course, the allegations are **substantiated**. The public certainly has an even greater interest in knowing the nature of the allegations and the agency response when the allegations are substantiated. Appellant's argument to the contrary is baffling.

Finally, Appellant argues that the public does not have a legitimate interest in the information contained in the records “unless and until a neutral third party makes a final determination.” Appellant’s Brief at 29. Again, Appellant appears to completely ignore the Washington Supreme Court’s opinion in *Morgan* where the Supreme Court ordered disclosure of an investigative report that “consisted solely of factual investigation” and contained “no legal analysis or recommendations” let alone final determinations. 166 Wn.2d at 755.

Similarly, in *Morgan*, the Court held that, just because the employee disputes substantiated allegations, it does not transform the allegations into “unsubstantiated” allegations. *Id.* at 756. It follows logically then that, just because an employee “appeals” substantiated allegations, the appeal does not transform the allegations into “unsubstantiated” allegations. Again, contrary to Appellant’s assertions, it did not matter in *Morgan* that the report could be subject to review by a hearing officer, arbitrator or court. Instead, the fact that the agency investigator substantiated the conduct was sufficient to deem the allegations “substantiated.”

Other case law has also clearly established that it is the agency that determines whether allegations are substantiated and not some neutral adjudicator. In *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 727, 748 P.2d 597 (1988), the Washington Supreme Court framed the issue

regarding substantiated allegations as one of whether the agency substantiated (or to use the word used in the *Cowles* case “sustained”) the allegations based on an internal investigation. Contrary to Appellant’s arguments here, it did not matter to the Court whether the agency’s determination might be subject to appeal.

Given the above and contrary to Appellant’s assertion, in determining whether allegations are deemed “substantiated” the Washington Supreme Court looks to whether the agency itself substantiated the allegations not whether the allegations are subject to appeal or whether they are upheld by a neutral third party.

### **3. Appellant Argues Against Redaction of His Name.**

Appellant takes the position that redaction of his name would not protect his right to privacy. Because the School District has taken the position that he has no right to privacy in the records, it does not address this argument.

#### **C. RCW 42.56.240 Does Not Apply to School Districts.**

Appellant also relies on RCW 42.56.240(1) as a basis for enjoining disclosure of the records at issue. That provision exempts investigative records compiled by investigative agencies. To qualify as an exemption under 42.56.240(1), a record (1) must contain specific intelligence or specific investigative information, (2) must be compiled by investigative, law

enforcement, or penology agencies, or state agencies vested with the responsibility to discipline members of any profession, and (3) nondisclosure of the information must either be (a) essential to effective law enforcement or (b) essential for the protection of any person's right to privacy.

In claiming an exemption under RCW 42.56.240(1), Appellant would have to prove that the School District is an “investigative agency” and that the records are “specific investigation records” – as those terms are utilized by that statute.

In *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990), however, the Washington Supreme Court rejected the contention that a school district is an investigative agency. The agency at issue in *Brouillet* was a school system, the Office of Superintendent of Public Instruction (“OSPI”), which has authority to revoke a teacher’s certificate. Here, of course, the School District is also a school system, but one with lesser authority than OSPI. The School District does not even have authority to revoke a teacher’s certificate. The School District’s only authority is with regard to Appellant’s employment contract.

More specifically, in *Brouillet*, the Washington Supreme Court explicitly distinguished “law enforcement” from the administration of a school system:

An examination of the term “law enforcement” reveals that certificate revocation involves neither criminal nor civil law enforcement. SPI administers a school system, it does not enforce law.

Law enforcement involves “[t]he act of putting ... law into effect; ... the carrying out of a mandate or command.” Black’s Law Dictionary 474 (5th ed. 1979). Because SPI “may” revoke certificates for immoral conduct, it does not carry out a command. SPI’s duties regarding revocation of teaching certificates are basically discretionary licensing decisions. Certificates “may be revoked” for grounds set out by statute. RCW 28A.70.160.

Law enforcement involves imposition of sanctions for illegal conduct. But SPI may revoke certificates for conduct which could not be illegal under the constitution, such as “immorality”, “intemperance”, or “unprofessional conduct”. The criteria governing certificate revocations defines unprofessional conduct which can justify termination, not illegal conduct. FN5

FN5. SPI has chosen to limit its broad statutory authority by regulation. See WAC 180-75-037. A teacher can still be fired for disobeying administrative rules of the state board of education and some other acts which violate no statute. *See, e.g.,* WAC 180-75-037(2).

Finally, law enforcement involves imposition of a fine or prison term. The record in this case does not link these investigations with any SPI attempt to seek either civil or criminal penalties against the teachers. *Cf. J.P. Stevens & Co. v. Perry*, 710 F.2d 136

(4th Cir.1983) (investigation of employment practices); *Birch v. United States Postal Serv.*, 803 F.2d 1206 (D.C.Cir.1986) (investigation into criminal use of postal permits).

The definition of administration, unlike the definition of “law enforcement”, precisely describes SPI’s duties. Administration includes “[d]irection or oversight of any ... employment.” Black’s Law Dictionary, at 41.

*Brouillet*, 114 Wn.2d at 795-96 (Emphasis added).

The School District directs this Court’s attention to *Brouillet* given that case appears dispositive of Appellant’s claim that exemptions under RCW 42.56.240(1) are applicable to the records here as they allege the School District is an “investigative agency.”

Appellant instead cites to *Ashley v. Washington State Public Disclosure Commission*, 16 Wn. App. 830, 560 P.2d 1156 (1977) in support of his claim that a school district is an investigative agency. In *Ashley*, the court held that, by virtue of its statutory duties, the Public Disclosure Commission (“PDC”) was an “investigative agency” for the purposes of the former Public Disclosure Act. *Ashley*, 16 Wn. App. 830 at 834. Notably, those statutory duties included “law enforcement related powers expressly

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prescribed for the [PDC]” including the power to “...enter a cease-and-desist order and to impose a civil penalty.” *Id.* at 835 (internal citations omitted).<sup>2</sup>

As discussed in *Brouillet*, whether an agency has power to impose civil or criminal sanctions or fines for illegal conduct is a key factor in determining whether an agency is an “investigative agency” for the purposes of RCW 42.56.240(1). Importantly, in *Ashley*, the law enforcement related powers expressly prescribed for the PDC included the power to impose civil penalties. By comparison, in *Brouillet*, OSPI did not have any power to impose civil penalties, but rather only had the ability to revoke a teacher’s certificate, and thus was not determined to be an “investigative agency.”

Even so, in claiming an exemption under RCW 42.56.240(1), Appellant would also have to prove that the nondisclosure of the information is either essential to effective law enforcement or essential for the protection of any person's right to privacy. As discussed, disclosure of the requested records would not violate Appellant’s right to privacy. In other words, nondisclosure of the information would not be essential for the protection of Mr. Martin’s right to privacy.

In any event, in determining whether agency investigative records relate to law enforcement, as that term is utilized in the statute, “law

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<sup>2</sup> One of the statutes cited by the court in *Ashley*, RCW 42.17.395(3) – re-codified as RCW 42.17A.755 – explicitly provides that “The commission may assess a penalty in an amount not to exceed ten thousand dollars.” RCW 42.17A.755(4).

enforcement” is defined as the nondiscretionary imposition of sanctions, such as a fine or a prison term, for illegal conduct. *Brouillet*, 114 Wn.2d at 795-96. Needless to say, school districts have no power to impose either civil or criminal sanctions against teachers. Moreover, the criteria governing employment termination is defined by sufficient cause – which is hardly limited to illegal conduct.

**D. Appellant Improperly Seeks Redactions Under RCW42.56.250.**

Appellant asks this Court to order redactions under RCW 42.56.250. However, Appellant’s request was never made prior to submission of his Brief to this Court. The general rule is that, absent manifest error affecting a constitutional right, an appellate court will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *State v. Tolia*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995). Appellant’s request fails to meet such a standard and Appellant does not even argue that it does.

**V. CONCLUSION**

Based on the above, the School District is prepared to disclose the records sought by the Spokesman Review.

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DATED this 25<sup>th</sup> day of April, 2013.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that on this 25<sup>th</sup> day of April, 2013, I served a true and correct copy of the above and foregoing RESPONDENT SCHOOL DISTRICT'S RESPONSE BRIEF on the following, in the method indicated:

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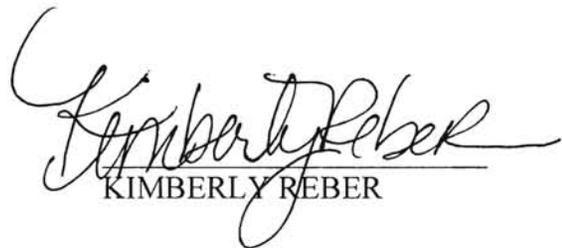
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