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Division III  
State of Washington  
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COA NO. 35555-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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Tye Sheats,

Appellant

v.

City of East Wenatchee, Douglas County, City of Wenatchee,  
Chelan County, Wenatchee World Newspaper,

Respondents

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BRIEF OF RESPONDENT CITY OF EAST WENATCHEE

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**A. Assignments of Error.**

**1. Assignment of Error.**

East Wenatchee acknowledges Sheats' assignment of error,<sup>1</sup> but believes the issue pertaining to his assignment of error is more appropriately formulated as follows: Did the Superior Court correctly deny Sheats' motion for a permanent restraining order?

**2. Issues pertaining to assignment of error.**

a) According to CR 3, to start a lawsuit, a plaintiff must file a summons and complaint. Sheats did not file a summons or a complaint. Should a court allow a party to move for an injunction without following the applicable court rules? No. Allowing a person to sue another without filing a complaint sets a bad precedent.

b) According to RCW 42.56.550, to enjoin the examination of a public record at the request a person named in the records, a court must find that examination would substantially and irreparably damage that person. Sheats put no evidence of substantial or irreparable damage into the record. Did the Superior Court correctly deny his motion for an injunction? Yes. Sheats failed to prove a necessary element of his case.

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<sup>1</sup> Brief of Appellant, p. 1

**B. Statement of the Case.**

Sheats, an East Wenatchee police officer, applied for employment with the Wenatchee Police Department.<sup>2</sup> Because of that application, he took a polygraph examination.<sup>3</sup> According to the report issued on the polygraph examination, Sheats disclosed at least 13 incidents, occurring between 2000 and 2016, of theft, dishonesty, and untruthfulness.<sup>4</sup>

The Douglas County Prosecutor's Office provided the East Wenatchee City Attorney with a redacted copy of the report ("redacted report").<sup>5</sup>

A reporter for the Wenatchee World made a public disclosure request to East Wenatchee. The request asked for: "All disciplinary records, citizen complaints and ethics complaints pertaining to East Wenatchee Officer Tye Sheats."<sup>6</sup>

East Wenatchee informed Sheats that it would release the redacted report unless it received an injunction before July 27, 2017.<sup>7</sup>

Without filing or serving a Summons or a Complaint on East

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<sup>2</sup> CP 3, ¶4

<sup>3</sup> CP 3, ¶4

<sup>4</sup> CP 12, 1. 1-7

<sup>5</sup> CP 13, ¶ 10

<sup>6</sup> CP 4, ¶ 7

<sup>7</sup> CP 4, ¶ 7

Wenatchee, Sheats filed an ex parte motion for an Order temporarily enjoining release of materials.<sup>8</sup> The motion asked the Douglas County Superior Court (“Superior Court”) to enjoin the release of material under the Public Records Act.<sup>9</sup>

On July 26, 2017, the Superior Court heard this ex parte motion and entered a Temporary Order enjoining East Wenatchee from disclosing “the requested report.”<sup>10</sup>

On July 30, 2017, Sheats once again argued that “the information in the redacted report is exempted from disclosure under 42.56 RCW. . . .”<sup>11</sup>

On August 9, 2017, Sheats expanded his initial motion made under 42.56 RCW and asked for a permanent restraining order based upon the Public Records Act, *Brady v. Maryland*, and a right to privacy.<sup>12</sup>

Nowhere in Sheats’ written pleadings does he allege that examination of the redacted report would cause him substantial and irreparable damage.<sup>13</sup>

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<sup>8</sup> CP 2

<sup>9</sup> CP 2

<sup>10</sup> CP 8

<sup>11</sup> CP 38, ¶ 5

<sup>12</sup> CP 55

<sup>13</sup> CP 27, CP 53-68, and CP 66-67

The Superior Court heard oral argument on August 14, 2017.<sup>14</sup> During oral argument, Sheats' attorney did not argue that examination of the redacted report would cause Sheats substantial and irreparable damage.<sup>15</sup>

Ultimately, the Superior Court decided that the material contained in the redacted report is required to be disclosed to defense counsel to comply with *Brady*.<sup>16</sup> The Superior Court also decided that the redacted report is required to be disclosed under the Public Records Act ("PRA").<sup>17</sup>

The Superior Court never entered a Final Order or a Final Judgment.

**C. Standard of Review.**

"Where the record consists only of affidavits, memoranda of law, and other documentary evidence, an appellate court stands in the same position as the trial court in reviewing agency action challenged under the PRA."<sup>18</sup> An appellate court reviews an order on an injunction under the

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<sup>14</sup> CP 49, l. 17

<sup>15</sup> Transcript of Proceedings, p. 16-28, and p. 50-52

<sup>16</sup> CP 151

<sup>17</sup> CP 151

<sup>18</sup> *Robbins, Geller, Rudman & Dowd, LLP v. Office of the Attorney Gen.*, 179 Wn. App. 711, 719-20, 328 P.3d 905 (2014)

PRA de novo.<sup>19</sup>

As part of this de novo review, this Court should keep in mind that RCW 42.56.030 expressly requires that the PRA be “liberally construed and its exemptions narrowly construed . . . to assure that the public interest will be fully protected.” When evaluating a PRA claim, a court must “take into account the policy of [the PRA] that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.”<sup>20</sup>

**D. Argument.**

**1. This Court should dismiss Sheats’ appeal because it is procedurally defective.**

According to CR 3(a), a civil action is commenced by filing a complaint. Because Sheats never filed a complaint, this Court should remand this case to Superior.

In *Eagle Sys., Inc. v. Employment Sec. Dep’t*,<sup>21</sup> Appellants argued that the superior court lacked personal jurisdiction because the Respondents improperly initiated and action through an ex parte show

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<sup>19</sup> *Robbins*, 179 Wn. App. at 720

<sup>20</sup> RCW 42.56.550(3)

<sup>21</sup> 181 Wn.App. 455, 326 P.3d 764, (Div. 2 2014)

cause motion. The Court of Appeals agreed and held, “the superior court lacked personal jurisdiction to proceed.”<sup>22</sup> Likewise, because Sheats failed to file a complaint, this Court should dismiss his appeal.

RAP 2.2(a)(1) states that a party may appeal from a final judgment. Because the Superior Court never entered a final order or a final judgment, Sheats has no right to appeal under this rule.

RAP 2.2(a)(3) states, “Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.” The Superior Court’s written decision did not discontinue the action.

Because Sheats has not satisfied any of the requirements of these rules, this Court should dismiss his appeal. Entertaining this appeal sets a bad precedent that a plaintiff may deftly avoid having to worry about general defenses, affirmative defenses, counterclaims, motions by an opposing party, and a final judgment by simply failing to file a complaint and claiming he is not actually suing anyone.

- 2. This Court should affirm the decision of the Superior Court because Sheats failed to prove that he is entitled to an injunction.**

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<sup>22</sup> *Id.* at 460

According to RCW 42.56.070(1), East Wenatchee must disclose public records upon request unless a specific exemption in the PRA applies or some other statute applies that exempts or prohibits disclosure of specific information or records.<sup>23</sup> RCW 42.56.540 allows an individual to seek an injunction to prevent the disclosure of public records under the PRA. RCW 42.56.540 states, “The examination of any specific public record may be enjoined if . . . **the superior court . . . finds that such examination** would clearly not be in the public interest and **would substantially and irreparably damage any person**, or would substantially and irreparably damage vital government functions.”<sup>24</sup>

Thus, for Sheats to obtain an injunction preventing disclosure of public records under the PRA, he must show that (1) the record in question specifically pertains to him, (2) an exemption applies, (3) the disclosure would not be in the public interest, and (4) disclosure would substantially and irreparably harm that party or a vital government function.<sup>25</sup>

In addition to the requirements in RCW 42.56.540, Sheats generally must establish three common law requirements to obtain

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<sup>23</sup> *Ameriquest Mortg. Co. v. Office of the Attorney Gen.*, 177 Wn.2d 467, 485-86, 300 P.3d 799 (2013)

<sup>24</sup> Emphasis added

<sup>25</sup> *Ameriquest*, 177 Wn.2d at 487.

permanent injunctive relief: (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the act complained of will result in actual and substantial injury.<sup>26</sup>

As courts have recently recognized:

It is unclear how these [common law] requirements relate to the injunction requirements of RCW 42.56.540, and no case has applied these general requirements in a RCW 42.56.540 case. However, the first two requirements for a permanent injunction relate to the existence of an exemption and the third requirement is consistent with a similar requirement in RCW 42.56.540.<sup>27</sup>

Here, Sheats failed to prove the existence of elements (2), (3), and (4). This brief will address these elements in reverse order.

**a) This Court should dismiss this appeal because Sheats entered no evidence of substantial and irreparable damage into the record.**

“An injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury.”<sup>28</sup>

In *Soter v. Cowles Pub. Co.*,<sup>29</sup> the Washington Supreme Court

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<sup>26</sup> *Huff v. Wyman*, 184 Wn.2d 643, 651, 361 P.3d 727 (2015)

<sup>27</sup> *Service Employees International Union (SEIU) Healthcare 775NW v. Dep 't of Soc. & Health Servs.*, 193 Wn.App. 377, 393, 377 P.3d 214, review denied, 186 Wn.2d 1016 (2016)

<sup>28</sup> *Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 221, 955 P.2d 63 (2000)

<sup>29</sup> *Soter*, 162 Wn.2d 716, 174 P.3d 60, (2007)

stated, “It may be that in most cases where a specific exemption applies, disclosure would also irreparably harm a person or a vital government interest. But if we assume that the additional findings contemplated by RCW 42.56.540 are unnecessary, then a significant portion of the statute is rendered superfluous.”<sup>30</sup>

Here, Sheats failed to prove his substantial-and-irreparable-damage element for the following reasons. First, because the Superior Court made no finding with regard to substantial and irreparable damage, Sheats cannot argue on appeal that he satisfied his burden of establishing substantial and irreparable damages in his request for injunctive relief.

Second, neither Sheats’ ex parte motion for a temporary injunction,<sup>31</sup> nor his Supplemental Declarations and Argument in Support of Plaintiff’s Motion for a Permanent Restraining Order,<sup>32</sup> nor the Declaration of Tye Sheats contain any evidence of alleged substantial and irreparable damage.<sup>33</sup>

Finally, the Brief of the Appellant does not allege or argue that disclosure of the redacted report will substantially and irreparably harm

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<sup>30</sup> *Soter*, 162 Wn.2d at 756-57

<sup>31</sup> CP 2-7

<sup>32</sup> CP 53-68

<sup>33</sup> CP 66-67

Sheats.

In sum, because PRA exemptions are permissive, not mandatory, simply showing that an exemption applies is not enough for a court to enjoin disclosure.<sup>34</sup> A showing of substantial and irreparable damage to the moving party is necessary.

Because there is no evidence of substantial and irreparable damage in the record for this Court to review, an analysis of the remaining elements is moot.

- b) This Court should affirm the Superior Court’s decision to order disclosure because disclosure of the redacted report is in the public interest.**

The PRA does not define the term “legitimate public concern.” In *Dawson v. Daly*,<sup>35</sup> however, the Washington Supreme Court defined the term, holding that “legitimate” meant “reasonable.” The Court then stated that determining whether the public's interest is “reasonable” requires balancing of the public's interest in disclosure against the public's interest in “efficient administration of government.”<sup>36</sup>

The court held that if the public's interest was harmed by disclosure more

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<sup>34</sup> See generally *Corey v. Pierce County*, 154 Wn. App. 752, 765-67, 225 P.3d 367, review denied, 170 Wn.2d 1016 (2010) (rejecting claim that PRA created a cause of action for releasing exempt records)

<sup>35</sup> 120 Wn.2d at 798

<sup>36</sup> *Id.*

than it was served, then the interest was not “reasonable” and thus not “legitimate” for purposes of the privacy test.<sup>37</sup>

Under *Brady* and its progeny, a prosecutor has a duty to disclose information that a defendant may use to impeach an officer at trial. A defendant or his/her attorney is under no obligation to keep the materials disclosed under *Brady* confidential. They are free to disseminate the information as they see fit. There is nothing in the PRA that identifies potential impeachment information as exempt from public inspection.

The theory behind *Brady* is that disclosure of evidence that a defendant may be able to use to impeach a witness is a powerful tool to guarantee a criminal defendant of his or her constitutional right to a fair trial.

The general public, likewise, has a legitimate interest in exploring whether an agency is conducting fair trials. It violates public policy to shield *Brady* material from the public under the guise of a privacy exemption or an application-file exemption. Stretching these exemptions to prevent an agency from disclosing *Brady* material sends a dangerous message that society is okay with police privacy interests trumping a defendant’s constitutional rights and trumping the public’s right to know if

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<sup>37</sup> *Id.*

an agency is operating within the confines of the constitution.

- c) **This Court should affirm the Superior Court’s decision to order disclosure because RCW 42.56.250(1) does not permit East Wenatchee to exempt the redacted report from inspection.**

According to maxim of expressio unius est exclusio alterius, “[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature.”<sup>38</sup>

Because the polygraph report is not a test question, is not a scoring key, and will not be used to administer an employment examination, 250(1) does not exempt the redacted report from inspection or copying. The plain language of 250(1) says nothing about exempting the results of an examination.

The case of *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*<sup>39</sup> illustrates how narrowly the courts have interpreted the language of RCW 42.56.250. In that case, a newspaper argued that a town of residence is not a residential address as contemplated in the exemption under RCW 42.56.250(3). The Court of Appeals agreed and held, “There

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<sup>38</sup> *In re Pers. Restraint of Hopkins*, 137 Wn.2d 897, 901, 976 P.2d 616 (1999)

<sup>39</sup> 156 Wn.App. 110, 231 P.3d 219 (Div. 2 2010)

is no question here that the information the [newspaper] requested did not fall under one of the PRA's precise, specific, and limited exceptions.”<sup>40</sup>

Florida’s Public Record Act reads as follows: “Examination *questions and answer sheets* of examinations administered by a governmental agency for the purpose of licensure, certification, or employment are exempt. . . .”<sup>41</sup> In *Rush v. High Springs*,<sup>42</sup> a Florida District Court held that this exemption applied to a pre-employment polygraph report.

Unlike the Florida PRA, Washington’s PRA does not exempt answer sheets or test results.

Sheats’ argument that “test answers” equal “other examination data” ignores the actual language of the statute. RCW 42.56.250(1) states, “The following employment and licensing information is exempt from public inspection and copying under this chapter: (1) Test questions, scoring keys, and **other examination data used to administer** a license, **employment**, or academic **examination**[.]”<sup>43</sup>

Factually, Sheats presented no evidence that his answers on the

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<sup>40</sup> *Kitsap County Prosecuting Attorney's Guild*, 156 Wn.App. at 119

<sup>41</sup> Emphasis added

<sup>42</sup> 37 *Fla. L. Weekly D* 482, 82 So.3d 1108 (1 Dist. 2012)

<sup>43</sup> Emphasis added

polygraph exam were used to administer the employment examination. Legally, WAC 139-07-040(2)(b) states, “(b) Polygraph tests administered under this chapter shall be based on data from existing research pertaining to screening and diagnostic polygraph testing, risk assessment, risk management, and field investigation principles.” This rule does not contemplate using exam answers as administration data.

Given the language of this rule, no reasonable reader of RCW 42.56.250(1) could conclude that existing data used to administer a polygraph actually refers to the test answers the examination is designed to discover. Why administer an examination just to discover data that the examiner had already discovered?

Given the legislative mandate to interpret exemptions narrowly, this Court should not expand the language of RCW 42.56.250 to redefine existing terms to include non-existent terms.

- d) This Court should affirm the Superior Court’s decision to order disclosure because RCW 42.56.250(2) does not permit East Wenatchee to exempt the redacted report from inspection.**

*In State v. Delgado*,<sup>44</sup> the Washington Supreme Court stated, “Language is unambiguous when it is not susceptible to two

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<sup>44</sup> 148 Wn.2d 723, 63 P.3d 792, (2003)

or more interpretations. [A] statute is unambiguous because there is only one interpretation we can draw from it.” Here, Sheats did not submit the redacted report to East Wenatchee as part of his application for employment. East Wenatchee received the redacted report from the Douglas County Prosecutor’s Office.<sup>45</sup> The redacted report is potential impeachment information as defined by *Brady v. Maryland*.<sup>46</sup> Because the potential impeachment information is not part of Sheats’ application for employment with East Wenatchee, RCW 42.56.250(2) does not apply.

- e) **This Court should affirm the Superior Court’s decision to order disclosure because WAC 139-07-040(1)(d) does not permit East Wenatchee to exempt the redacted report from inspection.**

Sheats argues that the redacted report is exempt from inspection and copying because the Washington State Criminal Justice Training Commission (“Commission”) enacted a rule that states, “Test information and results should be considered confidential within the screening process to be used exclusively by the county, city, or state law enforcement agency to assist with the selection of their applicant.”<sup>47</sup>

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<sup>45</sup> CP 13, ¶ 10

<sup>46</sup> 373 U.S. 83, 83 S. Ct. 1144, 10 L. Ed.2d 215 (1963)

<sup>47</sup> WAC 139-07-040(1)(d)

This argument conflicts with legal precedence for the following reasons. First, a promise of confidentiality does not create an enforceable privacy interest under the PRA. The Washington Supreme Court has repeatedly confirmed that promises of confidentiality are irrelevant to the PRA analysis. Agencies cannot make enforceable promises of secrecy. “[P]romises cannot override the requirements of the disclosure law.”<sup>48</sup> If an agency could create its own exemptions *sua sponte*, the PRA would become meaningless in short order.

Second, the legislature did not authorize the Commission to exempt public records from inspection or copying. In contrast, RCW 43.101.080 enumerates twenty, specific powers of the Commission. Exempting a public record from disclosure is not one of the enumerated powers. A self-created exemption is an unenforceable *ultra vires* act.

Third, this Court should follow the reasoning and holding set forth in *Brouillet v. Cowles Publishing Company*.<sup>49</sup> In *Brouillet*, the plaintiff argued that the Court should defer to a state board of education regulation<sup>50</sup> guaranteeing confidentiality. In response, the Washington Supreme Court stated, “Our unanimous decision in *Hearst* precludes

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<sup>48</sup> *Adams v. Dep't of Corr.*, 189 Wn.App. 925, 950 (Div. 3 2015)

<sup>49</sup> 114 Wn.2d 788, 794, 791 P.2d 526 (1990)

<sup>50</sup> WAC 180-75-019(3)

granting any deference to this regulation. In *Hearst*, we explained that the agency is without authority to determine the scope of exemptions under the act.”<sup>51</sup>

Fourth, the plain-language reading of RCW 43.101.095 does not exempt the results of the polygraph examination from inspection or copying. The Commission itself has stated:<sup>52</sup>

The purpose of the [Public Records Act] is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. In carrying out its responsibilities under the act, the Washington state criminal justice training commission shall be guided by the provisions of the act describing its purposes and interpretation.

Like the Commission, this Court must be guided by the provisions of the PRA in declaring a public record to be exempt or non-exempt.

- f) **This Court should affirm the Superior Court’s decision to order disclosure because Sheats does not enjoy a right-to-privacy in the redacted report.**

According to RCW 42.56.050, a person's “right to privacy” is violated only if disclosure of information about the person: (1)

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<sup>51</sup> *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d at 794

<sup>52</sup> WAC 139-02-010(3)

Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.

Furthermore, RCW 42.56.050 does not allow any balancing of an individual's privacy interest against the public interest. In contrast, the test balances the public's interest in disclosure against the public's interest in efficient government.<sup>53</sup> It is a public interest versus public interest balancing, not a public versus private interest test. The burden is on the opponent of disclosure to show that public interest weighs in favor of withholding the public record.<sup>54</sup>

Thus, Sheats has the burden of satisfying both prongs of the privacy test. As shown in Section E.3.b) of this brief, the public has a great interest in how East Wenatchee fulfills its *Brady* obligations.<sup>55</sup>

Likewise, the information contained in the redacted report is not “highly offensive.” The PRA does not provide a definition of “highly offensive” in RCW 42.56.050. But RCW 42.56.550(3) emphasizes that the PRA's policy is that “free and open examination of public records is in the

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<sup>53</sup> See *Dawson*, 120 Wn.2d at 798; *Brouillet*, 114 Wn.2d 788. *But see Cowles Publ'g Co. v. Pierce Cnty. Prosecutor's Office*, 111 Wn. App. 502, 511, 45 P.3d 620 (2002)

<sup>54</sup> See *Dawson*, 120 Wn.2d at 798; See *Brouillet*, 114 Wn.2d 788. See *Tacoma Public Library v. Woessner*, 90 Wn. App. 357, 951 P.2d 357 (1998).

<sup>55</sup> Brief of Respondent, p. 10

public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” Reading these statutes together suggests that the legislature intended the term “highly offensive” to mean something more than embarrassing.

In 2015, the Washington Supreme Court held, “the PRA will not protect everything that an individual would prefer to keep private.”<sup>56</sup> Because the PRA's 'right to privacy' is narrower, individuals have a privacy right under the PRA only in the types of “private” facts fairly comparable to those shown in the Restatement (Second) of Torts § 652D.

According to Division 1 of the Washington Court of Appeals:<sup>57</sup>

The pertinent section of the Restatement is as follows: 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. Restatement (Second) of Torts § 652D cmt. b.

Here, the alleged facts contained the requested records are all facts disclosed by Sheats. Also, the nature of the facts fall into the unprotected realm of embarrassing facts, rather than offensive facts.

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<sup>56</sup> *Predisik v. Spokane School District No. 81*, 182 Wn.2d 896, 905, 346 P.3d 737 (2015)

<sup>57</sup> *Does v. King County*, 192 Wn. App. 10, 26-27, 366 P.3d 936 (2015)

Information alleged to be private must be maintained in secrecy or at least subject to efforts to keep it secret. Events occurring in public or information shared with others or learned by others is unlikely to be deemed “private” such that disclosure will be highly offensive to reasonable people.<sup>58</sup>

In *Koenig v. Thurston County*,<sup>59</sup> the dissent argued that results of a polygraph examination contain within a special sex offender sentencing alternative (SSOSA) evaluation should not be disclosed.<sup>60</sup> It reasoned:

These SSOSA evaluations contain, among other things: a detailed sexual history section; mental health history; medical history; drug and alcohol history; a social history section, which may contain details of “ abuse the individual may have suffered in the past, including physical, sexual, and emotional abuse” ; results of a polygraph examination, which may be “ extremely detailed” regarding past and current sexual practices; and results of a phallometric test that measures the defendant's arousal response to a variety of pornography.

Making public much of this information would be highly offensive to a reasonable person, and the legitimacy of the public's interest in this information is minimal. See RCW 42.56.050.<sup>61</sup>

The majority of the Court, however, disagreed. The majority held the SSOA was not exempt from disclosure.<sup>62</sup>

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<sup>58</sup> See *Koenig v. Thurston County*, 155 Wn. App. 398, 229 P.3d 910 (2010)

<sup>59</sup> 175 Wn.2d 837, 287 P.3d 523 (2012)

<sup>60</sup> *Koenig v. Thurston County*, 175 Wn.2d at 850

<sup>61</sup> *Koenig v. Thurston County*, 175 Wn.2d at 850

Furthermore, in *Cowles Publishing Co. v. State Patrol*,<sup>63</sup> a newspaper sought access to records and names of police officers investigated by internal affairs for sustained allegations of misconduct. The Washington Supreme Court rejected an exemption based on privacy and ordered the records released. It stated:

In contrast to the types of information listed in the Restatement's comment, the information contained in the police investigatory reports in the present case does not involve private matters, [but] does involve events which occurred in the course of public service. Instances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life.... They are matters with which the public has a right to concern itself.<sup>64</sup>

Here, at least the portions of the redacted report dealing with events which occurred in the course of public duty are not exempt. Sheats' reliance on *Tiberino v. Spokane County*<sup>65</sup> is misplaced. In *Tiberino*, this Court held that disclosing an employee's e-mails to her mother, sister and friends about her personal and private life would be highly offensive to any reasonable person."<sup>66</sup> In contrast, the information in the redacted report relates to specific instances of misconduct and to

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<sup>62</sup> *Koenig v. Thurston County*, 175 Wn.2d at 849 and 850

<sup>63</sup> 109 Wn.2d 712, 748 P.2d 597 (1988)

<sup>64</sup> 109 Wn.2d 712, 721, 748 P.2d 597 (1988) (quoting RESTATEMENT §652D cmt. at 386)

<sup>65</sup> 103 Wn. App. 680, 13 P.3d 1104 (2000).

<sup>66</sup> *Tiberino v. Spokane County*, 103 Wn.App. at 689

instances that require his employer to disclose them as potential impeachment evidence.

Finally, disclosure under the PRA does not violate any constitutional right of privacy. This argument was analyzed by the Court of Appeals in its superseded decision in *Bellevue John Does 1-11 v. Bellevue School District #405*.<sup>67</sup> There, a teacher argued that disclosure under the PRA of records related to misconduct allegations against him would violate his right under Article I, §7 of the Washington Constitution to not “be disturbed in his private affairs.”<sup>68</sup> The Court of Appeals held that the asserted constitutional right to “nondisclosure of intimate personal information” was not “fundamental,” and thus was reviewed under the lenient rational-basis test.<sup>69</sup> The court concluded the PRA met this standard, finding that application of the rational review test “does not yield a different result than the privacy definition in the [PRA] under RCW 42.56.050, and that disclosure permitted under the PRA furthered a legitimate interest of assuring accountable government.”<sup>70</sup>

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<sup>67</sup> 129 Wn. App. 832, 120 P.3d 616 (2005), *rev'd in part*, 164 Wn.2d 199, 189 P.3d 139 (2008)

<sup>68</sup> *Id.* at 860-61

<sup>69</sup> *Id.* at 861

<sup>70</sup> *Id.* at 861-62

**4. The Superior Court had no jurisdiction to enjoin future, non-party litigants from receiving *Brady* material from East Wenatchee.**

In *Brady v. Maryland*, the Supreme Court held that due process forbids a prosecutor from suppressing ‘evidence favorable to an accused upon request where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.’<sup>71</sup> “The prosecution also has a duty to disclose any favorable evidence that could be used ‘in obtaining further evidence.’<sup>72</sup>

Although the Supreme Court of the United States “has never precisely pinpointed the time at which the disclosure under *Brady* must be made, “[i]t is abundantly clear . . . that delayed disclosure by the government[] may meaningfully alter a defendant's choices or prevent the defense from effectively using the disclosed information.”<sup>73</sup>

Thus, because restricting a criminal defendant’s ability to even view *Brady* material or restricting a criminal defendant’s ability to show another person what the material contains also restricts a criminal

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<sup>71</sup> *Brady v. Maryland*, 373 U.S. at 87 (citing *Giglio v. United States*, 405 U.S. 150 (1972)(“Giglio”); *United States v. McCrane*, 527 F.2d 906 (3d Cir. 1975), aff’d after remand, 547 F.2d 205 (1976); *Douglas v. Workman*, 560 F.3d 1156, 1172 (10th Cir. 2009)).

<sup>72</sup> *Giles v. Maryland*, 386 U.S. 66, 74, 87 S. Ct. 793, 17 L. Ed.2d 737 (1967)

<sup>73</sup> *United States v. Burke*, 571 F.3d 1048, 1053-56 (10th Cir. 2009))

defendant's ability to obtain further evidence and restricts a criminal defendant's ability to effectively use the disclosed information.

Also, Sheats has cited to no authority that would allow this Court to use the PRA to limit discovery in a criminal case under the jurisdiction of another court.

On appeal, Sheats argues that East Wenatchee should withhold potential impeachment information in cases where Sheats only acts as a back-up officer or when he has no substantive role in a criminal case. Because it is potential impeachment information, defense counsel should be allowed access to the information in all cases. Determination of materiality should be left to future parties and future courts. This Court should decline Sheats' invitation to pre-judge all future cases.

#### **E. Fees and Costs**

- 1. Because this Court should find that East Wenatchee is a prevailing party, this Court should also award East Wenatchee statutory fees and costs.**

East Wenatchee requests that this Court find that East Wenatchee is the substantially prevailing party on review. As the substantially prevailing party on review and as required by RAP 18.1, East

Wenatchee requests that this court grant it the allowable fees and expenses enumerated in RAP 14.3.

**2. Because Sheats filed a frivolous appeal, East Wenatchee is entitled to recover its reasonable attorney fees.**

RAP 18.9(a) authorizes an award of compensatory damages against the party who files a frivolous appeal.<sup>74</sup> An appeal is frivolous when there are no debatable issues over which reasonable minds could differ,<sup>75</sup> and the appeal is so devoid of merit that there is no reasonable possibility of reversal.<sup>76</sup>

Whether an appeal is frivolous depends on the following considerations:

(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeals frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) and an appeal frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.<sup>77</sup>

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<sup>74</sup> See e.g. *Kearney v Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999), *review denied*, 138 Wn.2d 1022 (1999)

<sup>75</sup> *Kearney*, 95 Wn. App. At 417 (citations omitted)

<sup>76</sup> *Matheson v. Gregoire*, 139 Wn. App. 624, 639, 161 P.3d 486 (2007)

<sup>77</sup> *Streator v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980).

In *Kearney v. Kearney*,<sup>78</sup> the Court of Appeals awarded reasonable attorney's fees because the appellant presented no debatable issue over which reasonable minds could differ, because the appeal had little merit, and because the chance for reversal was slim.

Here, Sheats' appeal is frivolous for the following reasons. First, because he failed to file a complaint and because the Superior Court never entered a final judgment, Sheats has no right of appeal under RAP 2.2.

Second, at the Superior Court level, by failing to put evidence of substantial and irreparable damage into the record, Sheats failed to prove a key element of his case. Because Sheats failed to put key evidence into the record, there is no debatable issue that he failed to prove his case at the Superior Court level. Because he failed to put key evidence into the record, his appeal has little merit.

**F. Conclusion.**

East Wenatchee respectfully requests this Court to affirm the Superior Court's decision to deny Sheats' motion for an injunction.

East Wenatchee respectfully requests this Court award East Wenatchee statutory fees and costs and reasonable attorney's fees.

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<sup>78</sup> 95 Wn.App. 405, 417, 974 P.2d (1999)

Respectfully submitted, March 19, 2018.

A handwritten signature in blue ink, appearing to read "Devin Poulson". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

DEVIN POULSON, WSBA #24245  
Attorney for Respondent

# CITY OF EAST WENATCHEE

March 19, 2018 - 11:19 AM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35555-1  
**Appellate Court Case Title:** Tye Sheats v. City of East Wenatchee, et al  
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