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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 36030-0-III

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WASHINGTON STATE COURT OF APPEALS  
DIVISION III

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JANE DOE #1, a married person; JANE DOES #2-10;

Respondents;

vs.

WASHINGTON STATE COMMUNITY COLLEGE DISTRICT 17 and  
COMMUNITY COLLEGES OF SPOKANE; an agency of the State of  
Washington;

Respondents;

vs.

COWLES PUBLISHING COMPANY,

Appellant.

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BRIEF OF APPELLANT

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DAVID M. KNUTSON, WSBA No. 24099  
CHRISTOPHER G. VARALLO, WSBA No. 29410  
CASEY M. BRUNER, WSBA No. 50168  
WITHERSPOON · KELLEY, P.S.  
422 West Riverside Avenue, Suite 1100  
Spokane, Washington 99201-0300  
Phone: (509) 624-5265  
dmk@witherspoonkelley.com  
cgv@witherspoonkelley.com  
cmb@witherspoonkelley.com  
Counsel for Appellant Cowles Publishing Company

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## I. INTRODUCTION

Appellant Cowles Publishing Co. ("The Spokesman Review") submitted a valid request for all documents related to the investigation, discipline, and termination of Spokane Falls Community College's ("SFCC" or the "College") then President, Dr. Darren Pitcher. *Clerk's Papers* ("CP") 5:5-12; 7:1-15. In early 2018, Dr. Pitcher resigned amid allegations of improper conduct, including sexual harassment. CP 8:15-23.

SFCC intended to disclose the requested documents on March 20, 2018. CP 18:17-19. Prior to disclosure, however, SFCC informed at least ten of its employees that their names were included in the documents. CP 31; 34; 37; 40; 43; 46; 49; 52; 55. The ten employees, known only as Jane Does #1 - 10, obtained a permanent injunction from Spokane County Superior Court, which precluded SFCC from disclosing, not only the employees' names, but all "identifiers" of the employees. CP 101 – 107.

In issuing the permanent injunction, the Superior Court determined the documents were exempt from disclosure pursuant to RCW 42.56.230(3) because they contained "[p]ersonal information in files maintained for employees" and that disclosure would violate the Respondents' right to privacy. CP 105. This was in error. The exemption does not apply. Further, the injunction was improper pursuant to RCW 42.56.540 as Respondents failed to provide sufficient evidence to satisfy

its requirements: that disclosure would clearly not be in the public's interest and that Respondents would suffer substantial and irreparable harm by disclosure. There are many elements that must be satisfied for an injunction of this nature to properly issue, and it is the burden of the Respondents to prove that each and every one has been satisfied. The Respondents have not met that burden, nor can they do so under applicable law.

## II. ASSIGNMENTS OF ERROR

1. **The Superior Court erred in finding that the information was "personal information in files maintained for employees," as required by RCW 42.56.230(3).**

Issue: Did the Superior Court err in determining that RCW 42.56.230(3) provided Respondents an exemption when there is no evidence that the documents in the file are "maintained for employees"?

2. **The Superior Court erred in finding that the disclosure of information would violate Respondents' "right to privacy," as required by RCW 42.56.230(3).**

Issue: Did the Superior Court err in finding that disclosure would violate the Respondents' right to privacy when there is no evidence that the conduct rose to the level of "highly offensive" or that the information is not of legitimate public concern?

3. **The Superior Court erred in finding that disclosure was clearly not in the public's interest, as required by RCW 42.56.540.**

Issue: Did the Superior Court err in granting Respondents' request for a Permanent Injunction, pursuant to RCW 42.56.540, when Respondents offered no legally sufficient justification for why disclosure would clearly not be in the public interest?

4. **The Superior Court erred in finding that disclosure would cause substantial and irreparable harm to the Respondents, as required by RCW 42.56.540.**

Issue: Did the Superior Court err in granting Respondents' request for a permanent injunction, pursuant to RCW 42.56.540, when Respondents offered insufficient evidence to show that they would be substantially or irreparably harmed by disclosure?

### III. STATEMENT OF THE CASE

Dr. Darren Pitcher was serving as Spokane Falls Community College's Acting President in 2017 and 2018. CP 7 – 8. In early 2018, Dr. Pitcher resigned amid allegations of improper conduct, including sexual harassment. CP 7 – 8. On March 1, 2018, Appellant Cowles Publishing Company d/b/a The Spokesman-Review submitted a public records request, pursuant to the PRA, to the College, as follows:

Please consider the following a request for public records pursuant to RCW 42.56.

Please provide all records and correspondence related to claims of misconduct, including claims of sexual harassment, involving Darren Pitcher, from before and during his time as acting president of Spokane Falls

Community College.

Please also provide all records and correspondence related to Community Colleges of Spokane's investigation into such allegations. Correspondence should include emails to and from Chancellor Christine Johnson regarding this matter.

Please also provide copies of all text messages that Pitcher exchanged with Kari Collen. These text messages are subject to public disclosure if Pitcher used a CCS-owned cell phone or received a stipend for work-related cell phone use.

Lastly, please provide a copy of Pitcher's resignation letter.

We are willing to pay any reasonable fees for copies of the records described.

CP 73. The College intended to release the documents on March 20, 2018.

*Id.* On Friday, March 16, 2018, Respondents filed a Complaint and a Notice of Hearing for Temporary Restraining Order and Preliminary Injunction. CP 4 – 23. Jane Does #1 – 10 requested a permanent injunction pursuant to RCW 42.56.540. CP 540. Subsequently, they identified RCW 42.56.230(3) as the only exemption from disclosure upon which they were relying. CP 90. Jane Does #1 – 10 also stated that they sought the injunction because disclosure of their identities would be "embarrassing" and that they were "fearful of retaliation." Jane Does #1 – 10 did not provide any evidence or support for these allegations other than their own conclusory declarations. CP 30; 34; 37; 40; 43; 46; 49; 52; 55.

On March 20, 2018, Spokane County Superior Court granted Jane Does #1 – 10 a temporary restraining order, precluding disclosure of *any*

documents related to the request. CP 56 – 63. The Superior Court ordered that the documents be delivered to the Superior Court for *in camera* review. *Id.*

On March 30, 2018, Spokane County Superior Court granted Respondents' request for a permanent injunction, pursuant to RCW 42.56.230(3) and RCW 42.56.540. CP 101 – 107. The Superior Court reasoned that the records "are exempt personal information under RCW 42.56.230(3) and no legitimate public interest in the names and identities of Plaintiffs' . . . exist." *Id.*

On April 25, 2018, Appellant filed a notice of appeal. Appellant argues that the Superior Court erred in determining RCW 42.56.230(3) is applicable to the subject records and in determining Respondents met their burden under RCW 42.56.540. Appellant seeks reversal.

#### IV. ARGUMENT

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. Based on these principles, in 1972, the citizens of Washington enacted, by initiative, Washington's Public Disclosure Act,

which has been amended and is now known as Washington's Public Records Act ("PRA").

"The PRA mandates the broad disclosure of public records." *Seiu Healthcare 775NW v. State, Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 390, 377 P.3d 214, 220 (2016) (citing *Resident Action Council v. Seattle Hous. Auth.*, 177 Wash.2d 417, 431, 327 P.3d 600 (2013)). And it is "a strongly worded mandate ...". *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). "A public record is virtually any record related to the government's conduct . . ." *Doe G v. Dep't of Corr.*, 190 Wn.2d 185, 191, 410 P.3d 1156, 1160 (2018) (citing *Nissen v. Pierce County*, 183 Wn.2d 863, 874, 357 P.3d 45 (2015)).

The strongly worded mandate is limited only by the precise, specific, and limited exemptions which [it] provides." *Lyft, Inc. v. City of Seattle*, 418 P.3d 102, 106–07 (2018) (quoting *Progressive Animal Welfare Soc. (PAWS) v. Univ. of Washington*, 125 Wn.2d 243, 258, 884 P.2d 592, 600 (1994). "[T]he PRA's disclosure provisions must be construed liberally and exemptions narrowly." *Doe G v. Dep't of Corr.*, 190 Wn.2d 185, 191–92, 410 P.3d 1156, 1160 (2018). "The party attempting to avoid disclosure bears the burden of proving an exemption applies." *Ameriquist Mortg. Co. v. Office of Att'y Gen.*, 177 Wash.2d 467, 486-87, 300 P.3d 799 (2013).

**A. THE SUPERIOR COURT ERRED IN FINDING THAT THE REQUESTED DOCUMENTS WERE EXEMPTED BY RCW 42.56.230(3).**

Again, the PRA mandates the "full disclosure of public records" and that mandate is "limited only by the precise, specific, and limited exemptions which [it] provides." *Lyft, Inc.*, 418 P.3d at 106–07 (2018) (quoting *PAWS*, 125 Wn.2d at 258). "[T]he PRA's disclosure provisions must be construed liberally and exemptions narrowly. To that end, we start with the proposition that the act establishes an affirmative duty to disclose public records unless the records fall within specific statutory exemptions." *Doe G*, 190 Wn.2d at 191–92 (internal quotations and citations omitted). It is the plaintiff's burden to establish that the exemption applies. *Ameriquest Mortg. Co.*, 177 Wn.2d at 486-87.

Respondents rely on only one statutory exemption in arguing that their names and all other identifying information should be redacted: RCW 42.56.230(3). The provision states: "The following personal information is exempt from public inspection and copying under this chapter: . . . Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." This exemption is inapplicable and it was error for the Superior Court to exempt the information under this provision because (1) the information was not

"personal information in files maintained for employees"; and (2) disclosure would not violate the Respondents' "right to privacy."

**1. RCW 42.56.230(3) does not apply to the requested documents as the information does not constitute "personal information in files maintained for employees."**

RCW 42.56.230(3)'s exemption requires a record to contain "personal information in files maintained for employees." Most, if not all, of the redactions, are not contained in "files maintained for employees." It is insufficient simply to show that personal information is contained in a file. Respondents must prove that the personal information was contained in a file that was maintained for an employee, such as a personnel record. *See Seiu Healthcare 775NW v. State, Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 377 P.3d 214 (2016); *Lindeman v. Kelso Sch. Dist. No. 458*, 166 Wn. 2d. 196, 202, 172 P.3d. 329 (2007).

In *SEIU*, requestor "sought disclosure of lists of Washington individual home care providers (individual providers) who provide personal care services to functionally disabled persons." *Id.* at 384. SEIU sought injunctive relief, purportedly on behalf of the healthcare workers, and argued that the documents were exempt under RCW 42.56.230(1), a statute similar to the one at issue here, and which exempts: "Personal information in any files maintained for . . . welfare recipients."

SEIU argued that the information could result in the disclosure of the "personal information" of the welfare recipients. *SEIU*, 193 Wn. App. at 409. The Court of Appeals disagreed, holding: "Under the plain language of RCW 42.56.230(1), this exemption is inapplicable to the lists of individual providers. The exemption applies only to personal information in any files maintained for welfare recipients." *Id.* Because the list of healthcare providers was not a file "maintained for welfare recipients," it was not subject to the statute even if the documents contained personal information.

Similarly, in *Lindeman*, two students engaged in a physical altercation were recorded by video surveillance cameras. *Lindeman*, 162 Wn.2d at 199. The parents submitted a public records request for the video. The school denied the request and cited the "student files" exemption, which has been recodified as RCW 42.56.230(1). The statute exempts: "Personal information in any files maintained for students in public schools . . ." *Id.* The Supreme Court held that just because the information contained "personal information" about a student, didn't mean it was subject to the student-files exemption. The Supreme Court explained, "The student file exemption does not exempt any and all personal information—it exempts only personal information 'in any files maintained for students in public schools.'" It "construe[d] the student file

exemption narrowly, in accordance with the directive of the PDA, by exempting information only when it is both 'personal' and 'maintained for students.'" *Id.* at 196. Therefore, a party seeking an injunction under that exemption must prove that the file contains personal information *and* that the file was "maintained for students." *Id.* The Supreme Court clarified further that in order for something to be "maintained for students," the file must be *necessarily* maintained.

The phrase "files maintained for students in public schools" denotes the collection of individual student files that public schools necessarily maintain for their students. The student file exemption contemplates the protection of material in a public school student's permanent file, such as a student's grades, standardized test results, assessments, psychological or physical evaluations, class schedule, address, telephone number, social security number, and other similar records.

*Lindeman*, 162 Wn.2d at 202. The Supreme Court made clear that the videotape, a "security and safety" record does not become a student file based on its location or even if the document is used for disciplinary purposes:

Merely placing the videotape in a location designated as a student's file does not transform the videotape into a record maintained for students. . . . Even if the District ultimately used the videotape as the basis for disciplining the student who committed the assault, the videotape itself would not thereby be converted into personal information in files maintained for students, since the videotape does not reveal whether discipline was or was not imposed. The District cannot change the inherent character of the record by

simply placing the videotape in the student's file or by using the videotape as an evidentiary basis for disciplining the student.

*Id.* at 203.

Here, just as in *SEIU* and *Lindeman*, it is insufficient for Respondents to prove that the documents contain personal information. Respondents must prove both (1) the documents contain "personal information"; and (2) the information is contained in "files maintained for the employees." RCW 42.56.230(3). A plain review of the *in camera* documents shows clearly that most, if not all of the documents are not "files maintained for employees."

The City of Spokane disclosed three batches of documents: (1) Working Documents; (2) Investigation Report and Exhibits; and (3) Emails. CP 136 – 151; 773 – 781; 1106 – 1111. The Emails are accurately self-described. The files contain nearly 400 pages of email correspondence between employees of SFCC. CP 1106 – 1497. They are maintained in email programs and email servers. They are not maintained in employment files and using them in an investigation that may or may not result in discipline is insufficient to turn them into an exempt file. *See Lindeman*, 162 Wn.2d at 203.

Similarly, the "Investigation File and Exhibits" contains more than 300 pages of documents and includes an investigation report, emails,

written statements, instant messenger transcripts, administrative procedures, SFCC policies, and other information. CP 773 – 1105. A review of these documents will show that none of them, except perhaps the loan and financial documents of Dr. Pitcher himself, are files "maintained for employees."

Finally, the "Working Documents" contains more than 600 pages of "interview notes," "complaints," "investigation guidelines," "emails," "interview timelines," and instant messenger messages. CP 136 – 772.

There is no evidence in the record and none presented to the superior court to support the contention that these documents, or any of the emails or investigation reports, were contained in files "maintained for employees." A review of the documents indicates that none of these documents are maintained in the personnel files of the Respondents. All of these files are maintained elsewhere. Respondents' assertions at the trial court that these were documents in files maintained for employees, is without any evidentiary support.

RCW 42.56.230(3) only permits the exemption or redaction of documents if (1) the document contains "personal information"; and (2) the documents are maintained in files "maintain for employees." *Id.* There is no evidence that these documents are in files "maintained for

employees," such as personnel files, and, therefore, the exemption does not apply.

**2. RCW 42.56.230(3) does not apply to the requested documents because disclosure would not violate Respondents' "right to privacy."**

Respondents cannot show, and have provided no evidence that, the documents were contained in files "maintained for employees" as required by 42.56.230(3). Assuming, *arguendo*, that they could, the exemption is still inapplicable because all of the Jane Does fail to establish that disclosure would violate their "right to privacy."

RCW 42.56.230(3) only permits exemption if disclosure would "violate their right to privacy." RCW 42.56.050 states: "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." The statute requires courts to "take into account the policy of this chapter 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." RCW 42.56.550. "Under this provision, the use of a test that balances the individual's privacy interest against the interest of the public in disclosure is not permitted." *Dawson v. Daly*, 120 Wn.2d

782, 795, 845 P.2d 995, 1003 (1993). If the information is not highly offensive or is of *any* public concern, then the documents must be disclosed.

Therefore, in order for the exemption in RCW 42.56.230(3) to apply, Respondent must prove that (1) disclosure would be highly offensive; and (2) the subject is not of legitimate public concern. *Id.* Respondents fail to prove either.

*a. Respondents Fail to Show that Disclosure Would Be Highly Offensive to a Reasonable Person*

A party asserting a privacy-based PRA exemption must prove that disclosure is both “highly offensive to a reasonable person” and “not of legitimate concern to the public.” *Does v. King Cty.*, 192 Wn. App. 10, 26, 366 P.3d 936, 944 (2015); RCW 42.56.050. The Supreme Court has made it clear, “the PRA will not protect everything that an individual would prefer to keep private.” *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 904–05, 346 P.3d 737 (2015). “The PRA’s ‘right to privacy’ is narrower [and] [i]ndividuals have a privacy right under the PRA only in the types of ‘private’ facts fairly comparable to those shown in” Restatement (Second) of Torts § 652(D) (1977). *Does*, 192 Wn. App. at 26 (citing *Predisik*, 182 Wn.2d at 905). The pertinent 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 § 652(D) (as quoted in *Does*, 192 Wn. App. at 26). According to the Supreme Court's ruling in *Prediski*, the Court of Appeals in *Does v. King Cty.*, and the Restatement (Second) of Torts, the information only qualifies as private if the conduct rises to the level of personal sexual relations, familial disputes, or humiliating illness.

In determining whether the Jane Does in this case are protected by the PRA's "right to privacy", it is critical to separate the Jane Does into categories based on their alleged involvement in the issues at hand. First, Jane Does #2 – 8, and 10 assert that they "were contacted/interviewed" during the investigation of Dr. Pitcher. CP 34; 37; 40; 43; 46; 49; 55. They do not allege that they themselves were the target of any harassment or that they themselves engaged in any inappropriate or sexual conduct. *Id.* Each of the declarations is limited to the conduct of *other individuals*, which they observed occurred in a public facility and in a public place. *Id.* The conduct in which they engaged does not rise to the level of "private"

matters as outlined in the Restatement. *Id.* These Respondents observed and reported the conduct of other individuals, which occurred in a public place. *Id.* There is no right to privacy in this conduct, it is not protected by the PRA's privacy provisions, and disclosure would not be highly offensive.

Jane Doe #9 allegedly received "instant messenger messages of a sexual nature from Dr. Pitcher." CP 55. Again, Jane Doe #9 does not assert that she engaged in any inappropriate conduct or that she has anything to be "highly offended" by. *Id.* In fact, the documents provided by SFCC show that both Jane Doe #9 and Dr. Pitcher agree that they did not engage in sexual activity together. CP 170 – 171. The documents related to Jane Doe #9, and the factual circumstances does not rise to the level of "private" matters as outlined in the Restatement.

Jane Doe #1 is the *only* Respondent whose conduct rises to the level of privacy contemplated by the PRA. By her own admission, she engaged in consensual sexual activity with Dr. Pitcher. CP 30. Appellants concede that, if this were the only point of inquiry, Jane Doe #1 would qualify for the exemption. However, as previously discussed, she cannot prove that RCW 42.56.230(3) is applicable as the documents are not contained in a file "maintained for employees". Further, as discussed in

detail below, she cannot show that there is no legitimate public interest or that disclosure would *clearly* not be in the public interest, as required.

b. *Respondent Fail to Show that Disclosure is not of Legitimate Public Concern*

Disclosure of public records violates a person's right to privacy only if the documents are "not of legitimate concern to the public." RCW 42.56.050. "Under this provision, the use of a test that balances the individual's privacy interest against the interest of the public in disclosure is not permitted." *Dawson v. Daly*, 120 Wn.2d 782, 795, 845 P.2d 995, 1003 (1993). If there is *any* legitimate public interest, the PRA requires disclosure. The PRA further requires courts to "take into account the policy of this chapter 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." RCW 42.56.550. Even if the information is highly offensive, if there is *any* public concern, then the documents must be disclosed.

Even if Respondents can show that the documents qualify for exemption under RCW 42.56.230(3), and even if they show that the disclosure of information is "highly offensive," Respondents cannot show that there is no legitimate public concern in disclosure.

Spokane Falls Community College has, according to its website, over 7,000 students and 300 teaching faculty, with a total of nearly 500 staff members. CP 79. The average age of the student body is 22 years old. *Id.* The College also advertises itself as a participant in Washington's Running Start program, which allows high-school students—minors—to attend classes. *Id.*

The citizens of Washington "do not yield their sovereignty to the agencies that serve them." RCW 42.56.030. It is the right of the citizens to "remain[] informed so that they may maintain control over the instruments that they have created." *Id.* "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." *Id.*

The citizens of Washington have a sovereign right to obtain information related to the management, conduct, and actions of public agencies. The documents requested by The Spokesman-Review are necessary for the citizens of Washington to maintain oversight over SFCC *and its faculty*. While Dr. Pitcher's conduct is itself a public concern, the College's response is of equal importance. How the College responded to the complaints, how it investigated the complaints, how it treated the alleged victims and witnesses, the expediency with which it acted, what it determined and whether discipline was imposed, and all other aspects

related to the investigation of Dr. Pitcher, is a matter of significant public concern.

Furthermore, each of these Does works for the College. Each of them alleges to have observed or experienced harassment by the College's top ranked official. CP 30; 34; 37; 40; 43; 46; 49; 52; 55. Each of them continues to work for the College and is entrusted with certain responsibilities by the people of this State. How each of them responded—whether they followed policy or not, whether they reported or not—is a matter of public concern. While it may be "embarrassing" for their names to be disclosed, their role as a public servant and the importance of the allegations involved, make their identities and conduct a matter of public concern.

Further, the documents disclosed indicate that there were significant issues with the management and oversight of various departments because of Dr. Pitcher's conduct and the conduct of the Does, including Jane Doe #1. The documents indicate that Jane Doe #1's position deals with some sort of student mental health services. CP 155-156; 162-163. She was a contract employee and regularly dealt with student suicide and other mental-health concerns. CP 158. The documents indicate a possibility that her complaints are motivated by job security concerns and that there was dysfunction in her department during the time

of, and caused by, her relationship with Dr. Pitcher. CP 155-156. Finally, there is some documentation that Jane Doe #1 was sent on business trips, at the taxpayers' expense, that she should not have been on, due to her relationship with Dr. Pitcher. CP 163 – 164. Presently, there is no way of knowing whether any of these things occurred. The heavy redactions make the documents unintelligible. However, the citizens have a right to review the public records and make a determination as to whether the public agency acted appropriately.

Similarly, there are files that indicate that Jane Doe #9's position required her to interact with high school students. CP 169. The files indicate that Jane Doe #9 possibly dressed inappropriately in her interactions with those students and when asked about it, she responded that she did so because it was what "Darren liked." *Id.* There is also significant evidence that Dr. Pitcher, Jane Doe #9, and others were deleting instant messenger messages and altering the instant messaging software for the purpose of avoiding the Public Records Act. CP 165 – 166. They deleted public records, which is itself unlawful.

Again, these things may or may not ultimately turn out to be accurate, and the Appellant is making no comment one way or another about the conduct of *any* of the Jane Does. However, the people have the right to observe and hold accountable the public agencies. Presently, the

heavily redacted versions of the requested documents make this task impossible.

Jane Does #1 and #9 are the two who are, arguably, the most likely to receive protection under the "right to privacy" standard. However, as demonstrated above, even if there is a privacy concern, the documents relate to a matter of legitimate public concern. Therefore, there is no balancing test and the documents must be disclosed.

\* \* \*

Respondents argued before the Superior Court that they were entitled to redactions of the "identifying information" under RCW 42.56.230(3). The Superior Court erroneously agreed. In order to qualify for exemption, Respondent must prove (1) the documents contain personal information and the files are "maintained for employees"; (2) that disclosure would violate their right to privacy; and (3) disclosure is of no legitimate public concern. Respondents fail to prove any one element, much less all three as is required for the exemption to apply. The exemption does not apply and they are not entitled to redaction.

**B. THE SUPERIOR COURT ERRED IN FINDING THAT RESPONDENTS FULFILLED THEIR BURDEN UNDER RCW 42.56.540.**

Assuming Respondents can show that RCW 42.56.230(3) provides a valid and applicable exemption, they must still prove that they are entitled to injunctive relief under RCW 42.56.540.

RCW 42.56.540 is a procedural statute granting the right to seek an injunction against disclosure, but only if the documents in question fall within a specific exemption found elsewhere in the act. *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011). More specifically, "a party seeking a TRO or preliminary injunction to prevent the disclosure of certain records must show a likelihood that an exemption applies and that the disclosure would clearly not be in the public interest and would substantially and irreparably damage any person or vital government functions." *Seiu Healthcare 775NW*, 193 Wn. App. at 393 (emphasis added).

This statute does not provide the exemption itself. It sets forth what must be satisfied for an injunction to issue - (i) an exemption that applies; (ii) a finding that disclosure would clearly not be in the public interest; and (iii) a finding that disclosure would substantially and irreparably damage the Plaintiffs.

As discussed at length above, RCW 42.56.230(3), the only exemption cited by Respondents, does not provide them the relief they seek. Even if the statute is applicable, however, Respondents cannot meet their separate burden under the PRA's injunction standard. They cannot prove (1) disclosure would clearly not be in the public interest; or (2) that they would cause irreparable harm.

**1. Respondents failed to provide any evidence that disclosure would "clearly not be in the public interest."**

As discussed above, Spokane Falls Community College is responsible for the care and education of over 7,000 students, many of whom are minor high school students. Dr. Pitcher's conduct is itself a public concern. So is SFCC's response to the conduct. SFCC's conduct and the conduct of its faculty is of legitimate and significant concern to the public. Appellant reiterates that it is the Respondents' burden to prove that disclosure is clearly not in the public interest. However, Appellant has independently shown that the documents are of public concern.

Respondents offer one, and only one justification for why disclosure is not in the public interest. Respondents argue only that they "would not have given information or would not have agreed to be interviewed had they known their names would be made public." CP 30; 34; 37; 40; 43; 46; 49; 52; 55. This is also the only justification the

Superior Court identified in its oral ruling and is error. "The Supreme Court . . . has made clear that '[a] general contention of chilling future witnesses is not enough to exempt disclosure.'" *Does v. King Cty.*, 192 Wn. App. 10, 28, 366 P.3d 936, 945 (2015) (citing *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 395, 314 P.3d 1093 (2013)).

Furthermore, these are public employees who are presumably well acquainted with Washington's PRA. Just as in *Spokane Research & Def. Fund v. City of Spokane*, 99 Wn. App. 452, 457 (2000), "person[s] in the[se] position[s] . . . cannot reasonably expect that evaluations of the performance of [Dr. Pitcher's] public duties will not be subject to public disclosure." These Respondents, who worked for a public college, made witness statements related to sexual misconduct of the College's highest ranking official. They could not reasonably expect that these statements or their identities would remain confidential in light of Washington's broad policy of public disclosures. Regardless of their expectation, Jane Does #2 - #10 have not asserted any facts that would constitute "highly offensive" disclosures. Inconvenience and embarrassment are legally insufficient.

As stated already, Jane Doe #1 is differently situated. She is the only Respondent who engaged in any conduct with Dr. Pitcher that could rise to the level of offensive. While the disclosure of Jane Doe #1's name

and statements, depending on the nature of the statements, could be construed as offensive, they must be disclosed pursuant to the PRA as they are a matter of legitimate public interest and she has not shown that disclosure is clearly not in the public's interest. "Under [the PRA], the use of a test that balances the individual's privacy interests against the interest of the public in disclosure is not permitted." *Spokane Research & Def. Fund*, 99 Wn. App. at 455 (citing *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990)) (emphasis added). "Even if the disclosure of the information would be offensive to the employee, it shall be disclosed if there is a legitimate or reasonable public interest in its disclosure." *Spokane Research & Def. Fund*, 99 Wn. App. at 455 (citing *Dawson v. Daly*, 120 Wn.2d 782, 797–98, 845 P.2d 995 (1993)).

In summary, it is the Respondents' burden to show that disclosure is clearly not in the public interest. The only justification that they have offered is the categorical "chilling effect" and that is the justification that the Superior Court accepted and relied upon. The error is that "[a] general contention of chilling future witnesses is not enough to exempt disclosure." *Does v. King Cty.*, 192 Wn. App. 10, 28, 366 P.3d 936, 945 (2015) (citing *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 395, 314 P.3d 1093 (2013)).

**2. Respondents failed to provide any evidence that they would suffer substantial or irreparable harm.**

Finally, "if one of the PRA's exemptions applies, a court can enjoin the release of a public record only if disclosure 'would clearly not be in the public interest and would substantially and irreparably damage any person, or vital governmental functions.'" *Lyft, Inc. v. City of Seattle*, 418 P.3d 102, 113 (Wash. 2018) (internal quotations omitted). "The injunction standard requires a showing on both elements." *Id.* "In a proceeding brought under this injunction statute, the party seeking to prevent disclosure has the burden of proof." *Id.* (quoting *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 35 (1989)). Therefore, it is the Respondents' burden to show that disclosure would cause substantial and irreparable damage. *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 756–57, 174 P.3d 60, 81 (2007).

Respondents have offered no admissible or substantive evidence to show that they would be substantially and irreparably harmed by the disclosure. Each of the Respondents, conveniently, say the exact same thing: that they would be "embarrassed" and that they are "fearful of retaliation." CP 30; 34; 37; 40; 43; 46; 49; 52; 55. Both of these reasons fail as a matter of law.

First, as a matter of black-letter statute, "embarrassment" is legally insufficient to prevent disclosure. RCW 42.56.550(3) states: "Courts shall take into account the policy of this chapter 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." Respondents must prove that the information is "highly offensive," and that disclosure is clearly not a legitimate, or in the, public interest. Embarrassment is insufficient.

Second, Respondents offer no evidence of their unfounded and unsubstantiated assertion that they fear retaliation. Mere allegations and conclusory statements are insufficient. A petitioner for a PRA injunction must provide a "truly persuasive reason as to why disclosure would harm" the petitioner. *Ameriquist Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 492, 300 P.3d 799, 811 (2013) ("Ameriquist has failed to demonstrate how an exemption applies or how it or a vital government function would be substantially and irreparably damaged."). Respondents have offered no real evidence except their conclusory allegations and unfounded assertions that any harm would come to them, except perhaps, embarrassment, which is insufficient as a matter of law.

## V. CONCLUSION

The Public Records Act is a strong mandate for public disclosure

of records. In order for a petitioner to succeed in obtaining injunctive relief, they must prove that (1) an exemption applies (2) that disclosure is clearly not in the public interest; and (3) disclosure would result in substantial and irreparable harm to the petitioner. Respondents failed to meet each of these elements before the Superior Court and it was error for the Superior Court to grant the injunction.

It may be unfortunate, or even regrettable, to disclose information such as that which the Respondents seek to keep private. However, under the strong mandate of the PRA, that is exactly what the law requires. Appellant respectfully requests the reversal of the order of the Superior Court and an order that the documents be disclosed in their unredacted form.

DATED this 11th day of October, 2018.



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DAVID M. KNUTSON, WSBA No. 24099  
CHRISTOPHER G. VARALLO, WSBA No. 29410  
CASEY M. BRUNER, WSBA No. 50168  
WITHERSPOON · KELLEY  
Attorneys for Cowles Publishing Co.

**PROOF OF SERVICE**

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the 11th day of October, 2018, the foregoing Brief of Appellant was delivered to the following persons in the manner indicated:

Emily Yates  
Attorney General of  
Washington  
Torts Division  
1116 West Riverside, Suite 100  
Spokane, WA 99201

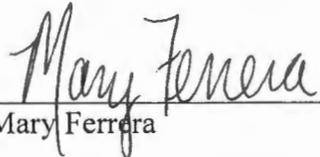
- Hand Delivery
- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile Transmission
- Electronic Mail

Troy Y. Nelson  
Randall & Danskin  
601 W. Riverside, Suite 1500  
Spokane, WA 99201

- Hand Delivery
- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile Transmission
- Electronic Mail

Nicholas D. Kovarik  
Piskel, Yahne, Kovarik, PLLC  
522 W. Riverside, Suite 700  
Spokane, WA 99201

- Hand Delivery
- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile Transmission
- Electronic Mail

  
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Mary Ferrara